C A N A D A

PROVINCE OF QUÉBEC
DISTRICT OF MONTREAL

Nº 500-11-048114-157

S U P E R I O R C O U R T
(Commercial Division)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
CLIFFS QUÉBEC IRON MINING ULC
WABUSH IRON CO. LIMITED
WABUSH RESOURCES INC.

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
WABUSH MINES
ARNAUD RAILWAY COMPANY
WABUSH LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

-and-

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED

Mises-en-cause

imk
avocats • advocates

BOOK OF ADDITIONAL AUTHORITIES
TWIN FALLS POWER CORPORATION

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17. *Century Services Inc.* v. *Canada (Attorney General)*, 2010 SCC, 60 para 65;

18. Frank Bennett, *Bennett on Bankruptcy,* 22e ed., Toronto, LexisNexis, 2020, p.1716;

19. *9145-7978 Québec inc. (Arrangement relatif à)*, 2007 QCCA 768;

20. *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14;

21. *9354-9186 Québec inc.* v. *Callidus Capital Corp.*, 2020 SCC 10;

22. Janis Sarra, *Rescue! The Compagnies's Creditors Arrangement Act*, Toronto, Thomson Carswell, 2007, p. 260;

23. Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven CCAAs" in Jill Corraini and Blair Nixon (eds.), *Annual Review of Insolvency Law*, Toronto, Thomson Reuters, 2019, p. 205;

24. *Ernst & Young Inc.* v. *Essar Global Fund Ltd.*, 2017 ONCA 1014;

25. *Act Respecting Public Inquiry Commissions*, RLRQ, chapter C-37, sect. 9;

26. *Act Respecting the Regulation of the Financial Section*, RLRQ, chapter E-6.1;

27. *Securities Act*, RLRQ, c. V-1.1, with sections 237 and 242;

28. *Arrangement relatif à 9227-1584 Québec inc.*, 2021 QCCS 1342;

29. *Club Resorts Ltd.* v. *Van Breda*, [2012] 1 S.C.R. 572;

30. *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077;

31. *Chevron Corp.* v. *Yaiguaje*, 2015 SCC 42, paras. 30-36;

32. *Tolofson* v. *Jensen*; *Lucas (Litigation Guardian of)* v. *Gagnon*; [1994] 3 S.C.R. 1022;

33. *Partner Reinsurance Company Ltd.* c. *Optimum Réassurance inc.*, 2020 QCCA 490;

34. *Google Inc.* v. *Equustek Solutions Inc.*, 2017 SCC 34;

35. *Actava TV, Inc.* v. *Matvil Corp.*, 2021 ONCA 105;

36. *Pro Swing Inc.* v. *Elta Golf Inc.*, 2006 CSC 52;

37. *Independence Plaza 1 Associates, L.L.C.* v. *Figliolini*, 2017 ONCA 44;

38. *Transat Tours Canada inc.* c. *Impulsora Turistica de Occidente, s.a. de c.v.*, 2006 QCCA 413, para. 36.

MONTREAL, this 2nd day of June 2021

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Century Services Inc. v. Canada (Attorney General)

Supreme Court Reports

Supreme Court of Canada

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

Heard: May 11, 2010;

Judgment: December 16, 2010.

File No.: 33239.

[2010] 3 S.C.R. 379 | *[2010] 3 R.C.S. 379* | *[2010] S.C.J. No. 60* | *[2010] A.C.S. no 60* | *2010 SCC 60* | *2010 CarswellBC 3419* | *72 C.B.R. (5th) 170* | *12 B.C.L.R. (5th) 1* | *296 B.C.A.C. 1* | *326 D.L.R. (4th) 577* | *409 N.R. 201* | *[2011] 2 W.W.R. 383*

Century Services Inc. Appellant; v. Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada Respondent.

(136 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Bankruptcy and Insolvency — Priorities — Crown applying on eve of bankruptcy of debtor company to have GST monies held in trust paid to Receiver General of Canada — Whether deemed trust in favour of Crown under Excise Tax Act prevails over provisions of Companies' Creditors Arrangement Act purporting to nullify deemed trusts in favour of Crown — Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36, s. 18.3*(1) — Excise Tax Act, *R.S.C. 1985, c. E-15, s. 222*(3).

Bankruptcy and insolvency — Procedure — Whether chambers judge had authority to make order partially lifting stay of proceedings to allow debtor company to make assignment in bankruptcy and to stay Crown's right to enforce GST deemed trust — Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36, s. 11*.

Trusts — Express trusts — GST collected but unremitted to Crown — Judge ordering that GST be held by Monitor in trust account — Whether segregation of Crown's GST claim in Monitor's account created an express trust in favour of Crown.

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Summary:

The debtor company commenced proceedings under the *Companies' Creditors Arrangement Act* ("*CCAA*"), obtaining a stay of proceedings to allow it time to reorganize its financial affairs. One of the debtor company's outstanding debts at the commencement of the reorganization was an amount of unremitted Goods and Services Tax ("GST") payable to the Crown. Section 222(3) of the *Excise Tax Act* ("*ETA*") created a deemed trust over

unremitted GST, which operated despite any other enactment of Canada except the *Bankruptcy and Insolvency Act* ("*BIA*"). However, s. 18.3(1) of the *CCAA* provided that any statutory deemed trusts in favour of the Crown did not operate under the *CCAA*, subject to certain exceptions, none of which mentioned GST.

Pursuant to an order of the *CCAA* chambers judge, a payment not exceeding $5 million was approved to the debtor company's major secured creditor, Century Services. However, the chambers judge also ordered the debtor company to hold back and segregate in the Monitor's trust account an amount equal to the unremitted GST pending the outcome of the reorganization. On concluding that reorganization was not possible, the debtor company sought leave of the court to partially lift the stay of proceedings so it could make an assignment in bankruptcy under the *BIA*. The Crown moved for immediate payment of unremitted GST to the Receiver General. The chambers judge denied the Crown's motion, and allowed the assignment in bankruptcy. The Court of Appeal allowed the appeal on two grounds. First, it reasoned that once reorganization efforts had failed, the chambers judge was bound under the priority scheme provided by the *ETA* to allow payment of unremitted GST to the Crown and had no discretion under s. 11 of the *CCAA* to continue the stay against the Crown's claim. Second, the Court of Appeal concluded that by ordering the GST funds segregated in the Monitor's trust account, the chambers judge had created an express trust in favour of the Crown.

Held (Abella J. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Charron, Rothstein and Cromwell JJ.: The apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA* can be resolved through an interpretation that properly recognizes the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by [page381] Parliament and the principles for interpreting the *CCAA* that have been recognized in the jurisprudence. The history of the *CCAA* distinguishes it from the *BIA* because although these statutes share the same remedial purpose of avoiding the social and economic costs of liquidating a debtor's assets, the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. Because the *CCAA* is silent on what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily provides the backdrop against which creditors assess their priority in the event of bankruptcy. The contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the *CCAA* and the *BIA*, and one of its important features has been a cutback in Crown priorities. Accordingly, the *CCAA* and the *BIA* both contain provisions nullifying statutory deemed trusts in favour of the Crown, and both contain explicit exceptions exempting source deductions deemed trusts from this general rule. Meanwhile, both Acts are harmonious in treating other Crown claims as unsecured. No such clear and express language exists in those Acts carving out an exception for GST claims.

When faced with the apparent conflict between s. 222(3) of the *ETA* and s. 18.3(1) of the *CCAA*, courts have been inclined to follow *Ottawa Senators Hockey Club Corp. (Re)* and resolve the conflict in favour of the *ETA*. *Ottawa Senators* should not be followed. Rather, the *CCAA* provides the rule. Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so expressly and elaborately. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. The internal logic of the *CCAA* appears to subject a GST deemed trust to the waiver by Parliament of its priority. A strange asymmetry would result if differing treatments of GST deemed trusts under the *CCAA* and the *BIA* were found to exist, as this would encourage statute shopping, undermine the *CCAA*'s remedial purpose and invite the very social ills that the statute was enacted to avert. The later in time enactment of the more general s. 222(3) of the *ETA* does not require application of the doctrine of implied repeal to the earlier and more specific s. 18.3(1) of the *CCAA* in the circumstances of this case. In any event, [page382] recent amendments to the *CCAA* in 2005 resulted in s. 18.3 of the Act being renumbered and reformulated, making it the later in time provision. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*. The conflict between the *ETA* and the *CCAA* is more apparent than real.

The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called upon to innovate. In

determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. Here, the chambers judge's order staying the Crown's GST claim was in furtherance of the *CCAA*'s objectives because it blunted the impulse of creditors to interfere in an orderly liquidation and fostered a harmonious transition from the *CCAA* to the *BIA*, meeting the objective of a single proceeding that is common to both statutes. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of *BIA* proceedings, but no gap exists between the two statutes because they operate in tandem and creditors in both cases look to the *BIA* scheme of distribution to foreshadow how they will fare if the reorganization is unsuccessful. The breadth of the court's discretion under the *CCAA* is sufficient to construct a bridge to liquidation under the *BIA*. Hence, the chambers judge's order was authorized.

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No express trust was created by the chambers judge's order in this case because there is no certainty of object inferrable from his order. Creation of an express trust requires certainty of intention, subject matter and object. At the time the chambers judge accepted the proposal to segregate the monies in the Monitor's trust account there was no certainty that the Crown would be the beneficiary, or object, of the trust because exactly who might take the money in the final result was in doubt. In any event, no dispute over the money would even arise under the interpretation of s. 18.3(1) of the *CCAA* established above, because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount.

Per Fish J.: The GST monies collected by the debtor are not subject to a deemed trust or priority in favour of the Crown. In recent years, Parliament has given detailed consideration to the Canadian insolvency scheme but has declined to amend the provisions at issue in this case, a deliberate exercise of legislative discretion. On the other hand, in upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, courts have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In the context of the Canadian insolvency regime, deemed trusts exist only where there is a statutory provision creating the trust and a *CCAA* or *BIA* provision explicitly confirming its effective operation. The *Income Tax Act*, the *Canada Pension Plan* and the *Employment Insurance Act* all contain deemed trust provisions that are strikingly similar to that in s. 222 of the *ETA* but they are all also confirmed in s. 37 of the *CCAA* and in s. 67(3) of the *BIA* in clear and unmistakeable terms. The same is not true of the deemed trust created under the *ETA*. Although Parliament created a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it did not confirm the continued operation of the trust in either the *BIA* or the *CCAA*, reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

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Per Abella J. (dissenting): Section 222(3) of the *ETA* gives priority during *CCAA* proceedings to the Crown's deemed trust in unremitted GST. This provision unequivocally defines its boundaries in the clearest possible terms and excludes only the *BIA* from its legislative grasp. The language used reflects a clear legislative intention that s. 222(3) would prevail if in conflict with any other law except the *BIA.* This is borne out by the fact that following the enactment of s. 222(3), amendments to the *CCAA* were introduced, and despite requests from various constituencies, s. 18.3(1) was not amended to make the priorities in the *CCAA* consistent with those in the *BIA*. This indicates a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA.*

The application of other principles of interpretation reinforces this conclusion. An earlier, specific provision may be

overruled by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails. Section 222(3) achieves this through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" other than the *BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3). By operation of s. 44(*f*) of the *Interpretation Act*, the transformation of s. 18.3(1) into s. 37(1) after the enactment of s. 222(3) of the *ETA* has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision. This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes other than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

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Cases Cited

By Deschamps J.

Overruled: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737; **distinguished:** *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; **referred to:** *Reference re Companies' Creditors Arrangement Act*, [1934] S.C.R. 659; *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4) 192; *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII); *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720; *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4) 219; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513; *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106; *Elan Corp. v. Comiskey (1990), 41 O.A.C. 282*; *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134; *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9; *Air Canada, Re* (2003), 42 C.B.R. (4) 173; *Air Canada, Re*, 2003 CanLII 49366; *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4) 158; *Skydome Corp., Re* (1998), 16 C.B.R. (4) 118; *United Used Auto & Truck Parts Ltd., Re*, *2000 BCCA 146*, *135 B.C.A.C. 96*, aff'g (1999), 12 C.B.R. (4) 144; *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4) 236; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108.

By Fish J.

Referred to: *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737.

By Abella J. (dissenting)

Ottawa Senators Hockey Club Corp. (Re) (2005), 73 O.R. (3d) 737; *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *Attorney General of Canada v. Public Service Staff Relations Board*, [1977] 2 F.C. 663.

Statutes and Regulations Cited

An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and [page386] the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts, S.C. 2005, c. 47, ss. 69, 128, 131.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 67, 81.1, 81.2, 86 [am. 1992, c. 27, s. 39; 1997, c. 12, s. 73; 2000, c. 30, s. 148; 2005, c. 47, s. 69; 2009, c. 33, s. 25].

Canada Pension Plan, R.S.C. 1985, c. C-8, s. 23.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [am. 2005, c. 47, s. 128], 11.02 [ad. *idem*], 11.09 [ad. *idem*], 11.4 [am. *idem*], 18.3 [ad. 1997, c. 12, s. 125; rep. 2005, c. 47, s. 131], 18.4 [*idem*], 20 [am. 2005, c. 47, s. 131], 21 [ad. 1997, c. 12, s. 126; am. 2005, c. 47, s. 131], s. 37 [ad. 2005, c. 47, s. 131].

Companies' Creditors Arrangement Act, 1933, S.C. 1932-33, c. 36 [am. 1952-53, c. 3].

Employment Insurance Act, S.C. 1996, c. 23, ss. 86(2), (2.1).

Excise Tax Act, R.S.C. 1985, c. E-15, s. 222.

Income Tax Act, R.S.C. 1985, c. 1 (5 Supp.), ss. 227(4), (4.1).

Interpretation Act, R.S.C. 1985, c. I-21, ss. 2 "enactment", 44(*f*).

Winding-up Act, R.S.C. 1985, c. W-11.

Authors Cited

Canada. Advisory Committee on Bankruptcy and Insolvency. *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*. Ottawa: Minister of Supply and Services Canada, 1986.

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3 Sess., 34 Parl., October 3, 1991, 15:15.

Canada. Industry Canada. Marketplace Framework Policy Branch. *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*. Ottawa: Corporate and Insolvency Law Policy Directorate, 2002.

Canada. Senate. *Debates of the Senate*, vol. 142, 1 Sess., 38 Parl., November 23, 2005, p. 2147.

Canada. 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*. Ottawa: Senate of Canada, 2003.

Canada. Study Committee on Bankruptcy and Insolvency Legislation. *Bankruptcy and Insolvency: Report of [page387] the Study Committee on Bankruptcy and Insolvency Legislation*. Ottawa: Information Canada, 1970.

Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 3 ed. Scarborough, Ont.: Carswell, 2000.

Côté, Pierre-André, avec la collaboration de Stéphane Beaulac et Mathieu Devinat. *Interprétation des lois*, 4e éd. Montréal: Thémis, 2009.

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

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Joint Task Force on Business Insolvency Law Reform. *Report* (2002) (online: http://www.cairp.ca/publications/submissions-to-government/law -reform/index.php).

Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals. Legislative Review Task Force (Commercial). *Report on the Commercial Provisions of Bill C-55* (2005).

Jackson, Georgina R. and Janis 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.

Jones, Richard B. "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2005*. Toronto: Thomson Carswell, 2006, 481.

Lamer, Francis L. *Priority of Crown Claims in Insolvency*. Toronto: Carswell, 1996 (loose-leaf updated 2010, release 1).

Morgan, Barbara K. "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461.

Sarra, Janis. *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations*. Toronto: University of Toronto Press, 2003.

Sarra, Janis P. *Rescue! The Companies' Creditors Arrangement Act*. Toronto: Thomson Carswell, 2007.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5 ed. Markham, Ont.: LexisNexis, 2008.

Waters, Donovan W. M., Mark R. Gillen and Lionel D. Smith, eds. *Waters' Law of Trusts in Canada*, 3 ed. Toronto: Thomson Carswell, 2005.

Wood, Roderick J. *Bankruptcy and Insolvency Law*. Toronto: Irwin Law, 2009.

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History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Newbury, Tysoe and Smith JJ.A.), *2009 BCCA 205*, 98 B.C.L.R. (4) 242, *270 B.C.A.C. 167*, 454 W.A.C. 167, *[2009] 12 W.W.R. 684*, *[2009] G.S.T.C. 79*, *[2009] B.C.J. No. 918* (QL), *2009 CarswellBC 1195*, reversing a judgment of Brenner C.J.S.C., *2008 BCSC 1805*, *[2008] G.S.T.C. 221*, *[2008] B.C.J. No. 2611* (QL), 2008 CarswellBC 2895, dismissing a Crown application for payment of GST monies. Appeal allowed, Abella J. dissenting.

Counsel

Mary I. A. Buttery, *Owen J. James* and *Matthew J. G. Curtis*, for the appellant.

Gordon Bourgard, *David Jacyk* and *Michael J. Lema*, for the respondent.

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

DESCHAMPS J.

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency [page389] Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

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4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to

make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (*2008 BCSC 1805*, *[2008] G.S.T.C. 221*).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (*2009 BCCA 205*, *270 B.C.A.C. 167*). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and [page391] that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)* *(2005), 73 O.R. (3d) 737* (C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

[page392]

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will

address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 *Purpose and Scope of Insolvency Law*

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain [page393] a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute -- it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either [page394] the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* -- Canada's first reorganization statute -- is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors [page395] Arrangement Act*, [*[1934] S.C.R. 659*], at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected -- notably creditors and employees -- and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make [page396] the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA*'s objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, 3rd Sess., 34th Parl., October 3, 1991, at 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a [page397] flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective

> process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, [page398] rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, s. 25; see also *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49, [2009] 3 S.C.R. 286; *Deputy Minister of Revenue v. Rainville*, [1980] 1 S.C.R. 35; *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency*).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, 30 Alta. L.R. (4th) 192, at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

[page399]

3.2 *GST Deemed Trust Under the CCAA*

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp. (Arrangement relatif à)*, 2009 QCCS 6332 (CanLII), leave to appeal granted, 2010 QCCA 183 (CanLII)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims [page400] largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was

whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as added by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bankr. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at s.2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property [page401] held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. M.N.R.*, 2002 SCC 49, [2002] 2 S.C.R. 720, this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

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34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222...** .
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver

> General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ... .

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, [page403] subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** ...
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*... .

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

[page404]

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions (*CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** ...

...

> (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ... .

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize [page405] conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* *(2002), 40 C.B.R. (4th) 219* (Alta. Q.B.); *Gauntlet*).

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré v. Verdun (City)*, *[1997] 2 S.C.R. 862*, and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, [page406] the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has

legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists [page407] in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

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48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

[page409]

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a

statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough [page410] contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, *R.S.C. 1985, c. I-21*, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding [page411] the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA*'s override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this

interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

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3.3 *Discretionary Power of a Court Supervising a CCAA Reorganization*

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

(*Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by [page413] staying enforcement actions by creditors to allow the debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Chef Ready Foods Ltd. v. Hongkong Bank of Can.* (1990), 51 B.C.L.R. (2d) 84 (C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134, at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), at para. 3; *Air Canada, Re*, 2003 CanLII 49366 (Ont. S.C.J.), at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society/Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

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62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* *(1998), 16 C.B.R. (4th) 118* (Ont. Ct. (Gen. Div.)); *United Used Auto & Truck Parts Ltd., Re*, *2000 BCCA 146*, *135 B.C.A.C. 96*, aff'g *(1999), 12 C.B.R. (4th) 144* (S.C.); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see *Metcalfe & Mansfield*). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA*'s supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) What are the sources of a court's authority during *CCAA* proceedings? (2) What are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against [page415] purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, *2003 BCCA 344*, *13 B.C.L.R. (4th) 236*, at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* *(2005), 75 O.R. (3d) 5* (C.A.), at paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and 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 J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the [page416] matter, ... subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The

burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* -- avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all [page417] stakeholders are treated as advantageously and fairly as the circumstances permit.

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

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

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74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA* the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA*'s objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament ... that authorizes or makes provision for the

sanction of compromises or arrangements between a company and its shareholders or any class of them", such as [page419] the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be [page420] lost in bankruptcy (*Ivaco Inc. (Re)* *(2006), 83 O.R. (3d) 108*, at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition [page421] to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 *Express Trust*

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29, especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008 sufficient to support an express trust.

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85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus, there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008 denying the Crown's application to enforce the trust once it was clear [page423] that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

The following are the reasons delivered by

FISH J. --

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). [page424] And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

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II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* -- or explicitly preserving -- its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), where s. 227(4) *creates* a deemed trust:

> (4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> (4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (*a*) to be held, from the time the amount was deducted or withheld by the person, separate and [page426] apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...
> >
> > ...
>
> ... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

> (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.
>
> (3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* ... .

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

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103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) of the *CCAA* and in s. 67(3) of the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust -- or expressly provide for its continued operation -- in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have

mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

> **222.** (1) Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a [page428] security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).
>
> ...
>
> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and InsolvencyAct*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> > (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest,
> > ...
>
> ...
>
> ... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (*2009 BCCA 205*, *98 B.C.L.R. (4th) 242*, at para. 37). *All* of the deemed trust [page429] provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit -- rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada [page430] be subject to no deemed trust or priority in favour of the Crown.

The following are the reasons delivered by

ABELLA J. (dissenting)

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, *R.S.C. 1985, c. E-15* ("*ETA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11[1] of the *CCAA* stated:

> **11.** (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

[page431]

> (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA*'s general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1)

states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737 (C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory [page432] interpretation: Does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act*... . The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from [page433] various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *Tele-Mobile Co. v. Ontario*, 2008 SCC 12, [2008] 1 S.C.R. 305, where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative

> history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

[page434]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogant*).

[page435]

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré v. Verdun (City)*, *[1997] 2 S.C.R. 862*).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> ... the overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, *[1944] S.C.R. 226*, ... at p. 239 ... :

> The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the [page436] legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant*). But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA* is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(*f*) of the *Interpretation Act*, *R.S.C. 1985, c. I-21*, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Attorney General of Canada v. Public Service Staff Relations Board*, *[1977] 2 F.C. 663*, dealing with the predecessor provision to s. 44(*f*)). It directs that new enactments not be construed as [page437] "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> ...
>
> (*f*) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an "enactment" as "an Act or regulation or any portion of an Act or regulation".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical

amendment to re-order the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the [page438] Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request [page439] for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

* * * * *

APPENDIX

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at December 13, 2007)

11. (1) [Powers of court] Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) [Initial application court orders] A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) [Other than initial application court orders] A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

[page440]

(*a*) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) [Burden of proof on application] The court shall not make an order under subsection (3) or (4) unless

(*a*) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(*b*) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) [Her Majesty affected] An order made under section 11 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

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(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) [When order ceases to be in effect] An order referred to in subsection (1) ceases to be in effect if

(*a*) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, [page442] as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person [page443] and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same [page444] effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) [Deemed trusts] Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

[page445]

18.4 (1) [Status of Crown claims] In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Operation of similar legislation] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and [page446] in respect of any related interest, penalties or other amounts.

20. [Act to be applied conjointly with other Acts] The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 (as at September 18, 2009)

11. [General power of court] Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

11.02 (1) [Stays, etc. -- initial application] A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) [Stays, etc. -- other than initial application] A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

[page447]

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) [Burden of proof on application] The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) [Stay -- Her Majesty] An order made under section 11.02 may provide that

(*a*) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(*b*) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income [page448] Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) [When order ceases to be in effect] The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(*a*) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the [page449] collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(*b*) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection [page450] 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) [Operation of similar legislation] An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(*c*) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

[page451]

37. (1) [Deemed trusts] Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) [Exceptions] Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

Excise Tax Act, *R.S.C. 1985, c. E-15* (as at December 13, 2007)

222. (1) [Trust for amounts collected] Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured [page452] creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) [Amounts collected before bankruptcy] Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act*), to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) [Extension of trust] Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

> (*a*) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (*b*) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

Bankruptcy and Insolvency Act, *R.S.C. 1985, c. B-3* (as at December 13, 2007)

67. (1) [Property of bankrupt] The property of a bankrupt divisible among his creditors shall not comprise

[page453]

> (*a*) property held by the bankrupt in trust for any other person,
>
> (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or
>
> (*b*.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

> (*c*) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
>
> (*d*) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) [Deemed trusts] Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) [Exceptions] Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(*a*) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

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(*b*) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) [Status of Crown claims] In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) [Exceptions] Subsection (1) does not affect the operation of

(*a*) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(*b*) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(*c*) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

[page455]

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Appeal allowed with costs, ABELLA J. *dissenting.*

Solicitors:

Solicitors for the appellant: Fraser Milner Casgrain, Vancouver.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

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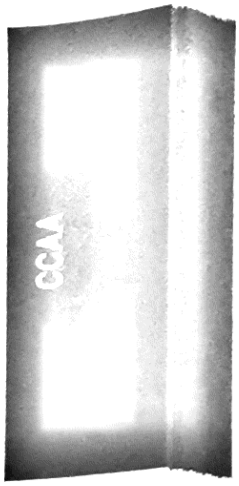
1 Section 11 was amended, effective September 18, 2009, and now states:

> **11.** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.



unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate. (S.C. 2005, c. 47, s. 127.)

(S.C. 2005, c. 47, s. 127.)

Section 11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

(S.C. 1992, c. 27, s. 90(1)(*f*); 1996, c. 6, s. 167(1)(*d*); 1997, c. 12, s. 124; 2005, c. 47, s. 128.)

Initial Application

Under section 11, the court has wide discretion to make any order protecting the debtor that it considers appropriate in the circumstances and subject to any restrictions under the Act. In exercising the discretion, the court takes into consideration the purposes of the legislation, whether the debtor has been acting in good faith, whether it has been acting with due diligence, and the appropriateness of making or not making the order.

On the initial application to the court under section 11 for an order that the debtor qualifies for the protection under the Act, the debtor company must file a projected weekly cash-flow statement and copies of all financial statements, whether audited or unaudited, within one year of the application.[113] If there are no financial statements prepared in the prior year, then the debtor company must produce a copy of the most recent statement. This conforms with the requirement for an insolvent person under the **BIA** to file a cash-flow statement together with reports of the trustee and the insolvent person. However, the section is silent as to the time period which the cash-flow statement should cover, but it is usually prepared over a 12-month period.[114]

The debtor company's application may be made to the court with or without

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[113] Prior to the debtor making an application for protection, the debtor may engage an insolvency accounting firm to prepare what are known as "pre-filing reports" with a view to assisting the court to decide favourably in permitting the debtor protection. However, the insolvency accounting firm expects to be appointed the monitor if an order is made. This may create an inherent conflict of interest.

[114] Under the 2005 amendments, the court may authorize a publication ban on the financial information if the release of the information would unduly prejudice the debtor: subsection 10(3).

notice to major creditors depending upon the urgency of the case.[115] The initial application is rarely made with notice to all creditors since it would be impractical if there are a large number of creditors. On the other hand, the debtor usually makes the application on notice to the larger creditors, as they have a major stake in the proceedings. However, if the debtor proceeds without notice or on an *ex parte* application, the debtor has the onus to satisfy the court that the matter is urgent and that notice to creditors would severely prejudice the debtor. If the debtor cannot justify the urgency of an *ex parte* initial order, such as in the case where secured creditors are attempting to enforce their security to the detriment of all stakeholders, or where there is an operating company with many employees, the court can set aside the initial order.[116] The company must make full and fair disclosure of its financial status, failing which the court will on a subsequent motion brought by a creditor set aside the protection afforded to it under the Act.[117]

The court performs a "gatekeeper's" role in granting initial protection and thereafter performs a "supervisory" role in allowing the debtor company some breathing room to attempt a work out with its creditors. The court relies heavily on the monitor for its review of the situation. In **Re Great Basin Gold Ltd.**,[118] the British Columbia Supreme Court in dealing with several issues under a CCAA proceeding aptly commented on the "urgency" theme on many applications including the initial protection, adding parties, setting aside portions of the initial order, and approving interim financing:

> Urgency is a continuing theme on many of these applications, just as it is on this application. Often materials are served on very short notice and participating stakeholders may not be afforded sufficient time to adequately consider the relief sought. Again, the court must be vigilant to ensure that it is not rushed to a decision based on an illusory sense of urgency which is not supported by the evidence. There are, no doubt, many cases where the matter is truly urgent. Issues can quickly arise from unforeseen circumstances or even perhaps due to a misstep by the management of the debtor company. In addition, once a filing takes place, many issues must be addressed quickly. The court must guard against deciding issues in the face of

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[115] Subsection 11(2).

[116] **Re Encore Developments Ltd.** (2009), 52 C.B.R. (5th) 30 (B.C.S.C.); **Re Marine Drive Properties Ltd.** (2009), 52 C.B.R. (5th) 47 (B.C.S.C.); **Re Marine Drive Properties Ltd.** (2009), 56 C.B.R. (5th) 65 (B.C.S.C.).

But see **Re 4519922 Canada Inc.**, [2015] O.J. No. 115, 2015 ONSC 124, 22 C.B.R. (6th) 44 at para. 31 (Ont. S.C.J. [Commercial List]) where despite the fact that a major creditor had not be notified of the initial application, the Court refused to set aside the initial order. Most other creditors supported the debtor's position. There was no issue of good faith or defence tactics. The major creditor's claim was contingent.

[117] **Re Hester Creek Estate Winery Ltd.** (2004), 50 C.B.R. (4th) 73 (B.C.S.C.).

[118] [2012] B.C.J. No. 2028 at paras. 179-183, 94 C.B.R. (5th) 228, 2012 BCSC 1459 (B.C.S.C.).

"manufactured" urgency, whether created by leverage from a stakeholder seeking certain relief or otherwise.

In addition, it is often the case that these applications are brought on an urgent basis where the court is asked to decide the issue without a full review of the evidence before it. The court will, of necessity, seek the input of the monitor, who will have the necessary background and hopefully, knowledge and insight on these important issues. However, if the monitor is, as in this case, only recently appointed, the ability of the monitor to provide meaningful input may be limited.[119]

Prior to the debtor making an application for protection, the debtor may engage an insolvency accounting firm to prepare what are known as "pre-filing reports" with a view to assisting the court to decide favourably in permitting the debtor protection. However, the insolvency accounting firm expects to be appointed the monitor if an order is made. This may create an inherent conflict of interest.

Considerations on the Initial Application

On the application, the court may grant an order not exceeding 30 days staying all legal proceedings that have been taken or that might be taken, restraining further proceedings in any action, and prohibiting the commencement of any other action.[120]

Subsection 11.02(3) states that the court shall not make an order unless the applicant satisfies the court that circumstances exist that make such an order "appropriate". The court has wide discretion in imposing a stay of proceedings. There is no definition or setting out of factors that the court should consider as to whether the granting of the order is appropriate. Having regard to the purpose of a compromise or an arrangement such as to save jobs, restructure the payment of debts, or preserve a business that is needed in the community or industry, the court has wide open discretion to make the order. Case law has developed this area.[121]

In considering whether the order is appropriate, the court will focus on a number of factors, including

- the purpose of the legislation;
- whether the debtor has been acting in good faith;
- whether it has been acting with due diligence;
- the appropriateness of making or not making the order;

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[119] *Ibid.*, at paras. 182, 183.

[120] Section 11.02. Note that section 136 of Bill C-97, **Budget Implementation Act, 2019, No. 1**, receiving Royal Assent on June 21, 2019, amended the **Companies' Creditors Arrangement Act** by shortening the stay of proceedings to 10 days with a "come back" clause.

[121] See, for example, **Re Woodward's Ltd.** (1993), 17 C.B.R. (3d) 236 at para. 31 (B.C.S.C.); **Re Canwest Global Communications Corp.** (2009), 61 C.B.R. (5th) 200 (Ont. S.C.J.) at para. 32.

9145-7978 Québec inc. (Arrangement relatif à)

Jugements du Québec

Cour d'appel du Québec

Greffe de Québec

Les honorables Louis Rochette J.C.A., François Pelletier J.C.A. et Paul Vézina J.C.A.

Entendu : 5 et 6 juin 2007.

Jugement oral : 6 juin 2007.

Motifs déposés : 18 juin 2007.

No : 200-09-005939-076 (200-11-014268-067)

[2007] J.Q. no 6446 | *2007 QCCA 768* | J.E. 2007-1281 | [2007] R.D.I. 483 | EYB 2007-120555

DANS L'AFFAIRE DE L'ARRANGEMENT DE : 9145-7978 QUÉBEC INC., HÔTEL & GOLF MARIGOT INC., GOLF LE MARIGOT S.E.N.C., LES CHÂTEAUX MARIGOT INC. et CONDOTEL MARIGOT S.E.N.C., INTIMÉES - (débitrices) requérantes et 9148-5110 QUÉBEC INC., APPELANTE - intimée et GROUPE THIBAULT VAN HOUTTE & ASSOCIÉS LTÉE (BRIAN FISET), MIS EN CAUSE - contrôleur et LES INVESTISSEMENTS IMQUA INC., INTERVENANTE

(36 paragr.)

Résumé

Faillite et insolvabilité — Loi sur les arrangements avec les créanciers des compagnies — Appel d'une décision homologuant la résiliation du bail de 9148 avec les locatrices débitrices, dont Groupe Marigot qui s'est prévalu de la Loi sur les arrangements avec les créanciers des compagnies — Droits procéduraux — Procédure sommaire et non civiliste — La relance commande des décisions rapides et pratiques — Pouvoir du juge de résilier des contrats par une débitrice sans que cette résiliation soit essentielle à la réussite du plan d'arrangement — Pouvoir d'intervention considérable du juge — La résiliation était nécessaire — Appel rejeté.

Appel de 9148-5110 Québec inc.(9148) à l'encontre d'un jugement de la Cour supérieure homologuant un avis de répudiation du bail qui liait 9145-7978 Québec inc., Hôtel & Golf Marigot inc., Golf Le Château Marigot S.E.N.C., Les Châteaux Marigot inc. et Condotel Marigot S.E.N.C.(Groupe Marigot), à titre de locatrices, et à 9148, à titre de locataire. 9148 demande également la suspension de l'ordonnance et des procédures à son égard en Cour supérieure. Dans un projet de construction d'un complexe hôtelier, les locatrices ont confié les activités de restauration à 9148. Suite à des difficultés financières, Groupe Marigot s'est prévalu de la Loi sur les arrangements avec les créanciers des compagnies (LACC). La Cour doit trancher les questions suivantes : s'il y a impossibilité de répudier un bail lorsque la débitrice est la locatrice, s'il y a eu non-respect des droits procéduraux, si le jugement constitue une confiscation de biens, s'il il y a litispendance et si le bail de 9148 met en péril la réalisation du plan de restructuration.

DISPOSITIF : Appel rejeté.

La Cour a le pouvoir de permettre la résiliation unilatérale de contrats par la débitrice. Les modifications à la LACC, à l'effet contraire, ne sont pas encore en vigueur. D'autre part, la LACC commande des décisions rapides et pratiques. Le juge et le contrôleur qu'il nomme ont un pouvoir considérable d'intervention afin de procéder avec célérité. L'approche civiliste est irréaliste et écartée par la LACC. La procédure sommaire prévue par la LACC a été respectée. Le terme "confiscation" est exagéré. Le jugement protège les droits de 9148 une fois le bail résilié même

si 9148 ne s'est pas prévalue de tous ses droits. Il est possible d'ordonner la résiliation d'un bail d'une débitrice sans que cette résiliation soit essentielle à la réussite du plan d'arrangement. Le premier juge connaissait très bien le dossier pour l'avoir suivi depuis janvier 2006 et son avis quand à la nécessité de résilier le bail a du poids. Le bail était un boulet pour la relance projetée. Le juge a procédé avec célérité et les ordonnances étaient appropriées.

Législation citée :

Loi sur les arrangements avec les créanciers des compagnies, L.R.C., c. C-36, art. 32

Modification à la Loi sur les arrangements avec les créanciers des compagnies, 2005, ch. 47, art. 131

Avocats

Me Jean-Guy Lebel (MICHAUD, LEBEL), pour l'appelante.

Me Marc-André Gravel (GRAVEL, BÉDARD), pour les intimées.

Me Jean Gagnon (GRONDIN, POUDRIER), pour le mis en cause.

Me Daniel Cantin (GAGNÉ, LETARTE), pour l'intervenante.

MOTIFS DE L'ARRÊT PRONONCÉ SÉANCE TENANTE

LE 6 JUIN 2007

1 L'appel interjeté contre un jugement de la Cour supérieure du district de Québec (l'honorable Marc Lesage), rendu le 13 avril 2007, a été entendu les 5 et 6 juin 2007 et la Cour a prononcé oralement, le 6 juin 2007, l'arrêt suivant : REJETTE l'appel sans frais. En voici les motifs.

2 L'appel a été autorisé par jugement d'un juge de notre Cour, rendu le 4 mai 2007, dont les premiers paragraphes situent bien le débat et font état des moyens avancés par l'appelante :

> [1] Je suis saisi d'une requête en vue d'une autorisation de pourvoi contre un jugement de la Cour supérieure du district de Québec rendu le 13 avril 2007 par l'honorable Marc Lesage, qui a homologué un avis de répudiation du bail qui liait les débitrices, à titre de locatrices, et l'appelante, à titre de locataire; l'appelante veut aussi la suspension de l'exécution de l'ordonnance et la suspension des procédures à son égard en Cour supérieure.
>
> [2] Les débitrices se sont engagées dans la construction d'un complexe hôtelier, résidentiel et sportif (un terrain de golf). Elles ont, dans un bail de 15 ans renouvelable, confié les activités de restauration à l'appelante 9148-5110 Québec Inc. L'affaire connut de sérieuses difficultés financières au point où les débitrices ("Groupe Marigot") se sont prévalues de la *Loi sur les arrangements avec les créanciers des compagnies*. [L.R.C., c. C-36, ci-après la *Loi*]
>
> [3] Statuant sur la requête de Groupe Marigot, la Cour supérieure a prononcé, le 9 janvier 2006, une ordonnance initiale dans laquelle elle a, entre autres, décrété ce qui suit :
>
> > DÉCLARE que, pour faciliter la restructuration ordonnée de leurs activités commerciales et affaires financières, les requérantes ont, sous réserve de l'approbation du Contrôleur ou d'une nouvelle ordonnance du Tribunal, le droit de faire ce qui suit :

[...]

Sous réserve des paragraphes 18 et 19 des présentes, répudier tout bail ou contrat accessoire se rapportant à des locaux loués ou des terrains loués selon ce qu'elles jugent approprié, à la condition que les Requérantes donnent au propriétaire concerné un préavis écrit d'au moins sept jours, aux conditions qui pourront être convenues entre les Requérantes et ce propriétaire ou, à défaut d'une telle entente, établir une provision à cet effet dans le Plan; et

Répudier les ententes, contrats ou arrangements, verbaux ou écrits, de quelque nature que ce soit, selon ce qu'elles jugent indiqué, aux conditions pouvant être convenues entre les Requérantes et la partie concernée ou, à défaut, établir une provision à cet effet dans le Plan et négocier des ententes, contrats ou arrangements modifiés ou nouveaux.

[...]

[5] Le 29 mars 2007, les débitrices, avec l'accord du contrôleur, dénonçaient le bail signé par 9148-5110 Québec Inc. le 17 mai 2005 et ordonnait à l'appelante de quitter les lieux le 5 avril 2007, à minuit. En réalité, 9148-5110 Québec Inc. exploitait un restaurant - nommé *Le Griffé* - depuis 2005. Cet établissement se situait dans l'hôtel administré grâce à une franchise concédée à Groupe Marigot par le Sheraton le 25 avril 2005, soit un mois avant la conclusion du bail de l'appelante.

[6] Le 5 avril 2007, 9148-5110 Québec Inc. n'avait pas quitté les lieux et la débitrice s'adressait à la Cour supérieure pour demander l'homologation de son avis de répudiation, obtenir des ordonnances d'expulsion du locataire et d'autorisation pour Groupe Marigot de prendre possession du local occupé par le restaurant et être autorisé à utiliser les équipements et autres biens nécessaires à l'exploitation.

[...]

[10] Le lendemain, 13 avril 2007, le juge déposait le jugement dont on veut appeler; les principales conclusions sont les suivantes :

- DÉCLARE le bail répudié et donc inopposable aux débitrices;
- PREND ACTE des engagements du Groupe Marigot :
    - d'acquérir les biens mobiliers de 9148-5110 Québec Inc. à leur juste valeur (art. 1891 *C.c.Q.*) et de participer à une médiation pour l'établir;
    - de permettre à l'appelante de reprendre les biens non attachés à l'immeuble;
    - de reprendre à ses frais tous les contrats de crédit-bail;
    - de déposer une caution de 25 000 $;
- AUTORISE Groupe Marigot à reprendre possession des lieux et exploiter le restaurant en payant aux salariés leur rémunération passée et future;
- ORDONNE l'expulsion de 9148-5110 Québec Inc. et de ses administrateurs.

[...]

[12] 9148-5110 Québec Inc. allègue cinq moyens d'appel :

- selon l'interprétation de la *Loi*, on ne peut répudier un contrat de location lorsque la débitrice est le locateur;
- les droits procéduraux n'ont pas été respectés;
- le jugement constitue une confiscation des biens;
- il y a litispendance entre la requête en injonction du 11 mars 2006 et la procédure à l'origine du jugement dont appel;
- le bail ne met pas en péril la réalisation du plan de restructuration.

[Références omises]

3 Le premier moyen est écarté dans le jugement d'autorisation même :

> [18] Cela dit, il n'est plus aujourd'hui contesté qu'une débitrice peut, dans le cadre de la réalisation d'un plan conçu en application de la *Loi*, répudier un contrat sous réserve du recours en dommages du créancier*.

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* *Dylex Ltd. (Re)*, *[1995] O.J. 595* (Ont. Ct. of Justice).

4 Pour le même motif, la Cour a refusé la permission d'appeler d'un jugement reconnaissant le pouvoir du tribunal de permettre la résiliation unilatérale de contrats par une débitrice[1].

5 L'appelante plaide, par ailleurs, l'effet d'entraînement d'une modification apportée à la *Loi sur les arrangements avec les créanciers des compagnies* en 2005 par le législateur (2005, ch. 47, art. 131), qui restreindrait le pouvoir d'une compagnie débitrice de résilier un bail auquel elle est partie en qualité de locateur à la date de dépôt de la demande initiale à son égard[2]. Or, cette modification législative n'est pas encore en vigueur. Le juge tranche donc ce moyen selon la *Loi* actuelle, avec raison.

6 Le second moyen d'appel témoigne d'une incompréhension du caractère particulier de la *Loi* ou du refus de s'y plier.

7 La relance d'une entreprise en difficulté financière commande des décisions pratiques et rapides. La *Loi* donne au juge, secondé par le contrôleur qu'il nomme, un pouvoir considérable d'intervention pour procéder avec célérité.

8 L'appelante s'est sentie bousculée, "bulldozée". C'est sans doute vrai, mais la *Loi* permet et les considérations d'affaires exigent que les délais soient minimums, la procédure sommaire, et les décisions expéditives.

9 L'avis de résiliation de bail a été de sept jours. Le juge a accordé une remise d'une semaine à la demande de l'appelante, notamment pour qu'elle puisse interroger le directeur général des intimées, Robert Desjardins, sur l'affidavit souscrit au soutien de la requête en homologation de l'avis de répudiation du bail. Notre collègue le juge Gendreau écrit à ce sujet :

> [9] Le 12 avril, la Cour supérieure a entendu les représentations des parties. À cette occasion, la transcription du témoignage hors cour du directeur général, bien que disponible, n'a pas été déposée et l'avocat de 9148-5110 Québec Inc. s'est opposé à la remise à la Cour des engagements pris par le témoin à l'occasion de son interrogatoire sur affidavit. Les parties n'ont fait aucune preuve et le procès-verbal ne révèle pas qu'une demande de remise ou autre remède interlocutoire fut recherché.

10 L'avocat de l'appelante n'a demandé ni de faire une preuve ni de reporter l'audition de la requête. Il s'est contenté de rappeler que la décision de déposer la transcription de l'interrogatoire fait quelques heures plus tôt lui appartenait et a fait objection au dépôt des engagements en découlant. En fait, l'appelante aurait voulu un procès selon la procédure habituelle avec interrogatoires au préalable, contestation liée, expertise et contre-expertise, etc.

Cette approche civiliste, irréaliste en pareil contexte, est écartée par la *Loi*. L'on ne peut s'offrir, lorsqu'il y a urgence, le luxe de tant de délais.

11 La situation du juge, aidé du contrôleur, s'apparente plutôt à celle du capitaine dans la tempête qui doit décider s'il jette à la mer la cargaison problématique pour sauver le navire. Il n'y a pas place à tergiversation.

12 La position de l'appelante est d'ailleurs ambiguë. D'une part, elle a prétendu ne pas être créancière et ne pas être impliquée dans la négociation du plan de relance et, d'autre part, elle se plaint de ne pas avoir été avisée comme les autres créanciers et de ne pas avoir eu suffisamment de temps pour prendre connaissance des documents soumis à la Cour.

13 L'ordonnance initiale, de janvier 2006, prévoyait la possibilité de résilier tout bail se rapportant à des locaux loués (au paragr. 19), ce qui incluait le bail de l'appelante.

14 Plusieurs mois avant la résiliation, il y eut une escarmouche judiciaire démontrant qu'il y avait déjà mésentente au sujet du bail et laissant présager sa remise en question.

15 L'arrivée de Robert Desjardins, en février 2007, n'a fait que confirmer le caractère irréconciliable des positions des parties et la nécessité d'enclencher la répudiation du bail pour relancer de façon viable les activités des intimées.

16 L'appelante savait ou aurait dû savoir que son bail était visé. Elle a d'ailleurs fait savoir aux intimées, déclare-t-elle, qu'elle était prête à renégocier les clauses insatisfaisantes. Le dossier permet d'ailleurs de déduire que des échanges ont eu lieu.

17 Dans ce contexte, la procédure sommaire, voulue par la *Loi*, a été respectée et le second moyen n'est pas fondé.

18 Quant au troisième moyen, le terme "confiscation" est exagéré et donc non signifiant. Le juge a pris soin de protéger équitablement les droits de la locataire une fois le bail résilié en prononçant les conclusions suivantes :

> [22] PREND acte de l'engagement des requérantes de pourvoir leur plan d'arrangement de toutes les provisions appropriées et plus particulièrement :
>
> - de l'offre des requérantes de se porter acquéreur de l'ensemble des biens mobiliers de l'intimée et ce, à leur juste valeur aux termes de l'article 1891 C.c.Q.;
> - de l'offre des requérantes de participer avec l'intimée à une médiation visant à établir la juste valeur des biens mobiliers, cette médiation devant être entreprise et conclue au plus tard le 24 avril 2007;
> - de l'offre formulée à l'intimée à l'effet qu'elle puisse en tout temps préalablement au 25 avril 2007, reprendre possession des biens mobiliers non fixés à l'immeuble, tel qu'ils sont listés au rapport du huissier Paré, et ce moyennant un préavis écrit de 48 heures transmis au contrôleur et aux requérantes;
> - de l'engagement des requérantes de déposer immédiatement en fiducie auprès du contrôleur une garantie de 25 000 $ destinée à couvrir d'éventuels dommages causés aux biens mobiliers de l'intimée jusqu'à ce qu'il soit définitivement statué sur le sort de ces biens;
> - de l'engagement des requérantes de se substituer à l'intimée dans tous les crédits-bails actuellement en vigueur et d'en assurer le paiement pour l'avenir;
> - de l'engagement des requérantes de maintenir le restaurant en opération et d'assurer, si nécessaire, le remplacement des équipements mobiliers repris par l'intimée.

19 Notons que l'appelante ne s'est pas prévalue de cette offre de reprendre ses biens mobiliers et son inventaire.

20 L'appelante a, par ailleurs, quitté les lieux à la suite du jugement du 13 avril 2007 et laissé s'écouler plusieurs jours avant de demander un sursis de celui-ci, laissant les intimées réorganiser le restaurant, épuiser l'inventaire, changer les fournisseurs, remercier certains employés, etc.

21 Le juge a également prévu que l'appelante pouvait réclamer des dommages-intérêts à la suite de la résiliation du bail :

> [28] ORDONNE aux deux parties de déposer au plus tard le 19 avril 2007, auprès du contrôleur, les réclamations qu'elles pourraient avoir les unes contre les autres ainsi que les pièces justificatives y afférentes afin que les provisions appropriées puissent être incluses au plan d'arrangement, le ou avant le 25 avril 2007;

22 Notons que l'appelante ne s'est pas prévalue de cette possibilité - de cet ordre - de produire une telle réclamation.

23 Au surplus, le premier juge a, le 27 avril 2007, autorisé "la signification d'une requête en homologation du plan d'arrangement ré-amendé incluant une clause concernant les provisions appropriées...", requête qui donna lieu à une nouvelle décision, le 11 mai 2007, homologuant un tel plan, décision par ailleurs visée à la requête pour permission d'appeler présentée dans le dossier connexe.

24 Le troisième moyen n'est pas fondé.

25 Le moyen de litispendance n'a pas été longtemps défendu par l'appelante, à l'audience, si ce n'est pour réitérer son droit à un procès suivant la procédure civile ordinaire.

26 Rappelons le dernier moyen avancé par l'appelante : le bail ne met pas en péril la réalisation du plan de restructuration.

27 Cette affirmation est vigoureusement contestée par les débitrices et le contrôleur et heurte de plein fouet l'appréciation du juge pour qui la relance ne peut se réaliser si le bail demeure en vigueur. Mais, quoi qu'il en soit, faut-il qu'il y ait péril? Suffit-il que la résiliation soit essentielle à la relance? Suffit-il qu'elle soit opportune ou souhaitable?

28 Sur la norme qui doit guider le juge, l'appelante cite Me Sylvain Vauclair[3] qui, après un survol de la situation aux États-Unis, dans les provinces canadiennes de common law et au Québec retient :

> Premièrement, aucune décision ne contredit la proposition qu'une débitrice peut résilier les contrats auxquels elle est partie et qui nuisent à sa restructuration aux termes de la L.A.C.C.
>
> Deuxièmement, les tribunaux exercent leur juridiction inhérente avec prudence, certes, mais non [pas] seulement dans les cas nécessaires à la survie de la débitrice ou autrement importants.

29 Analysant avec justesse l'affaire *Dylex*[4], l'auteur écrit :

> Le propriétaire de certains centre d'achats s'oppose à la résiliation par la débitrice des baux afférents à ces centres au motif que ces résiliations "would materially affect each shopping centre".
>
> Ces résiliations font partie d'un programme de fermeture de 200 magasins.
>
> Ces trois résiliations, considérées isolément, ne semblent pas être cruciales au plan ou à la survie de la débitrice et le juge décrit la situation de la manière suivante à la page 109, paragraphe 5 :

> "The subject stores have been a financial drain on Dylex, at a time when it is in a tight financial squeeze. Their closure is projected to bring about variable cost saving and a amelioration of some fixed costs [...]".

Une fois de plus, un tribunal énonce :

> "It is clear that s. 11 of the C.C.A.A. gives the power to the Court to sanction a plan which includes termination of leases as part of the debtor's plan of the arrangement [...]".

Il est à noter que la cour rejette spécifiquement l'argument à l'effet que les résiliations recherchées doivent être essentielles à la réussite du Plan d'arrangement.

[Références omises]

30 L'appelante plaide l'absence de précédent permettant la résiliation alors que la débitrice est locatrice. Cela ne suffit pas pour faire exception à la règle générale ci-dessus énoncée.

31 Le juge de première instance connaissait bien le dossier, il le suit depuis janvier 2006. On a fait état qu'il a rendu une quarantaine d'ordonnances en cours d'instance. Cela donne beaucoup de poids à son avis lorsqu'il conclut :

> [14] [...] Le Tribunal, vu l'expérience qu'il a vécue dans ce dossier et considérant les difficultés qui ont été aplanies ou franchies par les requérantes, n'a aucune raison de douter de l'affirmation du contrôleur dans sa lettre du 28 mars 2007 aux procureurs des requérantes que les problèmes opérationnels soulevés par le bail en cause et les défauts constatés par le locataire de respecter ses obligations sont de nature à mettre en péril la relance des activités commerciales des compagnies requérantes.
>
> [17] Il y a donc lieu de faire droit à la requête quant à la répudiation du bail concerné. Il y a également lieu de faire droit aux conclusions recherchées par les requérantes quant à la poursuite des affaires du restaurant "Le Griffé" qui est le restaurant qui dessert la clientèle de l'Hôtel Sheraton Marigot avec qui les requérantes sont liées par une licence de franchise laquelle comporte l'obligation d'une opération continue des activités du restaurant. Il va de soi qu'une ordonnance en ce sens rencontre tous les critères d'urgence et de préjudice sérieux et irréparable vu les obligations des requérantes vis-à-vis son franchiseur. L'apparence de droit découle des autorisations données par l'ordonnance initiale et des obligations qui y sont contenues.

32 On peut encore mieux mesurer sa conviction sur la nécessité de la résiliation du bail par son ordonnance subséquente d'homologation[5] du plan de relance dans laquelle il revient sur le sujet :

> [26] Le Tribunal est conscient et prend acte que plusieurs points soulevés ci-dessus dans le rappel des faits touchant le bail devraient faire l'objet de la décision à venir de la Cour d'appel. Il ne peut donc intervenir sur le sujet qui sera partie du débat en Cour d'appel. Par contre, dans le cadre de la requête en homologation du plan d'arrangement soumise au Tribunal, ce dernier peut apprécier la preuve présentée quant aux conséquences du maintien en vigueur de ce bail :
>
> 36. Les partenaires de la relance des Débitrices n'ont aucunement l'intention de réinjecter les millions de dollars requis dans l'optique où 9148-5110 Québec inc. se bute à exiger le respect du bail déraisonnable et lésionnaire qui, par ailleurs, n'a jamais été approuvé par le conseil d'administration des Débitrices;
>
> [27] Ainsi il apparaît clairement de cette allégation que la réalisation du plan d'arrangement est conditionnelle à la répudiation, résiliation et annulation du bail. Dans l'esprit du Tribunal, cette preuve démontre que le préjudice que subit sans doute 9148-5110 Québec inc. n'est pas comparable à celui que

représente la non-réalisation du plan d'arrangement et des pertes énormes qu'en subiront tous les créanciers. [...]

33 La requête en homologation du plan souligne quelques traits assez exceptionnels du bail qui font comprendre le boulet, le poids qu'il pouvait constituer pour la relance projetée. Le juge les rappelle dans le même jugement :

[22] [...] Cette situation fait l'objet des paragraphes suivants de la requête en homologation :

[...]

32. Les Débitrices soumettent respectueusement que les motifs ci-après énoncés justifient le maintien de la sanction de répudiation déjà prononcé et, partant, l'homologation du Plan tel que ré-amendé en tenant compte des réquisitions formulées dans l'ordonnance du 27 avril 2007 :

a) Le bail, sur plusieurs aspects, ne respecte pas les conditions du contrat de franchise intervenu entre Groupe Sheraton et les Débitrices. À titre d'exemple, le droit pour le locataire de changer la destination des lieux, ou de cesser l'exploitation de son commerce à sa seule guise sont dérogatoires. L'option unilatérale d'achat consentie au locataire (art. 23) est au même effet;

b) [...]

c) [...]

d) Le bail a été consenti à 9148-5110 Québec inc. sur des bases complètement lésionnaires; ce qui découle sans doute du fait que M. Guy St-Gelais était à l'époque de la signature à la fois actionnaire du locataire et du locateur. Ce caractère lésionnaire ressort , notamment, des dispositions suivantes :

- le montant du loyer et son absence d'indexation (art. 4.1);
- l'exclusivité consentie sans autre contribution sur l'ensemble du projet, c'est-à-dire tant sur les volets résidentiels, hôteliers que sur le golf (art. 4.1 et art. 5);
- le droit pour le locataire de vendre n'importe quel type de produits (art. 4.3);
- l'option d'achat unilatérale des lieux loués pour 225 000 $ (art. 23);
- le veto sur toute vente des actifs immobiliers des Débitrices (art. 23 *in fine*);
- l'obligation de subordination et de respect du bail (art. 24);

e) [...]

f) Le bail est, de par sa nature même, totalement désavantageux économiquement pour les Débitrices en ce que, pour les trente (30) prochaines années, celles-ci se voient contraintes de céder en exclusivité à un tiers, qui n'a pourtant aucune connaissance dans le domaine de la restauration, l'exclusivité de toute forme de restauration sur l'ensemble de son site en contrepartie d'un paiement annuel forfaitaire de 30 000 $ non indexable;

g) En ces circonstances, il serait totalement irrationnel pour un investisseur de financer les millions nécessaires à la terminaison des travaux du golf alors que celui-ci ne pourra espérer pour les trente (30) prochaines années tirer quelque bénéfice que ce soit des opérations de restauration et de bar découlant de l'exploitation de site;

h) [...]

34 Le cinquième moyen n'est pas fondé.

35 Le juge s'est bien guidé en droit. Il a procédé avec célérité comme il se devait de le faire. On ne nous a pas démontré que les ordonnances rendues, sur recommandation du contrôleur, étaient inappropriées.

36 C'est pourquoi, à l'audience, la Cour a conclu au rejet du pourvoi, sans frais.

LOUIS ROCHETTE J.C.A.
FRANÇOIS PELLETIER J.C.A.
PAUL VÉZINA J.C.A.

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1 *Hydrogenal inc.* c. *PCI Chimie Canada inc.* et *Richter et Associés inc.* et *Le Comité des créanciers*, *[2002] J.Q. no 9988*, AZ-504 24211 (C.A. j. Mailhot) et AZ-5011 5942 (C.s., j. D. Mayrand).

2 Il s'agit d'une modification à l'article 32 de la *Loi.*

3 VAUCLAIR, S., *La résiliation d'un contrat aux termes d'une ordonnance en vertu de la LAAC*, Conférence prononcée lors d'un colloque organisé par l'Institut canadien, le 24 septembre 2002.

4 *Re Dylex Ltd.*, *(1995) 31 C.B.R. (3d) 106* (Ontario Gen. Div.).

5 Il s'agit du jugement du 11 mai 2007.

Fin du document

Lehndorff General Partner Ltd. (Re)

Ontario Judgments

Ontario Court of Justice - General Division

Toronto, Ontario

Farley J.

Heard: December 24, 1992

Judgment: January 6, 1993

Court File No. B366/92

[1993] O.J. No. 14 | 9 B.L.R. (2d) 275 | 17 C.B.R. (3d) 24 | 37 A.C.W.S. (3d) 847 | 1993 CarswellOnt 183

IN THE MATTER OF The Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 AND IN THE MATTER OF The Courts of Justice Act, R.S.O. 1990, c. C. 43 AND IN THE MATTER OF a plan of compromise in respect of Lehndorff General Partner Ltd., in its own capacity and in its capacity as general partner of Lehndorff United Properties (Canada) Lehndorff Properties (Canada) - and - Lehndorff Properties (Canada) II and in respect of certain of their nominees Lehndorff United Properties (Canada) Ltd., Lehndorff Canadian Holdings Ltd., Lehndorff Canadian Holdings II Ltd., Baytemp Properties Limited and 102 Bloor Street West Limited and in respect of The Lehndorff Vermogensverwaltung GmbH in in its capacity as limited partner of Lehndorff United Properties (Canada) Applicants

(36 pp.)

Alfred Apps, Robert Harrison and Melissa J. Kennedy, for the Applicants. L. Crozier, for the Royal Bank of Canada. R.C. Heintzman, for the Bank of Montreal. J. Hodgson, Susan Lundy and James Hilton, for Canada Trustco Mortgage Corporation. Jay Schwartz, for Citibank Canada. Stephen Golick, for Peat Marwick Thorne Inc., proposed monitor. John Teolis, for the Fuji Bank Canada. Robert Thorton for certain of the advisory boards.

FARLEY J.

These are my written reasons relating to the relief granted the applicants on December 24, 1992 pursuant to their application under the Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36* ("CCAA") and the Courts of Justice Act, *R.S.O. 1990, c. C. 43* ("CJA"). The relief sought was as follows:

(a) short service of the notice of application;

(b) a declaration that the applicants were companies to which the CCAA applies;

(c) authorization for the applicants to file a consolidated plan of compromise;

(d) authorization for the applicants to call meetings of their secured and unsecured creditors to approve the consolidated plan of compromise;

(e) A stay of all proceedings taken or that might be taken either in respect of the applicants in their own capacity or on account of their interest in Lehndorff United Properties (Canada) ("LUPC"), Lehndorff Properties (Canada) ("LPC") and Lehndorff Properties (Canada) II ("LPC II") and collectively (the "Limited Partnerships") whether as limited partner, as general partner or as registered titleholder to certain of their assets as bare trustee and nominee; and

(f) certain other ancillary relief.

The applicants are a number of companies within the larger Lehndorff group ("Group") which operates in Canada and elsewhere. The group appears to have suffered in the same way that a number of other property developers and managers which have also sought protection under the CCAA in recent years. The applicants are insolvent; they each have outstanding debentures issued under trust deeds; and they propose a plan of compromise among themselves and the holders of these debentures as well as those others of their secured and unsecured creditors as they deemed appropriate in the circumstances. Each applicant except THG Lehndorff Vermogensverwaltung GmbH ("GmbH") is an Ontario corporation. GmbH is a company incorporated under the laws of Germany. Each of the applicants has assets or does business in Canada. Therefore each is a "company" within the definition of s. 2 of the CCAA. The applicant Lehndorff General Partner Ltd. ("General Partner Company") is the sole general partner of the Limited Partnerships. The General Partner Company has sole control over the property and businesses of the Limited Partnerships. All major decisions concerning the applicants (and the Limited Partnerships) are made by management operating out of the Lehndorff Toronto Office. The applicants aside from the General Partner Company have as their sole purpose the holding of title to properties as bare trustee or nominee on behalf of the Limited Partnerships. LUPC is a limited partnership registered under the Limited Partnership Act, *R.S.O. 1990, c. L.16* ("Ontario LPA"). LPC and LPC II are limited partnerships registered under Part 2 of the Partnership Act, R.S.A. 1980, c. P-2 ("Alberta PA") and each is registered in Ontario as an extra provincial limited partnership. LUPC has over 2,000 beneficial limited partners, LPC over 500 and LPC II over 250, most of whom are residents of Germany. As at March 31, 1992 LUPC had outstanding indebtedness of approximately $370 million, LPC $45 million and LPC II $7 million. Not all of the members of the Group are making an application under the CCAA. Taken together the Group's indebtedness as to Canadian matters (including that of the applicants) was approximately $543 million. In the summer of 1992 various creditors (Canada Trustco Mortgage Company, Bank of Montreal, Royal Bank of Canada, Canadian Imperial Bank of Commerce and the Bank of Tokyo Canada) made demands for repayment of their loans. On November 6, 1992 Funtanua Investments Limited, a minor secured lendor also made a demand. An interim standstill agreement was worked out following a meeting of July 7, 1992. In conjunction with Peat Marwick Thorne Inc. which has been acting as an informal monitor to date and Fasken Campbell Godfrey the applicants have held multiple meetings with their senior secured creditors over the past half year and worked on a restructuring plan. The business affairs of the applicants (and the Limited Partnerships) are significantly intertwined as there are multiple instances of intercorporate debt, cross-default provisions and guarantees and they operated a centralized cash management system.

This process has now evolved to a point where management has developed a consolidated restructuring plan which plan addresses the following issues:

(a) The compromise of existing conventional, term and operating indebtedness, both secured and unsecured.

(b) The restructuring of existing project financing commitments.

(c) New financing, by way of equity or subordinated debt.

(d) Elimination or reduction of certain overhead.

(e) Viability of existing businesses of entities in the Lehndorff Group.

(f) Restructuring of income flows from the limited partnerships.

(g) Disposition of further real property assets aside from those disposed of earlier in the process.

(h) Consolidation of entities in the Group; and

(i) Rationalization of the existing debt and security structure in the continuing entities in the Group.

Formal meetings of the beneficial limited partners of the Limited Partnerships are scheduled for January 20 and 21, 1993 in Germany and an information circular has been prepared and at the time of hearing was being translated into German. This application was brought on for hearing at this time for two general reasons: (a) it had now ripened to the stage of proceeding with what had been distilled out of the strategic and consultative meetings; and

(b) there were creditors other than senior secured lenders who were in a position to enforce their rights against assets of some of the applicants (and Limited Partnerships) which if such enforcement did take place would result in an undermining of the overall plan. Notice of this hearing was given to various creditors: Barclays Bank of Canada, Barclays Bank PLC, Bank of Montreal, Citibank Canada, Canada Trustco Mortgage Corporation, Royal Trust Corporation of Canada, Royal Bank of Canada, the Bank of Tokyo Canada, Funtauna Investments Limited, Canadian Imperial Bank of Commerce, Fuji Bank Canada and First City Trust Company. In this respect the applicants have recognized that although the initial application under the CCAA maybe made on an ex parte basis (s. 11 of the CCAA; Re Langley's Ltd., (1938) O.R. 123, *(1938) 3 D.L.R. 230* (C.A.); Re Kennoch Development Ltd. *(1991), 8 C.B.R. (3d) 95* (N.S.S.C.T.D.). The court will be concerned when major creditors have not been alerted even in the most minimal fashion (Re Inducon Development Corporation *(1992), 8 C.B.R. (3d) 306* (Ont. Gen. Div.) at p. 310). The application was either supported or not opposed.

"Instant" debentures are now well recognized and respected by the courts: see Re United Maritime Fisherman Co-Op *(1988), 67 C.B.R. (N.S.) 44*, at pp. 55-6, varied on reconsideration *(1988), 68 C.B.R. (N.S.) 170*, reversed on different grounds *(1988), 69 C.B.R. (N.S.) 161* at pp. 165-6; Re Stephanie's Fashions Ltd. *(1990), 1 C.B.R. (3d) 248* (B.C.S.C.) at pp. 250-1; Elan Corp. v. Comiskey *(1990), 1 O.R. (3d) 289*, *1 C.B.R. (3d) 101* (C.A.) per Doherty J.A., dissenting on another point, at pp. 306-310 (O.R.); Ultracare Management Inc. v. Gammon *(1990), 1 O.R. (3d) 321* (Gen. Div.) at p. 327. The applicants would appear to me to have met the technical hurdle of s. 3 and as defined s. 2) of the CCAA in that they are debtor companies since they are insolvent, they have outstanding an issue of debentures under a trust deed and the compromise or arrangement that is proposed includes that compromise between the applicants and the holders of those trust deed debentures. I am also satisfied that because of the significant intertwining of the applicants it would be appropriate to have a consolidated plan. I would also understand that this court (Ontario Court of Justice (General Division)) is the appropriate court to hear this application since all the applicants except GmbH have their head office or their chief place of business in Ontario and GmbH, although it does not have a place of business within Canada, does have assets located within Ontario.

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 6, 7, 8 and 11 of the CCAA; in Re Companies' Creditors Arrangement Act; A.G. Can. v. A.G. Que., (1934) S.C.R. 659 at p. 661; *16 C.B.R. 1*; *(1934) 4 D.L.R. 75*; Meridian Developments Inc. v. Toronto-Dominion Bank; Meridian Developments Inc. v. Nu-West Group Ltd., *(1984) 5 W.W.R. 215* at pp. 219-20; Norcen Energy Resources v. Oakwood Petroleums Limited. et al. *(1988), 72 C.B.R. (N.S.) 1*, *63 Alta. L.R. (2d) 361* (Alta., Q.B.), at pp. 12-13 (C.B.R.); Re Ouintette Coal Limited *(1990), 2 C.B.R.(3d) 303* (B.C.C.A), at pp. 310-1, affirming Ouintette Coal Limited v. Nippon Steel Corporation et al. *(1990) 2 C.B.R. (3d) 291*, 47 B.C.L.R. 193 (B.C.S.C.), leave to appeal to S.C.C. dismissed (1991), 7 C.B.R. (3d) 164 (S.C.C.).; Elan, supra at p. 307 (O.R.); Fine's Flowers v. Creditors of Fine's Flowers *(1992), 7 O.R. (3d) 193* (Gen. Div.), at p. 199 and "Re-Organizations under the Companies' Creditors Arrangement Act", Stanley E. Edwards, (1947), 25 Cdn. Bar Rev. 587 at p. 592.

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA. See Elan, supra at pp. 297 and p. 316; Stephanie's, supra, at pp. 251-2 and Ultracare, supra, at p. 328 and p. 330. It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed: see Meridian, supra, at p. 220 (W.W.R.). The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors

and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and all of the creditors: see Ouintette, supra, at pp. 108-110; Chef Ready Foods Ltd. v. Hongkong Bank of Canada *(1990), 4 C.B.R. (3d) 311*, *51 B.C.L.R. (2d) 84* (B.C.C.A.), at pp. 315-318, (C.B.R.) and Stephanie's, supra, at pp. 251-2.

One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors. Unlike the Bankruptcy Act, *R.S.C. 1985, c. B-3*, before the amendments effective November 30, 1992 to transform it into the Bankruptcy and Insolvency Act ("BIA"), it is possible under the CCAA to bind secured creditors it has been generally speculated that the CCAA will be resorted to by companies that are generally larger and have a more complicated capital structure and that those companies which make an application under the CCAA will be generally smaller and have a less complicated structure. Reorganization may include partial liquidation where it is intended as part of the process of a return to long term viability and profitability. See Chef Ready, supra, at p. 318 and Re Assoc. Investors of Can. Ltd. *(1987), 67 C.B.R. (N.S.) 237* at pp. 245; rev'd on other grounds at (1988), 71 C.B.R. 72. It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally. See Assoc. Investors, supra, at p. 318; Re Amirault Co. (1951), 32 C.B.R. 1986, (1951) 5 D.L.R. 203 (N.S.S.C.) at pp. 187-8 (C.B.R.).

It strikes me that each of the applicants in this case has a realistic possibility of being able to continue operating, although each is currently unable to meet all of its expenses albeit on a reduced scale. This is precisely the sort of circumstance in which all of the creditors are likely to benefit from the application of the CCAA and in which it is appropriate to grant an order staying proceedings so as to allow the applicant to finalize preparation of and file a plan of compromise and arrangement.

Let me now review the aspect of the stay of proceedings. Section 11 of the CCAA provides as follows:

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

The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and in particular to enable continuance of the company seeking CCAA protection. The power to grant a stay therefore extends to a stay which affects the position not only of the company's secured and unsecured creditors, but also all non-creditors and other parties who could potentially jeopardize the success of the plan and thereby the continuance of the company. See Norcen, supra at pp. 12-7 (C.B.R.) and Ouintette, supra, at pp. 296-8 (B.C.S.C.) and pp. 312-4 (B.C.C.A.) and Meridian, supra, at pp. 219 ff. Further the court has the power to order a stay that is effective in respect of the rights arising in favour of secured creditors under all forms of commercial security: see Chef Ready, supra, at p. 320 where Gibbs J.A. for the Court stated:

> The trend which emerges from this sampling will be given effect here by holding that where the word "security" occurs in the C.C.A.A., it includes s. 178 security and, where the word creditor occurs, it

> includes a bank holding s. 178 security. To the extent that there may be conflict between the two statutes, therefore, the broad scope of the C.C.A.A. prevails.

The power to grant a stay may also extend to preventing persons seeking to terminate or cancel executory contracts, including, without limitation agreements with the applying companies for the supply of goods or services, from doing so: see Wynden Canada Inc. v. Gaz Métropolitain Inc. (1982), 44 C.B.R. (N.S.) 285 (Que. S.C. in Bankruptcy) at pp. 290-1 and Ouintette, supra, at pp. 311-2 (B.C.C.A.). The stay may also extend to prevent a mortgagee from proceeding with foreclosure proceedings (see Re Northland Properties Limited et al. *(1988), 73 C.B.R. (N.S.) 141* (B.C.S.C.) or to prevent landlords from terminating leases, or otherwise enforcing their rights thereunder (see In Re Nathan Feifer et al. v. Frame Manufacturing Corporation (1947), 28 C.B.R. 124 (Qué. C.A.)). Amounts owing to landlords in respect of arrears of rent or unpaid rent for the unexpired portion of lease terms are properly dealt with in a plan of compromise or arrangement: see Sklar-Peppler Furniture Corporation *(1992), 8 C.B.R. (3d) 312* (Ont. Gen. Div.) especially at p. 318. The jurisdiction of the court to make orders under the CCAA in the interest of protecting the debtor company so as to enable it to prepare and file a plan is effective notwithstanding the terms of any contract or instrument to which the debtor company is a party. Section 8 of the CCAA provides:

> 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.

The power to grant a stay may also extend to prevent persons from exercising any right of set off in respect of the amounts owed by such a person to the debtor company, irrespective of whether the debtor company has commenced any action in respect of which the defense of set off might be formally asserted: see Ouintette, supra, at pp. 312-4 (B.C.C.A.).

It was submitted by the applicants that the power to grant a stay of proceedings may also extend to a stay of proceedings against non-applicants who are not companies and accordingly do not come within the express provisions of the CCAA. In support thereof they cited a CCAA order which was granted staying proceedings against individuals who guaranteed the obligations of a debtor-applicant which was a qualifying company under the terms of the CCAA: see In the Matter of the Proposal of Norman Slavik, unreported, *[1992] B.C.J. No. 341*. However in the Slavik situation the individual guarantors were officers and shareholders of two companies which had sought and obtained CCAA protection. Vickers J. in that case indicated that the facts of that case included the following unexplained and unamplified fact:

> 5. The order provided further that all creditors of Norvik Timber Inc. be enjoined from making demand for payment upon that firm or upon any guarantor of an obligation of the firm until further order of the Court.

The CCAA reorganization plan involved an assignment of the claims of the creditors to "Newco" in exchange for cash and shares. However the basis of the stay order originally granted was not set forth in this decision.

It appears to me that Dickson J. in International Donut Corp. v. 050863 N.B. Ltd., unreported, (1992) N.B.J. No. 339 (N.B.Q.B.T.D.) was focusing only on the stay arrangements of the CCAA when concerning a limited partnership situation he indicated:

> In August 1991 the limited partnership, through its general partner the plaintiff, applied to the Court under the Companies' Creditors Arrangement Act, R.S.C., c. C-36 for an order delaying the assertion of claims by creditors until an opportunity could be gained to work out with the numerous and sizable creditors a compromise of their claims. An order was obtained but it in due course expired without success having been achieved in arranging with creditors a compromise. That effort may have been wasted, because it seems questionable that the federal Act could have any application to a limited partnership in circumstances such as these. (Emphasis added).

I am not persuaded that the words of s. 11 which are quite specific as relating as to a company can be enlarged to encompass something other than that. However it appears to me that Blair J. was clearly in the right channel in his analysis in Campeau v. Olympia & York Developments Ltd. unreported, (1992) O.J. No. 1946 at pp. 4-7.

> The Power to Stay
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> The Court has always had an inherent jurisdiction to grant a stay of proceedings whenever it is just and convenient to do so, in order to control its process or prevent an abuse of that process: see Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. *(1982), 29 C.P.C. 60* (H.C.), and cases referred to therein. In the civil context, this general power is also embodied in the very broad terms of s. 106 of the Courts of Justice Act, *R.S.O. 1990, Chap. C. 43*, which provides as follows:
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> s. 106 A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.
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> Recently, Mr. Justice O'Connell has observed that this discretionary power is "highly dependent on the facts of each particular case": Arab Monetary Fund v. Hashim (unreported), *[1992] O.J. No. 1330*.
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> Apart from this inherent and general jurisdiction to stay proceedings, there are many instances where the Court is specifically granted the power to stay in a particular context, by virtue of statute or under the Rules of Civil Procedure. The authority to prevent multiplicity of proceedings in the same court, under Rule 6.01(1), is an example of the latter. The power to stay judicial and extra-judicial proceedings under s. 11 of the CCAA, is an example of the former. Section 11 of the CCAA provides as follows:
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> ...
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> The Power to Stay in the Context of CCAA Proceedings:
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> By its formal title the CCAA is known as "An Act to facilitate compromises and arrangements between companies and their creditors". To ensure the effective nature of such a "facilitative" process it is essential that the debtor company be afforded a respite from the litigious and other rights being exercised by creditors, while it attempts to carry on as a going concern and to negotiate an acceptable corporate restructuring arrangement with such creditors.
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> In this respect it has been observed that the CCAA is "to be used as a practical and effective way of restructuring corporate indebtedness.": see the case comment following the report of Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. *(1988), 72 C.B.R. (N.S.) 1* (Q.B.), and the approval of that remark as "a perceptive observation about the attitude of the courts" by Gibbs J.A. in Quintette Coal Ltd. v. Nippon Steel Corp. *(1990), 51 B.C.L.R. (2d) 105* at p. 113 (B.C.C.A.).
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> Gibbs J.A. continued with this comment:
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> To the extent that a general principle can be extracted from the new cases directly on point, and the others in which there is persuasive obiter, it would appear to be that the courts have concluded that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period (emphasis added).
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> I agree with those sentiments and would simply add that, in my view, the restraining power extends as well to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement. (In this respect, see also Sairex GmbH v. Prudential Steel Ltd. *(1991), 8 C.B.R. (3d) 62* (Ont. Gen. Div.) at p. 77).
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> I must have regard to these foregoing factors while I consider, as well, the general principles which have historically governed the Court's exercise of its power to stay proceedings. These principles were reviewed by Mr. Justice Montgomery in Canada Systems Group (EST) Ltd. v. Allendale Mutual Insurance, supra (a "Mississauga Derailment" case), at pp. 65-66. The balance of convenience must

> weigh significantly in favour of granting the stay, as a party's right to have access to the courts must not be lightly interfered with. The Court must be satisfied that a continuance of the proceeding would serve as an injustice to the party seeking the stay, in the sense that it would be oppressive or vexatious or an abuse of the process of the court in some other way. The stay must not cause an injustice to the plaintiff.

It is quite clear from Empire-Universal Films Limited et al. v. Rank et al., (1947) O.R. 775 (H.C.) that McRuer C.J.H.C. considered that the Judicature Act then [and now the CJA] merely confirmed a statutory right that previously had been considered inherent in the jurisdiction of the court with respect to its authority to grant a stay of proceedings. See also McCordic et al. v. Township of Bosanquet *(1974) 5 O.R. (2d) 53* (H.C.) and Canada Systems Group (Est) Ltd. v. Allendale Mutual Insurance Co. *(1982) 29 C.P.C. 60* (H.C.) at pp. 65-6.

Montgomery J. in Canada Systems, supra, at pp. 65-6 indicated:

> Goodman J. (as he then was) in McCordic v. Bosanquet *(1974), 5 O.R. (2d) 53* in granting a stay reviewed the authorities and concluded that the inherent jurisdiction of the Court to grant a stay of proceedings may be made whenever it is just and reasonable to do so. "This court has ample jurisdiction to grant a stay whenever it is just and reasonable to do so." (Per Lord Denning M.R. in Edmeades v. Thames Board Mills Ltd., [1969] 2 Q.B. 67 at 71, [1969] 2 All E.R. 127 (C.A.)). Lord Denning's decision in Edmeades was approved by Lord Justice Davies in Lane v. Willis; Lane v. Beach (Executor of Estate of George William Willis), [1972] 1 All E.R. 430, [1972] 1 W.L.R. 326 (sub nom. Lane v. Willis; Lane v. Beach) (C.A.).
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> ...
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> In Weight Watchers Int. Inc. v. Weight Watchers of Ont. Ltd. *(1972), 25 D.L.R. (3d) 419*, *5 C.P.R. (2d) 122*, appeal allowed by consent without costs (sub nom. Weight Watchers of Ont. Ltd. v. Weight Watchers Inc. Inc.) 42 D.L.R. (3d) 320n, 10 C.P.R. (2d) 96n (Fed. C.A.), Mr. Justice Heald on an application for stay said at p. 426 [25 D.L.R.]:
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> > "The principles which must govern in these matters are clearly stated in the case of Empire Universal Films Ltd. et al. v. Rank et al., *[1947] O.R. 775* at p. 779, as follows [quoting St. Pierre et al. v. South American Stores (Gath & Chaves), Ltd. et al., [1936] 1 K.B. 382 at p. 398]:
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> > '(1.) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused. (2.) In order to justify a stay two conditions must be satisfied, one positive and the other negative: (a) the defendant must satisfy the Court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way; and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.'"

Thus it appears to me that the inherent power of this court to grant stays can be used to supplement s. 11 of the CCAA when it is just and reasonable to do so. Is it appropriate to do so in the circumstances? Clearly there is jurisdiction under s. 11 of the CCAA to grant a stay in respect of any of the applicants which are all companies which fit the criteria of the CCAA. However the stay requested also involved the limited partnerships to some degree either (i) with respect to the applicants acting on behalf of the Limited Partnerships or (ii) the stays being effective vis-a-vis any proceedings taken by any party against the property assets and Undertaking of the Limited Partnerships in respect of which they hold a direct interest (collectively the "Property") as set out in the terms of the stay provisions of the order paragraphs 4 through 18 inclusive attached as an appendix to these reasons. I believe that an analysis of the operations of a limited partnership in this context would be beneficial to an understanding of how there is a close inter-relationship to the applicants involved in this CCAA proceedings and how the Limited Partnerships and their Property are an integral part of the operations previously conducted and the proposed restructuring.

A limited partnership is a creation of statute, consisting of one or more general partners and one or more limited partners. The limited partnership is an investment vehicle for passive investment by limited partners. It in essence combines the flow through concept of tax depreciation or credits available to "ordinary" partners under general partnership law with limited liability available to shareholders under corporate law. See Ontario LPA sections 2(2) and 3(1) and Lyle R. Depburn, Limited Partnerships, De Boo (1991), at p. 1-2 and 1-12. I would note here that the limited partnership provisions of the Alberta PA are roughly equivalent to those found in the Ontario LPA with the interesting side aspect that the Alberta legislation in s. 75 does allow for judgment against a limited partner to be charged against the limited partner's interest in the limited partnership. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership. In particular a general partner is fully liable to each creditor of the business of the limited partnership. The general partner has sole control over the property and business of the limited partnership: see Ontario LPA ss. 8 and 13. Limited partners have no liability to the creditors of the limited partnership's business; the limited partners' financial exposure is limited to their contribution. The limited partners do not have any "independent" ownership rights in the property of the limited partnership. The entitlement of the limited partners is limited to their contribution plus any profits thereon, after satisfaction of claims of the creditors. See Ontario LPA sections 9, 11, 12(1), 13, 15(2) and 24. The process of debtor and creditor relationships associated with the limited partnership's business are between the general partner and the creditors of the business. In the event of the creditors collecting on debt and enforcing security, the creditors can only look to the assets of the limited partnership together with the assets of the general partner including the general partner's interest in the limited partnership. This relationship is recognized under the Bankruptcy Act (now the BIA) sections 85 and 142.

A general partner is responsible to defend proceedings against the limited partnership in the firm name, so in procedural law and in practical effect, a proceeding against a limited partnership is a proceeding against the general partner. See Ontario Rules of Civil Procedure, O. Reg. 560/84 Rules 8.01 and 8.02.

It appears that the preponderance of case law supports the contention that contention that a partnership including a limited partnership is not a separate legal entity. See Lindley on Partnership, 15th ed. (1984), at p. 33-5; Seven Mile Dam Contractors v. R. in Right of British Columbia *(1979), 13 B.C.L.R. 137* (S.C.) affirmed *(1980), 25 B.C.L.R. 183* (C.A.) and "Extra-Provincial Liability of the Limited Partner", Brad E. Milne, (1985) 23 Alta. Law Rev. 345, at p. 350-1. Milne in that article made the following observations:

> The preponderance of case law therefore supports the contention that a limited partnership is not a separate legal entity. It appears, nevertheless, that the distinction made in Re Thorne between partnerships and trade unions could not be applied to limited partnerships which, like trade unions, must rely on statute for their validity. The mere fact that limited partnerships owe their existence to the statutory provision is probably not sufficient to endow the limited partnership with the attribute of legal personality as suggested in Ruzicks unless it appeared that the Legislature clearly intended that the limited partnership should have a separate legal existence. A review of the various provincial statutes does not reveal any procedural advantages, rights or powers that are fundamentally different from those advantages enjoyed by ordinary partnerships. The legislation does not contain any provision resembling section 15 of the Canada Business Corporation Act [S.C. 1974-75, c. 33] which expressly states that a corporation has the capacity, both in and outside of Canada, of a natural person. It is therefore difficult to imagine that the Legislature intended to create a new category of legal entity.

It appears to me that the operations of a limited partnership in the ordinary course are that the limited partners take a completely passive role (they must or they will otherwise lose their limited liability protection which would have been their sole reason for choosing a limited partnership vehicle as opposed to an "ordinary" partnership vehicle). For a lively discussion of the question of "control" in a limited partnership as contrasted with shareholders in a corporation, see R. Flannigan, The Control Test of Investor Liability in Limited Partnerships (1983), 21 Alta L. Rev. 303; E. Apps, Limited Partnerships and the "Control" Prohibition: Assessing the Liability of Limited Partners (1991), 70 Can. Bar. Rev. 611; R. Flannigan, Limited Partner Liability: A Response (1992), 11 Can. Bar Rev. 552. The limited partners leave the running of the business to the general partner and in that respect the care, custody and the maintenance of the property, assets and undertaking of the limited partnership in which the limited partners and the general partner hold an interest. The ownership of this limited partnership property, assets and undertaking is an undivided interest which cannot be segregated for the purpose of legal process. It seems to me that there

must be afforded a protection of the whole since the applicants' individual interest therein cannot be segregated without in effect dissolving the partnership arrangement. The limited partners have two courses of action to take if they are dissatisfied with the general partner or the operation of the limited partnership as carried on by the general partner - the limited partners can vote to (a) remove the general partner and replace it with another or (b) dissolve the limited partnership. However Flannigan strongly argues that an unfettered right to remove the general partner would attach general liability for the limited partners (and especially as to the question of continued enjoyment of favourable tax deductions) so that it is prudent to provide this as a conditional right: Control Test, (1992), supra, at pp. 524-5. Since the applicants are being afforded the protection of a stay of proceedings in respect to allowing them time to advance a reorganization plan and complete it if the plan finds favour, there should be a stay of proceedings (vis-a-vis) any action which the limited partners may wish to take as to replacement or dissolution) through the period of allowing the limited partners to vote on the reorganization plan itself.

It seems to me that using the inherent jurisdiction of this court to supplement the statutory stay provisions of s. 11 of the CCAA would be appropriate in the circumstances; it would be just and reasonable to do so. The business operations of the applicants are so intertwined with the limited partnerships that it would be impossible for relief as to a stay to be granted to the applicants which would affect their business without at the same time extending that stay to the undivided interests of the limited partners in such. It also appears that the applicants are well on their way to presenting a reorganization plan for consideration and a vote; this is scheduled to happen within the month so there would not appear to be any significant time inconvenience to any person interested in pursuing proceedings. While it is true that the provisions of the CCAA allow for a cramdown of a creditor's claim (as well as an interest of any other person), those who wish to be able to initiate or continue proceedings against the applicants may utilize the comeback clause in the order to persuade the court that it would not be just and reasonable to maintain that particular stay. I seems to me that in such a comeback motion the onus would be upon the applicants to show that in the circumstances it was appropriate to continue the stay.

The order is therefore granted as to the relief requested including the proposed stay provisions.

FARLEY J.

* * * * *

APPENDIX A

THE STAY

4. THIS COURT ORDERS that each of the Applicants shall remain in possession of its property, assets and undertaking and of the property, assets and undertaking of the Limited Partnerships in which they hold a direct interest (collectively the "Property") until March 15, 1993 (the "Stay Date") and shall be authorized, but not required, to make payment to Conventional Mortgage Creditors and to trade creditors incurred in the ordinary course prior to this Order including, without limitation, fees owing to professional advisors, wages, salaries, employee benefits, crown claims, unremitted source deductions in respect of income tax payable, Canada Pension Plan contributions payable, unemployment insurance contributions payable, realty taxes, and other taxes, if any, owing to any taxing authority and shall continue to carry on its business in the ordinary course, except as otherwise specifically authorized or directed by this Order, or as this Court may in future authorize or direct.

5. THIS COURT ORDERS that without in any way restricting the generality of paragraph 4 hereof, each of the Applicants, whether on behalf of a Limited Partnership or otherwise, be and is hereby authorized and empowered, subject to the existing rights of Creditors and any security granted in their favour, to:

   (a) borrow such additional sums as it may deem necessary,

(b) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order provided that such additional security expressly states that it ranks subsequent in priority to all then existing security including all floating charges, whether crystallized or uncrystallized,

(c) grant such additional security as it may deem necessary to any lender providing new advances subsequent to the date of this Order which may rank ahead of existing security if the consent is obtained of all secured creditors having an interest in the collateral in respect of which the additional security is granted to the granting of the additional security, and

(d) dispose of any of its Property subject, however, to the terms of any security affecting same, provided that no disposition of any Property charged in favour of any secured lender shall be made unless such secured lender consents to such disposition and to the manner in which the proceeds derived from such disposition are distributed,

the whole on at least three (3) business days' prior notice to all of the Senior Creditors and the Monitor and on such terms as to notice to any other affected creditor as this Court may direct, but nothing in this Order shall prevent any Applicant, whether on behalf of a Limited Partnership or otherwise, from borrowing further funds or granting further security against the Londonderry Mall substantially in accordance with any existing agreements in order to fund the project completion and leasing costs of the Londonderry Mall and nothing in this Order shall prevent any Senior Creditor from advancing further funds to any of the Applicants or the Limited Partnerships under any existing security, subject to the existing rights of such Senior Creditor and any subordinate creditor including pursuant to any postponements or subordinations as may be extant in respect thereof.

6. THIS COURT ORDERS that, until the Stay Date, the General Partner Company and LUPC shall cause the monthly interest and, as applicable, amortization owing by LUPC under CT1 and CT3, but not the arrears thereof, to be paid as and when due and to cause LUPC to perform all of its obligations to CT in respect of CT2 under its existing arrangement in respect of the segregation and application of the net operating income of the Northgate Mall.

7. THIS COURT ORDERS that, subject to paragraphs 4 and 6 and to subparagraph 5(d) hereof, the Applicants and Limited Partnerships be and are hereby directed, until further Order of this Court:

   (a) to make no payments, whether of capital, interest thereon or otherwise, on account of amounts owing by the Applicants to the Affected Creditors, as defined in the Plan, as of this date; and

   (b) to grant no mortgages, charges or other security upon or in respect of the Property other than for the specific purpose of borrowing new funds as provided for in paragraph 5 hereof.

but nothing in this Order shall prevent the General Partner Company or LUPC from making payments to Senior Creditors of interest and/or principal in accordance with existing agreements and nothing in this Order shall prevent the General Partner Company or the Limited Partnerships from making any funded monthly interest payments for loans secured against the Londonderry Mall.

8. THIS COURT ORDERS that until the Stay Date, the existing collateral position of Creditors in respect of marketable securities loans or credit facilities shall be frozen as at the date of this Order and all margin requirements in respect of such loans or credit facilities shall be suspended.

9. THIS COURT ORDERS that the Applicants shall be authorized to continue to retain and employ the agents, servants, solicitors and other assistants and consultants currently in its employ with liberty to retain such further assistants and consultants as they acting reasonably deem necessary or desirable in the ordinary course of their business or for the purpose of carrying out the terms of this Order or, subject to the approval of this Court.

10. THIS COURT ORDERS that, subject to paragraph 13 hereof, until the Stay Date or further Order of this Court:

(a) any and all proceedings taken or that may be taken by any of the Creditors, any other creditors, customers, clients, suppliers, lessors (including ground lessors), tenants, co-tenants, governments, limited partners, co-venturers, partners or by any other person, firm, corporation or entity against or in respect of any of the Applicants or the Property, as the case may be, whether pursuant to the Bankruptcy and Insolvency Act, S.C. 1992, c. 27, the Winding up Act, *R.S.C. 1985, c. W-11* or otherwise shall be stayed and suspended;

(b) the right of any person, firm, corporation or other entity to take possession of, foreclose upon or otherwise deal with any of the Property, or to continue such actions or proceedings if commenced prior to the date of this Order, is hereby restrained;

(c) the right of any person, firm, corporation or other entity to commence or continue realization in respect of any encumbrance, lien, charge, mortgage, attornment of rents or other security held in relation to the Property, including the right of any Creditor to take any step in asserting or perfecting any right against any Applicant or Limited Partnership, is hereby restrained, but the foregoing shall not prevent any Creditor from effecting any registrations with respect to existing security granted or agreed to prior to the date of this Order or from obtaining any third party consents in relation thereto;

(d) the right of any person, firm, corporation or other entity to assert, enforce or exercise any right, option or remedy available to it under any agreement with any of the Applicants or in respect of any of the Property, as the case may be, arising out of, relating to or triggered by the making or filing of these proceedings, or any allegation contained in these proceedings including, without limitation, the making of any demand, the sending of any notice or the issuance of any margin call is hereby restrained;

(e) no suit, action or other proceeding shall be proceeded with or commenced against any of the Applicants or in respect of any of the Property, as the case may be;

(f) all persons, firms, corporations and other entities are restrained from exercising any extra-judicial right or remedy against any of the Applicants or in respect ,of any of the Property, as the case may be;

(g) all persons, firms, corporations and other entities are restrained from registering or re-registering any of the Property which constitutes securities into the name of such persons, firms, corporations or other entities or their nominees, the exercise of any voting rights attaching to such securities, any right of distress, repossession, set off or consolidation of accounts in relation to amounts due or accruing due in respect of or arising from any indebtedness or obligation as at the date hereof; and

(h) notwithstanding paragraph 9(g) hereof, a Creditor may set off against its indebtedness to an Applicant, as the case may be, pursuant to any existing interest rate swap agreement any corresponding indebtedness of such Applicant, as the case may be, to such Creditor under the same interest rate swap agreement,

but nothing in this Order shall prevent suppliers of goods and services involved in completing the construction of the Londonderry Mall from commencing or continuing with any construction lien claims they may have in relation to the Londonderry Mall and nothing in this Order shall prevent the Bank of Montreal ("BMO") and the Applicants from continuing to operate the existing bank accounts of the Applicants and of the Limited Partnerships maintained with BMO, in the same manner as those bank accounts were operated prior to the date of this Order including any rights of set off in relation to monies deposited therein and nothing in this Order shall prevent CIBC from realizing upon its security in respect of CIBC1 and nothing in this Order shall prevent or affect either FB or CT in the enforcement of the security it holds on the Sutton Place Hotel and the Carleton Place Hotel, respectively.

11. THIS COURT ORDERS that no Creditor shall be under any obligation to advance or re-advance any monies after the date of this Order to any of the Applicants or to any of the Limited Partnerships, as the case may be, provided, however, that cash placed on deposit by any Applicant with any Creditor from

and after this date, whether in an operating account or otherwise and whether for its own account or for the account of a Limited Partnership, shall not be applied by such Creditor, other than in accordance with the terms of this Order, in reduction or repayment of amounts owing as of the date of this Order or which may become due on or before the Stay Date or in satisfaction of any interest or charges accruing in respect thereof.

12. THIS COURT ORDERS that all persons, firms, corporations and other entities having agreements with an Applicant or with a Limited Partnership, as the case may be, whether written or oral, for the supply or purchase of goods and/or services to such Applicant or Limited Partnerships, as the case may be, including, without limitation, ground leases, commercial leases, supply contracts, and service contracts, are hereby restrained from accelerating, terminating, suspending, modifying or cancelling such agreements without the written consent of such Applicant or Limited Partnership, as the case may be, or with the leave of this Court. All persons, firms, corporations and other entities are hereby restrained until further order of this Court from discontinuing, interfering or cutting off any utility (including telephone service at the present numbers used by any of the Applicants or Limited Partnerships, as the case may be, whether such telephone services are listed in the name of one or more of such Applicants or Limited Partnerships, as the case may be, or in the name of some other person), the furnishing of oil, gas, water, heat or electricity, the supply of equipment or other services so long as such Applicant or Limited Partnerships, as the case may be, pays the normal prices or charges for such goods and services received after the date of this Order, as the same become due in accordance with such payment terms or as may be hereafter negotiated by such Applicant or Limited Partnerships, as the case may be, from time to time. All such persons, firms, corporations or other entities shall continue to perform and observe the terms and conditions contained in any agreements entered into with an Applicant or Limited Partnerships, as the case may be, and, without further limiting the generality of the foregoing, all persons, firms, corporations and other entities including tenants of premises owned or operated by any of the Applicants or Limited Partnerships, as the case may be, be and they are hereby restrained until further order of this Court from terminating, amending, suspending or withdrawing any agreements, licenses, permits, approvals or supply of services and from pursuing any rights or remedies arising thereunder.

13. THIS COURT ORDERS that, upon the failure by any of the Applicants to perform their obligations pursuant to this Order, any Creditor affected by such failure may, on at least one day's notice to each of the Applicants and to all Senior Creditors and the Monitor, bring a motion to have the provisions of paragraphs 10, 11 or 12 of this Order set aside or varied, either in whole or in part.

14. THIS COURT ORDERS that from 9:00 o'clock a.m. on December 24, 1992 to the time of the granting of this Order, any act or action taken or notice given by any Creditors receiving such Notice of Application in furtherance of their rights to commence or continue realization, will be deemed not to have been taken or given, as the case may be, subject to the right of such Creditors to further apply to this Court in respect of such act or action or notice given, provided that the foregoing shall not apply to prevent any Creditor who, during such period, effected any registrations with respect to security granted prior to the date of this Order or who obtained third party consents in relation thereto.

15. THIS COURT ORDERS that all floating charges granted by any of the Applicants prior to the date of this Order, whether granted on behalf of any of the Limited Partnerships or otherwise, shall be crystallized, and shall be deemed to be crystallized, effective for all purposes immediately prior to the granting of this Order.

16. THIS COURT ORDERS that the Applicants shall be entitled to take such steps as may be necessary or appropriate to discharge any construction, builders, mechanics or similar liens registered against any of their property including, without limitation, the posting of letters of credit or the making of payments into Court, as the case may be, and no lender to any Applicant shall be prevented from doing likewise or from making such protective advances as may be necessary or appropriate, in which case such lender, in respect of such advances, shall be entitled to the benefit of any existing security in its favour as of the date of this Order in accordance with its terms.

17. THIS COURT ORDERS that the Applicants on or before January 1, 1993, shall provide the Senior Creditors with projections as to the monthly general, administrative and restructuring ("GAR") costs for the months of January, February and March, 1993, together with a cash-flow projection for LUPC for the period commencing on January 1, 1993 through to April 30, 1993 inclusive.

18. THIS COURT ORDERS that, notwithstanding the terms of this Order, the gross operating cash flow generated during the period commencing on the date of this Order to and until the Stay Date (the "Interim Period") by the Londonderry Mall shall be reserved and expended on the property in accordance with existing agreements, but all property management or other similar fees payable to any Applicant shall continue to be paid therefrom subject to the terms of any existing loan agreements affecting same.

9354-9186 Québec inc. v. Callidus Capital Corp.

Supreme Court of Canada Judgments

Supreme Court of Canada

Present: R. Wagner C.J. and R.S. Abella, M.J. Moldaver, A. Karakatsanis, S. Côté, M. Rowe and N. Kasirer JJ.

Heard: January 23, 2020;

Judgment: January 23, 2020.

Released: May 8, 2020.

File No.: 38594.

[2020] S.C.J. No. 100 | *[2020] A.C.S. no 100* | *2020 SCC 10* | *1 B.L.R. (6th) 1* | *317 A.C.W.S. (3d) 532* | *444 D.L.R. (4th) 373* | *78 C.B.R. (6th) 1* | *2020 CarswellQue 3772* | *2020EXP-1113*

9354-9186 Québec inc. and 9354-9178 Québec inc., Appellants, and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier, Respondents, and Ernst & Young Inc., IMF Bentham Limited (now known as Omni Bridgeway Limited), Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, Interveners And between IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited), Appellants, and Callidus Capital Corporation, International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier, Respondents, and Ernst & Young Inc., 9354-9186 Québec inc., 9354-9178 Québec inc., Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, Interveners

(117 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Case Summary

Bankruptcy and insolvency law — Companies' Creditors Arrangement Act (CCAA) matters — Compromises and arrangements — Proposals — Appeal by Bluberi from Quebec Court of Appeal judgment finding Callidus should be permitted to vote on plan of arrangement it submitted to Bluberi's creditors and finding that proposed third party litigation funding agreement (LFA) was plan of arrangement to be submitted to creditors' vote, allowed — During CCAA proceedings, Bluberi agreed to sell its assets to secured creditor Callidus in exchange for extinguishment of secured claim — Bluberi retained claims for damages against Callidus arising from alleged involvement in Bluberi's financial difficulties — Callidus filed proposed plan of arrangement whereby it would fund distribution to Bluberi's creditors in exchange for release from retained claims — Supervising judge did not err in preventing Callidus from vote on its own proposal — By reducing value of its security to nil and claiming status as unsecured creditor, Callidus was attempting to manipulate process to acquire control over vote outcome — No basis to interfere with supervising judge's exercise of discretion to approve LFA as interim financing — LFA was not plan of arrangement because it did not propose any compromise of creditors' rights — Companies Creditors' Arrangements Act, ss. 11, 11.2.

Bankruptcy and insolvency law — Proceedings — Practice and procedure — Courts — Jurisdiction — CCAA matters — Appeal by Bluberi from Quebec Court of Appeal judgment finding Callidus should be permitted to vote on plan of arrangement it submitted to Bluberi's creditors and finding that proposed third party litigation funding agreement (LFA) was plan of arrangement to be submitted to creditors' vote, allowed — During CCAA proceedings, Bluberi agreed to sell its assets to secured creditor Callidus in exchange for extinguishment of secured claim — Bluberi retained claims for damages against Callidus arising from alleged involvement in Bluberi's financial difficulties — Callidus filed proposed plan of arrangement whereby it would fund distribution to Bluberi's creditors in exchange for release from retained claims — Supervising judge did not err in preventing Callidus from vote on its own proposal — By reducing value of its security to nil and claiming status as unsecured creditor, Callidus was attempting to manipulate process to acquire control over vote outcome — No basis to interfere with supervising judge's exercise of discretion to approve LFA as interim financing — LFA was not plan of arrangement because it did not propose any compromise of creditors' rights — Companies Creditors' Arrangements Act, ss. 11, 11.2.

Appeal by Bluberi Gaming Technologies Inc. and its affiliated entities (collectively "Bluberi") from a judgment of the Quebec Court of Appeal finding that Callidus Capital Corp. ("Callidus") did not have an improper purpose and should be permitted to vote on its own plan of arrangement submitted to creditors of Bluberi, and finding that a third party litigation funding agreement proposed by Bluberi was a plan of arrangement that had to be submitted to a creditor's vote. In 2012, Callidus had extended a credit facility of approximately $24ámillion to Bluberi. Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus. In November 2015, Bluberi obtained an initial order under the Companies Creditors' Arrangements Act ("CCAA"). In its petition for the order, Bluberi alleged that its liquidity issues were the result of Callidus taking de facto control of the corporation and dictating a number of purposefully detrimental business decisions, in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it. A solicitation process for the sale of Bluberi's assets led to Bluberi entering into an asset purchase agreement with Callidus. Callidus acquired all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, but retained an undischarged secured claim of $3 million against Bluberi. The agreement also permitted Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims"), which Bluberi asserted could amount to over $200 million in damages. The Retained Claims were Bluberi's sole remaining asset, and thus the sole security for Callidus's $3 million claim. Bluberi filed an application seeking approval of a third party litigation funding agreement ("LFA") with a publicly traded, third party litigation funder, Bentham IMF Capital Limited ("Bentham"), to fund its pursuit of the Retained Claims. Callidus and certain unsecured creditors argued that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote. Callidus also filed an application to submit a plan of arrangement to a creditor's vote. Under the proposed plan, Callidus would fund a distribution to Bluberi's creditors in exchange for a release from the Retained Claims. The supervising judge granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham, but dismissed Callidus's application and declined to submit the proposed plan of arrangement to a creditors' vote. The supervising judge determined Callidus should not be permitted to vote on its own plan of arrangement because it was acting with an "improper purpose", and therefore the plan had no reasonable prospect of success. The Court of Appeal reversed both decisions, holding that the supervising judge erred in finding that Callidus had an improper purpose, and had "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case".

HELD: Appeal allowed.

Supervising judges in CCAA proceedings were given broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs". The judge had to keep in mind three baseline considerations, which the applicant bore the burden of demonstrating: (1) that the order sought was appropriate in the circumstances, and (2) that the applicant was acting in good faith and (3) with due diligence. A creditor generally could vote on a plan of arrangement or compromise affecting its rights, subject to any specific provisions of the CCAA or a proper exercise of discretion by the supervising judge. There were no specific

provisions in the CCAA to govern when a creditor who was otherwise eligible to vote on a plan could nonetheless be barred from voting. Section 11 provided supervising judges with the discretion to bar a creditor from voting where the creditor was acting for an improper purpose. When he made this decision, the supervising judge had presided over Bluberi's CCAA proceedings for over two years, received 15 reports from the Monitor, and issued approximately 25 orders. He was intimately familiar with Bluberi's CCAA proceedings. He was aware that, at a prior vote on an earlier version of Callidus' proposed plan of arrangement (the "First Plan"), Callidus had chosen not to value any of its claim as unsecured and had declined to vote at all ù despite the Monitor explicitly inviting it do so. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval. Between the failure of the First Plan and the proposal of the new plan ù which was identical to the First Plan, save for a modest increase of $250,000 ù none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. The inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the CCAA protected. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so. There was also no basis to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The breadth of a supervising judge's discretion to approve interim financing was apparent from the wording of s. 11.2(1) of the CCAA. That section did not mandate any standard form or terms, but simply provided that the financing had to be in an amount that was "appropriate" and "required by the company". The supervising judge was focused on the fairness at stake to all parties, the specific objectives of the CCAA, and the particular circumstances of this case. LFAs could constitute interim financing, and the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing". The LFA was not a plan of arrangement because it did not propose any compromise of the creditors' rights. The decision of the supervising judge was restored.

Statutes, Regulations and Rules Cited:

An Act respecting Champerty, R.S.O. 1897, c.á327,

Bankruptcy and Insolvency Act, R.S.C. 1985, c.áB3, s.á4.2, s. 43(7), s. 50(1), s. 54(3), s. 108(3), s. 187(9)

Budget Implementation Act, 2019, No.á1, S.C. 2019, c.á29, s.á133, s. 138, s. 140

Companies' Creditors Arrangement Act, R.S.C. 1985, c.áC36, s.á2(1), s. 3(1), s. 4, s.5, s. 6(1), s. 7, s. 11, s. 11.2(1), s. 11.2(2), s. 11.2(4)(a), s. 11.2(4)(b), s. 11.2(4)(c), s. 11.2(4)(d), s. 11.2(4)(e), s. 11.2(4)(f), s. 11.2(4)(g), s. 11(5), s. 11.7, s. 11.8, s. 18.6, s. 22(1), s. 22(2), s. 22(3), s. 23(1)(d)(i), s. 23 to 25, s. 36

Winding-up and Restructuring Act, R.S.C. 1985, c.áW-11, s.á6(1)

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Bankruptcy and insolvency -- Discretionary authority of supervising judge in proceedings under Companies' Creditors Arrangement Act -- Appellate review of decisions of supervising judge -- Whether supervising judge has discretion to bar creditor from voting on plan of arrangement where creditor is acting for improper purpose -- Whether supervising judge can approve third party litigation funding as interim financing -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11, 11.2.

Court Summary:

The debtor companies filed a petition for the issuance of an initial order under the *Companies' Creditors Arrangement Act* ("*CCAA*") in November 2015. The petition succeeded, and the initial order was issued by a supervising judge, who became responsible for overseeing the proceedings. Since then, substantially all of the assets of the debtor companies have been liquidated, with the notable exception of retained claims for damages against the companies' only secured creditor. In September 2017, the secured creditor proposed a plan of arrangement, which later failed to receive sufficient creditor support. In February 2018, the secured creditor proposed another, virtually identical, plan of arrangement. It also sought the supervising judge's permission to vote on this new plan in the same class as the debtor companies' unsecured creditors, on the basis that its security was worth nil. Around the same time, the debtor companies sought interim financing in the form of a proposed third party litigation funding agreement, which would permit them to pursue litigation of the retained claims. They also sought the approval of a related super-priority litigation financing charge.

The supervising judge determined that the secured creditor should not be permitted to vote on the new plan because it was acting with an improper purpose. As a result, the new plan had no reasonable prospect of success and was not put to a creditors' vote. The supervising judge allowed the debtor companies' application, authorizing them to enter into a third party litigation funding agreement. On appeal by the secured creditor and certain of the unsecured creditors, the Court of Appeal set aside the supervising judge's order, holding that he had erred in reaching the foregoing conclusions.

Held: The appeal should be allowed and the supervising judge's order reinstated.

The supervising judge made no error in barring the secured creditor from voting or in authorizing the third party litigating funding agreement. A supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. A supervising judge can also approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*. The Court of Appeal was not justified in interfering with the supervising judge's discretionary decisions in this regard, having failed to treat them with the appropriate degree of deference.

The *CCAA* is one of three principal insolvency statutes in Canada. It pursues an array of overarching remedial objectives that reflect the wide ranging and potentially catastrophic impacts insolvency can have. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. The architecture of the *CCAA* leaves the case-specific assessment and balancing of these objectives to the supervising judge.

From beginning to end, each proceeding under the *CCAA* is overseen by a single supervising judge, who has broad discretion to make a variety of orders that respond to the circumstances of each case. The anchor of this discretionary authority is s. 11 of the *CCAA*, with empowers a judge to make any order that they consider appropriate in the circumstances. This discretionary authority is broad, but not boundless. It must be exercised in furtherance of the remedial objectives of the *CCAA* and with three baseline considerations in mind: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence. The due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuvre or position themselves to gain an advantage. A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings and, as such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably.

A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights, or a proper exercise of discretion by the supervising judge

to constrain or bar the creditor's right to vote. Given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, the discretion to bar a creditor from voting should only be exercised where the circumstances demand such an outcome. Where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to the remedial objectives of the *CCAA* -- that is, acting for an improper purpose -- s. 11 of the *CCAA* supplies the supervising judge with the discretion to bar that creditor from voting. This discretion parallels the similar discretion that exists under the *Bankruptcy and Insolvency Act* and advances the basic fairness that permeates Canadian insolvency law and practice. Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that the supervising judge is best-positioned to undertake.

In the instant case, the supervising judge's decision to bar the secured creditor from voting on the new plan discloses no error justifying appellate intervention. When he made this decision, the supervising judge was intimately familiar with these proceedings, having presided over them for over 2 years, received 15 reports from the monitor, and issued approximately 25 orders. He considered the whole of the circumstances and concluded that the secured creditor's vote would serve an improper purpose. He was aware that the secured creditor had chosen not to value any of its claim as unsecured prior to the vote on the first plan and did not attempt to vote on that plan, which ultimately failed to receive the other creditors' approval. Between the failure of the first plan and the proposal of the (essentially identical) new plan, none of the factual circumstances relating to the debtor companies' financial or business affairs had materially changed. However, the secured creditor sought to value the entirety of its security at nil and, on that basis, sought leave to vote on the new plan as an unsecured creditor. If the secured creditor were permitted to vote in this way, the new plan would certainly have met the double majority threshold for approval under s. 6(1) of the *CCAA*. The inescapable inference was that the secured creditor was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. The secured creditor's course of action was also plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding, which includes acting with due diligence in valuing their claims and security. The secured creditor was therefore properly barred from voting on the new plan.

Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 of the *CCAA* and the remedial objectives of the *CCAA* more generally. Interim financing is a flexible tool that may take on a range of forms. This is apparent from the wording of s. 11.2(1), which is broad and does not mandate any standard form or terms. At its core, interim financing enables the preservation and realization of the value of a debtor's assets. In some circumstances, like the instant case, litigation funding furthers this basic purpose. Third party litigation funding agreements may therefore be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. These factors need not be mechanically applied or individually reviewed by the supervising judge, as not all of them will be significant in every case, nor are they exhaustive. Additionally, in order for a third party litigation funding agreement to be approved as interim financing, the agreement must not contain terms that effectively convert it into a plan of arrangement.

In the instant case, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the litigation funding agreement as interim financing. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with the debtor companies' *CCAA* proceedings, leads to the conclusion that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It is apparent that he was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the litigation funding agreement as interim financing. Further, the litigation funding agreement is not a plan of arrangement because it does not propose any compromise of the creditors' rights. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the funds generated from the debtor companies' assets, nor can it be said to compromise those rights. Finally, the litigation financing charge does not convert the litigation funding agreement into a plan of arrangement. Holding otherwise would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote,

which is expressly provided for in s. 11.2 of the *CCAA*.

Cases Cited

By Wagner C.J. and Moldaver J.

Applied: *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379; **considered:** *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102; *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296; **referred to:** *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974, 117 O.R. (3d) 150; *Hayes v. The City of Saint John*, 2016 NBQB 125; *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, 74 C.P.C. (7th) 332; *Re Blackburn*, 2011 BCSC 1671, 27 B.C.L.R. (5th) 199; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1 ; *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416 ; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 ; *Re Target Canada Co.*, 2015 ONSC 303 , 22 C.B.R. (6th) 323; *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 ; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24; *North American Tungsten Corp. v. Global Tungsten and Powders Corp.*, 2015 BCCA 390, 377 B.C.A.C. 6; *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 ; *Caterpillar Financial Services Ltd. v. 360networks Corp.*, 2007 BCCA 14, 279 D.L.R. (4th) 701 ; *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175; *New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338 ; *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 308 D.L.R. (4th) 339; *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135; *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 ; *Re 1078385 Ontario Inc.* (2004), 206 O.A.C. 17 ; *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 ; *Nortel Networks Corp., Re*, 2015 ONCA 681 , 391 D.L.R. (4th) 283; *Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 ; *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, 105 O.R. (3d) 364; *Montgrain v. National Bank of Canada*, 2006 QCCA 557, [2006] R.J.Q. 1009 ; *Langtry v. Dumoulin* (1884), 7 O.R. 644; *McIntyre Estate v. Ontario (Attorney General)* (2002), 218 D.L.R. (4th) 193; *Marcotte v. Banque de Montréal*, 2015 QCCS 1915; *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, 9 C.P.C. (8th) 321, aff'd 2018 ONSC 6352, 429 D.L.R. (4th) 739; *Stanway v. Wyeth*, 2013 BCSC 1585, 56 B.C.L.R. (5th) 192; *Re Crystallex International Corporation*, 2012 ONSC 2125, 91 C.B.R. (5th) 169; *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577 .

Statutes and Regulations Cited

An Act respecting Champerty, R.S.O. 1897, c. 327.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 4.2, 43(7), 50(1), 54(3), 108(3), 187(9).

Budget Implementation Act, 2019, No. 1, S.C. 2019, c. 29, ss. 133, 138, 140.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 2(1), 3(1), 4, 5, 6, (1), 7, 11, 11.2, (1), (2), (4), (a), (b), (c), (d), (e), (f), (g), (5), 11.7, 11.8, 18.6, 22(1), (2), (3), 23(1)(d), (i), 23 to 25, 36.

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11, s. 6(1).

Authors Cited

Agarwal, Ranjan K., and Doug Fenton. "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L.J.* 65.

Canada. Innovation, Science and Economic Development Canada. *Archived -- Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online: https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html#bill128e; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_1_eng.pdf).

Canada. Office of the Superintendent of Bankruptcy Canada. *Bill C-12: Clause by Clause Analysis*, developed by Industry Canada, last updated March 24, 2015 (online: https://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01986.html#a79; archived version: https://www.scc-csc.ca/cso-dce/2020SCC-CSC10_2_eng.pdf).

Canada. Senate. Standing Senate 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*. Ottawa, 2003.

Houlden, Lloyd W., Geoffrey B. Morawetz and Janis P. Sarra. *Bankruptcy and Insolvency Law of Canada*, vol. 4, 4th ed. Toronto: Thomson Reuters, 2009 (loose-leaf updated 2020, release 3).

Kaplan, Bill. "Liquidating CCAAs: Discretion Gone Awry?", in Janis P. Sarra, ed., *Annual Review of Insolvency Law*. Toronto: Carswell, 2008, 79.

Klar, Lewis N., et al. *Remedies in Tort*, vol. 1, by Leanne Berry, ed. Toronto: Thomson Reuters, 1987 (loose-leaf updated 2019, release 12).

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

Michaud, Guillaume. "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape", in Janis P. Sarra et al., eds., *Annual Review of Insolvency Law 2018*. Toronto: Thomson Reuters, 2019, 221.

Nocilla, Alfonso. "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012), 52 *Can. Bus. L.J.* 226.

Nocilla, Alfonso. "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73.

Rotsztain, Michael B., and Alexandra Dostal. "Debtor-In-Possession Financing", in Stephanie Ben-Ishai and Anthony Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond*. Markham, Ont.: LexisNexis, 2007, 227.

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

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

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

History and Disposition:

APPEALS from a judgment of the Quebec Court of Appeal (Dutil, Schrager and Dumas JJ.A.), *2019 QCCA 171*,

[2019] AZ-51566416, *[2019] Q.J. No. 670* (QL), 2019 CarswellQue 94 (WL Can.), setting aside a decision of Michaud J., *2018 QCCS 1040*, [2018] AZ-51477967, *[2018] Q.J. No. 1986* (QL), 2018 CarswellQue 1923 (WL Can.). Appeals allowed.

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Sylvain Rigaud, *Arad Mojtahedi* and *Saam Pousht-Mashhad*, for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals.

The reasons for the judgment of the Court were delivered by

THE CHIEF JUSTICE R. WAGNER AND M.J. MOLDAVER J.:—

I. Overview

1 These appeals arise in the context of an ongoing proceeding instituted under the *Companies' Creditors Arrangement Act*, *R.S.C. 1985, c. C-36* ("*CCAA*"), in which substantially all of the assets of the debtor companies have been liquidated. The proceeding was commenced well over four years ago. Since then, a single supervising judge has been responsible for its oversight. In this capacity, he has made numerous discretionary decisions.

2 Two of the supervising judge's decisions are in issue before us. Each raises a question requiring this Court to clarify the nature and scope of judicial discretion in *CCAA* proceedings. The first is whether a supervising judge has the discretion to bar a creditor from voting on a plan of arrangement where they determine that the creditor is acting for an improper purpose. The second is whether a supervising judge can approve third party litigation funding as interim financing, pursuant to s. 11.2 of the *CCAA*.

3 For the reasons that follow, we would answer both questions in the affirmative, as did the supervising judge. To the extent the Court of Appeal disagreed and went on to interfere with the supervising judge's discretionary decisions, we conclude that it was not justified in doing so. In our respectful view, the Court of Appeal failed to treat the supervising judge's decisions with the appropriate degree of deference. In the result, as we ordered at the conclusion of the hearing, these appeals are allowed and the supervising judge's order reinstated.

II. Facts

4 In 1994, Mr. Gérald Duhamel founded Bluberi Gaming Technologies Inc., which is now one of the appellants,

9354-9186 Québec inc. The corporation manufactured, distributed, installed, and serviced electronic casino gaming machines. It also provided management systems for gambling operations. Its sole shareholder has at all material times been Bluberi Group Inc., which is now another of the appellants, 9354-9178 Québec inc. Through a family trust, Mr. Duhamel controls Bluberi Group Inc. and, as a result, Bluberi Gaming (collectively, "Bluberi").

5 In 2012, Bluberi sought financing from the respondent, Callidus Capital Corporation ("Callidus"), which describes itself as an "asset-based or distressed lender" (R.F., at para. 26). Callidus extended a credit facility of approximately $24 million to Bluberi. This debt was secured in part by a share pledge agreement.

6 Over the next three years, Bluberi lost significant amounts of money, and Callidus continued to extend credit. By 2015, Bluberi owed approximately $86 million to Callidus -- close to half of which Bluberi asserts is comprised of interest and fees.

A. *Bluberi's Institution of CCAA Proceedings and Initial Sale of Assets*

7 On November 11, 2015, Bluberi filed a petition for the issuance of an initial order under the *CCAA*. In its petition, Bluberi alleged that its liquidity issues were the result of Callidus taking *de facto* control of the corporation and dictating a number of purposefully detrimental business decisions. Bluberi alleged that Callidus engaged in this conduct in order to deplete the corporation's equity value with a view to owning Bluberi and, ultimately, selling it.

8 Over Callidus's objection, Bluberi's petition succeeded. The supervising judge, Michaud J., issued an initial order under the *CCAA*. Among other things, the initial order confirmed that Bluberi was a "debtor company" within the meaning of s. 2(1) of the Act; stayed any proceedings against Bluberi or any director or officer of Bluberi; and appointed Ernst & Young Inc. as monitor ("Monitor").

9 Working with the Monitor, Bluberi determined that a sale of its assets was necessary. On January 28, 2016, it proposed a sale solicitation process, which the supervising judge approved. That process led to Bluberi entering into an asset purchase agreement with Callidus. The agreement contemplated that Callidus would obtain all of Bluberi's assets in exchange for extinguishing almost the entirety of its secured claim against Bluberi, which had ballooned to approximately $135.7 million. Callidus would maintain an undischarged secured claim of $3 million against Bluberi. The agreement would also permit Bluberi to retain claims for damages against Callidus arising from its alleged involvement in Bluberi's financial difficulties ("Retained Claims").[1] Throughout these proceedings, Bluberi has asserted that the Retained Claims should amount to over $200 million in damages.

10 The supervising judge approved the asset purchase agreement, and the sale of Bluberi's assets to Callidus closed in February 2017. As a result, Callidus effectively acquired Bluberi's business, and has continued to operate it as a going concern.

11 Since the sale, the Retained Claims have been Bluberi's sole remaining asset and thus the sole security for Callidus's $3 million claim.

B. *The Initial Competing Plans of Arrangement*

12 On September 11, 2017, Bluberi filed an application seeking the approval of a $2 million interim financing credit facility to fund the litigation of the Retained Claims and other related relief. The lender was a joint venture numbered company incorporated as 9364-9739 Québec inc. This interim financing application was set to be heard on September 19, 2017.

13 However, one day before the hearing, Callidus proposed a plan of arrangement ("First Plan") and applied for an order convening a creditors' meeting to vote on that plan. The First Plan proposed that Callidus would fund a $2.5 million (later increased to $2.63 million) distribution to Bluberi's creditors, except itself, in exchange for a release from the Retained Claims. This would have fully satisfied the claims of Bluberi's former employees and those

creditors with claims worth less than $3000; creditors with larger claims were to receive, on average, 31 percent of their respective claims.

14 The supervising judge adjourned the hearing of both applications to October 5, 2017. In the meantime, Bluberi filed its own plan of arrangement. Among other things, the plan proposed that half of any proceeds resulting from the Retained Claims, after payment of expenses and Bluberi's creditors' claims, would be distributed to the unsecured creditors, as long as the net proceeds exceeded $20 million.

15 On October 5, 2017, the supervising judge ordered that the parties' plans of arrangement could be put to a creditors' vote. He ordered that both parties share the fees and expenses related to the presentation of the plans of arrangement at a creditors' meeting, and that a party's failure to deposit those funds with the Monitor would bar the presentation of that party's plan of arrangement. Bluberi elected not to deposit the necessary funds, and, as a result, only Callidus's First Plan was put to the creditors.

C. *Creditors' Vote on Callidus's First Plan*

16 On December 15, 2017, Callidus submitted its First Plan to a creditors' vote. The plan failed to receive sufficient support. Section 6(1) of the *CCAA* provides that, to be approved, a plan must receive a "double majority" vote in each class of creditors -- that is, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims. All of Bluberi's creditors, besides Callidus, formed a single voting class of unsecured creditors. Of the 100 voting unsecured creditors, 92 creditors (representing $3,450,882 of debt) voted in favour, and 8 voted against (representing $2,375,913 of debt). The First Plan failed because the creditors voting in favour only held 59.22 percent of the total value being voted, which did not meet the s. 6(1) threshold. Most notably, SMT Hautes Technologies ("SMT"), which held 36.7 percent of Bluberi's debt, voted against the plan.

17 Callidus did not vote on the First Plan -- despite the Monitor explicitly stating that Callidus could have "vote[d] ... the portion of its claim, assessed by Callidus, to be an unsecured claim" (Joint R.R., vol. III, at p.188).

D. *Bluberi's Interim Financing Application and Callidus's New Plan*

18 On February 6, 2018, Bluberi filed one of the applications underlying these appeals, seeking authorization of a proposed third party litigation funding agreement ("LFA") with a publicly traded litigation funder, IMF Bentham Limited or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, "Bentham"). Bluberi's application also sought the placement of a $20 million super-priority charge in favour of Bentham on Bluberi's assets ("Litigation Financing Charge").

19 The LFA contemplated that Bentham would fund Bluberi's litigation of the Retained Claims in exchange for receiving a portion of any settlement or award after trial. However, were Bluberi's litigation to fail, Bentham would lose all of its invested funds. The LFA also provided that Bentham could terminate the litigation of the Retained Claims if, acting reasonably, it were no longer satisfied of the merits or commercial viability of the litigation.

20 Callidus and certain unsecured creditors who voted in favour of its plan (who are now respondents and style themselves the "Creditors' Group") contested Bluberi's application on the ground that the LFA was a plan of arrangement and, as such, had to be submitted to a creditors' vote.[2]

21 On February 12, 2018, Callidus filed the other application underlying these appeals, seeking to put another plan of arrangement to a creditors' vote ("New Plan"). The New Plan was essentially identical to the First Plan, except that Callidus increased the proposed distribution by $250,000 (from $2.63 million to $2.88 million). Further, Callidus filed an amended proof of claim, which purported to value the security attached to its $3 million claim at *nil*. Callidus was of the view that this valuation was proper because Bluberi had no assets other than the Retained Claims. On this basis, Callidus asserted that it stood in the position of an unsecured creditor, and sought the supervising judge's permission to vote on the New Plan with the other unsecured creditors. Given the size of its claim, if

Callidus were permitted to vote on the New Plan, the plan would necessarily pass a creditors' vote. Bluberi opposed Callidus's application.

22 The supervising judge heard Bluberi's interim financing application and Callidus's application regarding its New Plan together. Notably, the Monitor supported Bluberi's position.

III. Decisions Below

A. *Quebec Superior Court (2018 QCCS 1040) (Michaud J.)*

23 The supervising judge dismissed Callidus's application, declining to submit the New Plan to a creditors' vote. He granted Bluberi's application, authorizing Bluberi to enter into a litigation funding agreement with Bentham on the terms set forth in the LFA and imposing the Litigation Financing Charge on Bluberi's assets.

24 With respect to Callidus's application, the supervising judge determined Callidus should not be permitted to vote on the New Plan because it was acting with an "improper purpose" (para. 48). He acknowledged that creditors are generally entitled to vote in their own self-interest. However, given that the First Plan -- which was almost identical to the New Plan -- had been defeated by a creditors' vote, the supervising judge concluded that Callidus's attempt to vote on the New Plan was an attempt to override the result of the first vote. In particular, he wrote:

> Taking into consideration the creditors' interest, the Court accepted, in the fall of 2017, that Callidus' Plan be submitted to their vote with the understanding that, as a secured creditor, Callidus would not cast a vote. However, under the present circumstances, it would serve an improper purpose if Callidus was allowed to vote on its own plan, especially when its vote would very likely result in the New Plan meeting the two thirds threshold for approval under the CCAA.
>
> As pointed out by SMT, the main unsecured creditor, Callidus' attempt to vote aims only at cancelling SMT's vote which prevented Callidus' Plan from being approved at the creditors' meeting.
>
> It is one thing to let the creditors vote on a plan submitted by a secured creditor, it is another to allow this secured creditor to vote on its own plan in order to exert control over the vote for the sole purpose of obtaining releases. [paras. 45-47]

25 The supervising judge concluded that, in these circumstances, allowing Callidus to vote would be both "unfair and unreasonable" (para. 47). He also observed that Callidus's conduct throughout the *CCAA* proceedings "lacked transparency" (at para. 41) and that Callidus was "solely motivated by the [pending] litigation" (para. 44). In sum, he found that Callidus's conduct was contrary to the "requirements of appropriateness, good faith, and due diligence", and ordered that Callidus would not be permitted to vote on the New Plan (para. 48, citing *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 70).

26 Because Callidus was not permitted to vote on the New Plan and SMT had unequivocally stated its intention to vote against it, the supervising judge concluded that the plan had no reasonable prospect of success. He therefore declined to submit it to a creditors' vote.

27 With respect to Bluberi's application, the supervising judge considered three issues relevant to these appeals: (1) whether the LFA should be submitted to a creditors' vote; (2) if not, whether the LFA ought to be approved by the court; and (3) if so, whether the $20 million Litigation Financing Charge should be imposed on Bluberi's assets.

28 The supervising judge determined that the LFA did not need to be submitted to a creditors' vote because it was not a plan of arrangement. He considered a plan of arrangement to involve "an arrangement or compromise between a debtor and its creditors" (para. 71, citing *Re Crystallex*, 2012 ONCA 404, 293 O.A.C. 102, at para. 92 ("*Crystallex*")). In his view, the LFA lacked this essential feature. He also concluded that the LFA did not need to be accompanied by a plan, as Bluberi had stated its intention to file a plan in the future.

29 After reviewing the terms of the LFA, the supervising judge found it met the criteria for approval of third party litigation funding set out in *Bayens v. Kinross Gold Corporation*, *2013 ONSC 4974*, *117 O.R. (3d) 150*, at para. 41, and *Hayes v. The City of Saint John*, *2016 NBQB 125*, at para. 4 (CanLII). In particular, he considered Bentham's percentage of return to be reasonable in light of its level of investment and risk. Further, the supervising judge rejected Callidus and the Creditors' Group's argument that the LFA gave too much discretion to Bentham. He found that the LFA did not allow Bentham to exert undue influence on the litigation of the Retained Claims, noting similarly broad clauses had been approved in the *CCAA* context (para. 82, citing *Schenk v. Valeant Pharmaceuticals International Inc.*, *2015 ONSC 3215*, *74 C.P.C. (7th) 332*, at para. 23).

30 Finally, the supervising judge imposed the Litigation Financing Charge on Bluberi's assets. While significant, the supervising judge considered the amount to be reasonable given: the amount of damages that would be claimed from Callidus; Bentham's financial commitment to the litigation; and the fact that Bentham was not charging any interim fees or interest (i.e., it would only profit in the event of successful litigation or settlement). Put simply, Bentham was taking substantial risks, and it was reasonable that it obtain certain guarantees in exchange.

31 Callidus, again supported by the Creditors' Group, appealed the supervising judge's order, impleading Bentham in the process.

B. *Quebec Court of Appeal (2019 QCCA 171) (Dutil and Schrager JJ.A. and Dumas J. (ad hoc))*

32 The Court of Appeal allowed the appeal, finding that "[t]he exercise of the judge's discretion [was] not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate intervention [was] justified" (para. 48 CanLII)). In particular, the court identified two errors of relevance to these appeals.

33 First, the court was of the view that the supervising judge erred in finding that Callidus had an improper purpose in seeking to vote on its New Plan. In its view, Callidus should have been permitted to vote. The court relied heavily on the notion that creditors have a right to vote in their own self-interest. It held that any judicial discretion to preclude voting due to improper purpose should be reserved for the "clearest of cases" (para. 62, referring to *Re Blackburn*, *2011 BCSC 1671*, *27 B.C.L.R. (5th) 199*, at para. 45). The court was of the view that Callidus's transparent attempt to obtain a release from Bluberi's claims against it did not amount to an improper purpose. The court also considered Callidus's conduct prior to and during the *CCAA* proceedings to be incapable of justifying a finding of improper purpose.

34 Second, the court concluded that the supervising judge erred in approving the LFA as interim financing because, in its view, the LFA was not connected to Bluberi's commercial operations. The court concluded that the supervising judge had both "misconstrued in law the notion of interim financing and misapplied that notion to the factual circumstances of the case" (para. 78).

35 In light of this perceived error, the court substituted its view that the LFA was a plan of arrangement and, as a result, should have been submitted to a creditors' vote. It held that "[a]n arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them" (para. 85). The court considered the LFA to be a plan of arrangement because it affected the creditors' share in any eventual litigation proceeds, would cause them to wait for the outcome of any litigation, and could potentially leave them with nothing at all. Moreover, the court held that Bluberi's scheme "as a whole", being the prosecution of the Retained Claims and the LFA, should be submitted as a plan to the creditors for their approval (para. 89).

36 Bluberi and Bentham (collectively, "appellants"), again supported by the Monitor, now appeal to this Court.

IV. Issues

37 These appeals raise two issues:

(1) Did the supervising judge err in barring Callidus from voting on its New Plan on the basis that it was acting for an improper purpose?

(2) Did the supervising judge err in approving the LFA as interim financing, pursuant to s. 11.2 of the *CCAA*?

V. Analysis

A. *Preliminary Considerations*

38 Addressing the above issues requires situating them within the contemporary Canadian insolvency landscape and, more specifically, the *CCAA* regime. Accordingly, before turning to those issues, we review (1) the evolving nature of *CCAA* proceedings; (2) the role of the supervising judge in those proceedings; and (3) the proper scope of appellate review of a supervising judge's exercise of discretion.

(1) The Evolving Nature of *CCAA* Proceedings

39 The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).

40 Together, Canada's insolvency statutes pursue an array of overarching remedial objectives that reflect the wide ranging and potentially "catastrophic" impacts insolvency can have (*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 1). These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company (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; J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* 2nd ed. (2013), at pp. 4-5 and 14; Standing Senate 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* (2003), at pp. 9-10; R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 4-5).

41 Among these objectives, the *CCAA* generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company" (*Century Services*, at para. 70). As a result, the typical *CCAA* case has historically involved an attempt to facilitate the reorganization and survival of the pre-filing debtor company in an operational state -- that is, as a going concern. Where such a reorganization was not possible, the alternative course of action was seen as a liquidation through either a receivership or under the *BIA* regime. This is precisely the outcome that was sought in *Century Services* (see para. 14).

42 That said, the *CCAA* is fundamentally insolvency legislation, and thus it also "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 ... and enhancement of the credit system generally" (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 14; see also *Ernst & Young Inc. v. Essar Global Fund Ltd.*, 2017 ONCA 1014, 139 O.R. (3d) 1, at para. 103). In pursuit of those objectives, *CCAA* proceedings have evolved to permit outcomes that do not result in the emergence of the pre-filing debtor company in a restructured state, but rather involve some form of liquidation of the debtor's assets under the auspices of the Act itself (Sarra,

"The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at pp. 19-21). Such scenarios are referred to as "liquidating CCAAs", and they are now commonplace in the *CCAA* landscape (see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 70).

43 Liquidating CCAAs take diverse forms and may involve, among other things: the sale of the debtor company as a going concern; an "en bloc" sale of assets that are capable of being operationalized by a buyer; a partial liquidation or downsizing of business operations; or a piecemeal sale of assets (B. Kaplan, "Liquidating CCAAs: Discretion Gone Awry?", in J. P. Sarra, ed., *Annual Review of Insolvency Law* (2008), 79, at pp. 87-89). The ultimate commercial outcomes facilitated by liquidating CCAAs are similarly diverse. Some may result in the continued operation of the business of the debtor under a different going concern entity (e.g., the liquidations in *Indalex* and *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. C.J. (Gen. Div.)), while others may result in a sale of assets and inventory with no such entity emerging (e.g., the proceedings in *Re Target Canada Co.*, 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 7 and 31). Others still, like the case at bar, may involve a going concern sale of most of the assets of the debtor, leaving residual assets to be dealt with by the debtor and its stakeholders.

44 *CCAA* courts first began approving these forms of liquidation pursuant to the broad discretion conferred by the Act. The emergence of this practice was not without criticism, largely on the basis that it appeared to be inconsistent with the *CCAA* being a "restructuring statute" (see, e.g., *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93, at paras. 15-16, aff'g 1999 ABQB 379, 11 C.B.R. (4th) 204, at paras. 40-43; A. Nocilla, "The History of the Companies' Creditors Arrangement Act and the Future of Re-Structuring Law in Canada" (2014), 56 *Can. Bus. L.J.* 73, at pp. 88-92).

45 However, since s. 36 of the *CCAA* came into force in 2009, courts have been using it to effect liquidating CCAAs. Section 36 empowers courts to authorize the sale or disposition of a debtor company's assets outside the ordinary course of business.[3] Significantly, when the Standing Senate Committee on Banking, Trade and Commerce recommended the adoption of s. 36, it observed that liquidation is not necessarily inconsistent with the remedial objectives of the *CCAA*, and that it may be a means to "raise capital [to facilitate a restructuring], eliminate further loss for creditors or focus on the solvent operations of the business" (p. 147). Other commentators have observed that liquidation can be a "vehicle to restructure a business" by allowing the business to survive, albeit under a different corporate form or ownership (Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at p. 169; see also K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at p. 311). Indeed, in *Indalex*, the company sold its assets under the *CCAA* in order to preserve the jobs of its employees, despite being unable to survive as their employer (see para. 51).

46 Ultimately, the relative weight that the different objectives of the *CCAA* take on in a particular case may vary based on the factual circumstances, the stage of the proceedings, or the proposed solutions that are presented to the court for approval. Here, a parallel may be drawn with the *BIA* context. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at para. 67, this Court explained that, as a general matter, the *BIA* serves two purposes: (1) the bankrupt's financial rehabilitation and (2) the equitable distribution of the bankrupt's assets among creditors. However, in circumstances where a debtor corporation will never emerge from bankruptcy, only the latter purpose is relevant (see para. 67). Similarly, under the *CCAA*, when a reorganization of the pre-filing debtor company is not a possibility, a liquidation that preserves going-concern value and the ongoing business operations of the pre-filing company may become the predominant remedial focus. Moreover, where a reorganization or liquidation is complete and the court is dealing with residual assets, the objective of maximizing creditor recovery from those assets may take centre stage. As we will explain, the architecture of the *CCAA* leaves the case-specific assessment and balancing of these remedial objectives to the supervising judge.

(2) The Role of a Supervising Judge in *CCAA* Proceedings

47 One of the principal means through which the *CCAA* achieves its objectives is by carving out a unique

supervisory role for judges (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 18-19). From beginning to end, each *CCAA* proceeding is overseen by a single supervising judge. The supervising judge acquires extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings from their ongoing dealings with the parties.

48 The *CCAA* capitalizes on this positional advantage by supplying supervising judges with broad discretion to make a variety of orders that respond to the circumstances of each case and "meet contemporary business and social needs" (*Century Services*, at para. 58) in "real-time" (para. 58, citing R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484). The anchor of this discretionary authority is s. 11, which empowers a judge "to make any order that [the judge] considers appropriate in the circumstances". This section has been described as "the engine" driving the statutory scheme (*Stelco Inc. (Re)* (2005), 253 D.L.R. (4th) 109 (Ont. C.A.), at para. 36).

49 The discretionary authority conferred by the *CCAA*, while broad in nature, is not boundless. This authority must be exercised in furtherance of the remedial objectives of the *CCAA*, which we have explained above (see *Century Services*, at para. 59). Additionally, the court must keep in mind three "baseline considerations" (at para. 70), which the applicant bears the burden of demonstrating: (1) that the order sought is appropriate in the circumstances, and (2) that the applicant has been acting in good faith and (3) with due diligence (para. 69).

50 The first two considerations of appropriateness and good faith are widely understood in the *CCAA* context. Appropriateness "is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*" (para. 70). Further, the well-established requirement that parties must act in good faith in insolvency proceedings has recently been made express in s. 18.6 of the *CCAA*, which provides:

> **Good faith**
>
> **18.6 (1)** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **Good faith -- powers of court**
>
> **(2)** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.
>
> (See also *BIA*, s. 4.2; *Budget Implementation Act*, *2019, No. 1*, S.C. 2019, c. 29, ss. 133 and 140.)

51 The third consideration of due diligence requires some elaboration. Consistent with the *CCAA* regime generally, the due diligence consideration discourages parties from sitting on their rights and ensures that creditors do not strategically manoeuver or position themselves to gain an advantage (*Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. C.J. (Gen. Div.)), at p. 31). The procedures set out in the *CCAA* rely on negotiations and compromise between the debtor and its stakeholders, as overseen by the supervising judge and the monitor. This necessarily requires that, to the extent possible, those involved in the proceedings be on equal footing and have a clear understanding of their respective rights (see McElcheran, at p. 262). 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).

52 We pause to note that supervising judges are assisted in their oversight role by a court appointed monitor whose qualifications and duties are set out in the *CCAA* (see ss. 11.7, 11.8 and 23 to 25). The monitor is an independent and impartial expert, acting as "the eyes and the ears of the court" throughout the proceedings (*Essar*, at para. 109). The core of the monitor's role includes providing an advisory opinion to the court as to the fairness of any proposed plan of arrangement and on orders sought by parties, including the sale of assets and requests for

interim financing (see *CCAA*, s. 23(1)(d) and (i); Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp-566 and 569).

(3) Appellate Review of Exercises of Discretion by a Supervising Judge

53 A high degree of deference is owed to discretionary decisions made by judges supervising *CCAA* proceedings. As such, appellate intervention will only be justified if the supervising judge erred in principle or exercised their discretion unreasonably (see *Grant Forest Products Inc. v. Toronto-Dominion Bank*, 2015 ONCA 570, 387 D.L.R. (4th) 426, at para. 98; *Bridging Finance Inc. v. Béton Brunet 2001 inc.*, 2017 QCCA 138, 44 C.B.R. (6th) 175, at para. 23). Appellate courts must be careful not to substitute their own discretion in place of the supervising judge's (*New Skeena Forest Products Inc., Re*, 2005 BCCA 192, 39 B.C.L.R. (4th) 338, at para. 20).

54 This deferential standard of review accounts for the fact that supervising judges are steeped in the intricacies of the *CCAA* proceedings they oversee. In this respect, the comments of Tysoe J.A. in *Canadian Metropolitan Properties Corp. v. Libin Holdings Ltd.*, 2009 BCCA 40, 305 D.L.R. (4th) 339 ("*Re Edgewater Casino Inc.*), at para. 20, are apt:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests... . *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

55 With the foregoing in mind, we turn to the issues on appeal.

B. *Callidus Should Not Be Permitted to Vote on Its New Plan*

56 A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to any specific provisions of the *CCAA* that may restrict its voting rights (e.g., s. 22(3)), or a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s. 11 of the *CCAA*, which provides supervising judges with the discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case. In our view, the supervising judge here made no error in exercising his discretion to bar Callidus from voting on the New Plan.

(1) Parameters of Creditors' Right to Vote on Plans of Arrangement

57 Creditor approval of any plan of arrangement or compromise is a key feature of the *CCAA*, as is the supervising judge's oversight of that process. Where a plan is proposed, an application may be made to the supervising judge to order a creditors' meeting to vote on the proposed plan (*CCAA*, ss. 4 and 5). The supervising judge has the discretion to determine whether to order the meeting. For the purposes of voting at a creditors' meeting, the debtor company may divide the creditors into classes, subject to court approval (*CCAA*, s. 22(1)). Creditors may be included in the same class if "their interests or rights are sufficiently similar to give them a commonality of interest" (*CCAA*, s. 22(2); see also L. W. Houlden, G. B. Morawetz and J. P. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf)), vol. 4, at Ns.149). If the requisite "double majority" in each class of creditors -- again, a majority in *number* of class members, which also represents two-thirds in *value* of the class members' claims -- vote in favour of the plan, the supervising judge may sanction the plan (*Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 296 D.L.R. (4th) 135, at para. 34; see *CCAA*, s. 6). The supervising judge will conduct what is commonly referred to as a "fairness hearing" to determine, among other things, whether the plan is fair and reasonable (Wood, at pp. 490-92; see also Sarra, *Rescue! The Companies' Creditors*

Arrangement Act, at p. 529; Houlden, Morawetz and Sarra at Ns.45). Once sanctioned by the supervising judge, the plan is binding on each class of creditors that participated in the vote (*CCAA*, s. 6(1)).

58 Creditors with a provable claim against the debtor whose interests are affected by a proposed plan are usually entitled to vote on plans of arrangement (Wood, at p. 470). Indeed, there is no express provision in the *CCAA* barring such a creditor from voting on a plan of arrangement, including a plan it sponsors.

59 Notwithstanding the foregoing, the appellants submit that a purposive interpretation of s. 22(3) of the *CCAA* reveals that, as a general matter, a creditor should be precluded from voting on its own plan. Section 22(3) provides:

> **Related creditors**
>
> **(3)** A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.

The appellants note that s. 22(3) was meant to harmonize the *CCAA* scheme with s. 54(3) of the *BIA*, which provides that "[a] creditor who is related to the debtor may vote against but not for the acceptance of the proposal." The appellants point out that, under s. 50(1) of the *BIA*, only debtors can sponsor plans; as a result, the reference to "debtor" in s. 54(3) captures *all* plan sponsors. They submit that if s. 54(3) captures all plan sponsors, s. 22(3) of the *CCAA* must do the same. On this basis, the appellants ask us to extend the voting restriction in s. 22(3) to apply not only to creditors who are "related to the company", as the provision states, but to any creditor who sponsors a plan. They submit that this interpretation gives effect to the underlying intention of both provisions, which they say is to ensure that a creditor who has a conflict of interest cannot "dilute" or overtake the votes of other creditors.

60 We would not accept this strained interpretation of s. 22(3). Section 22(3) makes no mention of conflicts of interest between creditors and plan sponsors generally. The wording of s. 22(3) only places voting restrictions on creditors who are "related to the [debtor] company". These words are "precise and unequivocal" and, as such, must "play a dominant role in the interpretive process" (*Canada Trustco Mortgage Co. v. Canada*, *2005 SCC 54*, *[2005] 2 S.C.R. 601*, at para. 10). In our view, the appellants' analogy to the *BIA* is not sufficient to overcome the plain wording of this provision.

61 While the appellants are correct that s. 22(3) was enacted to harmonize the treatment of related parties in the *CCAA* and *BIA*, its history demonstrates that it is not a general conflict of interest provision. Prior to the amendments incorporating s. 22(3) into the *CCAA*, the *CCAA* clearly allowed creditors to put forward a plan of arrangement (see Houlden, Morawetz and Sarra, at Ns.33, *Red Cross*; *Re 1078385 Ontario Inc. (2004), 206 O.A.C. 17*). In contrast, under the *BIA*, only debtors could make proposals. Parliament is presumed to have been aware of this obvious difference between the two statutes (see *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, *2006 SCC 4*, *[2006] 1 S.C.R. 140*, at para. 59; see also *Third Eye*, at para. 57). Despite this difference, Parliament imported, with necessary modification, the wording of the *BIA* related creditor provision into the *CCAA*. Going beyond this language entails accepting that Parliament failed to choose the right words to give effect to its intention, which we do not.

62 Indeed, Parliament did not mindlessly reproduce s. 54(3) of the *BIA* in s. 22(3) of the *CCAA*. Rather, it made two modifications to the language of s. 54(3) to bring it into conformity with the language of the *CCAA*. First, it changed "proposal" (a defined term in the *BIA*) to "compromise or arrangement" (a term used throughout the *CCAA*). Second, it changed "debtor" to "company", recognizing that companies are the only kind of debtor that exists in the *CCAA* context.

63 Our view is further supported by Industry Canada's explanation of the rationale for s. 22(3) as being to "reduce the ability of debtor companies to organize a restructuring plan that confers additional benefits to related parties" (Office of the Superintendent of Bankruptcy Canada, *Bill C-12: Clause by Clause Analysis*, developed by Industry

Canada, last updated March 24, 2015 (online), cl. 71, s. 22 (emphasis added); see also Standing Senate Committee on Banking, Trade and Commerce, at p. 151).

64 Finally, we note that the *CCAA* contains other mechanisms that attenuate the concern that a creditor with conflicting legal interests with respect to a plan it proposes may distort the creditors' vote. Although we reject the appellants' interpretation of s. 22(3), that section still bars creditors who are related to the debtor company from voting in favour of *any* plan. Additionally, creditors who do not share a sufficient commonality of interest may be forced to vote in separate classes (s. 22(1) and (2)), and, as we will explain, a supervising judge may bar a creditor from voting where the creditor is acting for an improper purpose.

(2) Discretion to Bar a Creditor From Voting in Furtherance of an Improper Purpose

65 There is no dispute that the *CCAA* is silent on when a creditor who is otherwise entitled to vote on a plan can be barred from voting. However, *CCAA* supervising judges are often called upon "to sanction measures for which there is no explicit authority in the *CCAA*" (*Century Services*, at para. 61; see also para. 62). In *Century Services*, this Court endorsed a "hierarchical" approach to determining whether jurisdiction exists to sanction a proposed measure: "courts [must] rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding" (para. 65). In most circumstances, a purposive and liberal interpretation of the provisions of the *CCAA* will be sufficient "to ground measures necessary to achieve its objectives" (para. 65).

66 Applying this approach, we conclude that jurisdiction exists under s. 11 of the *CCAA* to bar a creditor from voting on a plan of arrangement or compromise where the creditor is acting for an improper purpose.

67 Courts have long recognized that s. 11 of the *CCAA* signals legislative endorsement of the "broad reading of *CCAA* authority developed by the jurisprudence" (*Century Services*, at para. 68). Section 11 states:

> **General power of court**
>
> **11** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the *CCAA* itself, and the requirement that the order made be "appropriate in the circumstances".

68 Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no *CCAA* provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the *CCAA* context (para. 36).

69 Oversight of the plan negotiation, voting, and approval process falls squarely within the supervising judge's purview. As indicated, there are no specific provisions in the *CCAA* which govern when a creditor who is otherwise eligible to vote on a plan may nonetheless be barred from voting. Nor is there any provision in the *CCAA* which suggests that a creditor has an absolute right to vote on a plan that cannot be displaced by a proper exercise of judicial discretion. However, given that the *CCAA* regime contemplates creditor participation in decision-making as an integral facet of the workout regime, creditors should only be barred from voting where the circumstances demand such an outcome. In other words, it is necessarily a discretionary, circumstance-specific inquiry.

70 Thus, it is apparent that s. 11 serves as the source of the supervising judge's jurisdiction to issue a discretionary order barring a creditor from voting on a plan of arrangement. The exercise of this discretion must further the

remedial objectives of the *CCAA* and be guided by the baseline considerations of appropriateness, good faith, and due diligence. This means that, where a creditor is seeking to exercise its voting rights in a manner that frustrates, undermines, or runs counter to those objectives -- that is, acting for an "improper purpose" -- the supervising judge has the discretion to bar that creditor from voting.

71 The discretion to bar a creditor from voting in furtherance of an improper purpose under the *CCAA* parallels the similar discretion that exists under the *BIA*, which was recognized in *Laserworks Computer Services Inc. (Bankruptcy), Re*, 1998 NSCA 42, 165 N.S.R. (2d) 296. In *Laserworks*, the Nova Scotia Court of Appeal concluded that the discretion to bar a creditor from voting in this way stemmed from the court's power, inherent in the scheme of the *BIA*, to supervise "[e]ach step in the bankruptcy process" (at para. 41), as reflected in ss. 43(7), 108(3), and 187(9) of the Act. The court explained that s. 187(9) specifically grants the power to remedy a "substantial injustice", which arises "when the *BIA* is used for an improper purpose" (para. 54). The court held that "[a]n improper purpose is any purpose collateral to the purpose for which the bankruptcy and insolvency legislation was enacted by Parliament" (para. 54).

72 While not determinative, the existence of this discretion under the *BIA* lends support to the existence of similar discretion under the *CCAA* for two reasons.

73 First, this conclusion would be consistent with this Court's recognition that the *CCAA* "offers a more flexible mechanism with greater judicial discretion" than the *BIA* (*Century Services*, at para. 14 (emphasis added)).

74 Second, this Court has recognized the benefits of harmonizing the two statutes to the extent possible. For example, in *Indalex*, the Court observed that "in order to avoid a race to liquidation under the *BIA*, courts will favour an interpretation of the *CCAA* that affords creditors analogous entitlements" to those received under the *BIA* (para. 51; see also *Century Services*, at para. 24; *Nortel Networks Corp., Re*, 2015 ONCA 681, 391 D.L.R. (4th) 283, at paras. 34-46). Thus, where the statutes are capable of bearing a harmonious interpretation, that interpretation ought to be preferred "to avoid the ills that can arise from [insolvency] 'statute-shopping'" (*Kitchener Frame Ltd.*, 2012 ONSC 234, 86 C.B.R. (5th) 274, at para. 78; see also para. 73). In our view, the articulation of "improper purpose" set out in *Laserworks* -- that is, any purpose collateral to the purpose of insolvency legislation -- is entirely harmonious with the nature and scope of judicial discretion afforded by the *CCAA*. Indeed, as we have explained, this discretion is to be exercised in accordance with the *CCAA*'s objectives as an insolvency statute.

75 We also observe that the recognition of this discretion under the *CCAA* advances the basic fairness that "permeates Canadian insolvency law and practice" (Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 27; see also *Century Services*, at paras. 70 and 77). As Professor Sarra observes, fairness demands that supervising judges be in a position to recognize and meaningfully address circumstances in which parties are working against the goals of the statute:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation ... . If the *CCAA* is to be interpreted in a purposive way, the courts must be able to recognize when people have conflicting interests and are working actively against the goals of the statute.
>
> ("The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law", at p. 30 (emphasis added))

In this vein, the supervising judge's oversight of the *CCAA* voting regime must not only ensure strict compliance with the Act, but should further its goals as well. We are of the view that the policy objectives of the *CCAA* necessitate the recognition of the discretion to bar a creditor from voting where the creditor is acting for an improper purpose.

76 Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the *CCAA*. As this case demonstrates, the supervising judge is best-positioned to undertake this inquiry.

(3) The Supervising Judge Did Not Err in Prohibiting Callidus From Voting

77 In our view, the supervising judge's decision to bar Callidus from voting on the New Plan discloses no error justifying appellate intervention. As we have explained, discretionary decisions like this one must be approached from the appropriate posture of deference. It bears mentioning that, when he made this decision, the supervising judge was intimately familiar with Bluberi's *CCAA* proceedings. He had presided over them for over 2 years, received 15 reports from the Monitor, and issued approximately 25 orders.

78 The supervising judge considered the whole of the circumstances and concluded that Callidus's vote would serve an improper purpose (paras. 45 and 48). We agree with his determination. He was aware that, prior to the vote on the First Plan, Callidus had chosen not to value *any* of its claim as unsecured and later declined to vote at all -- despite the Monitor explicitly inviting it do so[4]. The supervising judge was also aware that Callidus's First Plan had failed to receive the other creditors' approval at the creditors' meeting of December 15, 2017, and that Callidus had chosen not to take the opportunity to amend or increase the value of its plan at that time, which it was entitled to do (see *CCAA*, ss. 6 and 7; Monitor, I.F., at para. 17). Between the failure of the First Plan and the proposal of the New Plan -- which was identical to the First Plan, save for a modest increase of $250,000 -- none of the factual circumstances relating to Bluberi's financial or business affairs had materially changed. However, Callidus sought to value the *entirety* of its security at *nil* and, on that basis, sought leave to vote on the New Plan as an unsecured creditor. If Callidus were permitted to vote in this way, the New Plan would certainly have met the s. 6(1) threshold for approval. In these circumstances, the inescapable inference was that Callidus was attempting to strategically value its security to acquire control over the outcome of the vote and thereby circumvent the creditor democracy the *CCAA* protects. Put simply, Callidus was seeking to take a "second kick at the can" and manipulate the vote on the New Plan. The supervising judge made no error in exercising his discretion to prevent Callidus from doing so.

79 Indeed, as the Monitor observes, "Once a plan of arrangement or proposal has been submitted to the creditors of a debtor for voting purposes, to order a second creditors' meeting to vote on a substantially similar plan would not advance the policy objectives of the CCAA, nor would it serve and enhance the public's confidence in the process or otherwise serve the ends of justice" (I.F., at para. 18). This is particularly the case given that the cost of having another meeting to vote on the New Plan would have been upwards of $200,000 (see supervising judge's reasons, at para. 72).

80 We add that Callidus's course of action was plainly contrary to the expectation that parties act with due diligence in an insolvency proceeding -- which, in our view, includes acting with due diligence in valuing their claims and security. At all material times, Bluberi's Retained Claims have been the sole asset securing Callidus's claim. Callidus has pointed to nothing in the record that indicates that the value of the Retained Claims has changed. Had Callidus been of the view that the Retained Claims had no value, one would have expected Callidus to have valued its security accordingly prior to the vote on the First Plan, if not earlier. Parenthetically, we note that, irrespective of the timing, an attempt at such a valuation may well have failed. This would have prevented Callidus from voting as an unsecured creditor, even in the absence of Callidus's improper purpose.

81 As we have indicated, discretionary decisions attract a highly deferential standard of review. Deference demands that review of a discretionary decision begin with a proper characterization of the basis for the decision. Respectfully, the Court of Appeal failed in this regard. The Court of Appeal seized on the supervising judge's somewhat critical comments relating to Callidus's goal of being released from the Retained Claims and its conduct throughout the proceedings as being incapable of grounding a finding of improper purpose. However, as we have explained, these considerations did not drive the supervising judge's conclusion. His conclusion was squarely based on Callidus' attempt to manipulate the creditors' vote to ensure that its New Plan would succeed where its

First Plan had failed (see supervising judge's reasons, at paras. 45-48). We see nothing in the Court of Appeal's reasons that grapples with this decisive impropriety, which goes far beyond a creditor merely acting in its own self-interest.

82 In sum, we see nothing in the supervising judge's reasons on this point that would justify appellate intervention. Callidus was properly barred from voting on the New Plan.

83 Before moving on, we note that the Court of Appeal addressed two further issues: whether Callidus is "related" to Bluberi within the meaning of s. 22(3) of the *CCAA*; and whether, if permitted to vote, Callidus should be ordered to vote in a separate class from Bluberi's other creditors (see *CCAA*, s. 22(1) and (2)). Given our conclusion that the supervising judge did not err in barring Callidus from voting on the New Plan on the basis that Callidus was acting for an improper purpose, it is unnecessary to address either of these issues. However, nothing in our reasons should be read as endorsing the Court of Appeal's analysis of them.

C. *Bluberi's LFA Should Be Approved as Interim Financing*

84 In our view, the supervising judge made no error in approving the LFA as interim financing pursuant to s. 11.2 of the *CCAA*. Interim financing is a flexible tool that may take on a range of forms. As we will explain, third party litigation funding may be one such form. Whether third party litigation funding should be approved as interim financing is a case-specific inquiry that should have regard to the text of s. 11.2 and the remedial objectives of the *CCAA* more generally.

(1) Interim Financing and Section 11.2 of the *CCAA*

85 Interim financing, despite being expressly provided for in s. 11.2 of the *CCAA*, is not defined in the Act. Professor Sarra has described it as "refer[ring] primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, as well as to the financing to pay the costs of the workout process" (*Rescue! The Companies' Creditors Arrangement Act*, at p. 197). Interim financing used in this way -- sometimes referred to as "debtor-in-possession" financing -- protects the going-concern value of the debtor company while it develops a workable solution to its insolvency issues (p. 197; *Royal Oak Mines Inc., Re* (1999), 6 C.B.R. (4th) 314 (Ont. C.J. (Gen. Div.)), at paras. 7, 9 and 24; *Boutiques San Francisco Inc. v. Richter & Associés Inc.*, 2003 CanLII 36955 (Que. Sup. Ct.), at para. 32). That said, interim financing is not limited to providing debtor companies with immediate operating capital. Consistent with the remedial objectives of the *CCAA*, interim financing at its core enables the preservation and realization of the value of a debtor's assets.

86 Since 2009, s. 11.2(1) of the *CCAA* has codified a supervising judge's discretion to approve interim financing, and to grant a corresponding security or charge in favour of the lender in the amount the judge considers appropriate:

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

87 The breadth of a supervising judge's discretion to approve interim financing is apparent from the wording of s. 11.2(1). Aside from the protections regarding notice and pre-filing security, s. 11.2(1) does not mandate any standard form or terms.[5] It simply provides that the financing must be in an amount that is "appropriate" and "required by the company, having regard to its cash-flow statement".

88 The supervising judge may also grant the lender a "super-priority charge" that will rank in priority over the claims of any secured creditors, pursuant to s. 11.2(2):

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

89 Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies (Innovation, Science and Economic Development Canada, *Archived -- Bill C-55: clause by clause analysis*, last updated December 29, 2016 (online), cl. 128, s. 11.2; Wood, at p. 387). As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors (McElcheran, at pp. 298-99). Although super-priority charges do subordinate secured creditors' security positions to the interim financing lender's -- a result that was controversial at common law -- Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) (see M. B. Rotsztain and A. Dostal, "Debtor-In-Possession Financing", in S. Ben-Ishai and A. Duggan, eds., *Canadian Bankruptcy and Insolvency Law: Bill C-55, Statute c. 47 and Beyond* (2007), 227, at pp. 228-229 and 240-50). Indeed, this balance was expressly considered by the Standing Senate Committee on Banking, Trade and Commerce that recommended codifying interim financing in the *CCAA* (pp. 100-4).

90 Ultimately, whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer. The *CCAA* sets out a number of factors that help guide the exercise of this discretion. The inclusion of these factors in s. 11.2 was informed by the Standing Senate Committee on Banking, Trade and Commerce's view that they would help meet the "fundamental principles" that have guided the development of Canadian insolvency law, including "fairness, predictability and efficiency" (p. 103; see also Innovation, Science and Economic Development Canada, cl. 128, s. 11.2). In deciding whether to grant interim financing, the supervising judge is to consider the following non-exhaustive list of factors:

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

91 Prior to the coming into force of the above provisions in 2009, courts had been using the general discretion conferred by s. 11 to authorize interim financing and associated super-priority charges (*Century Services*, at para. 62). Section 11.2 largely codifies the approaches those courts have taken (Wood, at p. 388; McElcheran, at p. 301). As a result, where appropriate, guidance may be drawn from the pre-codification interim financing jurisprudence.

92 As with other measures available under the *CCAA*, interim financing is a flexible tool that may take different forms or attract different considerations in each case. Below, we explain that third party litigation funding may, in appropriate cases, be one such form.

(2) Supervising Judges May Approve Third Party Litigation Funding as Interim Financing

93 Third party litigation funding generally involves "a third party, otherwise unconnected to the litigation, agree[ing] to pay some or all of a party's litigation costs, in exchange for a portion of that party's recovery in damages or costs" (R. K. Agarwal and D. Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017), 59 *Can. Bus. L. J.* 65, at p. 65). Third party litigation funding can take various forms. A common model involves the litigation funder agreeing to pay a plaintiff's disbursements and indemnify the plaintiff in the event of an adverse cost award in exchange for a share of the proceeds of any successful litigation or settlement (see *Dugal v. Manulife Financial Corp.*, *2011 ONSC 1785*, *105 O.R. (3d) 364*; *Bayens*).

94 Outside of the *CCAA* context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance.[6] The tort of maintenance prohibits "officious intermeddling with a lawsuit which in no way belongs to one" (L. N. Klar et al., *Remedies in Tort* (loose-leaf), vol. 1, by L. Berry, ed., at p. 14-11, citing *Langtry v. Dumoulin* *(1884), 7 O.R. 644* (Ch. Div.), at p. 661). Champerty is a species of maintenance that involves an agreement to share in the proceeds or otherwise profit from a successful suit (*McIntyre Estate v. Ontario (Attorney General)* *(2002), 218 D.L.R. (4th) 193* (Ont. C.A.), at para. 26).

95 Building on jurisprudence holding that *contingency fee* arrangements are not champertous where they are not motivated by an improper purpose (e.g., *McIntyre Estate*), lower courts have increasingly come to recognize that *litigation funding* agreements are also not *per se* champertous. This development has been focussed within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice (see *Dugal*, at para. 33; *Marcotte v. Banque de Montréal*, *2015 QCCS 1915*, at paras. 43-44 (CanLII); *Houle v. St. Jude Medical Inc.*, *2017 ONSC 5129*, *9 C.P.C. (8th) 321*, at para. 52, aff'd *2018 ONSC 6352*, *429 D.L.R. (4th) 739* (Div. Ct.); see also *Stanway v. Wyeth*, *2013 BCSC 1585*, *56 B.C.L.R. (5th) 192*, at para. 13). The jurisprudence on the approval of third party litigation funding agreements in the class action context -- and indeed, the parameters of their legality generally -- is still evolving, and no party before this Court has invited us to evaluate it.

96 That said, insofar as third party litigation funding agreements are not *per se* illegal, there is no principled basis upon which to restrict supervising judges from approving such agreements as interim financing in appropriate cases. We acknowledge that this funding differs from more common forms of interim financing that are simply designed to help the debtor "keep the lights on" (see *Royal Oak*, at paras. 7 and 24). However, in circumstances like the case at bar, where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.

97 We conclude that third party litigation funding agreements may be approved as interim financing in *CCAA* proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the Act. This requires consideration of the specific factors set out in s. 11.2(4) of the *CCAA*. That said, these factors need not be mechanically applied or individually reviewed by the supervising judge. Indeed, not all of them will be significant in every case, nor are they exhaustive. Further guidance may be drawn from other areas in which third party litigation funding agreements have been approved.

98 The foregoing is consistent with the practice that is already occurring in lower courts. Most notably, in *Crystallex*, the Ontario Court of Appeal approved a third party litigation funding agreement in circumstances substantially similar to the case at bar. *Crystallex* involved a mining company that had the right to develop a large

gold deposit in Venezuela. Crystallex eventually became insolvent and (similar to Bluberi) was left with only a single significant asset: a US$3.4 billion arbitration claim against Venezuela. After entering *CCAA* protection, Crystallex sought the approval of a third party litigation funding agreement. The agreement contemplated that the lender would advance substantial funds to finance the arbitration in exchange for, among other things, a percentage of the net proceeds of any award or settlement. The supervising judge approved the agreement as interim financing pursuant to s. 11.2. The Court of Appeal unanimously found no error in the supervising judge's exercise of discretion. It concluded that s. 11.2 "does not restrict the ability of the supervising judge, where appropriate, to approve the grant of a charge securing financing before a plan is approved that may continue after the company emerges from CCAA protection" (para. 68).

99 A key argument raised by the creditors in *Crystallex* -- and one that Callidus and the Creditors' Group have put before us now -- was that the litigation funding agreement at issue was a plan of arrangement and not interim financing. This was significant because, if the agreement was in fact a plan, it would have had to be put to a creditors' vote pursuant to ss. 4 and 5 of the *CCAA* prior to receiving court approval. The court in *Crystallex* rejected this argument, as do we.

100 There is no definition of plan of arrangement in the *CCAA*. In fact, the *CCAA* does not refer to plans at all -- it only refers to an "arrangement" or "compromise" (see ss. 4 and 5). The authors of *Bankruptcy and Insolvency Law of Canada* offer the following general definition of these terms, relying on early English case law:

> A "compromise" presupposes some dispute about the rights compromised and a settling of that dispute on terms that are satisfactory to the debtor and the creditor. An agreement to accept less than 100 on the dollar would be a compromise where the debtor disputes the debt or lacks the means to pay it. "Arrangement" is a broader word than "compromise" and is not limited to something analogous to a compromise. It would include any scheme for reorganizing the affairs of the debtor: *Re Guardian Assur. Co.,* [1917] 1 Ch. 431, 61 Sol. Jo 232, [1917] H.B.R. 113 (C.A.); *Re Refund of Dues under Timber Regulations,* [1935] A.C. 185 (P.C.).
>
> (Houlden, Morawetz and Sarra, at Ns.33)

101 The apparent breadth of these terms notwithstanding, they do have some limits. More recent jurisprudence suggests that they require, at minimum, some compromise of creditors' rights. For example, in C*rystallex* the litigation funding agreement at issue (known as the Tenor DIP facility) was held not to be a plan of arrangement because it did not "compromise the terms of [the creditors'] indebtedness or take away ... their legal rights" (para. 93). The Court of Appeal adopted the following reasoning from the lower court's decision, with which we substantially agree:

> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be an arrangement or compromise between a debtor and its creditors. The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> (*Re Crystallex International Corporation*,
>
> *2012 ONSC 2125*, *91 C.B.R. (5th) 169*, at para. 50)

102 Setting out an exhaustive definition of plan of arrangement or compromise is unnecessary to resolve these appeals. For our purposes, it is sufficient to conclude that plans of arrangement require at least some compromise of creditors' rights. It follows that a third party litigation funding agreement aimed at extending financing to a debtor company to realize on the value of a litigation asset does not necessarily constitute a plan of arrangement. We would leave it to supervising judges to determine whether, in the particular circumstances of the case before them,

a particular third party litigation funding agreement contains terms that effectively convert it into a plan of arrangement. So long as the agreement does not contain such terms, it may be approved as interim financing pursuant to s. 11.2 of the *CCAA*.

103 We add that there may be circumstances in which a third party litigation funding agreement may contain or incorporate a plan of arrangement (e.g., if it contemplates a plan for distribution of litigation proceeds among creditors). Alternatively, a supervising judge may determine that, despite an agreement itself not being a plan of arrangement, it should be packaged with a plan and submitted to a creditors' vote. That said, we repeat that third party litigation funding agreements are not necessarily, or even generally, plans of arrangement.

104 None of the foregoing is seriously contested before us. The parties essentially agree that third party litigation funding agreements *can* be approved as interim financing. The dispute between them focusses on whether the supervising judge erred in exercising his discretion to approve the LFA in the absence of a vote of the creditors, either because it was a plan of arrangement or because it should have been accompanied by a plan of arrangement. We turn to these issues now.

(3) The Supervising Judge Did Not Err in Approving the LFA

105 In our view, there is no basis upon which to interfere with the supervising judge's exercise of his discretion to approve the LFA as interim financing. The supervising judge considered the LFA to be fair and reasonable, drawing guidance from the principles relevant to approving similar agreements in the class action context (para. 74, citing *Bayens*, at para. 41; *Hayes*, at para. 4). In particular, he canvassed the terms upon which Bentham and Bluberi's lawyers would be paid in the event the litigation was successful, the risks they were taking by investing in the litigation, and the extent of Bentham's control over the litigation going forward (paras. 79 and 81). The supervising judge also considered the unique objectives of *CCAA* proceedings in distinguishing the LFA from ostensibly similar agreements that had not received approval in the class action context (paras. 81-82, distinguishing *Houle*). His consideration of those objectives is also apparent from his reliance on *Crystallex*, which, as we have explained, involved the approval of interim financing in circumstances substantially similar to the case at bar (see paras. 67 and 71). We see no error in principle or unreasonableness to this approach.

106 While the supervising judge did not canvass each of the factors set out in s. 11.2(4) of the *CCAA* individually before reaching his conclusion, this was not itself an error. A review of the supervising judge's reasons as a whole, combined with a recognition of his manifest experience with Bluberi's *CCAA* proceedings, leads us to conclude that the factors listed in s. 11.2(4) concern matters that could not have escaped his attention and due consideration. It bears repeating that, at the time of his decision, the supervising judge had been seized of these proceedings for well over two years and had the benefit of the Monitor's assistance. With respect to each of the s. 11.2(4) factors, we note that:

* the judge's supervisory role would have made him aware of the potential length of Bluberi's *CCAA* proceedings and the extent of creditor support for Bluberi's management (s. 11.2(4)(a) and (c)), though we observe that these factors appear to be less significant than the others in the context of this particular case (see para. 96);
* the LFA itself explains "how the company's business and financial affairs are to be managed during the proceedings" (s. 11.2(4)(b));
* the supervising judge was of the view that the LFA would enhance the prospect of a viable plan, as he accepted (1) that Bluberi intended to submit a plan and (2) Bluberi's submission that approval of the LFA would assist it in finalizing a plan "with a view towards achieving maximum realization" of its assets (at para. 68, citing 9354-9186 Québec inc. and 9354-9178 Québec inc.'s application, at para. 99; s. 11.2(4)(d));
* the supervising judge was apprised of the "nature and value" of Bluberi's property, which was clearly limited to the Retained Claims (s. 11.2(4)(e));

* the supervising judge implicitly concluded that the creditors would not be materially prejudiced by the Litigation Financing Charge, as he stated that "[c]onsidering the results of the vote [on the First Plan], and given the particular circumstances of this matter, the only potential recovery lies with the lawsuit that the Debtors will launch" (at para. 91 (emphasis added); s. 11.2(4)(f)); and

* the supervising judge was also well aware of the Monitor's reports, and drew from the most recent report at various points in his reasons (see, e.g., paras. 64-65 and fn. 1; s. 11.2(4)(g)). It is worth noting that the Monitor supported approving the LFA as interim financing.

107 In our view, it is apparent that the supervising judge was focussed on the fairness at stake to all parties, the specific objectives of the *CCAA*, and the particular circumstances of this case when he approved the LFA as interim financing. We cannot say that he erred in the exercise of his discretion. Although we are unsure whether the LFA was as favourable to Bluberi's creditors as it might have been - - to some extent, it does prioritize Bentham's recovery over theirs -- we nonetheless defer to the supervising judge's exercise of discretion.

108 To the extent the Court of Appeal held otherwise, we respectfully do not agree. Generally speaking, our view is that the Court of Appeal again failed to afford the supervising judge the necessary deference. More specifically, we wish to comment on three of the purported errors in the supervising judge's decision that the Court of Appeal identified.

109 First, it follows from our conclusion that LFAs can constitute interim financing that the Court of Appeal was incorrect to hold that approving the LFA as interim financing "transcended the nature of such financing" (para. 78).

110 Second, in our view, the Court of Appeal was wrong to conclude that the LFA was a plan of arrangement, and that *Crystallex* was distinguishable on its facts. The Court of Appeal held that the LFA and associated super-priority Litigation Financing Charge formed a plan because they subordinated the rights of Bluberi's creditors to those of Bentham.

111 We agree with the supervising judge that the LFA is not a plan of arrangement because it does not propose any compromise of the creditors' rights. To borrow from the Court of Appeal in *Crystallex*, Bluberi's litigation claim is akin to a "pot of gold" (para. 4). Plans of arrangement determine how to distribute that pot. They do not generally determine what a debtor company should do to fill it. The fact that the creditors may walk away with more or less money at the end of the day does not change the nature or existence of their rights to access the pot once it is filled, nor can it be said to "compromise" those rights. When the "pot of gold" is secure -- that is, in the event of any litigation or settlement -- the net funds will be distributed to the creditors. Here, if the Retained Claims generate funds in excess of Bluberi's total liabilities, the creditors will be paid in full; if there is a shortfall, a plan of arrangement or compromise will determine how the funds are distributed. Bluberi has committed to proposing such a plan (see supervising judge's reasons, at para. 68, distinguishing *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, *2008 BCCA 327*, *296 D.L.R. (4th) 577*).

112 This is the very same conclusion that was reached in *Crystallex* in similar circumstances:

> The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders. I am of the view that the supervising judge's exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.
>
> ...
>
> ... While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, it did not compromise the terms of their

> indebtedness or take away any of their legal rights. It is accordingly not an arrangement, and a creditor vote was not required. [paras. 82 and 93]

113 We disagree with the Court of Appeal that *Crystallex* should be distinguished on the basis that it involved a single option for creditor recovery (i.e., the arbitration) while this case involves two (i.e., litigation of the Retained Claims and Callidus's New Plan). Given the supervising judge's conclusion that Callidus could not vote on the New Plan, that plan was not a viable alternative to the LFA. This left the LFA and litigation of the Retained Claims as the "only potential recovery" for Bluberi's creditors (supervising judge's reasons, at para. 91). Perhaps more significantly, even if there were multiple options for creditor recovery in either *Crystallex* or this case, the mere presence of those options would not necessarily have changed the character of the third party litigation funding agreements at issue or converted them into plans of arrangement. The question for the supervising judge in each case is whether the agreement before them ought to be approved as interim financing. While other options for creditor recovery may be relevant to that discretionary decision, they are not determinative.

114 We add that the Litigation Financing Charge does not convert the LFA into a plan of arrangement by "subordinat[ing]" creditors' rights (C.A. reasons, at para. 90). We accept that this charge would have the effect of placing secured creditors like Callidus behind in priority to Bentham. However, this result is expressly provided for in s. 11.2 of the *CCAA*. This "subordination" does not convert statutorily authorized interim financing into a plan of arrangement. Accepting this interpretation would effectively extinguish the supervising judge's authority to approve these charges without a creditors' vote pursuant to s. 11.2(2).

115 Third, we are of the view that the Court of Appeal was wrong to decide that the supervising judge should have submitted the LFA together with a plan to the creditors for their approval (para. 89). As we have indicated, whether to insist that a debtor package their third party litigation funding agreement with a plan is a discretionary decision for the supervising judge to make.

116 Finally, at the appellants' insistence, we point out that the Court of Appeal's suggestion that the LFA is somehow "akin to an equity investment" was unhelpful and potentially confusing (para. 90). That said, this characterization was clearly *obiter dictum*. To the extent that the Court of Appeal relied on it as support for the conclusion that the LFA was a plan of arrangement, we have already explained why we believe the Court of Appeal was mistaken on this point.

VI. Conclusion

117 For these reasons, at the conclusion of the hearing we allowed these appeals and reinstated the supervising judge's order. Costs were awarded to the appellants in this Court and the Court of Appeal.

Appeals allowed with costs in the Court and in the Court of Appeal.

Solicitors:

Solicitors for the appellants/interveners 9354-9186 Québec inc. and 9354-9178 Québec inc.: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the appellants/interveners IMF Bentham Limited (now known as Omni Bridgeway Limited) and Bentham IMF Capital Limited (now known as Omni Bridgeway Capital (Canada) Limited): Woods, Montréal.

Solicitors for the respondent Callidus Capital Corporation: Gowling WLG (Canada), Montréal.

Solicitors for the respondents International Game Technology, Deloitte LLP, Luc Carignan, François Vigneault, Philippe Millette, Francis Proulx and François Pelletier: McCarthy Tétrault, Montréal.

Solicitors for the intervener Ernst & Young Inc.: Stikeman Elliott, Montréal.

Solicitors for the interveners the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals: Norton Rose Fulbright Canada, Montréal.

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1 Bluberi does not appear to have filed this claim yet (see *2018 QCCS 1040*, at para. 10 (CanLII)).

2 Notably, the Creditors' Group advised Callidus that it would lend its support to the New Plan. It also asked Callidus to reimburse any legal fees incurred in association with that support. At the same time, the Creditors' Group did not undertake to vote in any particular way, and confirmed that each of its members would assess all available alternatives individually.

3 We note that while s. 36 now codifies the jurisdiction of a supervising court to grant a sale and vesting order, and enumerates factors to guide the court's discretion to grant such an order, it is silent on when courts ought to approve a liquidation under the *CCAA* as opposed to requiring the parties to proceed to liquidation under a receivership or the *BIA* regime (see Sarra, *Rescue! The Companies' Creditors Arrangement Act*, at pp. 167-68; A. Nocilla, "Asset Sales Under the Companies' Creditors Arrangement Act and the Failure of Section 36" (2012) 52 *Can. Bus. L.J.* 226, at pp. 243-44 and 247). This issue remains an open question and was not put to this Court in either *Indalex* or these appeals.

4 It bears noting that the Monitor's statement in this regard did not decide whether Callidus would ultimately have been entitled to vote on the First Plan. Because Callidus did not even attempt to vote on the First Plan, this question was never put to the supervising judge.

5 A further exception has been codified in the 2019 amendments to the *CCAA*, which create s. 11.2(5) (see *Budget Implementation Act, 2019, No. 1*, s. 138). This section provides that at the time an initial order is sought, "no order shall be made under subsection [11.2](1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period". This provision does not apply in this case, and the parties have not relied on it. However, it may be that it restricts the ability of supervising judges to approve LFAs as interim financing at the time of granting an Initial Order.

6 The extent of this controversy varies by province. In Ontario, champertous agreements are forbidden by statute (see *An Act respecting Champerty*, R.S.O. 1897, c. 327). In Quebec, concerns associated with champerty and maintenance do not arise as acutely because champerty and maintenance are not part of the law as such (see *Montgrain v. National Bank of Canada*, *2006 QCCA 557* *[2006] R.J.Q. 1009*; G. Michaud, "New Frontier: The Emergence of Litigation Funding in the Canadian Insolvency Landscape" in J. P. Sarra et al., eds., *Annual Review of Insolvency Law 2018* (2019), 221, at p. 231).

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monitor in its initial application to the court to commence a *CCAA* proceeding. Debtors and their advisors rapidly came to the conclusion that it was more productive for the debtor to ask for the appointment of the monitor right at the inception of the proceeding, as this provided more transparency and credibility to the process, thereby enhancing the chance of a successful workout.

2. Scope of the Monitor's Role

The *CCAA* sets out the duties of the monitor, including, that it shall monitor the company's business and affairs; have access to and examine the company's property; file reports with the court on both a periodic and specified basis on the state of the business' financial affairs; report on any material adverse change in the company's projected cash flow or financial circumstances; and advise creditors of reports filed with the court. The provisions also direct debtor corporations to provide the assistance necessary for the monitor to carry out its functions. The court can also exercise its discretion to direct the monitor to perform certain functions as it considers appropriate in the circumstances.

The duties of the monitor are set out in section 11.7 of the *CCAA:*

> 11.7(3) Functions of the monitor – The monitor shall
>
> (a) for the purposes of monitoring the company's business and financial affairs, have access to and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;
>
> (b) file a report with the court on the state of the company's business and financial affairs, containing the prescribed information,
>
> (i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
>
> (ii) at least seven days before any meeting of creditors under section 4 or 5, or
>
> (iii) at such other times as the court may order;
>
> (c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and
>
> (d) carry out such other functions in relation to the company as the court may direct.

If there is a material adverse change in the debtor's projected cash flow or financial circumstances, the *CCAA* specifies that the monitor must file a report on the state of the debtor's business and financial affairs forthwith.[7] The monitor must also file reports at least seven days before creditors' meetings and at such times as the court

[7] Section 11.7(3)(b), *CCAA*.

may order, and advise creditors of the filing of the report.[8] In many cases, monitors' reports are now posted on their websites or that of the legal counsel acting for the monitor in a *CCAA* proceeding or the debtor corporation's webpage, and hence are more accessible than previously.

As noted in chapter 3, the court's role in a *CCAA* proceeding is largely supervisory, undertaking both procedural and substantive rulings where the parties need direction or clarification regarding rights during the process of workout negotiations. The monitor, as a court-appointed officer, is to represent all stakeholders in monitoring the debtor's affairs during the proceeding and providing opinions to the court. The monitor's fees are paid for out of the assets of the debtor corporation on a priority basis, and the courts have justified the exercise of their discretion to order this security of payment because the monitor is an officer of the court.[9] The priority granted for the administration charge securing the monitor's compensation ensures that the monitor's reasonable fees and disbursements are paid.[10]

As originally conceived, the monitor had a relatively narrow monitoring and reporting function to the court and creditors. When the role of monitor was codified in 1997, the language of the statute reflected this role. The monitor is precisely as its name suggests; it is appointed to monitor the debtor during the proceeding, to ensure that the debtor does not engage in any conduct that will prejudice the interests of the creditors and other stakeholders. The monitor also assists the debtor in remaining compliant with the terms of the initial court order, as there can be confusion at the operational level regarding the scope of permitted activity once the stay protection is granted. However, the role of the monitor has been continually evolving, and while the statutory language envisions more of a monitoring role, the courts have liberally interpreted section 11.7(3)(d), which allows the court to direct the monitor to carry out such other functions in relation to the debtor company as the court may direct. This expanded role has been very effective in many *CCAA* proceedings.

The monitor can serve as a stabilizing force in the sense of reassuring creditors because it is monitoring the debtor's business and affairs, projected cash flow and appropriate use of assets and is monitoring managerial conduct in the operation of the business during the stay period. Given the limited size of the Canadian market of insolvency professionals and the less litigious legal culture in Canada than in the

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[8] Section 11.7(3), *CCAA*.

[9] *Starcom International Optics Corp., Re* (1998), 3 C.B.R. (4th) 177 (B.C. S.C.); *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43, 109 N.S.R. (2d) 12 (N.S. T.D.); *Canadian Asbestos Services Ltd. v. Bank of Montreal* (1992), 16 C.B.R. (3d) 114, 11 O.R. (3d) 353 (Ont. Gen. Div.), additional reasons at (1993), 13 O.R. (3d) 291 (Ont. Gen. Div.).

[10] The courts will assess the reasonableness of a monitor's or receiver's account on the basis of numerous facts, such as the nature, extent and value of assets over which there is responsibility; the complications encountered; the degree of assistance provided by the debtor; time spent; the monitor or receiver's knowledge, experience and skills; the result of efforts; and costs of comparable services: *Agristar Inc., Re* (2005), 2005 CarswellAlta 841, [2005] A.J. No. 727 (Alta. Q.B.); *Belyea v. Federal Business Development Bank* (1983), 1983 CarswellNB 27, [1983] N.B.J. No. 41 (N.B. C.A.).

United States, there has also developed a level of confidence and trust between professionals that serve as monitors and the creditors that are repeat players in insolvency proceedings. This confidence and trust can facilitate proceedings and enhance the effectiveness of the monitor. Equally, however, the monitor must be cognisant of the fact that for stakeholders that are new to the process, the trust and co-operation among repeat players can create a perception of bias. The monitor must be scrupulous in fulfilling its obligation to consider and balance the interests of all stakeholders.

Monitors increasingly navigate the debtor through the complexity of the *CCAA* process, providing business judgment, negotiation skills and financial advice. The monitor can act as mediator or facilitator, bringing the parties together in an effort to build consensus on a viable going forward business plan. In some cases, the monitor has had significant input in developing the plan of arrangement. The monitor makes judgment calls on levels of disclosure to creditors and timing of that disclosure and increasingly takes positions on disputes before the court during the *CCAA* proceeding. These multiple roles may be needed, yet one issue is whether they create a real or perceived conflict with the obligation of the monitor to monitor the debtor on behalf of all stakeholders.

While there was a period after codification of the role of monitor where creditors were concerned that monitors proposed by the debtor corporation were acting as advocates of the debtor, the court quickly dispensed with any misconceptions monitors might have in respect of their duties. Canadian courts have consistently held that the monitor is an officer of the court and has an obligation to act independently.[11] The courts have held that the duty of the monitor is to act in the best interests of all stakeholders with an interest in the proceeding.[12]

This need for impartiality was reinforced in the endorsement of Mr. Justice Farley of the Ontario Superior Court of Justice in the *JTI-MacDonald Corp.* proceeding, in dismissing a motion to terminate the *CCAA* proceeding and in granting an extension of the stay. [13] The Court reminded the monitor and parties to the proceeding:

> ¶2 I expect that the monitor which has reconfirmed its obligation and responsibility to be fair and objective as amongst the applicant and all the stakeholders to make certain that these discussions commence forthwith and continue in a reasonable fashion — and that status reports (without impinging on privilege and confidentiality)

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[11] *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.) at para. 33; *Siscoe & Savoie* v. *Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at para. 28, leave to appeal refused (1995), 32 C.B.R. (3d) 179n (S.C.C.); *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), at para. 20, affirmed (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), leave to appeal allowed but appeal discontinued (2000), 2000 CarswellBC 2132 (S.C.C.).

[12] *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) at para. 6; *PSINet Ltd., Re* (2002), 30 C.B.R. (4th) 226 (Ont. S.C.J. [Commercial List]), at para. 12, affirmed (2002), 32 C.B.R. (4th) 102 (Ont. C.A.).

[13] *In the Matter of the Companies' Creditors Arrangement Act and JTI-MacDonald Corp.* (September 14, 2004), Doc. 04-CL-5530 (Ont. S.C.J. [Commercial List]).

be given in the monitor's regular reports which are to be made available to all interested persons in the ordinary course.

The role of the monitor as impartial officer has allowed the court flexibility in the orders it makes directing the activities of the monitor.

In *Skydome Corp.*, an insolvency involving Toronto's baseball and football sports complex, the monitor was directed to co-ordinate a sale process: to ask for expressions of interest in an auction, arrange for confidentiality agreements in the bid process, set up an advisory committee of stakeholders, assess the offers, and bring a recommendation to the court.[14] These functions were undertaken in the context of *CCAA* proceedings, but were akin to the role of a receiver in disposing of assets. In approving the monitor's recommendations as fair and reasonable, the Court applied the tests used in that analogous situation, specifically, whether the monitor had made a sufficient effort to obtain the best price and had not acted improvidently; had considered the interests of all parties affected; the integrity and efficiency of the process by which offers were obtained; and whether there had been any unfairness in the workout process.

Where a monitor carries out the business of the debtor corporation, the monitor does not become personally liable to pay for liabilities that arose before or upon the monitor's appointment.[15] The monitor is also protected from liability for environmental damage.[16]

There can also be an expansion in the role of a monitor if the debtor breached the initial order. This was done in the Royal Oak Mines *CCAA* proceeding. First, the monitor's supervisory and reporting mandate was expanded, and eventually, the monitor was appointed as interim receiver to replace management.

The courts accord a high level of deference to decisions of the monitor. For example, in *Tiger Brand Knitting Co.*, the Ontario Superior Court of Justice held that a monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party, the new prospective purchaser or the union representing the employees, over others.[17]

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[14] *Skydome Corp., Re* (February 19, 1999), Blair J. (Ont. Gen. Div. [Commercial List]) (Endorsement), citing *Royal Bank* v. *Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) and *Crown Trust Co.* v. *Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

[15] Section 11.8, *CCAA*.

[16] Sections 11.8(3) - 11.8(8), *CCAA*.

[17] *Tiger Brand Knitting Co., Re* (2005), 2005 CarswellOnt 1240 (Ont. S.C.J.).

In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s

Luc Morin and Arad Mojtahedi[*]

I. INTRODUCTION

"A Jedi uses the Force for knowledge and defence, never for attack."

- Master Yoda - The Empire Strikes Back

The title of this article was not intended to echo the upcoming final chapter of the most recent Star Wars trilogy. In fact, we came up with the title before *The Rise of Skywalker* was announced. But for some reason, we could not help but to think that this was a sign from the force. After all, the very nature of the ethereal powers of a monitor appointed under the *Companies' Creditors Arrangement Act*[1] ("*CCAA*" or the "Act"), were akin to those bestowed upon any Jedi knight: guardian of the peace guided by selfless morality.

Monitor's powers have been described as being supervisory in nature and its role as being those of a fiduciary towards all stakeholders of an insolvent corporation. A *CCAA* monitor is not the agent of any particular category of stakeholders, let alone a secured creditor. It serves to be the eyes and ears of the court, to monitor the restructuring process of the insolvent corporation and account for all major operations and sometimes missteps, as the case may be, and report same to

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

the court and the overall body of stakeholders. It must maintain an over the crowd attitude aimed at ensuring that the restructuring process is being conducted in accordance with the canonical code of conduct set forth in the *CCAA*, at the behest of a variety of stakeholders.

The roots of the monastic role of the monitor stem from the importance of the ultimate objective of the *CCAA*, which is to favour the restructuring of a struggling business and limit the terrible consequences of a corporate insolvency on its stakeholders. The *CCAA* does not provide for a scheme of distribution, which is the case under the *Bankruptcy and Insolvency Act*[2] ("*BIA*"). It seems that failure to restructure was never an option contemplated under the *CCAA*'s purview, the legislator leaving this to be dealt with by the *BIA*.

The *CCAA* was historically aimed at *facilitating* a compromise between creditors and an insolvent corporation. *CCAA*'s historical objective is in the very title of the Act. That said, not all insolvent corporations can or should be saved, and to the extent that efforts are made to restructure their business, Courts have justifiably concluded that the *CCAA*'s objective would not be thwarted by facilitating the liquidation of the insolvent corporation's assets, property and undertakings. After all, in most cases, such a liquidation would take the form of a transfer of assets allowing for the business of the insolvent corporation to continue, albeit under a new entity or structure. Comfort could be taken in the end result that enables the restructuring of a business, even if it means that this business would have to thrive under a new master and/or a different structure.

It is in this context that one must analyze the recent trend allowing for the *CCAA* process to be initiated by secured creditors while granting extended powers to the *CCAA* monitor akin to those of a *BIA* receiver. To the extent that management of an insolvent corporation fails or neglects to address the

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

restructuring needs of the business, Courts have allowed a *CCAA* process to be initiated at the request of a secured creditor. Similarly, in the event that management is conflicted, notably with its intention to sponsor or be associated with a bid within a sale and investment solicitation process ("SISP") conducted in the context of a *CCAA* process, Courts have allowed the monitor to extend its role, to overstep the supervisory nature of its duties and play an active role in the management of the business while having direct powers over the assets, property and undertakings of an insolvent corporation.

That said, the driving factor in allowing a secured creditor to take control over a typically debtor-driven *CCAA* process and for the monitor to have extended powers is that management of the insolvent corporation is either neglecting/failing to abide by its fiduciary duties or that management was simply not in a position to exercise same in an objective manner. It must be demonstrated that management is acting, be it actively or passively, in a manner that is detrimental not only to the secured creditors' interest but also to all other stakeholders of the corporation, and that the extended powers granted to the monitor at the request of the secured creditor is for the purpose of restructuring the business of the insolvent corporation.

This raises a number of questions. What if the secured creditor has simply lost confidence in the management and wants to appoint a professional to overview an orderly liquidation of the corporation's business, assets, property and undertakings? Can it rely on the *CCAA* to initiate a restructuring process? Is it still management's game? What would be the difference with a *BIA* receivership? Should the monitor be considered an agent of the secured creditor?

All of these questions merit attention. First, the Supreme Court of Canada in *Lemare Lake*[3] appropriately warned

3 *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53, [2015] 3 SCR 419 (SCC) [*Lemare Lake*]. In *Lemare Lake*, the Supreme Court stated that delays to exercise secured rights

insolvency practitioners that the insolvency legislation's purpose may not be set aside lightly, even in the context of insolvency. Second, although from a practical standpoint, a *CCAA* monitor and a *BIA* receiver are actually the same professional, a licensed trustee, the reality is that the role and nature of the duties associated with each of these appointments have historically been very different, and to some extent plainly incompatible. The old saying of "same professional, different hat" might be too simplistic and inappropriate when it comes to separating the *BIA* receiver from the *CCAA* monitor.

This article proposes a review of case law and authorities on the competing roles of a *CCAA* monitor and a *BIA* receiver, with a special focus on the circumstances giving rise to the creditor-driven *CCAA* processes providing for extended powers being granted to a *CCAA* monitor. We argue that the *CCAA*'s historical objective is in line with limiting the monitor's powers, and only extending the same when absolutely necessary. *CCAA* monitor should remain neutral and exercise supervisory powers over the restructuring process, driven by the debtor, unless evidence demonstrating that its management is failing or neglecting to exercise its fiduciary duties appropriately.

The *CCAA* is a debtor-driven process, the secured creditor-driven process being the *BIA* receivership. The line between these two processes should not be blurred by the overarching practicalities that has come to define our Canadian Insolvency practice.

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provided by a provincial statute cannot be disregarded when appointing a receiver. The evidence showed a narrow purpose for s 243 of the *BIA*. It was determined that a secured creditor, wishing to enforce its security against farm land, needed to wait 150 days under the provincial law, rather than the ten days imposed by the federal law: "General considerations of promptness and timeliness, no doubt a valid concern in any bankruptcy or receivership process, cannot be used to trump the specific purpose of s 243 and to artificially extend the provision's purpose to create a conflict with provincial legislation": *Lemare Lake* at para 68.

May the force be with you, dear readers.

II. HISTORICAL PURPOSE AND OBJECTIVES OF THE *CCAA*: PRESERVATION OF GOING CONCERN

The *CCAA* was drafted with little consultation by the Conservative government of RB Bennett at the height of the Great Depression in 1933. It was introduced[4] via Bill 77 by Charles H Cahan, MP, who then stated that the economic circumstances of the time required the government to adopt a law that would allow for compromises between a debtor and its creditors without wholly destroying the company and forcing the wasteful sale of its assets:

> Mr. Speaker, at the present time any company in Canada, whether it be organized under the laws of the Dominion of Canada or under the laws of any of the provinces of Canada, which becomes bankrupt or insolvent is thereby brought under either the Bankruptcy Act or the Winding-up Act. **These acts provide for the liquidation of the company under a trustee in bankruptcy in the one case and under a liquidator in the other, and the almost inevitable result is that the organization of the company is entirely disrupted, its good-will depreciated and ultimately lost, and the balance of the assets sold by the trustees or the liquidator for whatever they will bring.** There is no mode or method under our laws whereby the creditors of a company may be brought into court and permitted by amicable agreement between themselves to arrange for a settlement or compromise of the debts of the company in such a way as to permit the company effectively to continue its business by its reorganization. [...]
>
> At the present time some legal method of making arrangements and compromises between creditors and companies is perhaps more necessary because of the prevailing commercial and industrial depression, and it was thought by the government that we should adopt some method whereby **compromises might be carried into effect under the supervision of the courts without utterly destroying the company or its organization, without loss of good-will and without forcing the improvident sale of its assets**.[5]
>
> [Emphasis added.]

4 *Companies' Creditors Arrangement Act*, SC 1933, c 36.

5 *House of Commons Debates*, 17-4 (20 April 1933) at 4090-4091 (Hon CH Cahan).

In the Senate, the Right Honourable Arthur Meighen (Conservative) similarly stated that the *CCAA* allows for cooperation and compromises for the greater good, notably by preserving the interests of employees and security holders:

> Honourable senators, the purpose of this Bill is to enable companies which otherwise would be confronted with bankruptcy to arrange compromises by means of conferences among their various classes of security holders. [...] The depression has brought almost innumerable companies to the pass where some such arrangement is necessary in the interest of the company itself, in the interest of its employees – because the bankruptcy of the company would throw the employees on the street – and in the interest of the security holders, who may decide that it is much better to make some sacrifice than run the risk of losing all in the general debacle of bankruptcy. [...] As it is, the best result can be attained only by the passage by our legislatures of such co-operative measures as will enable civil rights, and companies within their purview, to be interfered with for the general advantage.[6]

The Act, at merely 20 provisions long and without a preamble or a clear policy statement, was barely debated in the Parliament and was quickly passed into law without objection.[7] Yet, it was soon beset by constitutional controversy, as for the very first time a federal law could bind secured creditors' rights, an area which was then believed to be within the exclusive power of the provincial legislatures.[8]

The reluctance of practitioners at the time to use the *CCAA* or the *Farmers' Creditors Arrangement Act*[9] prompted the Bennett government to refer them to the Supreme Court of Canada in 1934 and 1936, respectively.[10] The Supreme Court

6 *Senate Debates*, 17-4 (9 May 1933) at 474 (Rt Hon A Meighen).

7 Virginia Erica Torrie, *Protagonists of company reorganization: A history of Companies' Creditors Arrangement Act (Canada) and the role of large secured creditors* (PhD Thesis, University of Kent Law School, 2015) at 1.

8 *Ibid.*

9 *Farmers' Creditors Arrangement Act*, SC 1934, c 53.

10 *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] SCR 659, [1934] 4 DLR 75 (SCC); *British Columbia (Attorney General) v Canada (Attorney General)*, [1936] SCR 384, 17 CBR 359 (SCC), affirmed [1937] AC 391, [1937] 1 DLR 695 (Jud Com of Privy Coun).

held that both laws were *intra vires* of the Parliament of Canada. In essence, the Supreme Court ruled that pursuant to s 91(21) of the *Constitution*[11] the *CCAA* is valid so long as it concerns arrangements between an insolvent debtor and its creditors.

From 1950 onwards the *CCAA* fell out of favour, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds, and by 1970 it was considered a dead letter law. It took another wave of economic recessions to revive the use of the Act in the 1980s and 1990s.

As a consequence of its ability to grant a broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization, the *CCAA* rose to become the functional equivalent of the American Chapter 11 restructuring. That characterization has since influenced its judicial interpretation.[12] Ever since, the courts have significantly widened the scope of the Act. As noted by one author in this Review, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world."[13]

To this day, and after multiple amendments, the *CCAA* lacks an express purpose clause. Nonetheless, the courts, culminating in the Supreme Court's decision of *Century Services* (2010), have time and again held that the Act has first and foremost a remedial purpose, geared at preserving the value of a company as a going concern:

> [15] As I will discuss at greater length below, the purpose of the *CCAA* – Canada's first reorganization statute – is to **permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets**. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a

11 *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution*].

12 Torrie, *supra* note 7 at 2-3.

13 Richard B Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2005* (Toronto: Carswell 2006) at 481.

> rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.
>
> [16] Prior to the enactment of the *CCAA* in 1933, practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company. [...]
>
> [17] Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected – notably creditors and employees – and that a workout which allowed the company to survive was optimal.
>
> [18] Early commentary and jurisprudence also endorsed the *CCAA*'s remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation. Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs. Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. **Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.**[14]
>
> [References omitted – Emphasis added.]

In furthering this remedial objective, the *CCAA* provides the supervising judge with wide discretion, which must be exercised with care. As mentioned by the Supreme Court, the court must be cognizant of the interests of *all* stakeholders, which often extend beyond those of the debtor and creditors:

> [59] Judicial discretion must of course be exercised in furtherance of the *CCAA*'s purposes. The remedial purpose I referred to in the historical

14 *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 (SCC) at paras 15-18 [*Century Services*]; see also *Chef Ready Foods Ltd v HongKong Bank of Canada* (1990), 51 BCLR (2d) 84, 1990 CarswellBC 394 (BCCA) at paras 10, 22 [*Hongkong Bank*]: "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* at para 10.

overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.

[60] Judicial decision-making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. [...] **In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company.**[15]

[References omitted – Emphasis added.]

Courts and practitioners alike have had a natural tendency to resort to a comparative analysis between the *BIA* and the *CCAA* in trying to justify the objective, purpose and identity of each of those two major pieces of the Canadian insolvency legislation.

In the spirit of such a comparative analysis, one cannot disregard that, as opposed to the *BIA*, the *CCAA* does *not* provide for a scheme of distribution. Despite clear recommendations made by the *Standing Senate Committee on Banking, Trade and Commerce* in this regard, leading to the 2009 amendments to the *BIA* and *CCAA*,[16] the legislator chose

15 *Century Services*, *supra* note 14 at paras 59-60.

16 Senate, Standing Senate 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* (November 2003) (Chair: Hon Richard H Kroft) [Senate Report]: "From the perspective of fairness, the Committee too believes that the same priority rules should govern the distribution of the proceeds of realization of the debtor's assets, regardless of the insolvency legislation under which proceedings are occurring. For this reason, the Committee recommends that: The *Companies' Creditors Arrangement Act* be amended to incorporate the priority rules in the *Bankruptcy and Insolvency Act*" at 153.

not to incorporate a scheme of distribution amongst different stakeholders of a company restructuring its affairs under the *CCAA*. This gives further weight to the consideration given by the legislator to the historical objective of the *CCAA*: to restructure an insolvent corporation's business by preserving the continuation of its going concern, thus avoiding, or at least narrowing the negative consequences attached to the pure liquidation of its assets, property and undertakings.

Increasingly the lines between liquidation and restructuring are blurred.[17] This pattern is further intensified by the increasing popularity of liquidating *CCAA*s.

Historically, liquidation was effected via *BIA* receiverships, bankruptcies, or a combination of both. Although such liquidation efforts could result in the continuation of the debtor's business for a time through a receiver or trustee in bankruptcy acting *in lieu* of the management, typically the liquidation conducted under the *BIA* would result in a piecemeal sale of the insolvent corporation's assets, property and undertakings.[18]

Generally speaking, for their fullest implementation, *BIA* processes are more rule-driven and require less discretion than the *CCAA*. The purpose of the *BIA* consists in bringing consistency to the administration and liquidation of bankrupt estates and, if possible, in facilitating restructuring under a proposal.[19] The *BIA* offers two alternatives to the remedial path of the proposal, a debtor-driven restructuring process similar in its objective to what the *CCAA* is:

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17 Janis Sarra, "Reflections on a Decade of Financing Insolvency Restructurings", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2012* (Toronto: Carswell, 2013) at 63.

18 For an in-depth comparison of liquidations under the *CCAA* and *BIA*, see Michelle Grant & Tevia R M Jeffries, "Having Jumped Off the Cliffs, When Liquidating Why Choose CCAA over Receivership (or vice versa)?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2013* (Toronto: Carswell, 2014).

19 Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013) at 9; *Lemare Lake*, *supra* note 3.

- The Bankruptcy Regime: A pure liquidation process conducted under the helm of a trustee in bankruptcy having full control over the assets, property and undertakings of the insolvent debtor. Bankruptcy is triggered either voluntary, by a general assignment executed by the debtor's management in favour of the creditors, or forced upon by a creditor through an application for a bankruptcy order. Bankruptcy is used in order to shut down an insolvent debtor's business, liquidate its assets and distribute any proceeds to creditors in accordance with a statutory scheme of distribution. Once effective, management has no longer any powers over the assets, property and undertakings of the insolvent corporation; and

- Receivership: The other alternative made available under the *BIA* is the appointment of a receiver pursuant to section 243 of the *BIA*. The appointment of a receiver is reserved to secured creditors only, who must convince the court that it is "just and convenient" to appoint a licensed trustee to exercise control over the assets, property and undertakings of an insolvent corporation. What circumstances qualify as being "just and convenient" under section 243 of the *BIA* has been the subject of a significant body of case law and is beyond the purview of this article. For the purpose hereto, we will limit ourselves to saying that the appointment of a receiver under section 243 of the *BIA* usually requires a demonstration to the court that the main secured creditor has lost confidence in the management of the insolvent corporation and that there is a tangible risk that management is unjustifiably putting at risk the secured creditor's position.

To the extent that we accept that transferring the assets of an insolvent corporation required to continue the going concern of

its business qualifies as restructuring, a *BIA* receivership may serve to effectively restructure a business, similar to what would be achieved under a liquidating *CCAA*. However, as previously mentioned, the major difference is that a *BIA* receivership is a secured creditor-driven process whereas the *CCAA* remains a debtor-driven process.

Receivership was crafted to allow for a secured creditor in specific circumstances to take over the management of an insolvent corporation through the appointment of a licensed trustee that it selects. The role and more specifically the beneficiary of the receiver's duties have yet to be defined by case law and authorities. Since the receiver is chosen/retained by the secured creditor, wherein the *BIA* does not provide for continuing reporting obligations to the court, let alone the debtor's management (as is the case under the *CCAA* regime), one could argue that the receiver appointed under section 243 of the *BIA* is acting as an agent of the secured creditor that has petitioned for its appointment. Undoubtedly, receivership is a secured creditor-driven process which cannot be initiated by the insolvent corporation.

In contrast, in a liquidating *CCAA* the insolvent corporation typically remains in possession and control of its assets, property and business. The monitor, who has continuous reporting obligations to the court and all stakeholders, exerts no specific power over the assets, property and business of the insolvent corporation. Management remains at the forefront of all restructuring efforts. A *CCAA* process is therefore a typically debtor-driven one. We will see from recent case law that courts have allowed secured creditors to resort to the *CCAA* to effectuate liquidating *CCAA*s, but always with a view to preserve the going concern operations of the business operated by the insolvent corporation.

Yet this remains the exception to the rule. Even in its liquidating form, a *CCAA* process is to be driven by the insolvent corporation's management. From recent cases, we

have identified four scenarios in which courts have allowed a secured creditor to rely on the *CCAA* while extending the powers of the monitor, rather than proceeding with a receivership under section 243 of the *BIA*:

- **Resignation of the management body**: When all directors and officers resign after a *CCAA* process has been initiated, courts have allowed for the continuation of the *CCAA* process by extending powers to the monitor akin to those of a receiver. Commonly referred to as a "super monitor," these powers allow the monitor to have direct powers over the assets, property and undertakings of the insolvent corporation and, for all intents and purposes, to act *in lieu* of management;

- **Unfitness of management to conduct *CCAA* proceedings**: This is trickier because it requires a demonstration that management is not fit to conduct a formal *CCAA* proceedings without causing harm to the stakeholders, akin to a fiduciary duties violation;

- **Management has no plan or their plan is doomed to fail**: This requires an analysis from the Court that management has no germ of a plan or that any potential restructuring plan is doomed to fail; and

- **Management being conflicted**: In the event that management is contemplating sponsoring or being associated with a bid in respect to the company's assets, property and undertaking in the context of a SISP.

The remainder of this article will analyze a recent rise in case law of *CCAA* liquidation processes, largely influenced or driven by creditors. The article will then aim to synthesize when and under what conditions such processes are appropriate.

III. INCREASING USE OF LIQUIDATING *CCAA*s: A PATH FOR SECURED CREDITORS

Since the 2009 amendments to the *CCAA*, courts across Canada have held that the purpose of the *CCAA* may be met where a restructuring is effected by way of a liquidation. This has facilitated the transfer of assets, property, undertakings of an insolvent corporation related to a business to allow for its going concern operations to be preserved, even if it means that such operations ought to be continued under a new entity and/or structure. These restructuring have become commonly referred to as liquidating *CCAA*s.

The concept of liquidating *CCAA*s was broadly approached in the recommendations made in the Senate Report, leading to section 36 as part of the 2009 *CCAA* amendments:

> During a reorganization, an insolvent company may benefit from an opportunity to sell part of its business in order to generate capital, avoid further diminution in value and/or focus better on the financially solvent aspects of its operations. In some situations, a win-win situation would be created: insolvent companies would be able to increase their chance of survival as they gain capital and focus on their solvent operations, and creditors would avoid further reductions in the value of their claims. These sales would occur outside the normal course of the organization's business. **In some cases, the best situation for stakeholders might involve the sale of the business in its entirety**. [...]
>
> The Committee also believes that there are circumstances where **all stakeholders would benefit from an opportunity for an insolvent company involved in reorganization to divest itself of all or part of its assets**, whether to raise capital, eliminate further loss for creditors or focus on the solvent operations of the business.[20]
>
> [Emphasis added.]

However, even in the most extreme cases where the debtor is "doomed to fail," the process must have a prospect for the continuation of, among other things, employment for employees, supply relationships between suppliers and trade creditors, and the credit relationships between the debtor

20 Senate Report, *supra* note 16, at 176-177.

business and creditors.[21] It cannot be a liquidation driven process without the prospect of a going concern being preserved and continued. The proper forum for such pure liquidation process being the *BIA*.

Virginia Torrie has argued that *CCAA* is historically a lender remedy, refuting conventional views of the Act being a debtor remedy inspired by concern for stakeholder groups, such as labour.[22] Accordingly, "if the Act was intended as a lender remedy (rather than to facilitate going-concern reorganizations) there may be less reason to object to liquidating *CCAA*s on normative or policy grounds."[23]

However, and as also noted by Dr Torrie, we respectfully submit that this perspective, taken to its extreme, risks undermining the rule of law. It is generally true that insolvency laws were enacted and amended in response to the needs of major creditors. Dr Torrie notes, regarding the *CCAA*, that the "impetus for this federal statute was to help prevent large bondholders [financial institutions] from failing, by allowing them to restructure debtors (read: restructure losses) and so return these companies (read: investments) to profitability."[24] Having said this, courts should not ignore the very purpose of the *CCAA*, as repeatedly and explicitly mentioned in the Parliament and confirmed by the Supreme Court (as well as implicitly acknowledged in the aforementioned quote), which is to preserve the value of the debtor companies as a going concern for the benefit of all of its stakeholders, including employees, and when possible avoid the economic consequences of a liquidation for the society at large by "returning these companies to profitability".

It is a long-standing concern that judicial discretion in

21 Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell, 2009) at 88.
22 Torrie, *supra* note 7 at 313, 315.
23 *Ibid* at 288.
24 *Ibid* at 5.

insolvency matters is bound by little in terms of procedure, *stare decisis*, or appellate oversight. As noted by David Bish, while this flexibility is of great value and is a cornerstone of Canadian restructuring law, the integrity of our system (as well as the equally important appearance of integrity), depends on the practitioners and the courts following meaningful checks and balances based on the purpose of the Act, unless we (the society at large) are comfortable embracing unfettered judicial discretion:

> If the beauty of our system lies in the unrestrained freedom of judges to drive a desirable commercial outcome, we should embrace it. If, however, we are not comfortable embracing unrestrained judicial discretion, at the very least we ought to find a way to credibly define and impose meaningful limits on that discretion. Either way – whether transparent unfettered discretion or meaningful checks and balances – the integrity of our system depends on it.[25]

As previously noted, the *CCAA* does not benefit from a scheme of distribution for debtors' assets and was not subject to parliamentary scrutiny and debate in this regard. Arguably, a *CCAA* court is granted wide discretion because our society expects this discretion to be used in a manner that will benefit the society at large. Given the impossibility to codify and rank the innumerable considerations that could come into play when a court is tasked with maintaining the operations of an insolvent debtor as a going concern, the great flexibility provided by the *CCAA* is entirely warranted in such circumstances.

Large creditors, who often enjoy secured status, are often best placed to evaluate the benefits and consequences of debtors' risk-taking. To allow them to call the shots by freely choosing between *CCAA* liquidation, receivership or bankruptcy will lead to inappropriate risk-taking and could, in theory, aggravate the often discussed inequity between stakeholders by syphoning value from stakeholders at large to their sole advantage.

25 David Bish, "Judicial Discretion in Insolvency Law" (2018) 7 *J Insolvency Inst Canada* 9.

We will see from the case law that the courts' position has evolved significantly after the 2009 *CCAA* amendments, which led, *inter alia*, to the enacting of section 36.

1. The Case Law Prior to the 2009 *CCAA* Amendments

Prior to the enactment of the 2009 amendments to the *CCAA*, appellate decisions remained wary of using *CCAA* to effect liquidations.

In 1990, the British Columbia Court of Appeal explicitly stated that the purpose of the *CCAA* is to facilitate the making of a compromise or arrangement in order to allow the debtor to continue business:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue business. [...] When a company has recourse to the C.C.A.A., the Court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.[26]

Similarly, in 1991, Justice LeBel, then of the Quebec Court of Appeal, wrote that what distinguishes the *CCAA* from the *BIA* is that *CCAA* is aimed at helping the debtor company avoid bankruptcy or emerge from its insolvency:

> More so than its liquidation, this *Act* is aimed at the reorganization of the company and its protection during the intermediate period, during which the approval and the realization of the reorganization plan is sought. Conversely, the *Bankruptcy Act* (RSC 1985, chapter B-3) seeks the orderly liquidation of the property of the bankrupt and the distribution of the proceeds of such liquidation among the creditors, in the order of priority defined by the Act. **The *Arrangements Act* responds to a distinct need and purpose, at least according to the interpretation generally given to it since its adoption. We want to either to prevent bankruptcy, or to help the company emerge from this situation.**[27]
>
> [Our translation – Emphasis added.]

26 *Hongkong Bank*, *supra* note 14 at para 10.

27 *Banque Laurentienne du Canada c Groupe Bovac Ltée*, EYB 1991-63766 (CA Que) at para 26.

In 1998, Justice Blair of the Ontario Court of Justice held that liquidation orders can be granted under the *CCAA* "if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation."[28]

In 1999, the Alberta Court of Appeal unanimously sided with Justice Paperny of the Alberta Court of Queen's Bench, who ruled in the first instance that the *CCAA* should not be used when the sale of the assets generates liquidity that is insufficient to be distributed to unsecured creditors and where no plan of arrangement was put to the creditors.[29] The Court of Appeal went a step further, by calling into question the use of the *CCAA* to liquidate the assets of insolvent companies:

> [w]hile we do not intend to limit the flexibility of the CCAA, we are concerned about its use to liquidate assets of insolvent companies which are not part of a plan or compromise among creditors and shareholders, resulting in some continuation of a company as a going concern. **Generally, such liquidations are inconsistent with the intent of the CCAA and should not be carried out under its protective umbrella.**[30]
>
> [Emphasis added.]

The notion that *CCAA* process could end in liquidation in exceptional situations was also recognized by the Quebec Superior Court in 2004. In *Papiers Gaspésia*,[31] Papiers Gaspésia Inc. ("Gaspésia") was a limited partnership created by the Fonds de Solidarité FTQ, SGF Rexfor and Tembec. The Chandler paper mill was subject, since 2001, to redevelopment

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28 *Re Canadian Red Cross Society* (1998), 5 CBR (4th) 299, 1998 CarswellOnt 3346 (Ont Gen Div [Commercial List]) at para 45, leave to appeal to ONCA refused (1998), 32 CBR (4th) 21 (Ont CA).

29 *Re Fracmaster Ltd*, 1999 ABQB 379, 11 CBR (4th) 204 (Alta QB) at paras 40-43.

30 *Royal Bank v Fracmaster Ltd*, 1999 ABCA 178 (Alta CA) at para 16.

31 *Re Papiers Gaspésia Inc (Faillite)*, 2004 CanLII 41522 (CS Que) [*Papiers Gaspésia*].

and modernization, and Gaspésia was seeking potential partners to refinance this project.

On 30 January 2004, Gaspésia obtained an order declaring that the company was subject to the provisions of the *CCAA*, that Ernst & Young Inc was appointed as monitor, and also offered certain relief to offer Gaspésia time to prepare a plan of compromise or arrangement. During the process the three directors of Gaspésia resigned, which event changed the role of the monitor. The monitor requested that it be allowed to act in the place of the board of directors for this matter and to represent Gaspésia in litigation before court.

The Superior Court of Quebec held that it is not excluded that proceedings under the *CCAA* can result in the liquidation of the debtor's assets, but this is only possible in exceptional and appropriate circumstances.[32]

In 2008, the British Columbia Court of Appeal appeared, in *obiter*, to cast further doubt about the possibility for liquidation to being conducted under the *CCAA* in *Cliffs Over Maple Bay*:

> I need not decide the point on this appeal, but I query whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.[33]

This line of reasoning was picked up by the Supreme Court in the above discussed 2010 decision of *Century Services*,[34] marking the last time the purpose of the Act was directly addressed on appeal.[35] Noteworthy, the *Century Services* decision was rendered on facts that occurred prior to the 2009 *CCAA* amendments and the enactment of section 36.

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32 *Ibid* at paras 50-54.

33 *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327 (BCCA) at para 32.

34 *Century Services*, *supra* note 14.

35 As noted in *Montreal, Maine & Atlantic City Canada Co. (Arrangement relatif à)*, 2014 QCCS 737 (Que Bktcy) [*Lac Mégantic*].

2. The Case Law Since the 2009 CCAA Amendments

Comprehensive changes made to the *CCAA* in 2009 brought with them the addition of section 36, which now permits the sale of assets outside the ordinary course of business subject to court authorization. As nothing in this section requires the filing of a plan or a continuing entity as a condition for court's approval, courts across the nation ruled that the court has the power to allow the sale of substantially all of the debtors' assets in the absence of a plan. Following the 2009 amendments, the trend towards liquidating *CCAA*s picked up.

In 2010, Alberta's Court of Queen's Bench granted an initial order under the *CCAA* with respect to Fairmont Resort Properties Ltd, Lake Okanagan Resort Vacation (2001) Ltd., Lake Okanagan Resort (2001) Ltd and LL Developments Ltd (the "Fairmont Group").[36] The Fairmont Group's operations were able to continue under *CCAA* protection from the date of the initial by taking certain key measures.

FRPL Finance Ltd ("FRPL") and a related corporation were major secured creditors of the Fairmont Group, and supported the *CCAA* proceedings. FRPL had issued bonds to many individual investors in order to provide capital to the group. The capital raised by FRPL, which amounted to approximately $41.5 million, was loaned to the Fairmont Group between 2005 and 2007.

On 15 April 2010, in proceedings linked to the *CCAA* process, FRPL applied for a final order in respect of a plan of arrangement pursuant to section 193 of the *Business Corporations Act*, RSA 2000, c B-9. At a bondholder meeting, FRPL proposed a reorganization plan which included the options available for recovery of FRPL's loans to the Fairmont Group.

Under the proposed plan, bondholders would exchange their bonds for trust units in the newly established Northwynd

36 *Re Fairmont Resort Properties Ltd*, 2012 ABQB 39 (Alta QB) at para 26 [*Fairmont*].

REIT. Northwynd REIT would acquire the Fairmont Group loans and security interest through a wholly-owned limited partnership, Northwynd Limited Partnership ("Northwynd"). The limited partnership would then take steps under the security to acquire ownership and control of the Fairmont Group assets.

Roughly 60 to 63% of total bondholders were represented at the meeting and a vast majority of voting bondholders voted in favour of the proposed arrangement. Justice Romaine found that the statutory procedures had been met, the application had been put forward in good faith, the arrangement had a valid business purpose and, on the basis of the strong bondholder support and the lack of opposition, the plan was fair and reasonable.

After being assigned the secured debt amounting to approximately $52 million, Northwynd applied for an order under the *CCAA* proceedings approving the acceptance by Fairmont Group of its offer to purchase all of the assets of the Fairmont Group in consideration for the discharge of the DIP financing and the crediting of $43.8 million against the secured debt owed to FRPL.

The sale of the assets under the *CCAA* proceedings was allowed. Citing *Anvil*,[37] Justice Romaine stated that "Farley, J. noted that the *CCAA* may be used to effect a sale or liquidation of a company in appropriate circumstances, most particularly where to do so would 'maximize the value of the stakeholders' pie'".[38] Justice Romaine also noted that, while the alternative of selling the assets through a receivership would be commercially equivalent, approval pursuant to the *CCAA* proceedings would be more efficient.[39]

Northwynd's plan proposed two options to bondholders:

37 *Re Anvil Range Mining Corp*, 2001 CarswellOnt 1325, [2001] OJ No 1453 (Ont SCJ [Commercial List]), affirmed on other grounds 2002 CarswellOnt 2254, [2002] OJ No 2606 (Ont CA) [*Anvil*].

38 *Fairmont*, *supra* note 36 at para 17, citing *ibid* at para 11.

39 *Fairmont*, *supra* note 36 at para 20.

either continue under the existing *CCAA* proceedings or through the termination of the proceedings and the appointment of a receiver. Northwynd submitted that the most time-efficient and cost-effective method of proceeding was the sale pursuant to the *CCAA* proceedings. On the contrary, monitor Ernst & Young submitted that "the potential of achieving a sale price for the secured assets was greater than the offer was very low and that the costs of a sales process would be significant," thus concluding that neither alternative would improve the return of creditors.

Based on precedents, Justice Romaine affirmed that a sale of substantially all of the assets of a debtor company is permitted in a *CCAA* proceeding pursuant to s 36 of the *CCAA* if certain statutory criteria are met and, in accordance with previous authority, if such a sale is consistent with the purpose and policy of the *CCAA* and in the best interests of creditors generally.[40]

Justice Romaine went on to cite Brenner CJ in *Pope & Talbot*:

> The decision by courts to extend the use of the CCAA to a liquidation is based on a recognition of the wider interests at stake in such a proceeding. **The purpose of a liquidating CCAA where the assets are to be sold on an operating basis, is to fairly have regard for the interests of not only the creditors and the stakeholders of the petitioner, but also the interests of employees, suppliers and others who will be affected by a complete shutdown. So provided that the objective is to dispose of assets on an operating basis, then even though it is a liquidation**, the exercise is not designed to effect a recovery for solely the secured lenders as submitted by Canfor. Clearly a continuation of operation will benefit a wider constituency.[41]
>
> [Emphasis added.]

Justice Romaine, pitting *BIA* receivership against *CCAA* as proper forum to effectuate a liquidation, relied heavily on the fact that the liquidating *CCAA* was aimed at preserving the going concern business of the insolvent corporation, thus finding comfort in the historical objective of the *CCAA*: to

40 *Ibid* at para 26.
41 *Ibid* at para 22.

preserve going concern business while avoiding the dire impact on a variety of stakeholders resulting from the shutdown and pure liquidation of same.

Noting that s 36 of the *CCAA* does not require that a plan be filed as a condition of court approval or there be a continuing entity after liquidation, Justice Romaine concluded that it made both practical and commercial sense to allow the sale process to take place under the existing *CCAA* proceedings. In the alternative, a bankruptcy would have been less efficient and would have jeopardized the going concern business, to the detriment of all stakeholders.[42]

More recently in *Bloom Lake* (2017),[43] Justice Hamilton, then at the Superior Court of Quebec, recognized once more that liquidating *CCAA* can serve a legitimate purpose but justly ruled that creditors should have analogous entitlements in liquidations under the *CCAA* and the *BIA*. Otherwise, the debtor or creditors can choose liquidation under the *CCAA* in order to avoid their responsibilities under the *BIA*.[44]

In *Bloom Lake*, the debtors, Wabush Iron Co Limited and Wabush Resources lnc et les mises-en-cause Wabush Mines, Arnaud Railway Company and Wabush Lake Railway Company Limited (collectively the "Wabush CCAA Parties") filed a motion for the issuance of an initial order under the *CCAA*. The Wabush CCAA Parties had two pension plans for their employees governed by the *Newfoundland and Labrador Pension Benefit Act* ("NLPBA"). Therein, the monitor filed a motion seeking direction with respect to the priority's order of the debts. The purpose of this decision was to determine the preliminary question of whether the Court defer to the Supreme Court of Newfoundland and Labrador for the application of certain rules concerning trusts and security interests under the NLPBA. Furthermore, the Court

42 *Ibid* at para 30.
43 *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 (CS Que) [*Bloom Lake*].
44 *Ibid* at para 164.

responded to the key issue of whether "the *CCAA* proceedings themselves, or some event within the *CCAA* proceedings, constitute a liquidation, assignment or bankruptcy" of the employer.

Recognizing its jurisdiction to interpret the provisions of NLPBA in the context of this *CCAA* proceeding, the Court concluded that this was a liquidating *CCAA* at the outset, which triggered the application of the deemed trusts under the federal *Pension Benefits Standards Act* and the NLPBA. To this end, the Court noted:

- Liquidation regime under Part XVIII of the *Canada Business Corporations Act* is only available to corporations that are solvent.[45]

- The debtor in a *CCAA* proceeding remains in possession of its assets and this is sufficient to meet the requirement of the estate in liquidation, assignment or bankruptcy.[46]

- The employer should not be allowed to avoid the priority of the deemed trust by choosing to liquidate under *CCAA* rather than the *BIA*.[47]

> [160] It is clear in the present matter that the Wabush CCAA parties have liquidated their assets. With the sale of the Wabush mine in June, the Wabush CCAA parties have now sold all or substantially all of their assets. However, they did not institute formal liquidation proceedings. **They proceeded instead under the CCAA with what has come to be known as a "liquidating CCAA" [...]**[48]
>
> [174] **The Court notes that there is nothing in any way pejorative about qualifying the CCAA as a liquidating CCAA. That is a legitimate and increasingly frequent use of CCAA proceedings. However, a liquidating CCAA should be more analogous to a BIA proceeding. One of the consequences is that the deemed trusts should be triggered.**[49]

45 *Ibid* at para 162.
46 *Ibid* at para 163.
47 *Ibid* at para 164.
48 *Ibid* at para 160.

> [References omitted – Emphasis added.]

In 2014, Justice Dumas in *Lac Mégantic* insisted that the question as to whether liquidations are allowed under the *CCAA* remains an open one, as there has been no recent decision from a court of appeal on this matter in Canada, but concluded that liquidating *CCAA*s were possible, on a case-by-case basis.[50]

More recently in 2019, the same Justice Dumas rendered a decision in the matter of *MPECO Construction*[51] denying a motion seeking extension of the stay of proceedings on the basis that there were no prospect for a plan of arrangement. Justice Dumas did not cast a doubt on the possibility for an insolvent corporation to liquidate its assets under a *CCAA* process. Rather, Justice Dumas questioned whether the *CCAA* was the proper forum to allow for such a liquidation exercise to be conducted to the extent that there were no reasonable grounds suggesting that such a liquidation would lead to the preservation of the going concern and that the proceeds of such an exercise could lead to the filing of a plan of arrangement being submitted to the creditors:

> [34] The objective of the CCAA is embedded in its title.
>
> [35] The objective of the Act is to allow for a struggling company to present a plan of arrangement to its creditors with the ultimate objective to restructure its business. (...)
>
> [44] That a liquidation of a debtor's assets is possible prior to the filing of a plan of arrangement is not in litigation. Courts will exercise their discretion in this regard on a case-by-case basis. **That said, one must**

49 *Ibid* at para 174.

50 *Lac Mégantic*, *supra* note 35 at paras 71, 104: "Bien que le soussigné aurait été porté à privilégier la thèse que la LACC et la LFI sont deux régimes distincts qui s'appliquent à deux types de situations distinctes et qui servent des objectifs distincts, les amendements apportés à la LACC et le cas particulier du présent dossier militent pour la possibilité de permettre la liquidation des actifs sous la LACC" at para 104.

51 *Arrangement de MPECO Construction Inc*, 2019 QCCS 297 (Que Bktcy) [*MPECO Construction*].

> **keep in mind that the debtor's request and acts under the CCAA should lead to the filing of a plan of arrangement submitted to the creditors**.
>
> [45] Proceedings under the CCAA ought not to be used to short circuit realization process under the Bankruptcy and Insolvency Act.[52]
>
> [Our translation – Emphasis added.]

Liquidating *CCAA* is no longer a trend. It is justly considered an efficient tool to facilitate the transfer of businesses on a going concern basis. So long as the liquidation conducted under a *CCAA* process will enhance the prospect of maintaining the going concern of the business(es) operated by an insolvent corporation, even if this going concern may ultimately be continued under a new entity/structure, courts are now relying on section 36 of the *CCAA* to allow such liquidation to proceed.[53] This is in line with the historical purpose and objective of the *CCAA*.

Prime evidence of the fact that liquidating *CCAA*s are now well accepted are Sears Canada Inc's *CCAA* proceedings, which began in 2017. In a span of less than two years, the monitor was capable of monetizing substantially all of the tangible assets of these entities while temporarily maintaining certain operations and allowing for the transfer of certain businesses formally operated under the banner of Sears, hence maximizing chances that going concern preservation is maintained.[54]

On a final note, it is interesting to note the Parliament's recent amendments to the *CCAA* via Bill C-97, which will add section 11.001 to the *CCAA* requiring initial orders to "be limited to relief that is reasonably necessary *for the continued operations of the debtor company in the ordinary course of business during that period*" [emphasis added].[55] Buried deep within the

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52 *Ibid* at paras 34-35, 44-45.

53 *Third Eye Capital Corporation v Ressources Dianor Inc*, 2019 ONCA 508 (Ont CA) at para 71.

54 *Re Sears Canada Inc*, Toronto, Ont SCJ [Commercial List] CV-17-11846-00CL.

government's budget, it remains to be seen how this new provision will be interpreted by the courts and if it will serve to reaffirm the primary and historical purpose of the *CCAA*, which is to enable a restructuring of an insolvent corporation's business for the benefit of a variety of stakeholders.

Following the guidance from the above decisions, in recent years liquidations under the *CCAA* have been effected when the maintenance of the debtors' business as a going concern was shown to increase the value for stakeholders and when the complexity of the matter justified the flexibility provided under the *CCAA*, always with a view to preserve the going concern of a business operated by an insolvent corporation. With the objective of avoiding or limiting the negative impact on a variety of stakeholders that the alternative of a liquidation on a piecemeal basis would bring. This is in line with the historical objective and very purpose of the *CCAA*.

That said, who should be at the helm of a liquidating *CCAA*? In coming to accept the liquidating *CCAA*s, Courts have insisted on the fact that it was for the benefit of all stakeholders of the insolvent corporation, in some cases plainly shrugging at the idea of a liquidating *CCAA*s that would serve no more than to reimburse the secured creditor. Can the debtor-driven *CCAA* process be continued or even initiated by a secured creditor? This is the question that next section seeks to address.

IV. CREDITOR-DRIVEN *CCAA*s AND ENHANCED POWERS FOR THE MONITOR

1. Initiating the *CCAA* Process

The *CCAA* does not prohibit creditors from bringing forth an application for an initial order. Nonetheless, given that the process is typically driven by the debtor, the Courts have

55 Bill C-97, *An Act to implement certain provisions of the budget tabled in Parliament on 19 March 2019 and other measures,* 1st Sess, 42nd Parl (assented to 21 June 2019), SC 2019, c 29.

historically been reluctant to grant an application made by creditors. While multiple cases in recent years have allowed the creditors to initiate the *CCAA* process and enhanced the role of the monitor, *CCAA* remains first and foremost debtor-driven.

In *Crystallex* (2012), a decision which was unanimously confirmed by the Ontario Court of Appeal, Justice Newbould held that when the court is presented with competing *CCAA* applications from the debtor and from a creditor, the key consideration is which application offers the best chance for a fair balancing of the interests of all stakeholders.[56] A creditor should not be able to prevent a debtor company from undertaking restructuring efforts under the *CCAA* to maximize recovery for the benefit of all stakeholders unless it can be shown that the company's efforts are "doomed to fail."

Crystallex is a mining company whose principal focus was the exploration and development of gold projects in Venezuela. In 2004, the company issued nearly $100 million worth of senior unsecured notes due on 23 December 2011. On 22 December 2011, one day prior to the maturity of the notes, Crystallex and the noteholders filed competing *CCAA* applications. The noteholders' application contemplated that all existing common shares would be cancelled, an equity offering would be undertaken, and if, or to the extent, the equity proceeds were insufficient to pay out the noteholders, the notes would be converted to equity.

Crystallex concurrently sought authority to file a plan of compromise and arrangement, the authority to continue to pursue an arbitration in Venezuela, and the authority to pursue all avenues of interim financing or a refinancing of its business and to conduct an auction to raise financing. Crystallex had already received an unsolicited offer of financing from Tenor Capital Management. In coming to the aforementioned conclusions, Justice Newbould wrote:

56 *Re Crystallex International Corp*, 2011 ONSC 7701 (Ont SCJ [Commercial List]) at para 26, affirmed 2012 ONCA 404 (Ont CA) [*Crystallex*].

> [20] The CCAA is intended to provide a structured environment for negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company **realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA**. The benefit to a debtor company could, depending upon the circumstances, mean a benefit to its shareholders.
>
> [21] It is clear that the CCAA serves the interests of a broad constituency of investors, creditors and employees. Thus it is appropriate at this stage to consider the interests of the shareholders of Crystallex. [...]
>
> [26] In my view, what the Noteholders propose at this stage, including the cancellation of the common shares held by the shareholders of Crystallex, is not a fair balancing of the interests of all stakeholders. **To say that they will never vote in favour of any plan unless they are paid out immediately or the current management and board of Crystallex is removed is not reflective of the purposes of the CCAA at this stage.**
>
> [27] The application of Crystallex and the terms of its Initial Order are not prejudicial to the legitimate interests of the Noteholders. The Noteholders are entitled to submit any proposal they wish to the board of Crystallex who will be obliged to consider it along with any other proposals obtained. **The board of directors of Crystallex has a continuing duty to balance stakeholder interests. If the Crystallex board does not choose their proposal, the Noteholders would have their remedies, if appropriate, in the CCAA process. What the Noteholders have sought in their CCAA application is to effectively prevent Crystallex from taking steps under the CCAA to attempt to obtain a resolution for all stakeholders without the benefit of seeing what Crystallex may be able to achieve. It cannot be said at this stage that the efforts of Crystallex are doomed to fail.**[57]
>
> [References omitted – Emphasis added.]

In *Semi-Tech* (1999),[58] the debtor ("Semi-Tech") was a holding company and its common shares traded on the Toronto Stock Exchange. Enterprise Capital Management Inc. ("Enterprise"), on its own behalf and on behalf of funds

57 *Ibid* at paras 20-21, 26-27.

58 *Enterprise Capital Management Inc v Semi-Tech Corp*, [1999] OJ No 5865 (Ont SCJ [Commercial List]) [*Semi-Tech*].

managed by it, and with the support of other holders of senior secured notes, applied for an initial order under the *CCAA* and sought orders in order to restrain the management and control of Semi-Tech in its operations by, for example, prohibiting Semi-Tech to make any payments to senior officers and directors and altering any material contracts. Agreeing that the Enterprise would be able to establish that Semi-Tech had breached certain covenants under the trust indenture, Ground J. noted that due to lack of appropriate notices, there had been no event of default as defined in the agreement.[59]

After mentioning the remedial purpose of the *CCAA*, and noting that an application by creditors is a rarity, Justice Ground held that in the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries, it would be inappropriate to make any order pursuant to the *CCAA*:

> [23] It is usual on initial applications under the *CCAA* for the applicant to submit to the Court at least a general outline of the type of plan of compromise and arrangement between the company and its creditors proposed by the applicant. **The application now before this Court is somewhat of a rarity in that the application is brought by an applicant representing a group of creditors and not by the company itself as is the usual case**. Enterprise has submitted that it is not in a position to submit an outline of a plan to the Court in that it lacks sufficient information and has been unable to obtain such information from Semi-Tech. Enterprise points out that, in the usual case, the application is brought by the company, the company has all the necessary information at hand and has usually had the assistance of a firm which is the proposed monitor and which has worked with the company in preparing an outline of a plan. [...]
>
> [25] **In the absence of any indication that Enterprise proposes a plan which would consist of some compromise or arrangement between Semi-Tech and its creditors and permit the continued operation of Semi-Tech and its subsidiaries in some restructured form, it appears to me that it would be inappropriate to make any order pursuant to the *CCAA*. If the Noteholders intend simply to liquidate the assets of Semi-**

59 *Ibid* at para 6.

> **Tech** and distribute the proceeds, it would appear that **they could do so** by proceeding under the Trust Indenture on the basis of the alleged covenant defaults, accelerating the maturity date of the Notes, realizing on their security in the shares of Singer and recovering any balance due on the Notes **by the appointment of a receiver or otherwise**.[60]
>
> [Emphasis added.]

In *SM Group* (2018),[61] the Court was presented with competing *CCAA* applications from management and secured creditors. The Quebec Superior Court chose to side with the secured creditors given the evidence submitted in respect to the loss of confidence in the management of the insolvent corporation. Serious allegations about the influence of the former president, and current main shareholder, caught in fraudulent criminal accusations and recent payments made to his benefit by management prior to the filing led the Court to side with the secured creditors' arguments that the appointment of a chief restructuring officer with powers akin to a *BIA* receiver was the best alternative to preserve going concern value of the SM Group's value, for the benefit of all stakeholders, including employees.

In *Taxelco* (2019),[62] the Court was presented with a motion seeking the issuance of an initial order by the main secured creditor, the National Bank of Canada, with a view to implement a SISP and preserve the going concern value of the business, while granting extended powers to the monitor, acting in lieu of management. The Court sided with the Bank's arguments, which focused on the fact that management had refused to file a motion to issue an initial order and that the directors and officers had announced their intention to resign.

In *Sural* (2019),[63] the Court was presented with a motion

60 *Ibid* at paras 23, 25.

61 *Re Le Groupe SMI Inc, et al* (24 August 2018), Montreal, Que SC 500-11-055122-184 [*SM Group*].

62 *Re Taxelco Inc, et al* (1 February 2019), Montreal, Que SC 500-11-055956-193 [*Taxelco*].

63 *Re Sural Inc, et al* (11 February 2019), Montreal, Que SC 500-11-056018-191 [*Sural*].

seeking the issuance of an initial order while granting enhanced powers to the monitor, akin to those of a *BIA* receiver, to allow for the company to implement a SISP on 28 June 2019. The motion was presented by the company and supported by its management.

In *Miniso*, the most recent decision rendered on the subject, the secured creditors of the debtor companies initiated the proceedings under the *CCAA*, and an initial order was granted on 12 July 2019. The British Columbia Supreme Court confirmed the standing for a creditor to commence *CCAA* proceedings while granting enhanced powers to the monitor:[64]

> The **commencement of *CCAA* proceedings is a proper exercise of creditors' rights** where, ideally, the *CCAA* will preserve the going-concern value of the business and allow it to continue for the benefit of the "whole economic community", including the many stakeholders here. This is intended to allow stakeholders to avoid losses that would be suffered in an enforcement and liquidation scenario. [...]
>
> A&M will have **enhanced powers as Monitor** to manage the Canadian operations and negotiate and implement a transaction, in consultation with the Migu Group ...[65]
>
> [Emphasis added.]

That being said, contrary to *Semi-Tech* and *Crystallex* cases, the *Miniso* case proceeded on an uncontested basis and management of the insolvent debtor company did not oppose the initiation of the *CCAA* process by the secured creditor, who was also providing interim financing to allow the corporation to continue its operations and preserve value for all stakeholders:

> 52 There is no doubt that the Miniso Group has dictated the course forward, for the most part. The Miniso Group holds first ranking security over all of the Migu Group's assets. **The Miniso Group has determined that a *CCAA* process is the best means to ensure the preservation and sale of the Migu Group's business as a going concern and maintain**

64 *Miniso International Hong Kong Limited v Migu Investments Inc*, 2019 BCSC 1234 (BCSC) at para 45 [*Miniso*].

65 *Ibid* at paras 47, 102.

> **enterprise value for the benefit of all stakeholders**, including the Miniso Group. In addition, as discussed below, the Miniso Group has agreed to provide interim financing during the course of the restructuring in order to allow that process to unfold.
>
> 53 I have no doubt that the Migu Group has asserted its wishes and wants within the context of the past and ongoing negotiations between the two Groups. **However, the Migu Group now grudgingly accepted its fate and did not oppose the relief sought here**.[66]
>
> [Emphasis added.]

Following the guidance from *Crystallex*, removing *ab initio* the management of an insolvent corporation from the driver seat in a restructuring process under *CCAA* in favour of the secured creditors ought to be considered as an extraordinary measure, and to address serious concerns with respect to the incapacity and/or inability of management to conduct such a process. It requires a demonstration that management has no plan or that such a plan is "doomed to fail," or that management has resigned, is unfit or conflicted to conduct such a process for the benefit of all stakeholders.

To the extent that management can demonstrate that it is focusing its efforts on exploring restructuring paths and that such efforts may reasonably lead to the restructuring of the insolvent corporation's business, preserving the going concern value of the business, for the benefit of all stakeholders, including but not limited to the secured creditors, management should not be stripped of its powers and duties lightly. Besides, we must be mindful that the *CCAA* provides at section 11.5 for the proper mechanism to remove a director that "is unreasonably impairing the possibility of a viable compromise or arrangement being made in respect of the company or is acting or is likely to act inappropriately as a director in the circumstances."

We also find comfort in the reasoning in *Semi-Tech*, which reminds us that the *CCAA* is not to be considered as a

66 *Ibid* at paras 52-53.

mechanism which allows a secured creditor to liquidate the assets, unless it demonstrates that the proposed restructuring efforts will lead to the going concern value preservation, referring to the *BIA* receivership for such an operation to be conducted.[67] The objective sought pursuant to the *CCAA* proceedings thus remaining to favour restructuring while preserving going concern value for all stakeholders involved.

2. Continuing the *CCAA* Process and Enhancing the Role of the Monitor

Courts have also allowed *CCAA* process initiated by the company, under certain circumstances, to be continued by the secured creditors by granting extended powers to the monitor, akin to a *BIA* receiver.

In the matter of *BioAmber*,[68] a Quebec-based company operating a succinic acid production facility in Sarnia (Ontario), the Court issued an initial order for the purpose of, *inter alia*, allowing the company to implement a SISP. When it became obvious that the SISP would not lead to the desired transaction and that management was involved/associated with a potential bidder, the Court at the request of secured creditors, issued an order granting additional powers to the monitor, akin to those of a *BIA* receiver.

In *ILTA Grain*,[69] a British Columbia-based grain producer, filed for protection under the *CCAA* on 7 July 2019. It was the company, and its management, that filed for the issuance of the Initial Order.

In its first report, filed merely eight days after the *CCAA* proceedings commenced, the monitor reported that it had become clear that certain members of the company's management did not support the company's current strategy

67 *Semi-Tech*, *supra* note 58 at para 25.

68 *Re BioAmber Canada Inc, et al* (31 July 2018), Montreal, Que SC 500-11-054564-188 [*BioAmber*].

69 *Re ILTA Grain Inc* (8 July 2019), Vancouver, BC SC S-197582 [*ILTA Grain*].

of undertaking a SISP and pursuing transactions that may lead to the sale of the company's business and assets.[70] The Court, at the request of the company, and likely pursuant to a strong suggestion from the secured creditors, issued an order to enhance powers of the monitor, but not to the extent of what would be typical of a *BIA* receiver.

Essentially, to ensure that the secured creditors and the monitor have confidence in the company's management, the order granted the monitor with specific recommendation, providing incremental powers while giving control powers over the receipt and disbursements to the monitor.[71]

While the role of the monitor has been expanded in various files, the Quebec Court of Appeal in *Aquadis* recently brought into question the limits of such expanded role in file driven *de facto* by the creditors. Notably, the Court highlighted that enhancing the powers of the monitor must not interfere with its role and neutrality. In that file, the debtor 9323-7055 Québec inc (formerly Aquadis International Inc, "Aquadis") was a wholesale seller of plumbing fixtures. Aquadis, however, suffered serious financial difficulties when hundreds of defective faucets supplied by it failed, causing significant damage to property owners whose insurers ultimately filed subrogated claims against Aquadis. The value of those claims amounted to nearly $22 million and the monitor estimated the value of potential future claims at an additional $25 million.

According to the monitor's first and second reports, Aquadis significantly reduced its operations in 2014, completely liquidated and ceased operations in 2015. As of the date of the initial order, Aquadis had no realizable assets and the near totality of its liabilities were the litigious claims of the insurers.

To maximize the value of Aquadis' assets, in December 2016, the monitor instituted legal proceedings against the Taiwanese manufacturers and distributor and their insurers. At the same

70 *Ibid* (16 July 2019) (Monitor's First Report).
71 *Ibid* (18 July 2019) (Order Made After Application).

time, the monitor was negotiating with the Canadian distributors and retailers. On 20 June 2018, the supervising judge authorized settlements between the monitor and the Taiwanese distributor and its insurers in the total amount of $7.2 million.

The monitor filed a plan of arrangement on 8 January 2019, and amended the plan at the meeting of the creditors on 25 April 2019. According to the amended plan, the monitor was empowered to institute legal proceedings on behalf of Aquadis' creditors against the other persons involved in the manufacture, distribution or sale of the defective faucets. It was approved by the Superior Court on 4 July 2019, over the objections of the retailers that a plan of arrangement cannot provide for the institution of legal proceedings by the monitor, on behalf of the creditors, against third parties in connection with rights that belong to the creditors and not to the debtor company.[72]

On 20 August 2019, Justice Hamilton of the Quebec Court of Appeal granted the retailers motions for leave to appeal, noting that the matter at hand goes to the serious issue regarding the role and neutrality of the monitor and the scope of the powers that it can obtain:

> [11] The issue is not frivolous. There are a number of *CCAA* cases where the debtor is a party to significant litigation in which there are a number of third parties who may be solidarily liable with the debtor to its creditors. In those cases, in order to reach a global settlement of all of the litigation relating to the debtor, the plan may allow third parties to contribute to a litigation pool with the debtor for the benefit of the creditors and to obtain a release. However, this case goes one step further and authorizes the Monitor to sue, on behalf of the creditors, third parties who decline to contribute to the litigation pool. There does not appear to be any precedent on this issue.
>
> [12] The issue is crucial to the file because the proceedings by the

72 *Arrangement relatif à 9323-7055 Québec inc (Aquadis International Inc)* (4 July 2019), Montreal, Que SC 500-11-049838-150, leave to appeal to QCCA granted (20 August 2019), Montreal, Que CA 500-09-028436-194, 500-09-028474-195, 500-09-028476-190 at paras 11-13 [*Aquadis*].

> Monitor against the Canadian distributors and retailers, including the Petitioners, are a key feature of the Amended Plan and the validity of those proceedings goes to the acceptance of the plan by the creditors and the approval of the plan by the judge.
>
> [13] **It is also important to the practice because it goes to the serious issue as to the role and neutrality of the monitor in *CCAA* proceedings and the scope of the powers that can be granted to a monitor**. More specifically, the issue of whether the court can approve a plan that provides for the monitor instituting legal proceedings, on behalf of the creditors, against third parties who do not owe anything to the debtor is a novel issue and is of particular relevance in *CCAA* proceedings used to reach a global settlement of significant litigation involving third party co-defendants.[73]
>
> [References omitted – Emphasis added.]

3. Filing of a *CCAA* Plan of Arrangement

More rarely, courts have also allowed secured creditors to directly file a plan of arrangement and have same submitted to other creditors.

In 2001, the Superior Court of Ontario in *Anvil* ruled that a plan submitted by the secured creditors through an interim receiver[74] appointed by them as a result of all directors and officers resigning, was fair and reasonable even though it offered nothing to unsecured creditors. In coming to that decision the Court insisted on the fact that the value of the company's assets was insufficient to yield any recovery to unsecured creditors and that it is not unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors.[75]

Anvil Range Mining Corporation ("Anvil") was the owner of a lead and zinc mine in the Yukon Territory. In 1990, Anvil

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73 *Ibid* at paras 11-13.

74 *Anvil*, *supra* note 37: "I would further point out that while secured creditors had the opportunity of filing a Plan, they did not so but rather they agreed amongst themselves that the authorized alternate, the IR, do so" at para 9.

75 *Ibid.*

applied for and received protection from its creditors under the *CCAA*. In 1998, Deloitte & Touche Inc had been appointed as the Interim Receiver ("IR") as a result of management resigning.

The hearing dealt with the application by the IR for the sanctioning of a plan of arrangement. The plan dealt with a series of complex priority disputes both within creditor classes and among creditor classes, as well as the allocation of funds in the IR's possession. The plan had been unanimously approved by the three groups of creditors in 2001. The unsecured creditors and the major shareholders objected to the plan because they asserted that the secured debt was lower than claimed and that the value of Anvil's assets was higher than suggested.

Justice Farley approved the plan, noting that it complied with all the statutory requirements and it was also fair and reasonable. It was determined that the IR exercised its judgment in a reasoned, practical and functional way.

The mere fact that the opponents of the plan were advocating an alternative did not imply that the IR had lost its neutrality. In fact, the alternatives proposed were unrealistic. Additionally, the plan was deemed fair because the secured claims were far in excess of the value of the assets.

> [11] While it is recognized that the main thrust of the CCAA is geared at a reorganization of the insolvent company – or enterprise, even if the company does not survive, the CCAA may be utilized to effect a sale, winding up or a liquidation of a company and its assets in appropriate circumstances. See *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) at p. 32; *Re Olympia & York Developments Ltd.* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]) at p. 104. **Integral to those circumstances would be where a Plan under the CCAA would maximize the value of the stakeholders' pie.**
>
> [12] The CCAA permits a debtor to propose a compromise or arrangement with its secured creditors. A **Plan proposed solely to secured creditors is not unfair where the insolvent's assets are of insufficient value to yield any recovery to unsecured creditors. It is not**

> **unreasonable for a court in such circumstances to sanction a plan which is directly solely at secured creditors.** See *Olympia & York Developments Ltd. v. Royal Trust Co*. (1993), supra at pp. 513-8; *Re Philip Services Corp*., [1999] O.J. No. 4232 (Ont. S.C.J. [Commercial List]) at paras. 20-1. That the plan does not include any agreement with a class a creditors does not, by virtue solely of that omission, make it unfair where that class is not being legally affected. Nothing is being imposed upon the unsecureds; none of their rights are being confiscated. See *Re Olympia & York* (1993), *supra* at pp. 508, 517-8. [...]
>
> [18] In my view, the approval of this Plan will allow the creditors (both secured and unsecured) and the shareholders of Anvil to move on with their lives and activities while the mining properties including the mine will be under proper stewardship. [...]
>
> [20] Mr. Aalto referred to *Royal Bank v. Fracmaster Ltd*., [1999] A.J. No. 675 (Alta. C.A.) at para. 16 with respect to the CCAA not being used to provide for a liquidation in a guise of a CCAA reorganization. But see my views above. **In any event, the IR has sought alternative relief allowing it to sell the assets, which sale would be on a commercially equivalent basis as the Plan under the CCAA contemplates. Given that the Plan would operate more efficiently in that respect, I see no reason to provide that this proceed as a sale by the IR**.[76]
>
> [Emphasis added.]

The reasoning of Justice Farley was soon reaffirmed by the Ontario Court of Appeal in *Bob-Lo Island*.[77] On 25 June 2004, an initial order was authorized against the debtor companies and on 22 November 2004, the plan of arrangement under the *CCAA* was sanctioned by the Court. Mr. Randy Oram, a shareholder of one of the debtor companies and also an unsecured creditor, requested a leave of appeal of the sanctioned order. His main objection was that "the plan of arrangement is a secured-creditor-led plan that excludes the unsecured creditors from any realistic prospect of recovery, without requiring the secured creditors to go through the formal process of enforcing their security and without exposing the secured assets to the market."[78] Accordingly, the assets of

76 *Ibid* at paras 11,12, 18, 20.

77 *Re 1078385 Ontario Ltd*, [2004] OJ No 6050, 2004 CarswellOnt 8034 (Ont CA) [*Bob-Lo Island*].

the debtor company were to be disposed and the debtor company would not continue as a going concern.

The Ontario Court of Appeal dismissed the motion for leave to appeal. Concluding that Mr. Oram had failed to establish an economic interest in the assets, the Court also noted that while there may be merit to the issue that the plan was contrary to the purposes of *CCAA*, Mr. Oram had also failed to demonstrate that there is sufficient merit in that issue to justify granting leave to appeal in the circumstances of this case:

> [27] In this case, Randy Oram submits that there are serious and arguable grounds for suggesting that, by sanctioning Amico's Plan and granting a vesting order to a non-arm's length purchaser, the motion judge erred in the application of the legal principles for determining if a *CCAA* plan is fair and reasonable. In particular, the Randy Oram contends that the plan:
>
> i) is contrary to the broad, remedial purpose of the *CCAA*, namely to give debtor companies an opportunity to find a way out of financial difficulties short of other drastic remedies;
>
> ii) is a proposal by the secured creditors for the exclusive benefit of the secured creditors, designed to liquidate the property of the debtor companies **without regard to the interests** of the debtor companies, their lien claimants, **unsecured creditors** or shareholders;
>
> iii) does not provide for the continued operation of the debtor companies as going concerns;
>
> iv) does not provide for the marketing and sale of the property to maximize its value for all of the debtor companies' stakeholders;
>
> v) **rather than leaving unsecured creditors as an unaffected class, releases their claims against the property, the debtor companies, Amico, and the purchaser...**
>
> [30] [T]his is not the first time a secured-creditor-led plan, which operates exclusively for the benefit of secured creditors and under which the assets of the debtor company will be disposed of and the debtor company will not continue as a going concern, has received court

78 *Ibid* at para 3.

> approval: see *Re Anvil Range Mining Corp*. (2001), 25 C.B.R. (4th) 1 (Ont. S.C.J.), aff'd on other grounds [2002] O.J. No. 2606 (C.A.). (See also the discussion of the purposes of the *CCAA* in the cases referred to in *Re Anvil Range Mining Corp*., *supra* at para. 11 (S.C.J.)).
>
> [31] **Moreover, the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement**: *Re Anvil Range Mining Corp*., *supra* at para. 31 (C.A.).[79]
>
> [Emphasis added.]

Bob-Lo Island and *Anvil*, while cautious in their approach, represented an arguably controversial shift in the evolution of the role of secured creditors under the *CCAA* and the use of the statute as a flexible and advantageous restructuring tool for secured creditors.[80]

V. CONCLUSION

We can appreciate from the case law that the *CCAA* remains largely a debtor-driven process and that the monitor is to be considered, in the vast majority of cases, as the supervisory agent safeguarding the interest of a variety of stakeholders. This is in line with the historical, and dare we say, societal objective pursued by the legislator in enacting the *CCAA*.

The *CCAA* was enacted to offer an alternative to the liquidation path offered by the *BIA*; to counter the devastating consequences on a variety of stakeholders when a corporation fails and ceases its operations; and to preserve going concern value of a business for the good of the greater pool of stakeholders. Although we have come to accept "liquidating *CCAA*s," the end result is usually a transfer of the assets required for a business to be continued, albeit under a new structure. Arguably, this is also in line with the *CCAA*'s

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79 *Ibid* at paras 27, 30-31, 42.

80 *Caterpillar Financial Services v 360networks corporation et al*, 2007 BCCA 14 (BCCA) at para 46.

objective, which is focused on preserving going concern operations of a struggling corporation.

To remove management from the helm of this restructuring process and extend the powers of the monitor accordingly is a measure that courts have cautiously limited to exceptional circumstances. In addition to adducing evidence that the *CCAA* process is likely to preserve going concern value of the business, it must be demonstrated to the court that either (i) management has resigned, leaving no directors and officers in place, (ii) management is unfit to conduct a restructuring process in a manner that would be in the best interest of all stakeholders, (iii) any potential restructuring path available would be doomed to fail, and/or that (iv) management is conflicted, notably because it is participating in the SISP under a *CCAA*.

Under those circumstances, courts have allowed the secured creditors to play a more active role in the restructuring process under a *CCAA*, be it through the appointment of a Chief Restructuring Officer, an interim receiver, or by the enhancement of the monitor's power to equate those of a *BIA* receiver.

As we have stated, the monitor's traditional role was not intended to exceed supervisory powers. This is also consistent with the fact that the monitor does not possess the required skill set to run a business on a long term basis – management does. This is why we believe that courts have and continue to exercise caution in all such cases in order to ensure that the powers afforded to the monitor are absolutely necessary and justified by specific and special circumstances.

Ernst & Young Inc. in its Capacity as Monitor of all ofthe Following: Essar Steel Algoma Inc. et al. v. EssarGlobal Fund Limited et al.[Indexed as: Ernst & Young Inc. v. Essar Global Fund Ltd.]

Ontario Reports

Court of Appeal for Ontario,

Blair, Pepall and van Rensburg JJ.A.

December 21, 2017

139 O.R. (3d) 1 | *2017 ONCA 1014*

Case Summary

Corporations — Oppression — Algoma's monitor in Companies' Creditors Arrangement Act ("CCAA") restructuring proceedings bringing oppression action under s. 241 of Canada Business Corporations Act ("CBCA") against Algoma's parent Essar — Monitor alleging that Essar had exercised de facto control over Algoma and had consistently preferred its own interests over those of Algoma and its stakeholders — Monitor having standing as complainant under oppression provisions of CBCA — Claim properly pleaded as oppression action rather than derivative action under s. 239 of CBCA — Algoma entirely dependent on access to port in order to function economically — Trial judge entitled to find that transaction directed by Essar which conveyed port to Essar-controlled Portco and resulted in Algoma losing control over port was oppressive to Algoma's stakeholders — Business judgment rule not providing defence to Essar — Trial judge not erring in granting remedy which removed Portco's control rights — Canada Business Corporations Act, *R.S.C. 1985, c. C-44, ss. 239*, 241 — Companies' Creditors Arrangement Act, *R.S.C. 1985, c. C-36*.

Algoma was a steel manufacturer in Sault Ste. Marie, and its port facilities were integral to its operations. At a time when Algoma was facing a liquidity crisis, its board of directors placed responsibility for Algoma's recapitalization efforts in the hands of its parent Essar. Essar directed a transaction which conveyed the port facilities to Portco, which Essar indirectly owned. The port transaction resulted in Algoma losing control over the port facilities. Algoma was involved in restructuring proceedings under the *Companies' Creditors Arrangement Act*. As a result of the port transaction, Portco -- and therefore Essar -- effectively had a veto over any party acquiring Algoma in the *CCAA* proceedings. With the authorization of the supervising *CCAA* judge, Algoma's *CCAA* monitor brought an oppression action under s. 241 of the *Canada Business Corporations Act* against Essar and certain Essar-controlled companies. The trial judge found that the monitor had standing to bring the action. He found that the reasonable expectations of Algoma's trade creditors, employees, pensioners and retirees were that Algoma would not deal with a critical asset like the port in such a way as to lose long-term control over such a strategic asset to a related party on terms that [page2 p]ermitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the related party. He concluded that Essar's actions were oppressive. He granted a remedy which, among other things, removed Portco's control of the port facilities. The defendants appealed.

Held, the appeal should be dismissed.

The trial judge did not err in finding that the monitor had standing as a complainant under s. 238(*d*) of the *CBCA*. While a monitor generally plays a neutral role in *CCAA* proceedings, in exceptional circumstances it may be appropriate for a monitor to serve as a complainant. This was one such case. There was a *prima facie* case that merited an oppression action. The monitor commenced the action as an adjunct to its role in facilitating a restructuring. The monitor could efficiently advance an oppression claim on behalf of a conglomeration of stakeholders -- Algoma's pensioners, retirees, employees and trade creditors -- who were not organized as a group

and who were all similarly affected by the alleged oppressive conduct. The remedy granted by the trial judge removed an insurmountable barrier to a successful restructuring.

The trial judge did not err in finding that the action was properly brought as an oppression action under s. 241 of the *CBCA* rather than as a derivative action under s. 239 of the *CBCA*. The derivative action and the oppression remedy are not mutually exclusive, and there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This case fell into that overlapping category.

The trial judge correctly identified the two prongs of the oppression remedy inquiry: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling with the term "oppression"? On the evidence, he was entitled to find that the port transaction, and in particular the transfer of control and the loss of Algoma's ability to restructure absent Essar's consent, violated the reasonable expectations of Algoma's stakeholders.

In light of the fact that Algoma's board of directors was not independent and did not actually exercise business judgment, the business judgment rule did not provide a defence to Essar.

The remedy granted by the trial judge was appropriate.

BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560, [2008] S.C.J. No. 37, 2008 SCC 69, 52 B.L.R. (4th) 1, EYB 2008-151755, J.E. 2009-43, 301 D.L.R. (4th) 80, 71 C.P.R. (4th) 303, 383 N.R. 119, 172 A.C.W.S. (3d) 915; *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J. (Comm. List)); *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp*. (2003), 68 O.R. (3d) 544, [2003] O.J. No. 5242, 180 O.A.C. 158, 42 B.L.R. (3d) 14, 46 C.B.R. (4th) 313, 127 A.C.W.S. (3d) 830 (C.A.); *Rea v. Wildeboer* (2015), 126 O.R. (3d) 178, 2015 ONCA 373, **consd**

Other cases referred to

Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 80 D.L.R. (4th) 161, 45 O.A.C. 320, 1 B.L.R. (2d) 225, 26 A.C.W.S. (3d) 1261 (C.A.); *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, 2011 D.T.C. 5006, 409 N.R. 201, 296 B.C.A.C. 1, 12 B.C.L.R. (5th) 1, 326 D.L.R. (4th) 577, EYB 2010-183759, 2011EXP-9, J.E. 2011-5, 2011 G.T.C. 2006, [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, [2010] G.S.T.C. 186, 196 A.C.W.S. (3d) 27; [page3 <]i>Chiang (Trustee of) v. Chiang (2009), 93 O.R. (3d) 483, [2009] O.J. No. 41, 2009 ONCA 3, 78 C.P.C. (6th) 110, 305 D.L.R. (4th) 655, 49 C.B.R. (5th) 1, 257 O.A.C. 64, 174 A.C.W.S. (3d) 105; *CW Shareholdings Inc. v. WIC Western International Communications Ltd*. (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131, 61 O.T.C. 81, 38 B.L.R. (2d) 196, 79 A.C.W.S. (3d) 518 (Gen. Div. (Comm. List)); *Essar Steel Algoma Inc. (Re)*, [2017] O.J. No. 4258, 2017 ONSC 3930, 53 C.B.R. (6th) 321 (S.C.J.); *Fedel v. Tan* (2010), 101 O.R. (3d) 481, [2010] O.J. No. 2839, 2010 ONCA 473, 264 O.A.C. 144, 83 C.C.E.L. (3d) 60, 70 B.L.R. (4th) 157, 191 A.C.W.S. (3d) 125; *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27, 12 B.L.R. (4th) 189, 144 A.C.W.S. (3d) 859 (C.A.); *Hamilton v. Open Window Bakery Ltd*., [2004] 1 S.C.R. 303, [2003] S.C.J. No. 72, 2004 SCC 9, 235 D.L.R. (4th) 193, 316 N.R. 265, J.E. 2004-470, 184 O.A.C. 209, 40 B.L.R. (3d) 1, [2004] CLLC Â210-025, 128 A.C.W.S. (3d) 1111; *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108, [2006] O.J. No. 4152, 275 D.L.R. (4th) 132, 26 B.L.R. (4th) 43, 25 C.B.R. (5th) 176, 56 C.C.P.B. 1, 151 A.C.W.S. (3d) 1004 (C.A.); *J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2008] O.J. No. 958, 2008 ONCA 183, 234 O.A.C. 59, 41 B.L.R. (4th) 51, 67 R.P.R. (4th) 1, 164 A.C.W.S. (3d) 788; *Malata Group (HK) Ltd. v. Jung* (2008), 89 O.R. (3d) 36, [2008] O.J. No. 519, 2008 ONCA 111, 233 O.A.C. 199, 290 D.L.R. (4th) 343, 44 B.L.R. (4th) 177, 164 A.C.W.S. (3d) 94; *Naneff v. Con-Crete Holdings Ltd*. (1995), 23 O.R. (3d) 481, [1995] O.J. No. 1377, 85 O.A.C. 29, 23 B.L.R. (2d) 286, 55 A.C.W.S. (3d) 86 (C.A.); *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1210, 29 B.C.L.R. (2d) 257, 69 C.B.R. (N.S.) 266, 73 C.B.R. (N.S.) 146, 11 A.C.W.S. (3d) 76 (S.C.); *Pente Investment Management Ltd. v. Schneider Corp*. (1998), 42 O.R. (3d) 177, [1998] O.J. No. 4142, 113 O.A.C. 253, 44 B.L.R. (2d) 115, 83 A.C.W.S. (3d) 51 (C.A.); *Philip's*

Manufacturing Ltd. (Re), [1992] B.C.J. No. 1163, 67 B.C.L.R. (2d) 385, 12 C.B.R. (3d) 145, 33 A.C.W.S. (3d) 838 (C.A.); *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, 106 D.L.R. (3d) 212, 30 N.R. 181, 50 C.C.C. (2d) 193, 14 C.R. (3d) 22, 17 C.R. (3d) 34, 4 W.C.B. 171; *Reference re: Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.R. 659, [1934] S.C.J. No. 46, [1934] 4 D.L.R. 75, 16 C.B.R. 1; *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276, 111 D.L.R. (4th) 19, 69 O.A.C. 312, 25 C.P.C. (3d) 61, 2 R.F.L. (4th) 232, 45 A.C.W.S. (3d) 1101 (C.A.); *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, 301 O.A.C. 1, 96 C.B.R. (5th) 171, 8 B.L.R. (5th) 1, 354 D.L.R. (4th) 581, 2013EXP-356, 2013EXPT-246, J.E. 2013-185, D.T.E. 2013T-97, EYB 2013-217414, 439 N.R. 235, 20 P.P.S.A.C. (3d) 1, 223 A.C.W.S. (3d) 1049, 2 C.C.P.B. (2d) 1; *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2004] O.J. No. 636, 250 D.L.R. (4th) 526, 183 O.A.C. 310, 42 B.L.R. (3d) 34, 32 C.C.E.L. (3d) 68, 40 C.C.P.B. 114, 137 A.C.W.S. (3d) 742 (C.A.), affg [2002] O.J. No. 2412, 214 D.L.R. (4th) 496, 27 B.L.R. (3d) 53, 19 C.C.E.L. (3d) 203, 32 C.C.P.B. 120, 115 A.C.W.S. (3d) 981 (S.C.J.) (Comm. List); *U.S. Steel Canada Inc. (Re)*, [2016] O.J. No. 4688, 2016 ONCA 662, 39 C.B.R. (6th) 173, 402 D.L.R. (4th) 450, 61 B.L.R. (5th) 1, 270 A.C.W.S. (3d) 471; *Woodward's Ltd. (Re)*, [1993] B.C.J. No. 79, 100 D.L.R. (4th) 133, 77 B.C.L.R. (2d) 332, 37 A.C.W.S. (3d) 1041 (S.C.)

Statutes referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 13 [as am.]

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 192 [as am.], 238, (*d*), 239 [as am.], 241 [as am.], (3) [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 11.7(1) [as am.], 23 [as am.], (1) (*c*) [as am.], (*k*) [page4]

Authorities referred to

Ben-Ishai, Stephanie, and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009)

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

Kent, A.J.F., and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008)

Mann, David, and Neil Narfason, "The Changing Role of the Monitor" (2008), 24 Bank. & Fin. L. Rev. 131

Peterson, Dennis H., and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2009)

Sarra, Janis P., "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010)

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

Wood, Roderick J., *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015)

APPEAL from the judgment of Newbould J. (2017), 137 O.R. (3d) 438, [2017] O.J. No. 1377, 2017 ONSC 1366 (S.C.J.) for the plaintiff in an action for an oppression remedy; and from the costs order, [2017] O.J. No. 4248, 2017 ONSC 4017, 50 C.B.R. (6th) 148 (S.C.J.).

Patricia D.S. Jackson, *Andrew D. Gray*, *Jeremy Opolsky*, *Alexandra Shelley* and *Davida Shiff*, for appellants Essar Global Fund Limited, New Trinity Coal, Inc., Essar Ports Algoma Holding Inc., Essar Ports Canada Holding Inc., Algoma Port Holding Company Inc., Port of Algoma Inc., and Essar Steel Limited.

Clifton P. Prophet, *Nicholas Kluge* and *Delna Contractor*, for respondent Ernst & Young Inc. in its capacity as monitor of Essar Steel Algoma Inc. et al.

Eliot N. Kolers and *Patrick Corney*, for respondent Essar Steel Algoma Inc.

Peter H. Griffin, *Monique Jilesen* and *Kim Nusbaum*, for appellants GIP Primus, L.P. and Brightwood Loan Services LLC.

The judgment of the court was delivered by

[1] **PEPALL J.A.**: — This appeal concerns a successful oppression action brought pursuant to s. 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"). It involves the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") restructuring proceedings of the respondent Essar [page5 S]teel Algoma Inc. ("Algoma"),[1] one of Canada's largest integrated steel mills, and the respondent Ernst & Young Inc., the court-appointed monitor.

[2] The supervising *CCAA* judge authorized the monitor to commence an action for oppression against Algoma's parent, the appellant Essar Global Fund Limited ("Essar Global"), and the remaining appellants, other companies owned directly or indirectly by Essar Global (the "Essar Group"). The action arose in the context of a recapitalization of Algoma and a transaction between Algoma and Port of Algoma Inc. ("Portco"), two companies indirectly owned by Essar Global, in which Algoma's port facilities in Sault Ste. Marie (the "port") were conveyed to Portco.

[3] Portco is a single-purpose company established by Essar Global. As Portco's name suggests, it currently controls the Sault Ste. Marie port. Portco obtained control in November 2014 in a transaction between Algoma, Portco and Essar Global (the "port transaction"). The port transaction effectively provided Portco with the ability to veto any change in control of Algoma's business. The intervenors below and appellants on appeal, GIP Primus, L.P. and Brightwood Loan Services LLC (collectively, "GIP"), are arm's-length lenders who loaned Portco US$150 million to effect the transaction.

[4] The trial judge found the port transaction and other conduct of Essar Global to be oppressive and granted a remedy that was designed to address that oppression. Essar Global and some of the members of the Essar Group, together with GIP, appeal from that judgment. The appellants advance a number of arguments, many of them factual, in support of their appeal. The appellants' two principal legal submissions are, first, that the monitor lacked standing to bring an oppression claim; and second, that the alleged harm was to Algoma and that therefore the appropriate redress was a derivative action.

[5] For the reasons that follow, I would dismiss the appeal.

A. *Facts*

(1) *Algoma's operations*

[6] The City of Sault Ste. Marie sits on the shore of St. Mary's River, a waterway that links Lake Superior to Lake [page6 H]uron at the heart of the Great Lakes, close to the Canada/U.S. border. The steel production operations that are owned by Algoma have been the primary employer and economic engine of the city since construction of the steel mill in 1901. Not surprisingly, the city's port, which is situated next to Algoma's buildings and facilities, is integral to the steel operations. Indeed, Algoma is the port's primary customer and its employees have traditionally run the port operations. Raw materials used to produce steel are shipped to the port and the steel that is produced is shipped to market from the port. The relationship is one of mutual dependence.

[7] Unfortunately, Algoma was in and out of *CCAA* protection proceedings both in 1991 and in 2001. In late 2013, Algoma faced another liquidity crisis and restructured under the *CBCA* in 2014. The recent *CCAA* filing occurred on November 9, 2015.

(2) *The Essar Group*

[8] Essar Global is a Cayman Islands limited liability company and the ultimate parent of the respondent Algoma, which it acquired through its subsidiaries in 2007. Essar Global is also the parent of the appellants Portco, Essar Power Canada Ltd., New Trinity Coal Inc., Essar Ports Algoma Holding Inc., Algoma Port Holding Company Inc. and Essar Steel Limited. Its investments are managed by Essar Capital Limited ("Essar Capital"), which is based in London, England. These companies are part of the Essar Group, a multinational conglomerate that was founded in India by two brothers, Sashi and Ravi Ruia. Members of the Ruia family are the beneficial owners of the Essar Group.

(3) *Algoma's recapitalization*

[9] In late 2013, Algoma was facing a liquidity crisis. Algoma anticipated being unable to meet a coupon payment due to unsecured bondholders in June 2014, and its US$346 million term loan was to mature in September 2014. Although Essar Global had been injecting substantial funds into Algoma, it was hesitant to advance further cash to Algoma. Algoma decided to consider mechanisms to restructure and reduce its debt and therefore embarked on a recapitalization project.

[10] At the time of the discussions relating to the recapitalization, Algoma's board of directors consisted of five appointees affiliated with the Ruia family or the Essar Group, and three independent directors. In early January 2014, the board of directors placed responsibility for Algoma's recapitalization efforts in the hands of Essar Global and Essar Capital employees. [page7 A]lgoma personnel had no day-to-day control over the recapitalization project.

[11] Although the three independent directors had begun expressing concerns about their roles on the board as early as the fall of 2013, in the face of Algoma's serious financial challenges, their concerns became more acute. Specifically, they were concerned that their requests for timely, full disclosure of information and full participation in the strategic decisions of the board had not been properly taken into account by the other board members. On January 19, 2014, the three sent a memo to the board proposing the establishment of an independent committee to work with outside financial advisors to evaluate options and alternatives for Algoma's recapitalization. The board held a meeting on February 11, 2014, and rejected this proposal by a vote of four to three, the three being the independent directors. In response, one of the three independent directors resigned. The other two initially remained on the board.

[12] On February 17, 2014, one of the remaining independent directors, Thomas Dodds, wrote to Prashant Ruia seeking a meeting. Prashant Ruia was then the vice-chair of Algoma's board, the son of one of the founders of Essar Group, and a director of Essar Capital. Mr. Dodds wrote:

> If your expectation of [the Algoma] Board is to simply be a formality and our role as independent directors is to essentially "rubberstamp" shareholder and management decisions, we are not prepared to continue serving as directors.
>
> As you know, Directors and particularly independent directors have a legal, fiduciary responsibility to all the stakeholders of the Company starting with the Company first, followed by the shareholders, employees, community and others. This Director responsibility may on occasion conflict with the objectives of the shareholder who may, understandably, be more interested in matters of import to themselves. Most of the time there will be no conflict between the responsibilities of the Directors, objectives of the shareholder and that of the Company stakeholders as broadly defined. However, there are other occasions when they do.
> What we as independent directors have experienced in the last few Board meetings is a complete disregard for any discussion or wholesome debate on alternatives to re-financing or contingency planning at [Algoma].

. . . . .

> In addition when we ask questions, or propose alternatives, we are asked to wait a while for additional information and told that everything will work out.
> We cannot discharge our responsibilities under such an environment. [page8]

[13] The two remaining independent directors resigned on February 21 and May 5, 2014, respectively. In his resignation letter, Mr. Dodds explained his rationale, stating:

> I lacked confidence that I was receiving information and engaged in decision-making in the same manner as those Board members who are directly affiliated with the company or its parent.

[14] The trial judge found, at para. 15 of his reasons, that the four directors who voted against the independent committee were "Essar-affiliated directors", that it was clear that the Ruia family did not want an independent committee, and that the Essar-affiliated directors voted accordingly.

[15] The trial judge also found that the recapitalization and the port transaction were run by Joe Seifert, chief investment officer of Essar Capital. The trial judge rejected the contention that Mr. Seifert was merely an advisor to the board that independently made all of the critical decisions. Rather, Essar Global and Essar Capital, led by Mr. Seifert, directed and made decisions relating to the recapitalization and the port transaction. As the trial judge noted, at para. 49, the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

(4) *Restructuring support agreement*

[16] Essar Global engaged Barclays Capital, an investment bank, to pursue alternative financing structures for Algoma on behalf of Essar Global. Barclays introduced GIP to Mr. Seifert of Essar Capital. In May 2014, representatives of Essar Global, GIP, and Barclays met to discuss Algoma's infrastructure assets and potential asset disposition transactions. They discussed the possibility of a transaction in which Algoma might sell its port assets to a new corporate entity to generate cash proceeds, but not for the purpose of recapitalizing Algoma. Rather, the proceeds would flow upstream to Essar Global. In light of Algoma's prior insolvencies, GIP thought it important that a separate corporate entity distinct from Algoma be established to hold the port assets. By the end of June 2014, Algoma had an exclusivity agreement with GIP regarding GIP's loan to finance the port transaction.

[17] Soon after entering into the exclusivity agreement with GIP, on July 24, 2014, Algoma entered into a restructuring support agreement (the "RSA") with Essar Global and an ad hoc committee of Algoma's unsecured noteholders. The RSA set out the principal terms of a restructuring. It provided for a reduction of Algoma's debt through the exchange of the unsecured notes in [page9 r]eturn for the payment of a percentage of their original principal amount and the issuance of new notes. The note restructuring would be implemented through a court-approved *CBCA* plan of arrangement. As a condition of the RSA and pursuant to an equity commitment letter dated July 23, 2014, Essar Global agreed to acquire equity in Algoma for cash in the minimum amount of US$250 million and subject to a maximum of US$300 million. The trial judge found that Essar Global never intended to honour this obligation.

[18] The equity commitment letter provided a remedy in the event of a breach. The plan of arrangement contained a release of any claim arising out of the equity commitment letter in favour of Essar Global, the noteholders and the other corporations participating in the arrangement.

[19] It was a condition of the proposed plan of arrangement that Essar Global would comply with its RSA obligation to provide the aforementioned cash equity infusion. However, as early as March 28, 2014, representatives of the Ruia family had made it clear that they did not have US$250 million for equity. Efforts were made to reduce Essar Global's contribution. In late July 2014, one of the Ruia representatives wrote that ideally the equity contribution would be kept to US$150 to US$160 million.

[20] Nonetheless, an application for approval of the plan of arrangement was made to the court. The recapitalization contemplated by the RSA was approved as an arrangement under s. 192 of the *CBCA* on September 15, 2014.

[21] Beginning in October 2014, roadshow presentations were made to market the securities being offered through the recapitalization. However, the transaction marketed did not accord with the transaction contemplated by the RSA. First, the roadshow presentation described an Essar Global cash equity contribution in Algoma of less than US$100 million, not the US$250 to US$300 million described in the RSA. Second, the presentation provided for the cash to be generated from the sale of the port by Algoma. The RSA did not allow for such a sale absent the noteholders' consent. No such consent had been obtained. In addition, the proceeds of any sale were to be used to reduce Algoma's debt.

[22] The roadshow was unsuccessful and investors failed to subscribe for the securities marketed. The lead bookrunner attributed this failure to the perception among investors that the transaction described in the roadshow presentation contemplated an insufficient contribution of equity into Algoma by Essar Global. [page10]

[23] And so it was that Algoma was left without the cash to repay or refinance its debt.

[24] Ultimately, the RSA was amended on November 6, 2014, such that Essar Global contributed US$150 million rather than the cash contribution of between US$250 and US$300 million originally contemplated by the equity commitment letter. The amended RSA went on to provide that upon fulfillment of this revised contribution, Essar Global was deemed to have satisfied all of its obligations under the equity commitment letter. The releases contained in the original filing were repeated in the amended plan of arrangement.

[25] As subsequently discussed, in light of the amended RSA, an amended plan of arrangement was approved on November 10, 2014.

(5) *Port transaction*

[26] The port transaction closed on November 14, 2014. In summary, Algoma sold to Portco the port assets consisting of the port buildings, the plant and machinery, but not the land. Algoma leased the realty to Portco for a term of 50 years. Portco agreed to provide port cargo handling services in return for a monthly payment from Algoma to Portco. Algoma agreed to provide to Portco the services necessary to operate the port in return for a monthly payment from Portco that would be less than the monthly payment paid by Algoma to Portco for cargo handling services.

[27] Turning to the details of the port transaction, Algoma and Portco entered into a master sale and purchase agreement ("MSPA"). Under the MSPA:

(i) Algoma conveyed to Portco all of the fixed assets owned and used by Algoma in relation to the Port, and agreed to lease the realty to Portco;

(ii) Portco agreed to pay Algoma US$171.5 million to be satisfied by:

-- a cash payment by Portco of US$151.66 million; and

-- the issuance of an unsecured promissory note in the amount of US$19.84 million payable in full on November 13, 2015.

[28] To fund these obligations, Portco obtained a US$150 million term loan from GIP. GIP Primus, L.P. lent US$125 million, while Brightwood Loan Services LLC lent US$25 million. This term loan was secured by all of Portco's current and future real and personal property and supported by two guarantees in favour of GIP: one from Essar Global, and another from Algoma Port Holding Company Inc., Portco's direct parent. [page11]

[29] Pursuant to the MSPA, Algoma and Portco executed five additional documents: a promissory note, a lease, a shared services agreement, an assignment of material contracts agreement and a cargo handling agreement.

(i) *Promissory note*

[30] The promissory note was for US$19.84 million payable by Portco to Algoma. Portco immediately assigned its obligations under the promissory note to Essar Global. Essar Global therefore became the obligor under the note and Algoma released Portco from its obligation. As of the date of the trial, the promissory note remained unpaid. At para. 27 of a subsequent decision released on June 26, 2017, the trial judge granted a declaration that any amounts owing to Algoma under the promissory note given by Portco to Algoma have been set off against amounts owing by Algoma to Portco under the cargo handling agreement: *Essar Steel Algoma Inc. (Re)*, [2017] O.J. No. 4258, 2017 ONSC 3930, 53 C.B.R. (6th) 321 (S.C.J.). The decision allows for set-off against Portco, but preserves GIP's right to repayment.

(ii) *Lease*

[31] Under the lease, Portco leased from Algoma the port lands, roads and outdoor storage space for a 50-year term. Portco prepaid Algoma the rent for the entire 50-year period. The present value of this leasehold interest was stated to be US$154.8 million. Algoma maintained responsibility for all maintenance, repairs, insurance and property taxes.

(iii) *Shared services agreement*

[32] Under the shared services agreement, Algoma was to be responsible for providing all the services necessary for Portco to fulfill its obligations under the cargo handling agreement. These services were to be provided by Algoma employees, not Portco employees. Portco agreed to pay Algoma US$11 million annually subject to escalation at the rate of 3 per cent per annum beginning in 2016.

(iv) *Assignment of material contracts*

[33] Under the assignment of material contracts agreement, Algoma provided a covenant in favour of GIP, which precluded Algoma from selling or assigning any material contract relating to the port, including the cargo handling agreement except by way of security granted to its other third party lender. [page12]

(v) *Cargo handling agreement*

[34] Under the cargo handling agreement, Portco agreed to provide Algoma with cargo handling services for an initial 20-year term with automatic renewal for successive three-year periods unless either party gave written notice of termination to the other. Algoma agreed to pay Portco based on tonnage with a minimum monthly assured volume of US$3 million. In other words, Algoma was obliged to pay a minimum of US$36 million annually to Portco for 20 years subject to an escalation in price of 1 per cent per annum commencing in 2016. Therefore, while Algoma was entitled to US$11 million annually under the shared services agreement, it had to pay Portco at least US$36 million annually under the cargo handling agreement, such that Portco would receive an annual revenue stream from Algoma of US$25 million. This amount was intended to service GIP's term loan at US$25 million a year. However, GIP's loan had a term of eight years, and therefore Portco would have the full benefit of the US$25 million for at least 12 years of the initial 20-year term of the cargo handling agreement, and potentially for 42 years if the agreement was not terminated.

[35] Section 15.2 of the cargo handling agreement also contained a change of control clause that stated that the "Agreement may not be assigned by either Party without the prior written consent of the other Party." This provision became particularly contentious because it effectively gave Portco -- and therefore Portco's parent, Essar Global -- a veto over any party acquiring Algoma in the *CCAA* proceedings.

[36] Although inclusion of the change of control provision in the cargo handling agreement was driven by GIP, the trial judge found that it was effectively for the benefit of Essar Global, as it gave Portco a veto. Furthermore, the trial judge noted, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit, by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[37] In discussing the financial ramifications of the shared services agreement and the cargo handling agreement, the trial judge observed, at para. 26 of his reasons:

> When the costs of operating the Port (shared services) are netted from the cargo handling charges, the result is that Algoma will pay approximately $25 million per year to Portco, which is the amount required by Portco to service the Term Loan each year. That amount of $25 million for 20 years comes to $500 million, far more than the amount needed to repay the $150 million GIP loan. [page13]

[38] Duff & Phelps assessed the fair value of the Portco transaction as ranging between US$150.9 million and US$174.2 million with a midpoint of US$161.7 million. However, this assessment failed to take into account the change of control provision in the cargo handling agreement. Deloitte LLP reviewed Duff & Phelps' assessment and concluded it was reasonable.[2]

(6) *Final recapitalization*

[39] Ultimately, the recapitalization of Algoma consisted of the following transactions:

(a) Algoma issued US$375 million in senior secured notes pursuant to an offering memorandum;

(b) Algoma entered into a new US$50 million senior secured asset-based revolving credit facility and a new US$375 million term loan;

(c) Algoma's unsecured noteholders were paid a portion of their principal and were issued new junior secured notes;

(d) Algoma completed the port transaction;

(e) Essar Global contributed US$150 million in cash in exchange for common equity, and also contributed US$150 million in debt forgiveness; and

(f) All other Algoma lenders were repaid in full.

[40] In addition, GIP entered into a secured term loan for US$150 million with Portco, secured by a GSA over all of Portco's assets. It also received guarantees -- one from Essar Global and one from Algoma Port Holding Company Inc. -- guaranteeing Portco's liabilities. In November 2014, the transactions in furtherance of Algoma's recapitalization, including the port transaction, were approved unanimously by Algoma's board of directors after receiving advice and on the recommendation of Algoma's management. By this time, the board consisted of four directors: Mr. Kishore Mirchandani, who became a director on June 23, 2014; Mr. Naresh Kothari, who became a director on [page14]August 24, 2014; the board's chair, Mr. Jatinder Mehra of Essar Global; and Algoma's CEO, Mr. Kalyan Ghosh. Mr. Ghosh and Mr. Rajat Marwah, Algoma's CFO, both testified that they supported the port transaction not because it was ideal, but because there was no other option given Essar Global's failure to capitalize Algoma as it had committed to do.

[41] As mentioned, the approved plan of arrangement that included the original RSA had to be amended in light of the revised equity contribution. A *CBCA* plan of arrangement incorporating the recapitalization and authorizing the amendment of the September 2014 approval order was granted by Morawetz J. on November 10, 2014.

[42] Based on the materials before this court, it would appear that the port transaction was not mentioned or brought to Morawetz J.'s attention. In this regard, the trial judge found that there was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement. The port transaction is not mentioned in that order or in any endorsement.

[43] The outcome of the port transaction was that all port assets were transferred from Algoma to Portco, the port lands were leased to Portco for 50 years, and Portco obtained change of control rights. Portco paid Algoma US$151,660,501.50 in cash, provided the US$19,840,000 promissory note and was obliged to pay Algoma US$11 million per annum under the shared services agreement. In turn, Algoma was obliged to pay Portco US$36 million per annum for an initial term of 20 years under the cargo handling agreement, subject to renewal, netting Portco US$25 million per annum as against the shared services agreement payments. Meanwhile, under the revised RSA, Essar Global contributed cash of US$150 million to Algoma rather than the original cash commitment of US$250 to US$300 million.

(7) *Insolvency protection proceedings*

[44] On November 9, 2015, Newbould J. granted an order placing Algoma, Essar Tech Algoma Inc., Algoma Holdings B.V., Essar Steel Algoma (Alberta) ULC, Cannelton Iron Ore Company, and Essar Steel Algoma Inc. USA (the "*CCAA* applicants") under *CCAA* protection. As mentioned, he appointed Ernst & Young Inc. as the monitor. The order contained various paragraphs addressing the rights and obligations of the monitor, including a direction to perform such duties as were required by the court. On November 20, 2015, Morawetz J. granted an amended and restated initial order that, among other [page15]things, directed the monitor to review and report to the court on any related party transactions (expressly including the port transaction).

[45] During the *CCAA* proceedings, on February 10, 2016, a sales and investment solicitation process ("SISP") for Algoma's business and property was approved by the court. Essar North America, a subsidiary of Essar Global, submitted a bid but was disqualified in April 2016 under the terms of the SISP because it failed to provide sufficient evidence of financial ability to purchase. In May and July of 2016, Essar Global persisted in its efforts to be the purchaser of the *CCAA* applicants. On May 10, 2016, counsel to Portco, who was also counsel to Essar Global, wrote to counsel for Algoma to highlight matters of particular concern in connection with the *CCAA* process. The letter stated that any prospective bidder was to be told of the consent or veto right:

> Portco and [Algoma] are party to a Cargo Handling Agreement pursuant to which [Algoma] has committed to long-term use of the port. Portco, has, of course, a keen interest in any successor to [Algoma] as counterparty to that agreement and would like it to be clear to prospective bidders that, pursuant to the terms of the Cargo Handling Agreement, Portco has a consent right in the event of any assignment by [Algoma] of the agreement or a change of control of [Algoma].
> Again please confirm that this has been made clear to prospective bidders.

[46] On June 20, 2016, the monitor filed its thirteenth report, which described the Portco transaction and indicated that there may be grounds for further review of that transaction. The monitor noted that the renegotiated equity commitment resulted in Essar Global contributing the sum of US$150 million in equity rather than US$250 to US$300 million, and that the Portco transaction transferred control of one of Algoma's most critical assets, the Port, to Essar Global. The Monitor stated that it remained "particularly concerned about the effect on the completion of a restructuring transaction of the restrictions on assignment in the Portco Transaction documents".

[47] On September 26, 2016, Deutsche Bank AG, who led the debtor-in-possession ("DIP") lenders of Algoma and also represented the interests of potential bidders in the *CCAA* process, applied for an order empowering the monitor to commence certain proceedings and make certain investigations.[3] On September 26, 2016, Newbould J. granted an order authorizing the [page16]monitor to commence and continue proceedings under s. 241 of the *CBCA* in relation to related party transactions, including but not limited to the port transaction.

[48] The action proceeded on an accelerated timetable due to the progress of the *CCAA* restructuring.[4] On October 20, 2016, the monitor commenced proceedings claiming oppression pursuant to s. 241 of the *CBCA* against Essar Global and others in the Essar Group including Portco. It pleaded that by reason of its role as a court officer directed to commence the oppression proceedings and to oversee the interests of all stakeholders of Algoma, it was a complainant within the meaning of ss. 238 and 241 of the *CBCA*.

[49] It alleged that since June 2007, the Essar Group had exercised *de facto* control over Algoma and had engaged in a course of conduct that consistently preferred the interests of the Essar Group and, in particular, Essar

Global, to those of Algoma and its stakeholders. This included the transfer to the Essar Group of long-term control over, and a valuable equity interest in, Algoma's port facilities, an irreplaceable and core strategic asset of Algoma. The value of control over the port to Algoma and its stakeholders was immeasurable, since Algoma's business could not function without access to the port.

[50] The monitor pointed out that the Essar Group obtained its control and equity interest in the port through a cash contribution of less than US$4.7 million. It pleaded that the US$150 million raised as part of the port transaction came from third party lenders, namely, GIP, and was money raised against the security and value of the port facilities, an asset of Algoma, as well as a promissory note that remained unpaid, and a guarantee from Essar Global. The monitor also stressed that the control obtained by the Essar Group was not only over the port facilities, but extended to any sale of the Algoma business such that Essar Global had an indirect veto on transactions involving Algoma's enterprise. Essar Global also obtained a right to substantial payments under the cargo handling agreement.

[51] The oppression occasioned was exacerbated by the fact that the borrowed moneys raised through the transaction were a substitution for moneys Essar Global had promised to contribute as equity in Algoma.

[52] The monitor also argued that s. 15.2 of the cargo handling agreement itself constituted oppression, because it was for the [page17]long-term benefit of Essar Global and not in the interests of Algoma's non-shareholder stakeholders. The monitor took the position that the provision gave Portco and Essar Global a veto over any party acquiring Algoma in the *CCAA* process, thus negatively affecting the sales process. The monitor also argued that the change of control provision was not necessary for the protection of GIP because it had its own change of control rights under its credit agreement.

[53] In addition, the monitor pleaded that the oppression and prejudice to creditors was continuing as Essar Global and other related companies had insisted that bidders for Algoma's business under the SISP, which was approved by the court on February 11, 2016, be advised of Portco's consent rights under the change of control clause in the cargo handling agreement.

[54] Essar Global and the remaining defendants filed their defence rejecting the monitor's allegations, describing the action as "an improper and ill-conceived leverage tactic". They asserted that the litigation was an attempt to attack the port transaction for the benefit of other bidders under the sales process, including the DIP lenders. They pleaded that the monitor had no standing, the claim was improperly pleaded, an oppression remedy seeking to unwind or claim damages in respect of the port transaction was unavailable at law, and in any event there was no oppression, prejudice or unfairness.

[55] Portco's lenders, GIP, were granted intervenor status as parties on December 22, 2016. They noted that they were *bona fide*, arm's-length and independent commercial parties and no cause of action or wrongful conduct was asserted by the monitor against them. Nonetheless, the monitor was seeking remedies that eviscerated the security held by them. They asserted that the monitor did not have standing and could not establish any oppressive conduct in any event. Moreover, the structure of the port transaction was transparent to all of Algoma's stakeholders. Lastly, even if the court granted a remedy to the monitor, it had no jurisdiction to prejudice the interests of GIP. The monitor subsequently amended its statement of claim to modify the language on the relief claimed relating to the indebtedness and security interests in favour of GIP.

[56] Various procedural motions were brought. Others who are not before this court intervened: Deutsche Bank AG; the ad hoc committee of Algoma's noteholders; Algoma retirees; and two locals from the union United Steelworkers, Locals 2724 and 2251. The Essar Group and GIP brought motions to strike on the basis that the monitor lacked standing and later also sought an order for particulars. On December 1, 2016, Newbould J. ordered that [page18]the standing motions be dealt with at the trial scheduled for January 30, 2017. On January 5, 2017, he urged the monitor to give as many particulars as it could regarding the relief it might seek.

[57] On January 30, 2017, Essar Capital served a motion for an order re-opening the SISP and to make information available to Essar Global to allow it to consider submitting a bid. Newbould J. dismissed the request. At para. 114 of his reasons, the trial judge found that Essar Global was still interested in purchasing the assets of Algoma.

[58] The action proceeded to a five-day trial before Newbould J. commencing on January 31, 2017.

B. *Trial Judgment*

[59] The trial judge organized his reasons for decision under six principal headings: the monitor's standing; who directed the recapitalization and the port transaction; reasonable expectations and were they violated; the business judgment rule; and the appropriate remedy. I will summarize his conclusions on each issue.

(1) *Monitor's standing*

[60] As mentioned, both Essar Global and GIP challenged the monitor's standing as a complainant under the oppression provisions of the *CBCA*. They also argued that only persons directly damaged by the oppressive conduct could bring the action and that this action was in substance a derivative claim by Algoma. The trial judge rejected these arguments.

[61] He found that the stakeholders harmed were Algoma's trade creditors, pensioners, retirees and employees. At para. 32, he noted that Algoma owed CDN$911.9 million as of the date of the port transaction to a group of creditors including trade creditors, pensioners, retirees and the City of St. Sault Marie.

[62] The trial judge acknowledged, at para. 34, that normally a monitor, who is a court officer, is to be neutral and not take sides. However, there are exceptions. Under s. 23(1) (*k*) of the *CCAA*, a monitor must carry out any function in relation to the debtor that the court may direct. At para. 35, the trial judge also pointed to the *CCAA* proceedings of Nortel Networks Corp. as a precedent: *Nortel Networks Corp. (Re)* (October 3, 2012), Toronto, 09-CL-7950 (Ont. S.C.J. (Commercial List)). In those proceedings, a monitor was authorized to act as a litigant after all of Nortel's directors and senior executives had resigned.

[63] Moreover, the trial judge observed that determining whether someone is a complainant under s. 238 of the *CBCA* is [page19]a discretionary decision. In *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.* *(2003), 68 O.R. (3d) 544*, *[2003] O.J. No. 5242* (C.A.), this court confirmed that a trustee in bankruptcy acting on behalf of the creditors of a bankrupt estate could be a complainant within the meaning of s. 238. In so doing, the court noted the need for flexibility to ensure that the remedial purpose of the oppression provisions is achieved. The trial judge saw no reason why the principle of collective action -- which posits that it is more efficient for creditors to pursue their claims in a bankruptcy collectively with a trustee acting as their representative rather than individually -- should not be followed in the present *CCAA* proceeding. At para. 37, he concluded that the monitor had taken the action as an adjunct to its role in facilitating a restructuring and was therefore a proper complainant.

[64] To respond to Essar Global and GIP's arguments that the claim was properly a derivative action and that no person had been personally harmed beyond Algoma, at para. 39 the trial judge relied on *Rea v. Wildeboer* *(2015), 126 O.R. (3d) 178*, *2015 ONCA 373*, at para. 27. There, Blair J.A. commented that the derivative action and the oppression remedy are not mutually exclusive. Although on the facts of *Wildeboer*, Blair J.A. had struck out a statement of claim pleading the oppression remedy, the trial judge distinguished *Wildeboer* on the basis that the relief sought was for the benefit of the corporation and there was no allegation that individualized personal interests were affected by the alleged wrongful conduct.

(2) *Essar Global directed the recapitalization and the Portco transaction*

[65] The trial judge observed that in some respects, it did not matter who made the decisions regarding the recapitalization and the port transaction -- if the conduct was oppressive, relief could be granted. Nonetheless, he found, at para. 49, that the evidence was "overwhelming" that Essar Global and Essar Capital were "calling the shots".

[66] At para. 52, he accepted the evidence of Mr. Ghosh and Mr. Marwah that they did not negotiate the economic terms of the refinancing or the port transaction. Nor was either involved in the renegotiation of the RSA.

[67] The trial judge relied on other evidence, including Algoma's annual business plan dated February 3, 2014, to support his factual findings. He also considered evidence of the witnesses. He found, at paras. 56-57, that some of the witnesses had been evasive, including Rewant Ruia, the Ruia family's [page20]lead in the Essar Group's North American operations; Mr. Seifert; and Rajiv Saxena, the executive director of Essar Steel India Ltd.

[68] After reviewing the evidence, the trial judge noted, at para. 58, that he was satisfied that Mr. Seifert, who represented the Essar Group's interests, had primary responsibility for pursuing the recapitalization negotiations and Algoma's refinancing via the port transaction. He concluded, at para. 60:

> I am satisfied that representatives of Essar Global including Essar Capital carried out the Recapitalization and Portco Transaction negotiations and made the critical decisions. Algoma management were handed the economic terms of the Recapitalization and Port Transaction and implemented them from an operational perspective. Algoma management did not negotiate the terms. Their role was to support the negotiations with regard to non-economic, primarily operational, issues.

(3) *Reasonable expectations and their violation*

[69] The trial judge identified the two-step process to determine whether a violation of reasonable expectations has occurred under s. 241 of the *CBCA*, which is described at para. 68 of *BCE Inc. v. 1976 Debentureholders*, *[2008] 3 S.C.R. 560*, *[2008] S.C.J. No. 37*, *2008 SCC 69*: (i) does the evidence support the reasonable expectation asserted by the complainant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct that is oppressive, unfairly prejudicial or unfairly disregards a relevant interest?

[70] He described the reasonable expectations asserted by the monitor as relating to the loss by Algoma of a critical asset and the change of control clause in the cargo handling agreement. He stated, at para. 64:

> The monitor contends that the reasonable expectations of the creditors of Algoma, including the trade creditors, employees, pensioners and retirees, were that Algoma would not deal with its core assets like the Port in such a way as it would lose long-term control and value over those assets to a related party on terms that permitted the related party to veto or thwart Algoma's ability to do significant transactions or restructure, as was done in this case.

[71] At para. 67, the trial judge did not accept that the expectations of creditors such as the employees, pensioners, and retirees were governed only by their agreements with Algoma. Furthermore, the evidence, including the inferences drawn from the circumstances that existed at Algoma in 2014, supported the expectations relied upon by the monitor. He noted, at para. 73, that stakeholders have a reasonable expectation of fair treatment and this was particularly so in Sault Ste. Marie, where Algoma is of critical importance to the local economy and relied upon greatly by trade creditors and employees. [page21]

> [72] He concluded, at para. 75, that
> the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[73] The trial judge held that the reasonable expectations of the trade creditors, employees, pensioners and retirees were violated in two principal ways: first, the port transaction itself; and second, the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[74] The port transaction was caused by Essar Global's breach of both the RSA and the equity commitment letter. Because the lease of the land from Algoma to Portco was for 50 years and Essar Global was in a position to terminate the cargo handling agreement after 20 years, Algoma would be at Essar Global's mercy for the duration of these agreements. The trial judge found, at para. 78, that the transfer of the port assets to Portco was driven by GIP's desire for a "bankruptcy remote" special purpose vehicle. GIP was aware of Algoma's previous insolvencies and would only lend to a new entity that held the port assets and that was separate from Algoma.

[75] The port transaction and the GIP secured loan to Portco would not have been necessary had Essar Global lived up to its obligations under the RSA and the equity commitment letter under which Essar Global had pledged a cash investment of US$250 to US$300 million. The trial judge found, at para. 82, that Essar Global had no intention of living up to its promises and had acted in bad faith in this regard. The content of the roadshow presentations reflected the discordance with the RSA. The alternative transaction in the roadshow presentations contemplated cash being contributed to the recapitalization through the sale of the port. That these presentations failed was partially attributable, as the trial judge found at para. 82, to Essar Global's insufficient contribution of cash equity into Algoma.

[76] The trial judge concluded that Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter made it necessary to carry out the port transaction. GIP's loan of US$150 million reduced the amount of cash equity Essar Global promised to advance to Algoma. Essar Global's failure to inject cash equity into Algoma as agreed was the root cause of the port transaction and the transfer of control. This was, as the trial judge concluded at para. 89, an exercise in bad faith. Had an independent committee of Algoma's board of directors been [page22]struck, Essar may have been held to its bargain rather than looking to third party financing from GIP under the port transaction structure. The board's failure to examine alternatives to effect Algoma's recapitalization indicated a lack of regard for the interests of Algoma's stakeholders.

[77] Additionally, the long-term value given to Essar Global by the port transaction was itself oppressive (although in stating this, the trial judge noted that the monitor did not pursue its claim that the port assets were transferred to Portco at an undervalue).

[78] As for the release in the amended RSA, the trial judge observed that it was a release of any claim arising out of the equity commitment letter. The trial judge found, at para. 100, that the monitor was not making a claim under that letter, nor was it asking that Essar Global provide the equity it had promised in that commitment. Rather, Essar Global's failure to live up to its commitment was part of the factual circumstances to be taken into account in considering whether Algoma's stakeholders were treated fairly under the port transaction.

[79] The trial judge also observed that when the court approved the amended plan of arrangement under the amended RSA, it did not have knowledge of the port transaction. There was no reference to the port transaction in the affidavits filed in support of the amendment to the plan of arrangement; there was no finding relating to the release of Essar Global; the trade creditors, the employees, pensioners and retirees were not parties to the motion approving the amended RSA; and the order was obtained without opposition.

[80] Ultimately, he concluded that the port transaction was itself unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(4) *Change of control provision*

[81] The trial judge determined, at para. 104, that the change of control provision gave effective control to Portco (*i.e.*, Essar Global) over who may acquire the Algoma business. Any buyer of Algoma or its business would need to be assigned the cargo handling agreement so that it could operate the steel mill. Therefore, the veto under this clause was effectively a veto over any change of control of the Algoma business.

[82] Although the evidence indicated that the change of control provision was included for GIP's protection, the trial judge found that this end could have been achieved in other ways. For example, as the trial judge pointed out, at para. 110, the parties [page23]could have included a provision in the assignment of material contracts agreement that prevented a change of control of Algoma without GIP's explicit consent. Such an alternative might have been considered had there been a committee of independent directors with advisors independent of Essar Global. But, as the trial judge concluded, at para. 111, the reality was that there was no pushback on the change of control provision that was implemented, and which gave Portco/ Essar Global a veto.

[83] The trial judge concluded, at para. 113, that the change of control provision was of considerable value to Essar Global. Furthermore, as mentioned, the trial judge stated, at para. 117, that Essar Global had in fact relied on s. 15.2 to its benefit by holding out its change of control rights to dissuade competing bidders for Algoma in the restructuring process while Essar Global continued to express its own interest as a prospective bidder.

[84] The May 10, 2016 letter from Portco's counsel, which sought confirmation from Algoma's counsel that prospective bidders would be advised of Portco's rights, exemplified this. In the letter, Essar Global effectively held out its consent to any change of control right to dissuade competing bidders for Algoma in the restructuring process while it continued to express its own interest as a prospective bidder. The trial judge observed, at para. 115, that "it is clear that the dictate of Portco through its solicitors that prospective purchasers should be made aware of the change of control provision was successful".

[85] The trial judge also observed that the evidence established that Portco's right to refuse assignment of the cargo handling agreement was a material impediment to restructuring Algoma as Algoma could not survive without access to the port. He concluded that the change of control provision in favour of Portco in the cargo handling agreement was unfairly prejudicial to, and unfairly disregarded, the interests of Algoma's trade creditors, employees, pensioners and retirees.

(5) *The business judgment rule*

[86] The trial judge also determined that the business judgment rule, which accords deference to a business decision of a board of directors so long as the decision lies within a range of reasonable alternatives, did not provide a defence to Essar Global. The board had not followed advice that it insist Essar Global comply with its commitments under the RSA and the equity commitment letter. As the trial judge stated, at para. 123, the result of this was the port transaction, which was

> an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with [page24]a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[87] Moreover, there was no evidence that the board even considered whether protection to GIP could be provided in the absence of the change of control provision in favour of Portco and hence Essar Global. This failure was unreasonable.

(6) *Remedy*

[88] The trial judge stated, at para. 136, that if there were no less obtrusive way to remedy the oppression, he would have ordered that Portco's shares be transferred to Algoma. However, mindful that a remedy for oppression should be approached with a scalpel, he instead relied on s. 241(3) of the *CBCA* to order a variation of the port transaction. He accordingly deleted s. 15.2 of the cargo handling agreement and inserted a provision in the assignment of material contracts agreement, which provided that, if GIP becomes the equity owner of Portco, its consent would be required for a change of control of Algoma. He rejected the suggestion that either GIP or Essar Global were taken by surprise by this relief.

[89] He also addressed the imbalance created by the 50-year term of the lease between Algoma and Portco as against the 20-year term of the cargo handling agreement (with automatic renewal for successive three-year periods, barring either party's termination). As the port was critical to Algoma's operation and survival, Algoma's ability under the cargo handling agreement to refuse an extension after 20 years was illusory and, in reality, the renewal provision was one-sided in favour of Essar Global.

[90] He concluded, at para. 144, that the payments under the cargo handling agreement were an unreasonable benefit in favour of Essar Global. If the agreement lasted only the initial 20-year term, Portco/Essar Global would receive US$300 million after GIP's loan was paid off. If the agreement was not terminated before the end of its 50-year life, Portco/Essar Global would receive an additional US$750 million for the last 30 years.

[91] Accordingly, the trial judge ordered that the lease, the cargo handling agreement and the shared services agreement be amended to provide Algoma with the option to terminate any of these three agreements once GIP's loan matured and was paid. If Portco elected not to renew after 20 years, or any of the three-year extensions, those three agreements would terminate, and Algoma would then owe Portco US$4.2 million plus interest.

[92] The trial judge decided, at para. 147, that the appropriate place for Portco to assert its claims for a declaration that the US$19.8 million promissory note had been paid as a result [page25]of set-off and for amounts owing under the cargo handling agreement was in the ongoing *CCAA* proceedings.

(7) *Costs*

[93] Lastly, following the release of the judgment, Essar Global agreed to pay costs of CDN$1.17 million to the monitor. The trial judge then ordered Essar Global to pay Algoma CDN$1.5 million in costs and ordered that no costs be payable by the monitor or by or to GIP.

C. *Issues*

[94] There are eight issues to be addressed:

(1) Did the monitor lack standing to be a complainant under s. 238 of the *CBCA*?

(2) Could the claim of the monitor only be brought as a derivative action under s. 239 of the *CBCA* rather than an oppression action under s. 241 of the *CBCA*?

(3) Did the trial judge err in his analysis of reasonable expectations?

(4) Did the trial judge err in his analysis of wrongful conduct and harm?

(5) Did the trial judge err in tailoring a remedy?

(6) Was there procedural unfairness?

(7) Should the fresh evidence be admitted?

(8) Should leave to appeal costs be granted to GIP and the costs award varied?

D. *Analysis*

(1) *Standing of the monitor*

[95] Essar Global submits that the monitor is not a proper complainant given the conflict between it and the stakeholders it represents. The trial judge failed to consider whether the monitor could avoid conflicts.

[96] GIP supports the position of Essar Global. It states that the trial judge erred in assuming that the court's broad jurisdiction under the *CCAA* could be combined with the equally broad jurisdiction under the *CBCA* to create a super remedy that would interfere with the contractual rights of non-offending third parties. A trustee in bankruptcy is a representative of the creditors of the bankrupt. A monitor owes duties to all [page26]stakeholders, not just creditors. Its duty to Essar Global as sole shareholder of Algoma cannot be reconciled with the monitor's oppression claim against it. Also, Algoma can be directed to make the cargo handling agreement payments to GIP directly and therefore the monitor owed a fiduciary duty to GIP.

[97] In addressing this issue, I will first discuss the evolution of the role of a monitor. I will then discuss who can be a complainant under the *CBCA* oppression provisions. Lastly, I will consider whether in the particular circumstances of this case, the trial judge was correct in concluding that the monitor could have standing to bring an oppression action.

(a) *The purpose of CCAA restructurings*

[98] As has been repeatedly described, the *CCAA* was originally enacted in 1933 to respond to the ravages of the Great Depression and to allow large corporations with outstanding bonds and debentures to restructure their debt in a court-supervised process through plans of arrangement or compromise negotiated with their creditors.

[99] As outlined by Deschamps J. in *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379, [2010] S.C.J. No. 60, 2010 SCC 60, the *CCAA* fell into disuse after amendments in 1953 that limited its application

to companies issuing bonds. Courts breathed new life into the statute in the early 1980s in response to an economic recession, and the *CCAA* became the primary vehicle through which major restructurings were attempted. Amendments to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), introduced in 1992, allowed insolvent debtors to make proposals to creditors under that statute, and were expected to supplant the *CCAA*. However, the *CCAA* continues to be employed as the vehicle of choice to restructure large corporations, particularly where flexibility is needed in the restructuring process: Roderick J. Wood, *Bankruptcy & Insolvency Law*, 2nd ed. (Toronto: Irwin Law Inc., 2015), at pp. 336-37; and *Century Services*, at para. 13.

[100] The corporate restructuring process at the heart of the *CCAA* "provide[s] a constructive solution for all stakeholders when a company has become insolvent": *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 271, [2013] S.C.J. No. 6, 2013 SCC 6, at para. 205. There are a number of justifications for why such a process is desirable. The traditional justification for *CCAA*-enabled restructurings, as explained by Duff C.J. shortly after the statute's enactment, was to rescue financially distressed corporations without forcing them to first declare bankruptcy: [page27]*Reference re: Constitutional Creditor Arrangement Act (Canada)*, [1934] S.C.R. 659, [1934] S.C.J. No. 46, at p. 661 S.C.R.

[101] The restructuring process can also allow creditors to obtain a higher recovery than may otherwise be available to them through bankruptcy or other liquidation proceedings, by preserving the corporate entity or the value of its business as a going concern: Wood, at pp. 338-39. Additionally, restructuring proceedings can provide an opportunity to evaluate the root of a corporation's financial difficulties, and develop strategies to achieve a turnaround, whether the best option be a full restructuring, or a liquidation of the corporation within the restructuring regime: Wood, at p. 340.

[102] The benefits of the restructuring process are not limited to creditors. Even early commentary lauded restructurings as promoting the public interest by salvaging corporations that supply goods or services important to the economy, and that employ large numbers of people: see Stanley E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 Can. Bar Rev. 587, at p. 593. This view remains applicable today, with restructurings "justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation": *Century Services*, at para. 18.

[103] To summarize, by enabling the restructuring process, the *CCAA* can achieve multiple objectives. It permits corporations to rehabilitate and maintain viability despite liquidity issues. It allows for the development of business strategies to preserve going-concern value. It seeks to maximize creditor recovery. It can serve to preserve employment and trade relationships, protecting non-creditor shareholders and the communities within which the corporation operates: see Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed. (Toronto: Carswell, 2013), at pp. 13-17. The flexibility inherent in the restructuring process permits a broad balancing of these objectives and the multiple stakeholder interests engaged when a corporation faces insolvency.

[104] It is against this background that the role of a monitor must be considered.

(b) *The role of the monitor*

[105] Originally, the *CCAA* was a very slim statute and made no mention of a monitor. Born of the court's inherent jurisdiction, the term "monitor" was first used in *Northland Properties Ltd. (Re)*, [1988] B.C.J. No. 1210, 29 B.C.L.R. (2d) 257 (S.C.). [page28]In that case, an interim receiver was appointed whose role was described, at p. 277 B.C.L.R., as that of a monitor or watchdog. As a watchdog, the monitor could "observe the conduct of management and the operation of the business while a plan was being formulated": A.J.F. Kent and W. Rostom, "The Auditor as Monitor in CCAA Proceedings: What is the Debate?" (2008), online: Mondaq https://www.mondaq.com. The monitor was thus a court-appointed officer.

[106] The 1997 amendments to the *CCAA* gave legislative recognition to the role of the monitor and made the appointment mandatory. The 2007 amendments to the *CCAA* expanded the description of the monitor's role and responsibilities. In essence, its minimum powers are set out in the Act and they may be augmented through the exercise of discretion by the court, typically the *CCAA* supervising judge. This framework is reflected in s. 23 of the *CCAA*, which enumerates certain duties and functions of a monitor. Paragraph 23(1)(*k*) directs that a monitor shall

carry out "any other functions in relation to the company that the court may direct". Its express duties under s. 23(1)(*c*) include making, or causing to be made, any appraisal or investigation that the monitor "considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency". It is then to file a report on its findings.

[107] Not surprisingly, as with the *CCAA* itself, the role of the monitor has evolved over time. As stated by David Mann and Neil Narfason in their article entitled "The Changing Role of the Monitor" (2008), 24 Bank. & Fin. L. Rev. 131, at p. 132:

> Born out of invention, the role has developed from one of passive observer to one of active participant. The monitor has enhanced communication, mediated disputes, provided input into plans of reorganization, and provided expert advice in complex affairs. As the business community has become more sophisticated and global, so too has the monitor -- taking on larger mandates, often times involving complex, cross-border restructurings.

[108] Examples of the use of expanded powers for a monitor are found in *Philip's Manufacturing Ltd. (Re)*, *[1992] B.C.J. No. 1163*, *67 B.C.L.R. (2d) 385* (C.A.), where the British Columbia Court of Appeal ordered a monitor to report on the causes of financial problems of the company and report on improper payments made to management, shareholders and directors, and in *Woodward's Ltd. (Re)*, *[1993] B.C.J. No. 79*, *77 B.C.L.R. (2d) 332* (S.C.), where Tysoe J. (as he then was) held that a monitor was to review all transactions and conveyances for fraud, preferences, or other reviewable features and act in a similar manner to a trustee in bankruptcy. [page29]

[109] Under s. 11.7(1) of the *CCAA*, a monitor must be a licensed trustee in bankruptcy and, as such, under s. 13 of the *BIA*, is subject to the supervision of the Office of the Superintendent of Bankruptcy. The monitor is to be the eyes and the ears of the court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose. In the course of a *CCAA* proceeding, a monitor frequently takes positions; indeed, it is required by statute to do so. See, for example, s. 23 of the *CCAA* that describes certain duties of a monitor.

[110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

> Quite fairly, monitors state that creditors and the Court currently expect them to express opinions and make recommendations. . . . [T]he expanded role of the monitor forces the monitor more and more into the fray. Monitors have become less the detached observer and expert witness contemplated by the Court decisions, and more of an active participant or party in the proceedings.

(c) *A monitor as complainant in an oppression action*

[111] Turning to the issue of a monitor and an oppression action, there is some difference in academic opinion on the suitability of the oppression remedy in insolvency proceedings. Professor Stephanie Ben-Ishai has argued that the remedy should be unavailable for use once the debtor has entered a court-supervised reorganization under the *BIA* or the *CCAA*.[5] Professor Janis Sarra has countered that the oppression remedy continues to be an important corporate law remedy that should be available in such proceedings.[6] I do not understand the appellants to be taking the former position; rather, they simply argue that the monitor has no standing.

[112] Section 238 of the *CBCA* defines a complainant as

(*a*) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates, [page30]

(*b*) a director or an officer or a former director or officer of a corporation or any of its affiliates,

(*c*) the Director, or

(*d*) any other person who, in the discretion of a court, is a proper person to make an application under this Part.

For the purposes of this analysis, s. 238(*d*) is the relevant subsection.

[113] Section 241of the *CBCA* describes the oppression remedy:

> 241(1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> *(a)* any act or omission of the corporation or any of its affiliates effects a result,
>
> *(b)* the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> *(c)* the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

[114] The question here is whether the trial judge erred in concluding that the monitor had standing to be a complainant. There are two elements to this analysis: can a monitor be a complainant under the *CBCA*; and should the monitor have been a complainant in this case? I would answer both questions affirmatively.

[115] As is clear from s. 238(*d*) of the *CBCA*, a court exercises its discretion in determining who may be a complainant, and this discretion is broad. There has been much jurisprudence on who qualifies as a complainant. In *Olympia & York*, a trustee in bankruptcy, acting on behalf of the creditors of the bankrupt estate, was entitled to be a complainant in an oppression action involving an oppressive agreement between the debtor and a non-arm's-length party. As this court said in that case, at para. 45:

> . . . the trustee is neither automatically barred from being a complainant nor automatically entitled to that status. It is for the judge at first instance to determine in the exercise of his or her discretion whether in the circumstances of the particular case, the trustee is a proper person to be a complainant.

[116] Admittedly, a monitor differs from a trustee in bankruptcy in that the latter represents the interests of the creditors whereas the monitor has a broader mandate. However, like [page31]a trustee in bankruptcy, a monitor is neither automatically barred from being a complainant nor automatically entitled to that status.

[117] Section 241 speaks of *a* proper person, not *the* proper person, therefore allowing for discretion to be exercised in the face of more than one proper person. The appellants did not direct us to any authority saying that a monitor could not be a complainant. Paragraph 23(1)(*k*) of the *CCAA* expressly provides that a monitor shall carry out any functions in relation to the company that the court may direct. Moreover, s. 23(1)(*c*) directs a monitor to conduct any investigation that the monitor considers necessary to determine the state of the company's business and financial affairs. It does not strain credulity that this responsibility will frequently place a monitor at odds with the shareholders or other stakeholders.

[118] Additionally, there is nothing in the *CCAA* itself to suggest that a monitor cannot be authorized to act as a complainant. Indeed, the broad language of s. 11 of the *CCAA*, which permits a supervising court to "make any order that it considers appropriate in the circumstances", is permissive of such orders. As this court and the Supreme Court have made clear, the broad language of s. 11 "should not be read as being restricted by the availability of more specific orders": *U.S. Steel Canada Inc. (Re)*, *[2016] O.J. No. 4688*, *2016 ONCA 662*, *39 C.B.R. (6th) 173*, at para. 79, citing *Century Services*, at para. 70. Courts can, and sometimes should, make "creative orders" in the context of *CCAA* proceedings: *U.S. Steel*, at paras. 80, 86-87.

[119] Generally speaking, the monitor plays a neutral role in a *CCAA* proceeding. To the extent it takes positions, typically those positions should be in support of a restructuring purpose. As stated by this court in *Ivaco Inc. (Re)*

(2006), 83 O.R. (3d) 108, *[2006] O.J. No. 4152* (C.A.), at paras. 49-53, a monitor is not necessarily a fiduciary; it only becomes one if the court specifically assigns it a responsibility to which fiduciary duties attach.

[120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. In my view, this is one such case.

[121] Here, in para. 37(c) of the amended and restated initial *CCAA* order dated November 20, 2015, the monitor was directed to investigate whether there were potential related party transactions that should be reviewed. It then reported back to the supervising *CCAA* judge that there were, and on that basis the *CCAA* judge authorized the monitor to commence proceedings under s. 241 of the *CBCA*. The monitor proceeded with the oppression action in the interests of the restructuring consistent [page32]with the objectives of the *CCAA*. The trial judge ultimately found that aspects of the port transaction, such as the change of control clause in the cargo handling agreement that gave Essar Global control over who can be a buyer of the Algoma business, were oppressive and also harmful to the restructuring process. The monitor took the action as an "adjunct to its role in facilitating a restructuring".

[122] Moreover, it cannot be said that the monitor was a fiduciary. Indeed, the appellants did not say this in their pleadings, opening submissions, or closing submissions before the trial judge. The remedy granted by the trial judge was directed at the oppression and removed an insurmountable barrier to a successful restructuring. In addition, it was brought in the face of Essar Global demonstrating a continuous desire to acquire Algoma and, as evident from the letter sent by its counsel, a desire to discourage others from doing so.

[123] It will be a rare occasion that a monitor will be authorized to be a complainant. Factors a *CCAA* supervising judge should consider when exercising discretion as to whether a monitor should be authorized to be a complainant include whether

(i) there is a *prima facie* case that merits an oppression action or application;

(ii) the proposed action or application itself has a restructuring purpose, that is to say, materially advances or removes an impediment to a restructuring; and

(iii) any other stakeholder is better placed to be a complainant.

These factors are not exhaustive, and none of them is necessarily dispositive; they are simply factors to consider.

[124] In the circumstances that presented themselves here, the *CCAA* supervising judge was justified in providing authorization. A *prima facie* case had been established; the monitor had reviewed and reported to the court on related party transactions; the oppression action served to remove an insurmountable obstacle to the restructuring; and the monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely, the pensioners, retirees, employees and trade creditors, who were not organized as a group and who were all similarly affected by the alleged oppressive conduct.

[125] Quite apart from meeting the aforementioned criteria, I would also observe that as the presiding judge in the *CCAA* proceeding and the trial judge, Newbould J. had insight into the dynamics of the restructuring and was well positioned to [page33]supervise all parties including the monitor to ensure that no unfairness or unwarranted impartiality occurred.

[126] Lastly, I do accept the appellants' position that the *Nortel* proceedings relied upon by the trial judge in support of his conclusion were quite different from this case. In *Nortel*, the monitor's powers were expanded by an order authorizing the monitor to exercise any powers properly exercisable by a board of directors of Nortel or its subsidiaries. But this expansion was a response to the resignations of the boards of Nortel and its subsidiaries, not, as here, a response to the results of investigations the monitor had been directed to pursue. That said, the case does illustrate the need to avoid rigid definition of a monitor's role and responsibilities.

[127] In conclusion, I would not give effect to the appellants' submission that the trial judge erred in granting the monitor standing to pursue an action for oppression.

(2) *Derivative or oppression action*

[128] In addition to attacking the standing of the monitor to bring the action, the appellants also submit that the monitor was precluded from bringing the action in the form of an oppression remedy proceeding pursuant to s. 241 of the *CBCA*. In their view, the action could only have been brought as a derivative action pursuant to s. 239 of that Act. They say the claim asserted is a corporate claim belonging to Algoma, if anyone, and the stakeholders, on whose behalf the monitor asserts the claim, were not harmed directly or personally but only derivatively through harm done to Algoma. I disagree.

[129] In support of their submission, the appellants rely heavily on the decision of this court in *Wildeboer*. This case is not *Wildeboer*, however.

[130] In *Wildeboer*, "insiders" who controlled the corporation had misappropriated many millions of dollars from the corporation. The *sole claim* advanced by the complainant minority shareholder by way of oppression remedy was for the return of the misappropriated funds *to the corporation*. There was *no claim* asserted by the complainant, of any kind, *for a personal remedy qua shareholder*. As the court noted, at para. 45, "[t]he substantive remedy claimed is the disgorgement of all the ill-gotten gains back to Martinrea [the corporation in question]".

[131] The *Wildeboer* decision must be read in that context. It does not stand for the proposition that in all cases where there has been a wrong done to the corporation, the action must be brought as a derivative action. Consistent with a number of other authorities, this court expressly reaffirmed [page34]the principles that the derivative action and the oppression remedy are not mutually exclusive and that there may be circumstances giving rise to overlapping derivative actions and oppression remedies where harm is done both to the corporation and to stakeholders in their separate stakeholder capacities. This is clear from para. 26:

> I accept that the derivative action and the oppression remedy are not mutually exclusive. Cases like *Malata [Malata Group (HK) Ltd. v. Jung*, 2008 ONCA 111, 89 O.R. (3d) 36] and *Jabalee [Jabalee v. Abalmark Inc.*, [1996] O.J. No. 2609 (C.A.)] make it clear that there are circumstances where the factual underpinning will give rise to both types of redress and in which a complainant will nonetheless be entitled to proceed by way of oppression. Other examples include: *Ontario (Securities Commission) v. McLaughlin*, [1987] O.J. No. 1247 (Ont. H.C.); *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, [1992] O.J. No. 2382 (Gen. Div. [Commercial List]); *C.I. Covington Fund Inc. v. White*, [2000] O.J. No. 4589, [2000] O.T.C. 865 (S.C.J.), affd [2001] O.J. No. 3918, 152 O.A.C. 39 (Div. Ct.); *Waxman v. Waxman*, [2004] O.J. No. 1765, 186 O.A.C. 201 (C.A.), at para. 526, leave to appeal refused [2004] S.C.C.A. No. 291.

[132] Or, as Armstrong J.A. put it in *Malata (Group (HK) Ltd. v. Jung* (2008), 89 O.R. (3d) 36, [2008] O.J. No. 519 (C.A.)), at para. 26:

> [T]here is not a bright-line distinction between the claims that may be advanced under the derivative action section of the Act and those that may be advanced under the oppression remedy provisions.

[133] In short, there will be circumstances in which a stakeholder suffers harm in the stakeholder's capacity as stakeholder, from the same wrongful conduct that causes harm to the corporation. In my opinion -- unlike in *Wildeboer*, where the harm alleged was solely harm to the corporation -- this case falls into the overlapping category.

[134] For the purposes of this analysis, it is the nature of the claim put forward by the claimants, on whose behalf the monitor was pursuing the oppression remedy, that must be examined. As the trial judge noted, at para. 31, the monitor initially cast quite widely the net of stakeholders affected by the port transaction and on whose behalf it was claiming a remedy. By the time of the hearing, however, the net's reach had been narrowed to Algoma's trade creditors, employees, pensioners and retirees.

[135] In oppression remedy parlance, the nub of the exercise lies in determining whether the claimant has identified a "reasonable expectation" and shown that it has been violated by wrongful conduct that is "oppressive" (in the broad sense contemplated by the Act) *of the interests of the claimant*: see *BCE*. The monitor asserted at the hearing, and the trial judge found, at para. 75: [page35]

> [T]hat the reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[136] It was alleged, and the trial judge found, that these reasonable expectations had been violated both by aspects of the port transaction itself, and by the change of control veto provided to Portco, and thus Essar Global, in the port transaction.

[137] The appellants argue that the reasonable expectations asserted relate only to harm done to Algoma. The trial judge disagreed, as do I. As he concluded, at para. 37:

> Aspects of the Port Transaction, such as the change of control clause in the Cargo Handling Agreement that gives the parent control over who can be a buyer of the Algoma business, are harmful to a restructuring process *and negatively impact creditors*.

(Emphasis added)

[138] On this basis, at para. 40, the trial judge distinguished *Wildeboer* because the monitor was asserting "that the personal interests of the creditors ha[d] been affected".

[139] The appellants place considerable emphasis on certain language contained in *Wildeboer* to the effect that, in circumstances where there may be overlapping derivative and oppression claims, the wrong must both harm the corporation and must also affect the claimant's "individualized personal interests". They interpret these comments as mandating not only that each claimant must suffer an identifiable individual harm but also that this harm must be different from other individualized personal harms suffered by others in their same class.

[140] For example, the appellants rely on certain aspects of the following comments by this court, at paras. 29, 32-33 of *Wildeboer*:

> On my reading of the authorities, in the cases where an oppression claim has been permitted to proceed even though the wrongs asserted were wrongs to the corporation, those same wrongful acts have, for the most part, also directly affected the complainant in a manner that was different from the indirect effect of the conduct on similarly placed complainants[.]
>
> . . . . .
>
> The appellants are not asserting that their personal interests as shareholders have been adversely affected in any way other than the type of harm that has been suffered by all shareholders as a collectivity. Mr. Rea -- the only director plaintiff -- does not plead that the Improper Transactions have impacted his interest *qua* director. [page36]
> Since the creation of the oppression remedy, courts have taken a broad and flexible approach to its application, in keeping with the broad and flexible form of relief it is intended to provide. However, the appellants' open-ended approach to the oppression remedy in circumstances where the facts support a derivative action on behalf of the corporation misses a significant point: the impugned conduct must harm the complainant personally, not just the body corporate, *i.e.*, the collectivity of shareholders as a whole.

[141] While pertinent to the *Wildeboer* context, some of the foregoing language, when read in isolation and out of context, may be misconceived when it comes to a more general application. However, I do not read *Wildeboer* as precluding an oppression remedy in respect of individuals forming a homogenous group of stakeholders -- for example, trade creditors, employees, retirees or pensioners -- simply because each of them, separately, may have suffered the same type of individualized harm.

[142] Instead, I read the reference, at para. 29, to the complainant being directly affected "in a manner that was different from the indirect effect of the conduct on similarly placed complainants" to be another way of capturing the notion expressed in paras. 32-33 that the individualized harm is to be distinct from conduct harming only "the body corporate, *i.e.*, the collectivity of shareholders as a whole".

[143] Were the appellants correct in their submissions, as counsel for the monitor points out, this court would not have upheld an oppression remedy on behalf of *all* shareholders of a company that had suffered harm as a result of a non-market executive compensation contract: see *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.*, [2002] O.J. No. 2412, 214 D.L.R. (4th) 496 (S.C.J.) (Commercial List), at para. 153, affd [2004] O.J. No. 636, 42 B.L.R. (3d) 34 (C.A.). Nor would it have upheld an oppression remedy claim on behalf of *a class* of shareholders who were harmed as a result of the existence of a transfer pricing regime that was disadvantageous to the company, as it did in *Ford Motor Co. of Canada v. Ontario Municipal Employees Retirement Board* (2006), 79 O.R. (3d) 81, [2006] O.J. No. 27 (C.A.). *Wildeboer* contains no suggestion that these authorities are no longer good law; nor would it have done.

[144] The same may be said, in my view, about a group of creditors who have suffered similar harm from a corporate wrong that affects both their interests as creditors and the interests of the corporation. While the oppression remedy is not available as redress for a simple contractual breach (such as the failure to pay a debt), it has long been held to be available, in appropriate circumstances, to creditors whose interests have been "compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself": [page37]*J.S.M. Corp. (Ontario) Ltd. v. Brick Furniture Warehouse Ltd*., [2008] O.J. No. 958, 2008 ONCA 183, 41 B.L.R. (4th) 51, at para. 66. See, also, *Fedel v. Tan* (2010), 101 O.R. (3d) 481, [2010] O.J. No. 2839, 2010 ONCA 473, at para. 56.

[145] The question is whether the impugned conduct is "oppressive" (in the broad sense contemplated by the *CBCA*) and, if so, whether the stakeholder has suffered harm in its capacity as a stakeholder as a result of that conduct.

[146] Moreover, the circumstances that presented themselves emphasize the need for flexibility in the availability of the oppression remedy. The court and the monitor were faced with *prima facie* evidence of oppression including bad faith and self-dealing. There was *prima facie* evidence of personal harm to the pensioners, employees, retirees and trade creditors. While leave of the court is required for a derivative action, in substance, in the context of a *CCAA* proceeding, court supervision is present, thereby neutralizing the need for the derivative action procedural safeguard of leave.

[147] I would also note that GIP argues that the decision not to bring this action by way of derivative action may have been a strategic decision made because Algoma was contractually prohibited from seeking to set aside or vary the contracts arising from the port transaction, including the cargo handling agreement and the lease. If anything, this argument supports the conclusion that it was appropriate for this action to be brought as an oppression claim.

[148] In conclusion, at law, the monitor was at liberty to bring an action for oppression. I will now turn to the issue of reasonable expectations.

(3) *Reasonable expectations*

[149] Essar Global and GIP submit that the trial judge erred in his analysis of reasonable expectations. They argue that there was no evidence of any subjectively held expectations, that the trial judge did not consider whether the expectations were objectively reasonable, and that he failed to consider factors identified in *BCE*.

[150] The monitor and Algoma respond by saying that the existence of reasonable expectations is a question of fact that can be proved by direct evidence or by the drawing of reasonable inferences. In this case, the trial judge properly considered the evidence that was before him to conclude that the pensioners, employees, retirees and trade creditors held expectations that had been violated and that those expectations were objectively reasonable. [page38]

[151] In his analysis, the trial judge correctly identified the two prongs of the oppression inquiry identified by the Supreme Court, at para. 68 of *BCE*: (i) does the evidence support the reasonable expectation asserted by a claimant; and (ii) does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice", or "unfair disregard" of a relevant interest?

[152] In identifying these two prongs, at paras. 58-59, the Supreme Court made two preliminary observations:

> First, oppression is an equitable remedy. It seeks to ensure fairness -- what is "just and equitable". It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair. . . . It follows that courts considering claims for oppression should look at business realities, not merely narrow legalities.
> Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

(Citations omitted)

> [153] As also stated in *BCE*, at para. 71:
> Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful." The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all the interests at play.

[Citations omitted]

[154] Evidence of an expectation "may take many forms depending on the facts of the case": *BCE*, at para. 70. The "actual expectation of a particular stakeholder is not conclusive": *BCE*, at para. 62. Furthermore, a stakeholder's reasonable expectation of fair treatment "may be readily inferred", because fundamentally all stakeholders are entitled to expect fair treatment: *BCE*, at paras. 64, 70. Once the expectation at issue is identified, the focus of the inquiry is on whether it has been established that the particular expectation was reasonably held: *BCE*, at para. 70.

[155] The monitor particularized the reasonable expectations in issue. It stated that the stakeholders had reasonable expectations that the Essar Group would not cause Algoma to engage in transactions for their benefit to the detriment of Algoma and its stakeholders, cause Algoma to transfer long-term control over an irreplaceable and core strategic asset of Algoma (*i.e.,* the port) to the Essar Group, and, among other things, provide the Essar Group with a veto. The source and content of the expectations [page39]were stated by the monitor to include commercial practice, the nature of Algoma and past practice. These particulars would all feed an expectation of fair treatment.

[156] Based on the reasonable expectations particularized by the monitor, as already noted, the trial judge found, at para. 75 that:

> [T]he reasonable expectations of the trade creditors, the employees, pensioners and retirees of Algoma were that Algoma would not deal with a critical asset like the Port in such a way as to lose long-term control over such a strategic asset to a related party on terms that permitted the related party to veto and control Algoma's ability to do significant transactions or restructure and which gave unwarranted value to the third party.

[157] There was evidence of subjective expectations before the trial judge. For example, at para. 65 of his reasons, the trial judge considered the evidence of subjective expectations of two trade creditors explaining that they were unaware of the port transaction and would not have expected an outcome in which Algoma no longer had full control over the port facility.

[158] The trial judge also drew reasonable inferences from the evidence and circumstances that existed at Algoma in 2014 in support of the expectations relied upon by the monitor, as he was entitled to do: see *Ford Motor*, at para. 65. In that regard, he noted that Algoma had gone through a number of insolvencies and restructurings

since the early 1990s. Given the cyclical nature of the steel business, it was reasonable for the stakeholders to expect a restructuring in the future. The reasonableness of this restructuring-related expectation was confirmed by GIP's insistence on a "bankruptcy remote" structure for its loan "given the fluctuating prices of steel and Algoma's history of insolvencies", as GIP said in its factum.

[159] Based on the evidence of subjective expectations and the reasonable inferences the trial judge drew from the record, it cannot be said that there was no evidence supporting the trial judge's conclusion that a future restructuring was not reasonably foreseeable.

[160] The trial judge also concluded that it was objectively reasonable for the stakeholders to expect, as he noted, at para. 73, that Algoma would not lose its ability to restructure absent the consent of Essar Global -- particularly in Sault Ste. Marie, where Algoma is the major industry on which trade creditors and employees rely. Put differently, it would not be reasonable to expect that the shareholder would have the right to veto any restructuring in a *CCAA* proceeding in which it was not an applicant and have the right to prefer its own interests over those of others such as the retirees, pensioners, trade creditors [page40]and employees. Contrary to the assertions of the appellants, the trial judge expressly considered those issues.

[161] Similarly, Essar Global submits that the foreseeability of another insolvency was contradicted by Mr. Marwah's affidavit evidence on the application for approval of the plan of arrangement, where he deposed that he believed that Algoma would be solvent. I would not give effect to this argument, as the trial judge's conclusion on the foreseeability of the insolvency is a factual finding, based on his review of the record as a whole. Essar Global has not demonstrated that this finding is subject to any palpable and overriding error.

[162] The appellants' complaint that the trial judge failed to consider any of the factors identified in *BCE* is also misplaced. In that decision, the Supreme Court stated, at para. 62:

> As denoted by "reasonable", the concept of reasonable expectations is objective and contextual. . . . In the context of whether it would be "just and equitable" to grant a remedy, the question is whether the expectation is reasonable having regard to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

[163] Essar Global's argument that the trial judge did not turn his mind to the *BCE* factors ignores the trial judge's explicit reasons on this point. At para. 68 of his decision, the trial judge referred to the factors identified by the Supreme Court as "useful" in determining whether an expectation was reasonable. These factors include (i) general commercial practice; (ii) the nature of the corporation; (iii) the relationship between the parties; (iv) past practice; (v) steps the claimant could have taken to protect itself; (vi) representations and agreements; and (vii) the fair resolution of conflicting interests between corporate stakeholders.

[164] The trial judge correctly noted that, due to the fact-specific nature of the inquiry into reasonable expectations, not all listed factors must be satisfied in any particular case. I agree with his conclusion. The *BCE* factors are "not hard and fast rules", but are merely intended to "guide the court in its contextual analysis": Dennis H. Peterson and Matthew J. Cumming, *Shareholder Remedies in Canada*, 2nd ed. (Toronto: LexisNexis, 2009), at 17.47.

[165] Nonetheless, the trial judge did consider a number of the *BCE* factors based on the facts before him. For instance, at para. 68, he concluded that Algoma's prior sale of a non-critical asset, relating to factor (iv), past practice, was not helpful in determining reasonable expectations. This was because the sale of a non-critical asset differs from the sale of a critical [page41]asset, as in the port transaction. Also under the rubric of past practices, he considered Algoma's prior insolvencies and restructuring proceedings. He concluded that while it was reasonable for stakeholders to expect that significant corporate changes might be necessary for Algoma in the future, it was not reasonable for them to expect that Algoma would lose its ability to restructure without the prior agreement of its parent, Essar Global.

[166] As the trial judge's reasons reveal, he specifically considered the *BCE* factors and made findings on the objective reasonableness of the expectations at issue. I endorse the comments of the monitor found at para. 80 of

its factum:

> In this case, Justice Newbould found that the employees, retirees, and trade creditors all had a reasonable expectation that Essar Group would not engineer a transaction that deprived Algoma of a key strategic asset, rendering it incapable of restructuring or engaging in significant transactions without the approval of Essar Global, for minimal cash consideration in circumstances where there had been no consideration of alternative transactions. This was entirely supported by the entirety of the record adduced at trial.

[167] This was essentially a factual exercise. There was conflicting evidence before the trialI judge. However, it was for the trial judge to weigh the evidence and make factual findings. That is what he did. Based on the record before him, those factual findings were available to him. He considered both subjective expectations and whether the expectations were objectively reasonable. I see no reason to interfere.

[168] I therefore reject the appellants' submissions on reasonable expectations.

(4) *Wrongful conduct and harm*

[169] Essar Global also takes issue with the trial judge's conclusion that Essar Global's conduct was wrongful and harmful.

[170] First, Essar Global submits that the trial judge inappropriately relied on the equity commitment letter. It argues that the court approved the amended plan of arrangement that released Essar Global from any claim relating to the equity commitment letter, and that reliance on a released obligation in connection with the wrongful conduct requirement of oppression was an impermissible collateral attack on the approval order.

[171] I disagree. I can state no more clearly than the trial judge did, at para. 100 of his reasons:

> The Monitor is not making a claim under the Equity Commitment Letter or asking that Essar Global provide the equity it agreed to provide in that commitment. Nor is the Monitor asking that the release be set aside. The [page42]Monitor contends, and I agree, that the failure of Essar Global to fund as agreed in the RSA and Equity Commitment Letter is a part of the factual circumstances to be taken into account in considering whether the affected stakeholders who were not party to the agreements were treated fairly by the Port Transaction.

[172] An amended plan of arrangement became necessary when Essar Global did not provide the promised equity contribution, the roadshow presentations were unsuccessful and the port transaction was the only available means to generate sufficient cash for Algoma.

[173] I also note that the trial judge recognized that the trade creditors, the employees, pensioners and retirees were not parties to nor did they play any role in the amended plan of arrangement proceedings. Although the release was in both the original RSA and the amended RSA, it would appear that there was no express reference to the port transaction being part of the plan of arrangement, nor was there any mention of it in any endorsement or the order approving the amended plan of arrangement.

[174] In addition, the trial judge did not make his finding of wrongful conduct based on Essar Global's breach of the equity commitment letter. Rather, he found that the totality of Essar Global's conduct regarding the recapitalization and port transaction satisfied the wrongful conduct requirement.

[175] Taken in context, the trial judge made no error in his treatment of the release in favour of Essar Global.

[176] Second, Essar Global submits that the trial judge made factual errors relating to Essar Global's cash contributions. In particular, it submits that he erred in concluding that the cash Essar Global did advance in the recapitalization, namely, US$150 million rather than the US$250 to US$300 million that was originally promised, was generated by the port transaction when it was not. They also complain that he erred in granting an oppression remedy when the equity commitment letter provided for a limited remedy in the event of a breach.

[177] The reasons of the trial judge on Essar Global's cash contribution are admittedly somewhat confusing. In para. 20 of his reasons, he states that Essar Global's revised cash contribution under the amended RSA was "to be funded largely not by Essar Global but by a loan from third party lenders to Portco of $150 million". Reading that

paragraph in isolation might lend credence to the appellants' submission. That said, having regard to the record before him and reading the reasons as a whole, I am not persuaded that the trial judge misunderstood Essar Global's contribution to the recapitalization. [page43]

[178] The relevant contributions made to Algoma in November 2014 consisted of

- US$150 million in cash from Essar Global under the amended RSA;
-
- US$150 million in debt reduction in the form of loan forgiveness for certain loans owed by Algoma to
- members of the Essar Group under the amended RSA; and

-- US$150 million in cash generated from the port transaction.

[179] Essar Global only provided Algoma with US$150 million in cash equity, not the US$250 to 300 million in cash equity it had originally promised. The debt forgiveness would not assist Algoma in addressing its impending liquidity issues in the same way a cash injection would. Additionally, as the trial judge noted, at para. 88, the US$150 million in debt reduction related to loans at the bottom of Algoma's capital structure, and therefore this reduction was of "questionable value" to Algoma at the time.

[180] Algoma, the monitor and Essar Global all provided the trial judge with written submissions describing the cash equity contribution as consisting of US$150 million in cash from Essar Global and US$150 million in cash from the port transaction. The contributions were also repeatedly referenced in the record. For example, the affidavit of Mr. Seifert -- which the trial judge considered in great detail -- clearly sets out Essar Global's cash contribution to Algoma and the US$150 million in cash paid by Portco to Algoma under the port transaction as separate transactions. Similarly, these contributions are described as separate transactions in the affidavits of Messrs. Marwah and Ghosh.

[181] The trial judge's reasons establish that he understood that there were two separate cash payments made to Algoma -- one made by Essar Global in satisfaction of its commitments under the amended RSA and one made by Portco under the port transaction. He also understood that these cash payments were made in addition to Essar Global's forgiveness of US$150 million debt owed to it by Algoma.

[182] Specifically, at para. 85, the trial judge noted that in October 2014, after the original RSA had been executed, Essar Global contemplated reducing the amount of its cash contribution promised under the RSA and the equity commitment letter. The roadshow presentation prepared regarding Algoma's capitalization showed that Essar Global proposed to contribute less than US$100 million of *cash* rather than the US$250 --$300 million required. He obviously understood that there was to be [page44]a cash component to Essar Global's contribution separate and apart from the proceeds of the port transaction.

[183] In addition, at para. 88, the trial judge noted that the port transaction "*reduced* the amount of cash equity previously promised by Essar Global to be advanced to Algoma" (emphasis added). This shows that the trial judge understood that the proceeds from the port transaction were not *replacing* Essar Global's promised cash contribution. The trial judge recognized that the cash equity contribution of US$150 million and the debt reduction of US$150 million were insufficient to successfully refinance Algoma, and using the port transaction proceeds was the only way to generate the additional US$150 million in cash necessary. The trial judge highlighted at para. 96 that Algoma's CEO, Mr. Ghosh, had indicated that "he had to agree to the Port Transaction" as it was the "only way" to refinance Algoma, since Essar Global's contribution was only "bringing in $150 million".

[184] Even if the appellants were correct in this regard, which I do not accept, on their analysis, they themselves admit that Essar Global's contribution was short by US$50 million.

[185] No matter the correct figure, Essar Global's conduct created a situation where Algoma had no choice but to accept the port transaction. There was no palpable and overriding error in the trial judge's understanding of the recapitalization requirements.

[186] In any event, the reduction in Essar Global's cash contribution was only one aspect of Essar Global's overall conduct considered by the trial judge. He did not conclude that the cash equity reduction was itself the oppressive act. Accordingly, again, any factual error regarding Essar Global's actual cash contribution was not a palpable and overriding error.

[187] As mentioned, Essar Global also asserts that the remedy for breach contained in the equity commitment letter precluded any oppression remedy. No one was suing for breach of the equity commitment letter. Rather, it formed part of the context that included a failure to explore alternatives, the port transaction itself, control rights that were proffered as a disincentive to other bidders and that erased any possibility of a successful restructuring, all in disregard of the expectations of the pensioners, employees, retirees and trade creditors.

[188] Third, although not identified as a ground of appeal nor advanced as such in their factum, in oral argument, the appellants submitted that the alleged breach of the equity commitment letter did not cause Algoma to enter the port transaction.

[189] Essar Global contends that the trial judge made factual errors in finding a causal connection between Essar Global's [page45]equity commitment and the port transaction. It argues that the port transaction was a key component of the recapitalization before the execution of the equity commitment letter.

[190] At trial, the trial judge rejected Essar Global's argument, finding, at para. 87, that the port transaction was contemplated as a possible transaction when first introduced in May 2014, but that the transaction was not a certainty. He accurately noted that the first plan of arrangement that was approved by the court required Essar Global to comply with its cash funding commitment of US$250 to US$300 million pursuant to the equity commitment letter and that the port transaction was not a part of that plan. He found that the port transaction had to be carried out because of Essar Global's decision not to fund Algoma according to the terms of the equity commitment letter.

[191] The causal connection between Essar Global's equity commitment and the port transaction is a factual matter and the trial judge's factual finding was supported by the evidence.

[192] Furthermore, the port transaction that was floated in May 2014 was an entirely different transaction, in which the proceeds of sale would flow upstream to Essar Global and would not be used to recapitalize Algoma. Moreover, the RSA prohibited a related party transaction without noteholder consent, and the proceeds of any sale in excess of US$2 million had to be used to reduce Algoma's debt.

[193] I am not persuaded that the trial judge made any palpable and overriding error in his finding.

[194] Fourth, Essar Global submits that the trial judge erred in disregarding the business judgment rule, which should have applied to prevent judicial second-guessing of the board's decisions.

[195] The trial judge correctly described [at para. 119] the business judgment rule, relying on para. 40 of *BCE*:

> In considering what is in the best interests of the corporation, directors may look to the interests of, *inter alia*, shareholders, employees, creditors, consumers, governments and the environment to inform their decisions. Courts should give appropriate deference to the business judgment of directors who take into account these ancillary interests, as reflected by the business judgment rule. The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives . . . It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions. [page46]

[196] Two additional points should be made with respect to the business judgment rule. First, the rule shields business decisions from court intervention only where they are made prudently and in good faith: *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* (1998), 39 O.R. (3d) 755, [1998] O.J. No. 1886, 160 D.L.R. (4th) 131 (Gen. Div. (Commercial List)), at pp. 150-51 D.L.R.

[197] Second, the rule's protection is available only to the extent that the board of directors' actions actually evidence their business judgment: *UPM-Kymmene*, at para. 153.

[198] In deciding that the rule afforded no defence to Essar Global, the trial judge, at para. 123, relied on the fact that the board did not follow "advice to go after Essar Global on its cash equity commitment". The trial judge went on to note that had Algoma's board formed an independent committee in February 2014, events may have evolved differently, and the board may have accepted the advice to hold Essar Global to its commitment.

[199] Essar Global takes issue with this conclusion by asserting that the trial judge should not have characterized Algoma's board as lacking independence because of its decision not to strike an independent committee. Essar Global points out that there was no evidence that Mr. Ghosh -- who cast the deciding vote in that decision -- was not free to vote as he chose.

[200] Essar Global's argument ignores the trial judge's key finding that the four directors who voted against the independent committee in February 2014, including Mr. Ghosh, were not independent. The trial judge noted, at para. 15, that he could "not overlook" that Mr. Ghosh had been with Essar Steel India, adding that Algoma's CFO, Mr. Marwah, had described these four directors as "Essar-affiliated directors". On this basis, it was open for the trial judge to find that the Essar-affiliated directors were not free from the influence of Essar Global and the Ruia family, particularly when considered alongside his extensive comments, at paras. 43-60, finding that the critical decisions regarding Algoma's recapitalization and the port transaction were made not by Algoma's board, but by Essar Global and Essar Capital as led by Mr. Seifert.

[201] Specifically, the trial judge made findings of fact, at paras. 51-53, regarding the limited role played by Algoma's board and management. He accepted the evidence of Messrs. Ghosh and Marwah that they did not negotiate the economic terms of the debt refinancing or the port transaction. He also accepted the evidence of Mr. Ghosh that the transaction was [page47]approved because there was no realistic alternative to generate sufficient cash to complete the recapitalization. He rejected the contradictory evidence of Mr. Seifert because the evidence of Messrs. Ghosh and Marwah was consistent with the documentary evidence. In my view, the trial judge was entitled to weigh the evidence as he did and make these findings of fact that were not infected by any palpable and overriding error.

[202] Essar Global maintained before the trial judge, as they do before this court, that the Algoma board's decisions were nonetheless shielded from court intervention because the board had the benefit of sophisticated advisors throughout the recapitalization process. And yet, the only evidence tendered of any such advice was advice that the board elected not to follow.

[203] At para. 122, the trial judge described this advice, which was provided at least in part by Ray Schrock, described by the appellants as Algoma's lawyer. Mr. Schrock told the board that unsecured noteholders would not react well to the port transaction and were likely to seek a higher infusion of cash from Essar Global, as promised in the equity commitment letter. Mr. Schrock said that the board should insist that Algoma press Essar Global to fulfill its equity commitments. There was no evidence that steps were taken in this regard and the trial judge found that this advice was not followed.

[204] Additionally, the circumstances surrounding the resignation of the independent directors from Algoma's board lend support to the trial judge's conclusion that reliance on the business judgment rule was unavailable. Mr. Dodds' letter stated that his decision to resign was driven by his conclusion that as an independent director, he lacked confidence that he was "receiving information and engaged in decision-making in the same manner as those board members who are directly affiliated with the company and/or its parent". It was open to the trial judge to reach the conclusions he did. In these circumstances, the business judgment rule was of little assistance.

[205] Essar Global also submits that the trial judge should not have gone on to censure the activities of the board in November 2014 (when the board approved the transactions) by relying on the board's February 2014 decision regarding the independent committee.

[206] The trial judge did not censure the decisions of the Algoma board solely based on the February 2014 meeting. The February meeting, and the events surrounding it, are part of a larger context that included the November 2014 meeting, all of which the trial judge considered, and all of which demonstrated [page48]that the

board's decisions regarding the recapitalization were not made prudently or in good faith, as found by the trial judge, and thereby failed to attract the application of the business judgment rule.

[207] Specifically, the trial judge found, at para. 123, that, if the board had acquiesced to forming an independent committee, or listened to the truly independent directors before they resigned in frustration, subsequent steps taken in pursuit of the recapitalization transaction "may have been taken differently". He then went on to say that

> What happened in the Port Transaction was an exercise in self-dealing in that Algoma's critical Port asset was transferred out of Algoma to a wholly owned subsidiary of Essar Global with a change of control provision that benefited Essar Global at a time that a future insolvency was a possibility.

[208] Additionally, the trial judge found that the board had accepted the inclusion of the contentious change of control provision in the cargo handling agreement without considering alternatives. If the provision was truly for the benefit of GIP, it could have been accomplished in another way, without providing Essar Global with an effective veto over a change of control of Algoma.

[209] All this evidence speaks to the board's lack of business judgment and good faith, the failure to consider reasonable alternatives, and the Algoma board's limited role in directing the recapitalization. There is no palpable and overriding error in the trial judge's conclusion that the board was precluded from relying on the business judgment rule. His decision was amply supported by the record.

[210] Essar Global makes an additional point relating to the business judgment rule: that, in any event, no independent committee was required under corporate law.

[211] It is a contrivance for Essar Global to impugn the trial judge's conclusion regarding the business judgment rule on the basis that an independent committee was not required. Although it is true that an independent committee was not legally or technically required, the board's decision not to strike one, in the circumstances surrounding the November 2014 restructuring transactions, speaks volumes. The decision not to strike an independent committee must be considered alongside the evidence I have already reviewed: the board's lack of independence, the board's failure to follow its advisors' advice, the board's failure to consider alternatives, and the board's acquiescence to recapitalization transactions that primarily benefited the interests of Essar Global over those of Algoma. Again, the [page49]totality of the evidence supports the board's lack of good faith, and renders the business judgment rule inapplicable.

[212] There is one final argument Essar Global raises in invoking the business judgment rule. It claims that it was procedurally offensive for the trial judge to criticize the directors for not following Mr. Schrock's advice because evidence of the advice was not before him. It adds that, had the directors relied on legal advice from Mr. Schrock in the legal proceedings, privilege had not been waived.

[213] Here, the minutes of the board meeting held in November 2014 describe Mr. Schrock as "informing the Board [that] the [unsecured noteholders] would not react well to the proposed changes and that they were likely to push [Essar Global] for a higher infusion of cash/equity into [Algoma] as set forth in the Commitment [L]etter". Mr. Schrock also commented that the proposed Port Transaction "was likely to cause concern by the [unsecured noteholders]". Accordingly, Mr. Schrock advised the board to "insist that [Algoma] should press all parties to fully satisfy their . . . obligations regarding the equity contributions".

[214] To the extent that Mr. Schrock's comments amounted to legal advice, I would first note that his advice was only one piece of the evidentiary puzzle in the broader factual context. Even if Mr. Schrock's advice, and the board's failure to implement it, are disregarded, the record still amply supports the trial judge's conclusions on this issue.

[215] I would also add that Essar Global's claim that the evidence of Mr. Schrock's advice was not before the trial judge is incorrect. The board minutes were included in the record as an exhibit to an affidavit tendered by Essar Global. Finally, as for Essar Global's argument that privilege had not been waived, any privilege that may have attached to Mr. Schrock's advice belonged to Algoma and not Essar Global.

[216] Fifth, Essar Global submits that the involvement of Algoma's management and board in the port transaction sanitizes that transaction, because the trial judge concluded that Messrs. Ghosh and Marwah acted in good faith

thinking they were doing the best for Algoma in the circumstances. Essar Global also claims that the trial judge erred by holding otherwise because the monitor failed to attack the board's process in its pleading. I do not accept these arguments.

[217] Despite Essar Global's argument, this court has established that good faith corporate conduct does not preclude a finding of oppression: *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.). [page50]

[218] Moreover, Essar Global's argument on this point ignores the trial judge's findings that Algoma's board and management played a limited role in the port transaction. It also ignores evidence that indicates that Messrs. Ghosh and Marwah's support was only given because there was no alternative to address Algoma's financial straits. This factual background demonstrates why it was open for the trial judge to conclude that the port transaction was oppressive, despite the good faith of Messrs. Ghosh and Marwah.

[219] On the pleadings issue, I note that the monitor pleaded that the port transaction was the result of Essar Global's "*de facto* control" of Algoma. In response, Essar Global pleaded that the port transaction was in the best interests of Algoma, based on the approval of the transaction by Algoma's board and senior management, who were acting on an informed basis and with the benefit of financial advice. Given the way in which Essar Global framed its defence in its pleadings, it cannot now say that issues related to the board's process were not properly before the trial judge.

[220] Turning to the appellants' last argument relating to wrongful conduct and harm, they submitted that the trial judge identified two potential harms caused by Essar Global, neither of which is actionable in the oppression action: the undervalue of the port transaction to Algoma and the impairment of Algoma's ongoing restructuring.

[221] In my view, it is inaccurate to characterize the trial judge's findings and analysis as concluding that harm flowed to stakeholders because the port transaction did not provide sufficient value to Algoma.

[222] Specifically, he did not find that the US$171.5 million in consideration paid by Portco to Algoma constituted undervalue. Indeed, his remedy that GIP be repaid in full suggests the contrary. Rather, he found that Essar Global received an unreasonable benefit from the port transaction.

[223] Moreover, it was an exercise in self-dealing. As the trial judge stated, at para. 144:

> For the balance of the first 20 years under the Cargo Handling Agreement after the GIP loan matures, if that agreement survives only to that date, Algoma will pay a further 12 years at $25 million, or $300 million, to Portco which will benefit Essar Global after the balance of the GIP loan is paid off. If the Cargo Handling Agreement is not terminated before the end of its life of 50 years, that will be another 30 years at $25 million, or $750 million, paid to Portco/Essar Global. Taken with the small amount paid by Essar Global, the $4.2 million in cash (and the $19.8 million note that it has refused to pay), it means that Essar Global will obtain an extremely large amount of cash from Algoma for little money. I realize that if Algoma became solvent and able to pay its debts, it would be able to pay a dividend [page51]to Essar Global (or the appropriate subsidiary) so long as Essar Global remained its shareholder. Whether and when Algoma could become solvent with its pension deficits that have existed for some time and be in a position to pay dividends to its shareholder is a significant unknown. But the payments under the Cargo Handling Agreement do not require any solvency test and are in the financial circumstances Algoma finds itself in, a clear contractual benefit for little money. It is an unreasonable benefit that was prejudicial to, and unfairly disregarded, the interests of the creditors on whose behalf this action has been brought by the Monitor.

[224] The trial judge also concluded that the mismatched terms of the cargo handling agreement (20 years renewable) and the 50-year lease offered Essar Global an additional benefit. In that regard, he was not bound to accept the evidence of the appellants' expert. He reasoned, at para. 142, that the port was critical to Algoma's functioning, and therefore that Algoma would not be in a position to terminate the cargo handling agreement for the duration of the lease:

> The other concerns are with respect to the obligations in the Cargo Handling Agreement. I have a concern with the imbalance in the term of the lease to Portco for 50 years against the term of the Cargo Handling Agreement for 20 years with automatic renewal for successive three year periods unless either party gives written notice of termination to the other party. If Essar Global thought that it wanted an increased payment after 20 years, it could refuse to continue the Cargo Handling Agreement and put Algoma at its complete mercy. If the market did not support an increased payment, or indicated that the payments from Algoma to Portco should be less in the future, Algoma would still be at the mercy of Essar Global. As the Port facilities are critical to the operation and survival of Algoma, it would be foolhardy indeed for Algoma to refuse to extend the Cargo Handling Agreement. The language in the Cargo Handling Agreement that Algoma can refuse to extend it after 20 years is illusory and not realistic. In reality, it is a provision that is one-sided in favour of Essar Global.

[225] The change of control provision or veto was also an exercise in "self-dealing". The consent provision unnecessarily tied Algoma's strategic options to Essar Global. The trial judge properly found that the insertion of control rights in the cargo handling agreement served no practical purpose to GIP and the same rights could have been provided for in the assignment of material contracts.

> [226] As the trial judge concluded, at para. 138:
> In my view, and I so order, the appropriate relief for the oppression involving the change of control clause in the Cargo Handling Agreement is to delete section 15.2 from that agreement and to insert a provision in the Assignment of Material Contracts agreement that if GIP becomes the equity owner of Portco, Algoma or its parent cannot agree to or undertake a change of control of Algoma without the consent of GIP. [page52]

[227] There was evidence from Messrs. Ghosh and Marwah that supported the trial judge's conclusion that harm had flowed from the presence of the change of control provision and the ensuing letter from counsel. They were not cross-examined and no competing evidence was tendered by the appellants. It was also open to the trial judge to interpret the letter sent by Portco's counsel to Algoma's counsel as a veto threat to potential bidders while Essar Global continued to be interested in being a bidder. I would not give effect to this argument.

[228] On the issue of the impairment of Algoma's ongoing restructuring, the appellants argue that no harm could have flowed from this, as the restructuring was not, in fact, impaired. Specifically, they argue that the only evidence of impairment consisted of statements in the affidavits of Messrs. Ghosh and Marwah that potential bidders for Algoma were concerned about the change of control clause. I would reject this argument as well. Again, I note that the appellants chose not to cross-examine on these affidavits, nor did they object to their admission into evidence. They cannot now, after the fact, impugn the trial judge's reliance on these statements.

[229] Additionally, the appellants argue that it was premature for the trial judge to conclude that the control clause impaired the restructuring, because Portco/Essar Global was never asked to consent to a new transaction or to new owners. However, at para. 117, the trial judge noted that the change of control rights had to be considered alongside Essar Global's holding itself out as a prospective buyer in any bidding process for Algoma. That Essar Global has never been asked to consent to a new transaction was immaterial, as it remained in Essar Global's "interest to dissuade other buyers in order for it to achieve the lowest possible purchase price". In coming to this conclusion, the trial judge pointed to the letter from counsel for Portco/Essar Global on May 12, 2016, which "sp[oke] volumes" by "clearly invit[ing] any bidder to understand that Essar Global has control rights".

> [230] I see no error in the trial judge's conclusion.

(5) *The remedy*

[231] Turning then to the issue of the remedy. Essar Global submits that the trial judge erred in striking out the control clause in the cargo handling agreement and in granting Algoma the option of terminating the port agreements upon repayment of the GIP loan. They argue that he was only permitted to rectify the harm that was suffered. Deleting the provision was an overly broad remedy that was unconnected to the [page53]reasonable expectations of the stakeholders, and instead, he should have considered a nominal damages award.

[232] GIP supports the submissions of Essar Global. It argues that the remedy awarded was not sought by any party, no evidence had been called in respect of that remedy and no submissions were made. The practical effect of granting Algoma a termination right is that GIP does not have the security for which it bargained and it was prejudiced, despite its lack of involvement in the oppression found against Essar Global. GIP also argues that the monitor and Algoma are seeking to set-off amounts owed by Essar Capital to Algoma against amounts owed to GIP, which results in additional prejudice.

[233] I would not give effect to these submissions. First, trial judges have a broad latitude to fashion oppression remedies based on the facts before them. Once a claim in oppression has been made out, a court may "grant any remedy it thinks fit": *Pente Investment Management Ltd. v. Schneider Corp.* *(1998), 42 O.R. (3d) 177*, *[1998] O.J. No. 4142* (C.A.), at para. 4. The focus is on equitable relief, and deference is owed to the remedy granted: *Fedel*, at para. 100.

[234] Second, the trial judge properly identified the need to avoid an overly broad remedy, stating, at para. 136, that there were "less obtrusive ways" of remedying the oppression than ordering shares of Portco be transferred to Algoma (the remedy the monitor had originally requested). Varying the transaction as he did was one such way. The trial judge's remedy removes Portco's control rights (the main obstacle to a successful restructuring) and, after GIP is paid, restores the port to the ownership of Algoma. If GIP becomes the equity owner of Portco, its consent will be required to any change of control. Unlike a damages award, the remedy was responsive to the oppressive conduct. It served to vindicate the expectations of the stakeholders that Algoma would retain long-term control of the port and that Essar Global would not have a veto over its restructuring efforts.

[235] Third, the remedy granted preserves the security GIP had bargained for and therefore GIP has not suffered any prejudice as a result of the remedy. The trial judge's remedy, as described at para. 145, ensures that GIP is to be paid in full. Until "payment in cash of all amounts owing to GIP" is made, the port remains in Portco's hands and the contractual remedies held by GIP to enforce its security remain in place. Moreover, Essar Global guaranteed Portco's liabilities to GIP under GIP's loan in the port transaction, which further demonstrates GIP's lack of prejudice. As GIP's own affiant indicated, this guarantee [page54]provides GIP with "an extra layer of protection in the event the debtor is unable to repay the loan".

[236] Finally, regarding the issue of set-off, I note that the arguments made by GIP in support of this ground were made prior to Newbould J.'s subsequent ruling dealing with this issue. In that decision, he held that Algoma had set-off amounts owed under the promissory note against Essar Global, but he preserved GIP's right to repayment. This decision is a full answer to GIP's arguments on this point, and ensures that GIP will not suffer any prejudice as a result of the remedy granted in response to Essar Global's oppressive conduct.

(6) *Was there procedural unfairness?*

[237] Essar Global submits that the trial judge erred in basing his decision and relief on bases that were not pleaded. GIP supports the position of Essar Global, with particular focus on the remedy that was ultimately imposed.

[238] As mentioned, the trial judge was the supervising *CCAA* judge and deeply acquainted with the facts of the restructuring. Of necessity, and on agreement of all parties to the oppression action, the timelines for pleadings, productions and examinations were truncated. Additionally, no party objected at trial that the process had been procedurally unfair. Given the context and the complexity of the dispute, the pleadings were not as clear as they might have been in a less abbreviated schedule. That said, on a review of the record, I am not persuaded that there was any procedural unfairness with respect to the claims or that the appellants did not know the case they had to meet.

[239] The focus of at least GIP's complaint lies in the remedy. The appellants are correct that the precise remedy awarded by the trial judge was not pleaded. A trial judge must fashion a remedy that best responds to the oppressive conduct and that is not overly broad. While it is desirable for a party seeking oppression relief to provide particulars of the remedy, a trial judge is not bound by those particulars. Because the discretionary powers under the oppression remedy must be exercised to *rectify* the oppressive conduct complained of (see *Naneff v. Con-Crete*

Holdings Ltd. (1995), 23 O.R. (3d) 481, [1995] O.J. No. 1377 (C.A.), at para. 27), it follows that the remedy will, by necessity, be linked to the oppressive conduct that was pleaded. Therefore, a party against whom a specifically tailored oppression remedy is ordered cannot fairly complain that the remedy caught them by surprise. This conclusion is consistent with *Fedel*, where this court upheld oppression remedies imposed by [page55]the trial judge where the relief granted had not been specifically pleaded or sought in argument.

[240] Moreover, absent error, a trial judge's decision on remedy is entitled to deference. As I have discussed, there is an absence of error. Furthermore, in this case, there is no prejudice to GIP. Its position is preserved by the remedy granted by the trial judge. At the same time, the remedy is responsive to Essar Global's oppressive conduct.

[241] That said, the trial judge did consider whether Essar Global and GIP could fairly argue that they were taken by surprise by his remedy. At para. 141, he rejected this position, holding that the issue of the change of control clause was pleaded by the monitor, and affidavit material filed by both Essar Global and GIP provided evidence on the provision's significance. At para. 146, he concluded that issues relating to the relief he ordered were "fully canvassed in the evidence and argument", and that the remedy he ordered in fact was less intrusive than the remedy originally pled by the monitor. And although he did not think an amendment was necessary, he nonetheless ordered that the monitor would be granted leave to amend its claim to support the relief he granted.

[242] I would not give effect to this ground of appeal.

(7) *Fresh evidence*

[243] Essar Global seeks to introduce fresh evidence on appeal that addresses the independence of Algoma's board of directors. It takes the position that the trial judge's rejection of the independence of two directors, Messrs. Kothari and Mirchandani, played a significant role in his decision. It adds that the lack of independent directors was not pleaded by the monitor and so Essar Global had no reason to adduce this evidence earlier.

[244] Messrs. Mirchandani and Kothari joined Algoma's board in June and August 2014, respectively, after the three independent directors resigned. They were therefore on the board when the port transaction was approved in November 2014.

[245] Whether "a proper case" exists to allow fresh evidence is determined by applying the test outlined in *R. v. Palmer*, [1980] 1 S.C.R. 759, [1979] S.C.J. No. 126, or the slightly modified test from *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208, [1994] O.J. No. 276 (C.A.).

[246] As this court has noted, the two tests are quite similar: see *Chiang (Trustee of) v. Chiang* (2009), 93 O.R. (3d) 483, [2009] O.J. No. 41, 2009 ONCA 3, at para. 77. Under the *Palmer* test, the party seeking to admit fresh evidence must [page56]demonstrate that the evidence could not, by due diligence, have been adduced at trial; that the evidence is relevant in that it bears on a decisive issue in the trial; that the evidence is credible; and that the evidence, if believed, could be expected to affect the result.

[247] Under the *Sengmueller* test, the moving party must demonstrate that the evidence could not have been obtained by the exercise of reasonable diligence prior to trial; that the evidence is credible; and that the evidence, if admitted, would likely be conclusive of an issue on appeal.

[248] Essar Global has failed to meet either the *Palmer* or the *Sengmueller* test for two main reasons.

[249] In both its original and its amended statement of claim, the monitor alleged that representatives of Essar Global were members of Algoma's board and exercised *de facto* control over Algoma, such that they made decisions for the benefit of Essar Global while unfairly disregarding the interests of Algoma's stakeholders. Essar Global cannot claim to have been caught by surprise by the issue of the board's independence being in play. The fresh evidence could have been obtained with reasonable diligence prior to trial.

[250] In any event, the evidence would not have affected the result at trial, and is not conclusive of any issue on appeal. The fresh evidence Essar Global asks to proffer consists of the affidavit of Mr. Mirchandani, which states that he and Mr. Kothari were determined to be independent board members as a result of a conflict of interest policy and by virtue of the questionnaires they each completed.

[251] However, there was evidence before the trial judge essentially to this effect, including Algoma's October 2014 offering memorandum, which stated that the board included two independent directors. Indeed, the trial judge commented on this evidence in footnote 7 of his reasons, and rejected it in concluding that Messrs. Mirchandani and Kothari were not truly independent of Essar Global.

[252] Additionally, and as I have already discussed elsewhere in these reasons, the remainder of the record strongly supported the board's lack of independence. Even if the trial judge had Mr. Mirchandani's affidavit before him, it would not have made a difference.

[253] I would therefore dismiss the motion for fresh evidence.

(8) *Costs*

[254] GIP claimed costs of CDN$750,156.18 against the monitor payable on a partial indemnity scale. It claimed it was [page57]entirely successful because it successfully resisted relief sought by the monitor that would have prejudiced GIP. The trial judge exercised his discretion and observed that success between the monitor and GIP was divided. He also relied on GIP's appeal as a basis to conclude success was divided. He therefore did not order any costs in favour of or against GIP.

[255] GIP seeks leave to appeal the trial judge's costs award. Before this court, GIP in essence renews the arguments made before the trial judge. The awarding of costs is highly discretionary and leave is granted sparingly. I see no error in principle in the trial judge's exercise of discretion nor was the award plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, *[2004] 1 S.C.R. 303*, *[2003] S.C.J. No. 72*, *2004 SCC 9*, at para. 27.

[256] At trial, GIP was unsuccessful in challenging both the monitor's claim of standing and its claim that the port transaction was oppressive. It also seems incongruous for GIP to suggest that it was entirely successful in defeating the monitor's claims, while it appeals the trial decision.

[257] I see no basis on which to interfere with the costs award of the trial judge and would refuse leave to appeal costs.

E. *Disposition*

[258] For these reasons, I would dismiss the appeal, the motion for fresh evidence and the motion for leave to appeal costs.

[259] As agreed, I would order that the monitor and Algoma are entitled to costs of the appeal fixed in the amounts of CDN$100,000 and CDN$60,000, respectively, inclusive of disbursements and applicable taxes on a partial indemnity scale. At the oral hearing, the parties had not agreed on whether the award should be payable on a joint and several basis and requested more time to consider the matter. On September 15, 2017, counsel wrote advising that they had still not agreed on this issue. GIP requested the opportunity to make additional costs submissions on this issue at the appropriate time. Under the circumstances, I would permit GIP to make brief written submissions on this issue by January 10, 2018. Essar Global shall have until January 17, 2018 to file its submissions. The monitor and Algoma shall have until January 24, 2018 to respond.

Appeal dismissed.

Notes

1 Algoma was named in the proceeding below as a defendant, but supports the position taken by the respondent Ernst & Young Inc. It is therefore a respondent on this appeal.

2 In early 2015, Essar Consulting obtained two additional valuations of the port assets, one in February from Royal Bank of Canada and one in April from ICICI Securities. The RBC valuation, which was an exhibit to the affidavit of Joseph Seifert, was between US$165 and US$200 million. The ICICI valuation, which was an exhibit to the affidavit of Anshumali Dwivedi, was US$349 million.

3 Although Deutsche Bank intervened in the proceedings below, it was not involved in this appeal.

4 Before this court, no submissions on urgency were advanced.

5 Stephanie Ben-Ishai and Catherine Nowak, "The Threat of the Oppression Remedy to Reorganizing Insolvent Corporations" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009), at pp. 430-31 and 436.

6 Janis P. Sarra, "Creating Appropriate Incentives, A Place for the Oppression Remedy in Insolvency Proceedings" in Janis P. Sarra, ed., *Annual Review of Insolvency Law, 2009* (Toronto: Carswell, 2010), at p. 99.

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chapter C-37

ACT RESPECTING PUBLIC INQUIRY COMMISSIONS

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1. Whenever the Government deems it expedient to cause inquiry to be made into and concerning any matter connected with the good government of Québec, the conduct of any part of the public business, the administration of justice or any matter of importance relating to public health, or to the welfare of the population, it may, by a commission issued to that effect, appoint one or more commissioners by whom such inquiry shall be conducted.

R. S. 1964, c. 11, s. 1.

2. The commissioners so appointed shall, before acting, take the following oath of office before a judge of the Superior Court:

"I, A. B., declare under oath that I will exercise and perform the powers and duties vested in me by the provisions of the Act respecting public inquiry commissions (chapter C-37), according to the best of my knowledge and judgment.".

R. S. 1964, c. 11, s. 2; 1999, c. 40, s. 66.

3. The Government may also appoint a secretary to the commission.

The commissioners may, with the authorization of the Minister of Justice, employ stenographers, clerks and messengers.

They may also incur such further expenses as may be necessary for the performance of their duties.

R. S. 1964, c. 11, s. 3; 1965 (1st sess.), c. 16, s. 21.

4. The salaries of the commissioners, secretary, stenographers, clerks and messengers shall be fixed by the Government.

R. S. 1964, c. 11, s. 4.

5. The commissioners shall, within a reasonable time after their appointment, hold meetings for the purposes of the inquiry, at the place where the necessary information is to be obtained.

They shall give notice of the time and place of their first meeting, in two French and two English newspapers published nearest to the place of meeting.

The commissioners shall not adjourn the inquiry for a period of more than one week, unless they be duly authorized to that effect by the Minister of Justice.

R. S. 1964, c. 11, s. 5; 1965 (1st sess.), c. 16, s. 21.

6. The commissioners may, by all such lawful means as they may think best fitted to discover the truth, inquire into the matters referred to them for investigation.

As soon as the inquiry is completed, they shall report the result, with all evidence taken during the inquiry, to the Government, which shall order such action to be taken in the matter as shall be warranted by the evidence and report.

R. S. 1964, c. 11, s. 6.

7. A majority of the commissioners must attend and preside at the hearing of witnesses, and they, or a majority of them, shall have, with respect to the proceedings upon the hearing, all the powers of a judge of the Superior Court in term.

R. S. 1964, c. 11, s. 7.

8. Notwithstanding any legislative provision inconsistent herewith, the Government may grant to commissioners appointed under the authority of this Act such indemnity as it deems advisable.

R. S. 1964, c. 11, s. 8.

9. The commissioners or any of them may, by a summons under his or their hand or hands, require the attendance before them, at a place and time therein specified, of any person whose evidence may be material to the subject of inquiry, and may order any person to bring before them such books, papers, deeds and writings as appear necessary for arriving at the truth.

Every such person shall attend and answer all questions put to them by the commissioners touching the matter to be inquired into, and shall produce before the commissioners all books, papers, cheques, promissory notes, deeds and writings required of him and in his custody or control, according to the tenor of the summons.

The commissioners or any one of them may require the usual oath or affirmation from every person examined before them, and may administer the same.

R. S. 1964, c. 11, s. 9.

10. Any person on whom any summons has been served, in person or by leaving a copy thereof at his usual residence, who fails to appear before the commissioners, at the time and place specified therein, may be proceeded against by the commissioners in the same manner as if he had failed to obey any subpoena or any process lawfully issued from a court of justice.

R. S. 1964, c. 11, s. 10.

11. Any person refusing to be sworn when duly required, or omitting or refusing, without just cause, sufficiently to answer any question that may be lawfully put to him, or to render any testimony in virtue of this Act, is in contempt of court and shall be punished accordingly.

No answer given by any person so heard as a witness may be used against him in any prosecution under any Act, except in the case of prosecution for perjury or for the giving of contradictory evidence.

R. S. 1964, c. 11, s. 11; 1986, c. 95, s. 100; 1999, c. 40, s. 66.

12. If any person refuse to produce, before the commissioners, any paper, book, deed or writing in his possession or under his control which they deem necessary to be produced, or if any person be guilty of contempt of the commissioners or of their office, the commissioners may proceed for such contempt in the same manner as any court or judge under like circumstances.

R. S. 1964, c. 11, s. 12.

13. The commissioners may allow to any witness summoned to appear before them, and who resides at more than 16 km from the place of examination, the actual cost of his travelling expenses and cost of maintenance during the time he is detained by the inquiry.

R. S. 1964, c. 11, s. 13; 1984, c. 47, s. 213.

14. The Conseil du trésor and the commissioners named by it, the inspectors of correctional facilities and other institutions and any inspector of public offices, and each of such inspectors, the incumbent minister of a department or the persons appointed by him, the Comptroller of Finance and the Deputy Minister of Education, Recreation and Sports, shall have, by law, the powers mentioned in sections 9, 10, 11, 12 and 13.

The Lieutenant-Governor may, by order in council, whenever he deems it advisable in the interest of the public service, confer the same powers upon any other board, body or person applying therefor, for the purpose of any inquiry to be made by such board, body or person.

R. S. 1964, c. 11, s. 14; 1969, c. 21, s. 26; 1970, c. 17, s. 86, s. 102; 1971, c. 48, s. 161; 1977, c. 5, s. 14; 1978, c. 15, s. 140; 1985, c. 38, s. 83; 1988, c. 84, s. 562; 1992, c. 21, s. 141; 1993, c. 51, s. 72; 1994, c. 16, s. 50; 1999, c. 40, s. 66; 2005, c. 28, s. 195; 2002, c. 24, s. 209.

15. *(Repealed).*

R. S. 1964, c. 11, s. 15; 1971, c. 48, s. 161; 1977, c. 5, s. 14; 1992, c. 21, s. 142.

16. The commissioners shall have the same protection and privileges as are conferred upon judges of the Superior Court, for any act done or omitted in the execution of their duty.

R. S. 1964, c. 11, s. 16.

17. No injunction or application under subparagraph 2 of the first paragraph of article 529 of the Code of Civil Procedure (chapter C-25.01) or any other legal proceeding shall interfere with or stay the proceedings of the commissioners in the inquiry.

R. S. 1964, c. 11, s. 17; 1965 (1st sess.), c. 80, a. 1; I.N. 2016-01-01 (NCCP).

18. Certified copies of the evidence taken by the commissioners may be obtained by any person applying therefor, on payment therefor at the rate of $0.10 per 100 words.

R. S. 1964, c. 11, s. 18.

19. The Government shall fix the date when the commissioners shall complete their labours and reports, and the limit of the expenditure on such commission; after which date all expenses of the commission shall cease.

R. S. 1964, c. 11, s. 19.

20. *(This section ceased to have effect on 17 April 1987).*

1982, c. 21, s. 1; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

REPEAL SCHEDULE

In accordance with section 17 of the Act respecting the consolidation of the statutes (chapter R-3), chapter 11 of the Revised Statutes, 1964, in force on 31 December 1977, is repealed effective from the coming into force of chapter C-37 of the Revised Statutes.

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chapter E-6.1

ACT RESPECTING THE REGULATION OF THE FINANCIAL SECTOR

Note *This Act was formerly entitled "Act respecting the Autorité des marchés financiers". The title was amended by section 603 of chapter 23 of the statutes of 2018.*

2004, c. 37, s. 90; 2018, c. 23, s. 603.

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TITLE VI

TITLE I

THE AUTORITÉ DES MARCHÉS FINANCIERS

2004, c. 37, s. 90.

CHAPTER I

ESTABLISHMENT

1. The "Autorité des marchés financiers" is hereby established, hereinafter called the "Authority".

The Authority is a legal person and a mandatary of the State.

2002, c. 45, s. 1; 2004, c. 37, s. 90.

2. The property of the Authority forms part of the domain of the State but the execution of the obligations of the Authority may be levied against its property.

The Authority binds none but itself when it acts in its own name.

2002, c. 45, s. 2; 2004, c. 37, s. 90.

3. The Authority has its head office in the national capital at the location it determines. A notice of the location of the head office, and of any change in its location, shall be published in the *Gazette officielle du Québec*.

2002, c. 45, s. 3; 2004, c. 37, s. 90.

CHAPTER II

DIVISION I

MISSION

4. The mission of the Authority is to

(1) provide assistance to consumers of financial products and services, in particular by setting up consumer-oriented educational programs on financial products and services, processing complaints filed by consumers and giving consumers access to dispute-resolution services;

(2) ensure that the financial institutions and other regulated entities of the financial sector comply with the solvency standards applicable to them as well as with the obligations imposed on them by law with a view to protecting the interests of consumers of financial products and services, and take any measure provided by law for those purposes;

(3) supervise the activities connected with the distribution of financial products and services, administer the rules governing eligibility for and the carrying on of those activities, and take any measure provided by law for those purposes;

(4) supervise stock market and clearing house activities and monitor the securities market, in particular, by administering the controls provided by law as regards access to the public capital market, ensuring that the issuers and other practitioners involved in the financial sector comply with the obligations imposed on them by law and taking any measure provided by law for those purposes;

(4.1) supervise derivatives markets, including derivatives exchanges and clearing houses and ensure that regulated entities and other derivatives market practitioners comply with the obligations imposed by law; and

(5) see to the implementation of protection and compensation programs for consumers of financial products and services and administer the compensation funds set up by law.

2002, c. 45, s. 4; 2004, c. 37, s. 90; 2008, c. 24, s. 182.

5. The Direction de l'encadrement de l'assistance aux consommateurs, the Direction de l'encadrement de la solvabilité, the Direction de l'encadrement de la distribution, the Direction de l'encadrement des marchés de valeurs and the Direction de l'encadrement de l'indemnisation shall be established within the Authority.

The Authority shall achieve each aspect of its mission and develop the specialized skills needed to carry out the duties and powers that ensue from it through the intermediary of the directions mentioned above.

2002, c. 45, s. 5; 2004, c. 37, s. 90.

6. The Authority shall establish any other directorate and any other administrative structure that is appropriate for the exercise of all of the duties and powers related to the regulation of the financial sector, coordination among directorates, coordination of relations with the industry, coordination of the disclosure requirements and coordination of inspections and investigations.

2002, c. 45, s. 6; 2004, c. 37, s. 90.

DIVISION II

FUNCTIONS AND POWERS

7. The Authority shall perform the functions and exercise the powers conferred on it by the Acts listed in Schedule 1 or by other Acts, and shall administer all the Acts or legislative provisions entrusted to the administration of the Authority by an Act or by the Government.

The Authority shall also act as an information and reference centre in all fields of the financial sector.

In addition, the Authority shall perform the functions and exercise the powers conferred on it by this Act.

2002, c. 45, s. 7; 2004, c. 37, s. 90.

8. The Authority shall perform its functions and exercise its powers in a way as to:

(1) foster the confidence of the public and of the business community as regards financial institutions and practitioners in the financial sector as regards solvency and the competence of agents, advisers, brokers, representatives and other practitioners in the financial sector;

(2) promote the availability of high-quality, competitively priced financial products and services for individuals and enterprises in all regions of Québec;

(3) see to the establishment of an effective and efficient regulatory framework that promotes the development of the financial sector and facilitates innovative management and commercial practices;

(4) grant the public and the business community access to reliable, accurate and complete information on the financial institutions and practitioners in the financial sector and on the financial products and services offered;

(5) protect consumers against unethical, abusive or fraudulent practices and give individuals and enterprises access to various dispute resolution mechanisms.

2002, c. 45, s. 8; 2004, c. 37, s. 90.

CHAPTER III

INSPECTIONS AND INVESTIGATIONS, WHISTLEBLOWER PROTECTION AND IMMUNITY AND PENAL PROVISIONS

2002, c. 45, c. III; 2018, c. 23, s. 604.

DIVISION I

INSPECTIONS AND INVESTIGATIONS

2018, c. 23, s. 604.

9. The Authority may, to verify compliance with an Act referred to in section 7, except the Act respecting transparency measures in the mining, oil and gas industries (chapter M-11.5), designate any person who is a staff member to carry out an inspection.

The Authority may, in writing, authorize a person other than a staff member to carry out an inspection and report to it.

It may also delegate, by agreement, all or part of its inspection functions and powers to a self-regulatory organization in accordance with Title III.

2002, c. 45, s. 9; 2004, c. 37, s. 90; 2012, c. 25, s. 27; 2015, c. 23, s. 46; 2017, c. 27, s. 156.

10. The person so authorized to carry out an inspection by the Authority or by a self-regulatory organization may

(1) enter, at any reasonable time of day, the establishment of a person or partnership where activities governed by an Act referred to in section 7 are carried on and carry out an inspection;

(2) require from the persons present any information related to the application of such an Act as well as the production of any book, register, account, contract, record or other relevant document;

(3) examine and make copies of the documents containing information that is relevant to the activities of the person or partnership.

Any person who has the custody, possession or control of documents referred to in this section must, on request, communicate them to the person carrying out the inspection and facilitate their examination by such person.

2002, c. 45, s. 10; 2004, c. 37, s. 90.

11. The person authorized to carry out an inspection by the Authority or by a self-regulatory organization must, on request, produce identification and show the document attesting his or her authorization.

No proceedings may be brought against that person by reason of acts performed in good faith in the exercise of his or her functions.

2002, c. 45, s. 11; 2004, c. 37, s. 90.

12. The Authority may, on its own initiative or on request, conduct any investigation if it has reasonable grounds to believe there has been contravention of an Act referred to in section 7.

The investigation is held *in camera*.

2002, c. 45, s. 12; 2004, c. 37, s. 90; 2008, c. 7, s. 1.

13. The Authority may authorize a person referred to in the first or second paragraph of section 9 to exercise all or part of the powers conferred on it by section 12.

2002, c. 45, s. 13; 2004, c. 37, s. 90.

14. The person the Authority has authorized to conduct an investigation is vested with the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions (chapter C-37), except the power to order imprisonment.

2002, c. 45, s. 14; 2004, c. 37, s. 90.

14.1. The Authority may prohibit a person from communicating information related to an investigation to anyone except the person's lawyer.

2008, c. 7, s. 2.

14.2. A person called on to testify during an investigation or an examination may be assisted by a lawyer of the person's choice.

2008, c. 7, s. 2.

15. The person shall transmit all investigation reports to the Authority.

2002, c. 45, s. 15; 2004, c. 37, s. 90.

15.1. No chartered professional accountant may refuse to communicate to the Authority or to a person authorized by the Authority any information or document relating to a legal person, partnership or other entity that is under an investigation conducted under section 12 of this Act, section 116 of the Derivatives Act (chapter I-14.01) or section 239 of the Securities Act (chapter V-1.1) that was obtained or prepared by the accountant for the purposes of an audit or for the purposes of the examination of interim financial statements of the legal person, partnership or entity, on the grounds that the communication would result in the disclosure of information protected by professional secrecy.

Nor may such an accountant refuse to allow a document described in the first paragraph to be examined, copied or seized by the Authority, or a person authorized to investigate by the Authority, in the course of a search under the Code of Penal Procedure (chapter C-25.1).

This section shall not operate to allow the communication, examination, copying or seizure of a document or information protected by the professional secrecy binding a member of a professional order other than a chartered professional accountant.

2008, c. 7, s. 3; 2008, c. 24, s. 183; 2012, c. 11, s. 32; 2018, c. 23, s. 605.

15.2. Despite any other provision of this Act or of an Act referred to in section 7, information or a document obtained under section 15.1 is confidential and may not be used or communicated otherwise than in accordance with sections 15.3 to 15.7.

The disclosure of such information or such a document, and its use or communication pursuant to any of sections 15.3 to 15.7, may not operate to otherwise affect the right to professional secrecy.

2008, c. 7, s. 3.

15.3. Information or a document obtained under section 15.1 may only be used within the Authority for the purposes of the investigation or the search.

It may be accessed by persons whose functions within the Authority require that they be informed of the substance of the investigation or the search.

2008, c. 7, s. 3.

15.4. The Authority may communicate information or a document obtained under section 15.1 to a person authorized to exercise all or part of its powers of investigation or to a person providing expert support in the course of the investigation or the search, but solely for such purposes and only insofar as the Authority has obtained the person's undertaking to uphold the same confidentiality obligations as are incumbent on the Authority and the persons referred to in section 15.3.

2008, c. 7, s. 3.

15.5. The President and Chief Executive Officer of the Authority, a member of the personnel of the Authority, a person authorized to investigate by the Authority or a person providing expert support may not testify in relation to or produce information or a document obtained under section 15.1 except insofar as the disclosure is necessary for the purposes of a proceeding to which the Authority is a party following the investigation or the search.

Information or a document obtained under section 15.1 may not be used or communicated for the purposes of a civil suit.

It may be used or communicated for the purposes of section 19.1.

The first paragraph also applies to persons who no longer exercise the functions described in that paragraph.

2008, c. 7, s. 3; I.N. 2015-06-01.

15.6. Information or a document obtained under section 15.1 may be communicated by the Authority

(1) to a police force having jurisdiction in Québec, if there are reasonable grounds to believe that the legal person, partnership or other entity has committed or is about to commit a criminal or penal offence against the Authority or one of its employees or under this Act, an Act referred to in section 7 or another securities provision, and the communication is necessary for the investigation of that offence or any prosecution resulting from the investigation;

(2) to a Canadian securities authority, if the communication is needed by that authority in the exercise of its powers of investigation or necessary for any prosecution resulting from the investigation;

(3) to a regulatory body, other than an authority referred to in paragraph 2, which, at the time of the communication, is a signatory to a multilateral memorandum of understanding concerning consultation and cooperation and the exchange of information of the International Organization of Securities Commissions or the Multilateral Memorandum of Understanding on Cooperation and Information Exchange of the International Association of Insurance Supervisors, published in the Authority's bulletin, if the communication is needed by that regulatory body in the exercise of its powers of investigation or necessary for any prosecution resulting from the investigation; or

(4) to the Ordre des comptables professionnels agréés du Québec, within the scope of an agreement entered into under section 9 of the Chartered Professional Accountants Act (chapter C-48.1).

2008, c. 7, s. 3; 2009, c. 35, s. 76; 2011, c. 26, s. 3; 2012, c. 11, s. 15; 2018, c. 23, s. 606.

15.7. Before communicating information or a document in accordance with paragraph 2 or 3 of section 15.6, the Authority must obtain an undertaking from the recipient that it will use the information or document solely for the purposes stated in that paragraph and that it will uphold the same confidentiality obligations

with respect to the information or document as are incumbent on the Authority under this section and sections 15.2 to 15.6.

If the Authority is of the opinion that the information or document will not, with a recipient referred to in paragraph 3 of section 15.6, benefit from the same level of protection as is provided by this section and sections 15.2 to 15.6, it must refuse to communicate the information or document.

2008, c. 7, s. 3.

16. No person employed by the Authority or authorized by the Authority to exercise the powers to make an inspection or inquiry shall communicate or allow to be communicated to anyone information obtained under this Act or a regulation made by the Government, or allow the examination of a document filed under this Act or the regulation, unless the person is authorized to do so by the Authority. The same applies to any information or document relating to the application of guidelines and provided voluntarily to the Authority.

Notwithstanding sections 9 and 59 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), only a person generally or specially authorized by the Authority may have access to such information or such a document.

2002, c. 45, s. 16; 2002, c. 70, s. 177; 2004, c. 37, s. 41; 2013, c. 18, s. 7.

16.1. The President and Chief Executive Officer of the Authority, a member of the personnel of the Authority or any other person who exercised functions in the course of an investigation under section 12 or under an Act referred to in section 7 may not testify in relation to information or a document obtained in the course of the investigation or produce such a document, except insofar as the disclosure is necessary for the purposes of a proceeding to which the Authority is a party.

Information or a document described in the first paragraph may be used or communicated for the purposes of section 19.1.

The first paragraph also applies to persons who no longer exercise the functions described in that paragraph.

2008, c. 7, s. 4; I.N. 2015-06-01.

17. The Authority may summarily dismiss any request for investigation considered to be frivolous or clearly unfounded.

The applicant must be informed of any dismissal.

2002, c. 45, s. 17; 2004, c. 37, s. 90; 2008, c. 24, s. 184.

DIVISION II

WHISTLEBLOWER PROTECTION

2018, c. 23, s. 607.

17.0.1. Any person who wishes to make a disclosure may do so by communicating any information to the Authority that the person believes could show that a contravention of an Act referred to in section 7 has been committed or is about to be committed, or that could show that the person has been asked to commit such a contravention.

A person who discloses such a contravention may do so despite the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), the Act respecting the protection of personal information in the private sector (chapter P-39.1), any other communication restrictions

under other laws of Québec, any provision of a contract or any duty of loyalty or confidentiality that may be binding on the person, in particular with respect to an employer or client.

However, the lifting of professional secrecy authorized under this section does not apply to professional secrecy between a lawyer or a notary and a client.

2018, c. 23, s. 607.

17.0.2. The Authority must take all the measures necessary to protect the identity of persons who make a disclosure. However, the Authority may communicate the identity of such a person to the Director of Criminal and Penal Prosecutions or to another competent authority.

2018, c. 23, s. 607.

17.0.3. If a person makes a disclosure to the Authority that should have been made to the Anti-Corruption Commissioner or to another competent authority, the Authority must inform the person of that fact, unless the Authority is unable to contact the person.

2018, c. 23, s. 607.

17.0.4. It is forbidden to take a reprisal against a person who, in good faith, makes a disclosure to the Authority or who cooperates in an investigation conducted under this Act, or to threaten to take a reprisal against a person so that he or she will abstain from making such a disclosure or cooperating in such an investigation.

2018, c. 23, s. 607.

17.0.5. For the purposes of this division, the demotion, suspension, dismissal or transfer of an employee or any disciplinary or other measure that adversely affects his or her employment or working conditions is presumed to be a reprisal.

2018, c. 23, s. 607.

DIVISION III

IMMUNITY AND PENAL PROVISIONS

2018, c. 23, s. 607.

17.1. A person who, in good faith and in accordance with section 17.0.1, reports a failure to comply with an Act referred to in section 7 to the Authority is not subject to any civil liability for doing so.

2011, c. 26, s. 4; 2018, c. 23, s. 608.

18. Except on a question of jurisdiction, no application for judicial review under the Code of Civil Procedure (chapter C-25.01) may be exercised, nor any injunction granted, against any person authorized to carry out an inspection or conduct an investigation.

Any judge of the Court of Appeal may, on an application, summarily annul any decision, order or injunction made or granted contrary to the first paragraph.

2002, c. 45, s. 18; 2004, c. 37, s. 90; 2007, c. 15, s. 20; I.N. 2016-01-01 (NCCP).

19. Anyone who

(1) provides information, when making a disclosure under section 17.0.1, that they know to be false or misleading, or

(2) contravenes section 17.0.4,

is guilty of an offence and is liable to a fine of $2,000 to $20,000 in the case of a natural person and $10,000 to $250,000 in all other cases.

The fines are doubled for a subsequent offence.

2002, c. 45, s. 19; 2004, c. 37, s. 90; 2018, c. 23, s. 609.

19.0.1. Anyone who

(1) hinders or attempts to hinder the action of an inspector or investigator in the exercise of inspection or investigation functions or powers or who hides, destroys or refuses to provide information, a document or a thing the inspector or investigator is entitled to require or examine when exercising those functions or powers, or

(2) fails to appear after summons or refuses to testify in connection with an inspection or investigation,

is guilty of an offence and is liable to a fine of $5,000 to $50,000 in the case of a natural person and $15,000 to $150,000 in all other cases.

The minimum and maximum fines are doubled for a second offence and tripled for a subsequent offence.

2018, c. 23, s. 609.

19.0.2. Anyone who helps a person to commit an offence under section 19 or 19.0.1 or who, by encouragement, advice or consent or by an authorization or order, induces another person to commit such an offence is guilty of an offence and is liable to the same penalty as that prescribed for the offence they helped or induced the person to commit.

2018, c. 23, s. 609.

CHAPTER III.1

RECEIVERSHIP

2008, c. 7, s. 5.

19.1. The Superior Court may order the appointment of a receiver if the Authority shows that it has reasonable grounds to believe

(1) that the assets of the person, partnership or other entity are insufficient to meet the obligations of the person, partnership or other entity or were used for a purpose other than the purpose for which they were intended, or that there is an inexplicable deficiency in the assets;

(2) that an officer or director of the person, partnership or other entity has committed embezzlement, a breach of trust or another offence;

(3) that the management exercised by the officers and directors is unacceptable in view of generally accepted principles and could endanger the rights of the investors or members of the person, partnership or other entity or the persons insured by the person, partnership or other entity, or cause the depreciation of securities or titles issued by the person, partnership or other entity; or

(4) that the appointment is necessary to protect the public in the context of an investigation ordered under section 12 of this Act, section 116 of the Derivatives Act (chapter I-14.01) or section 239 of the Securities Act (chapter V-1.1).

The Authority may also request that the Court issue a receivership order if the authorization granted under the Insurers Act (chapter A-32.1), the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2) or the Trust Companies and Savings Companies Act (chapter S-29.02) was suspended and the causes for the suspension were not remedied within 30 days after the suspension took effect, or in cases where a person, partnership or other entity is carrying on activities without having been granted such an authorization although the authorization is required.

The Authority recommends to the Court the names of persons who could act as receiver.

2008, c. 7, s. 5; 2008, c. 24, s. 185; 2013, c. 26, s. 129; 2018, c. 23, s. 610.

19.2. The receivership order may empower the receiver to

(1) take possession of all the property belonging to the person, partnership or other entity, or held by the person, partnership or other entity for another person, in any place where it is being kept, even if it is in the possession of a bailiff, a creditor or another person claiming it;

(2) exercise, in the case of a natural person, the powers relating to the person's affairs and, in other cases, the powers of the shareholders, associates, directors, officers and members, as applicable, of the person, partnership or other entity;

(3) pursue all or part of the affairs of the person, partnership or other entity or take any conservatory measure related to those affairs;

(4) terminate or cancel any contract to which the person, partnership or other entity is a party;

(5) institute or continue, without continuance of suit, or take part in any proceedings relating to the affairs or property of a person, partnership or other entity to which the person, partnership or other entity was or would have been a party;

(6) investigate the activities of the person, partnership or other entity;

(7) retain the services of accountants, lawyers or other persons to assist in receivership functions;

(8) assign, on behalf of the person, partnership or other entity, all of the property of the person, partnership or other entity for the benefit of the creditors or act as trustee under any federal statute applicable to bankruptcy or insolvency matters;

(9) wind up the person, partnership or other entity in accordance with the Winding-up Act (chapter L-4), the Business Corporations Act (chapter S-31.1) or any special provision of an Act referred to in section 7 applicable to the person, partnership or other entity or in the manner determined by the Superior Court; and

(10) exercise any other power or function the Court considers appropriate to enable the receiver to carry out receivership functions.

2008, c. 7, s. 5; 2011, c. 26, s. 5.

19.3. Any person exercising powers relating to the affairs or property of the person, partnership or other entity that are covered by the receivership order must immediately cease to do so, to the extent specified in the order, unless otherwise requested by the receiver.

2008, c. 7, s. 5.

19.4. No judicial proceedings may be brought against the receiver, or any person the receiver designates to assist in the exercise of receivership functions, for an act done in good faith in the exercise of their functions.

2008, c. 7, s. 5.

19.5. For the purposes of their investigation, the receiver and any person the receiver designates to assist in the investigation have the powers and immunity provided for in the first paragraph of section 6 and sections 9 to 13 and 16 of the Act respecting public inquiry commissions (chapter C-37).

For the purposes of the investigation, they have all the powers of a judge of the Superior Court, except the power to order imprisonment.

2008, c. 7, s. 5.

19.5.1. An application by the Authority for the appointment of a receiver must be served on the defendant at least 10 days prior to its presentation. The application is heard and decided by preference.

The application is contested orally on the day of its presentation. The parties may adduce detailed affidavits in evidence to establish all the facts needed to support their allegations. The affidavits and all documents referred to must be served on the other party at least two clear working days before the day of presentation of the application.

2011, c. 26, s. 6; I.N. 2016-01-01 (NCCP).

19.6. At the Authority's request, if urgent action is required or to prevent irreparable injury, the Superior Court shall hear the application without delay in the defendant's absence. The defendant has 10 days after an order is rendered to file a notice of contestation with the Court.

At the Authority's request, the application may be heard in private.

2008, c. 7, s. 5; 2011, c. 26, s. 7; I.N. 2016-01-01 (NCCP); 2018, c. 23, s. 611.

19.7. The Superior Court may prohibit a person from communicating any information related to the receivership order or disclosed during the hearing.

2008, c. 7, s. 5.

19.8. Receivership with respect to the property of a federation of mutual companies governed by the Insurers Act (chapter A-32.1) includes receivership with respect to its guarantee fund and, if applicable, receivership with respect to its segregated investment funds.

2008, c. 7, s. 5; 2018, c. 23, s. 612.

19.9. The directors, officers, personnel members, associates or mandataries of the person, partnership or other entity subject to the receivership order must cooperate with the receiver and provide the receiver with any information related to the affairs and property of the person, partnership or other entity.

2008, c. 7, s. 5.

19.10. At the request of the Authority, the receiver shall inform the Authority of the receiver's findings, management and investigation conclusions, and communicate any information collected within the scope of the receivership mandate to the Authority.

2008, c. 7, s. 5.

19.11. At the request of the Authority, the receiver or any interested person, the Superior Court may modify the receiver's powers.

The Court may also terminate the receivership, in particular if it considers

(1) that the receivership may not reasonably be expected to benefit the creditors of the person, partnership or other entity, the persons who have property in the possession or under the control of the person, partnership or other entity, or the investors, members or insured persons of the person, partnership or other entity; or

(2) that the financial situation of the person, partnership or other entity subject to the receivership order will not allow payment of the costs associated with the receivership.

The Court may then order the winding-up of the person, partnership or other entity and appoint a liquidator, or assign, on behalf of the person, partnership or other entity, all of the property of the person, partnership or other entity for the benefit of its creditors and appoint a trustee.

2008, c. 7, s. 5.

19.12. The liquidator of a federation of mutual companies must, within 10 days after the decision of the Court ordering the winding-up of the federation, notify the federation's member companies.

2008, c. 7, s. 5; 2010, c. 7, s. 192; 2010, c. 40, s. 92; 2018, c. 23, s. 613.

19.13. In the case of a security fund within the meaning of the Act respecting financial services cooperatives (chapter C-67.3), the liquidator shall first pay the debts of the fund and the costs of winding it up, and the balance from the winding-up devolves to the federation within the meaning of that Act.

2008, c. 7, s. 5.

19.14. No appeal lies from an order made under section 19.1.

2008, c. 7, s. 5; 2011, c. 26, s. 8.

19.15. The receiver's fees and expenses are taken out of the mass of assets, after approval by the Superior Court.

The receiver's fees and expenses are deemed to constitute a prior claim and to have the same rank as expenses incurred in the common interest. The prior claim establishes a real right and confers on the receiver the right to follow the property that is subject to the claim into whosever hands it may be.

2008, c. 7, s. 5.

19.16. The receiver may, at any time during the receivership mandate, request the approval of fees and expenses by filing with the Superior Court a summary statement of the fees and expenses, together with a notice to the Authority.

2011, c. 26, s. 9.

19.17. Only the Authority may oppose the request and must do so by filing a notice of opposition with the Superior Court, together with a notice to the receiver, within 30 days after the notice referred to in section 19.16 is sent.

The receiver shall request the Superior Court, within the 10 days after a notice of opposition is filed, to set a hearing date and shall give the Authority notice of the date.

The Superior Court shall hear the parties' oral arguments on the notice of opposition on the day of the hearing and shall then determine the fees and expenses.

2011, c. 26, s. 9; I.N. 2016-01-01 (NCCP).

CHAPTER IV

OPERATION

20. The affairs of the Authority shall be administered by a President and Chief Executive Officer appointed by the Government, which shall determine the remuneration, employee benefits and other terms of employment of the President and Chief Executive Officer.

The term of the President and Chief Executive Officer is five years. At the end of that term, the President and Chief Executive Officer shall remain in office until replaced or reappointed.

2002, c. 45, s. 20; 2004, c. 37, s. 90; I.N. 2015-06-01.

21. The President and Chief Executive Officer is responsible for the administration and direction of the Authority within the scope of its internal by-laws and policies and shall exercise his or her functions on a full-time basis.

2002, c. 45, s. 21; 2004, c. 37, s. 90; I.N. 2015-06-01.

22. The President and Chief Executive Officer shall designate one or more members of the staff of the Authority to replace the President and Chief Executive Officer in the case of absence or inability to act. The designation shall be published in the *Gazette officielle du Québec* and in the Authority's bulletin, but shall take effect as soon as the instrument evidencing the designation is signed by the President and Chief Executive Officer.

2002, c. 45, s. 22; 2004, c. 37, s. 90; I.N. 2015-06-01.

23. The President and Chief Executive Officer shall appoint at least three but no more than five superintendents who shall administer the activities and operations of the five directions of the Authority referred to in section 5.

The superintendents shall assist the President and Chief Executive Officer in the exercise of his or her functions and shall exercise their administrative functions under the President and Chief Executive Officer's authority.

The President and Chief Executive Officer shall also appoint the secretary of the Authority. Documents intended for the Authority are served on the secretary.

2002, c. 45, s. 23; 2004, c. 37, s. 90; 2008, c. 24, s. 186; I.N. 2015-06-01.

24. Subject to all applicable legislative provisions, the Authority's President and Chief Executive Officer may delegate, generally or specially, to any of the superintendents, any other member of the staff of the Authority or any other person he or she designates any function or power under an Act referred to in section 7. The decision shall be published in the *Gazette officielle du Québec* and in the Authority's bulletin.

The Authority's powers to make regulations, define a policy statement or establish a guideline that are provided for in those Acts may not, however, be delegated.

The President and Chief Executive Officer may, in the instrument of delegation, authorize the subdelegation of the functions and powers he or she indicates; in such a case, he or she shall identify the superintendent, the staff member or the person to whom such subdelegation may be made.

2002, c. 45, s. 24; 2004, c. 37, s. 90; I.N. 2015-06-01.

25. The decisions made by the Authority, and certified true by the President and Chief Executive Officer, the secretary or any other person authorized for that purpose by the Authority, are authentic. The same applies to the documents or copies of documents emanating from the Authority or forming part of its records when they have been signed or certified true by any of such persons.

2002, c. 45, s. 25; 2004, c. 37, s. 90; I.N. 2015-06-01.

25.0.1. An attestation issued by the Authority concerning any matter relating to the administration of this Act or an Act referred to in section 7 constitutes proof of its content in any proceeding without further proof of the signature or authority of the signatory, until proof to the contrary.

2018, c. 23, s. 614.

25.1. Subject to the conditions determined by by-law, the Authority may allow the signature of the President and Chief Executive Officer or a delegate referred to in section 24 to be affixed by means of an automatic device on the documents determined in the by-law

2004, c. 37, s. 42; I.N. 2015-06-01.

25.2. The Authority may, in cases that are not expressly provided for in this Act or an Act referred to in section 7, require the use of a medium or technology it specifies for completing a formality under one of those Acts. It shall determine such requirements as to the form of documents and the manner in which they are to be sent or received as are necessary to allow the use of that medium or technology.

In the cases described in the first paragraph, signature requirements for technology-based documents sent to the Authority, including what may stand in lieu of a signature, are also determined by the Authority.

2011, c. 26, s. 10.

26. A by-law made by the Authority shall establish a staffing plan as well as the selection criteria and procedure of appointment of the members of its staff.

Subject to the provisions of a collective agreement, such by-law shall also determine the standards and scales of their remuneration, employee benefits and other terms of employment in accordance with the conditions defined by the Government.

2002, c. 45, s. 26; 2004, c. 37, s. 90.

27. The superintendents, the secretary and the other members of the staff of the Authority may not, on pain of dismissal, occupy another position or have a direct or indirect interest in an enterprise that may place their personal interests in conflict with their duties or functions. If such interest devolves to them by succession or gift, they must renounce it or dispose of it with diligence.

2002, c. 45, s. 27; 2004, c. 37, s. 90.

28. The Authority shall determine, by by-law, the rules of ethics and the disciplinary sanctions applicable to staff members.

Such a by-law must prescribe special rules and sanctions applicable to transactions carried out by personnel members on securities governed by the Securities Act (chapter V-1.1).

The special rules and sanctions must be sent to the Minister not later than 30 days before they are to be adopted. The Minister may, before they are adopted, specify the amendments the Authority must make to them.

2002, c. 45, s. 28; 2004, c. 37, s. 90; 2016, c. 7, s. 154.

29. The President and Chief Executive Officer must, if he or she has an interest in an enterprise to which an Act the administration of which is entrusted to the Authority applies, or under which functions or powers are conferred on the President and Chief Executive Officer, disclose that fact to the Minister, on pain of forfeiture of office.

2002, c. 45, s. 29; 2004, c. 37, s. 90; I.N. 2015-06-01.

30. The President and Chief Executive Officer may not contract a loan with a legal person or partnership to which an Act the administration of which is entrusted to the Authority applies, or under which functions or powers are conferred on the President and Chief Executive Officer, without the Minister having been informed of that fact in writing.

2002, c. 45, s. 30; 2004, c. 37, s. 90; I.N. 2015-06-01.

31. A superintendent, the secretary or any other member of the staff of the Authority who exercises functions or powers delegated or subdelegated to him or her with respect to the administration of any Act must, at the time determined by the President and Chief Executive Officer, send the President and Chief Executive Officer a list of his or her interests in any partnership or legal person to which such an Act applies, as well as a list of the loans contracted with such enterprise and on which a balance remains due together with the related conditions.

2002, c. 45, s. 31; 2004, c. 37, s. 90; I.N. 2015-06-01.

32. No proceedings may be brought against the Authority, the President and Chief Executive Officer, a staff member or an appointed agent of the Authority by reason of acts performed in good faith in the exercise of his or her functions.

The same rule applies to every person who exercises a function or power under a delegation by the Authority and to every person or organization referred to in Chapter II of Title X of the Securities Act (chapter V-1.1) when that person or organization exercises a function or power of a person referred to in this section.

2002, c. 45, s. 32; 2004, c. 37, s. 43; 2006, c. 50, s. 113; 2008, c. 24, s. 187; I.N. 2015-06-01.

32.1. If the President and Chief Executive Officer, a staff member or an appointed agent of the Authority is prosecuted by a third party for an act done in the exercise of the functions of office, the Authority shall assume the person's defence and shall pay any damages awarded as compensation for the injury resulting from that act, unless the person committed a gross fault or a personal fault separable from those functions.

In penal or criminal proceedings, however, the Authority shall pay the defence costs of the President and Chief Executive Officer, a staff member or an appointed agent only if the person had reasonable grounds to believe that his or her conduct was in conformity with the law, or was discharged or acquitted.

2004, c. 37, s. 44; I.N. 2015-06-01.

32.2. If the Authority prosecutes the President and Chief Executive Officer, a staff member or an appointed agent for an act done in the exercise of the functions of office and loses its case, it shall pay the person's defence costs if a court of justice so decides.

If the Authority wins its case only in part, a court of justice may determine the amount of the defence costs it must pay.

2004, c. 37, s. 44; I.N. 2015-06-01; 2016, c. 7, s. 171.

33. The Authority may, as provided by law, enter into an agreement with a government other than the Government of Québec, a department of such a government, an international organization or a body of such a government or organization.

It may also, as provided by law, enter into an agreement with the Government or one of its departments or bodies, or with a person or an organization in Québec or outside Québec, with a view to facilitating the application of this Act, one or more Acts referred to in section 7, or a foreign Act on a similar subject.

The agreement may allow the communication of any personal information to facilitate the application of any Act referred to in section 7 or of any similar legislation outside Québec.

2002, c. 45, s. 33; 2004, c. 37, s. 90; 2008, c. 7, s. 6.

33.1. After receiving authorization from the Minister, the Authority may enter into an agreement with a person, partnership or other organization in Québec or, after receiving authorization from the Government, with a person, partnership or other organization outside Québec to examine complaints filed, within the scope

of the complaint examination and dispute resolution policy provided for in an Act referred to in section 7 by persons dissatisfied with the complaint examination procedure or its outcome.

Such an agreement may also include provisions allowing the person, partnership or organization, when the person, partnership or organization considers it appropriate, to act as a mediator if the parties agree.

The Authority may also retain the services of any natural person or any group of mediators to act as mediator or, with the authorization of the Government, enter into an agreement for that purpose with a body, partnership or a legal person other than a group of mediators.

2008, c. 7, s. 7.

34. The Authority shall publish a periodic bulletin to inform the financial institutions and the practitioners in the financial industry, as well as consumers and the public, on its activities. In particular, the Authority shall publish its draft regulations and regulations.

2002, c. 45, s. 34; 2004, c. 37, s. 90.

34.1. Except on a question of jurisdiction, no application for judicial review under the Code of Civil Procedure (chapter C-25.01) may be exercised, nor any injunction granted, against the Authority.

Any judge of the Court of Appeal may, on an application, summarily annul any decision, order or injunction made or granted contrary to the first paragraph.

2007, c. 15, s. 21; I.N. 2016-01-01 (NCCP).

35. Chapter I of Title I of the Act respecting administrative justice (chapter J-3) applies to the decisions of the Authority.

2002, c. 45, s. 35; 2004, c. 37, s. 90.

35.1. Subject to a recourse under section 322 of the Securities Act (chapter V-1.1) or section 113 of the Derivatives Act (chapter I-14.01), the Authority may review its decisions at any time, except in the event of an error in law.

A person having rendered a decision under delegated powers may review it if justified by a new fact.

2009, c. 58, s. 32.

36. The Authority is subject to the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

2002, c. 45, s. 36; 2004, c. 37, s. 90.

36.1. Despite section 8 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), the President and Chief Executive Officer of the Authority may delegate to a member of the management staff of the agency authorized under section 178 of the Automobile Insurance Act (chapter A-25) the functions assigned to the person responsible for access to documents or the protection of personal information by the Act respecting Access to documents held by public bodies and the Protection of personal information concerning the exercise of the rights of access and correction with regard to the information referred to in section 177 of the Automobile Insurance Act, but only as concerns insured persons' automobile driving experience.

2018, c. 23, s. 615.

CHAPTER V

FINANCIAL PROVISIONS AND REPORTS

37. The Authority may, by regulation, prescribe the duties, fees and other charges payable for any formality provided for by this Act or the regulations, and for the services provided by the Authority as well as the terms and conditions of payment.

A regulation made pursuant to the first paragraph requires the approval of the Government which may approve it with or without amendment.

2002, c. 45, s. 37; 2004, c. 37, s. 90.

38. The expenses incurred for the application of this Act shall be borne, to the extent determined by the Government, by the persons, partnerships and other entities carrying on an activity governed by an Act referred to in section 7.

The Authority shall determine the share of the expenses that each person, partnership and entity must pay to it and may provide for cases of exemption, with or without conditions.

The share may vary according to categories of persons, partnerships and other entities and within the same category according to the nature of the activity they carry on, the nature of the services supplied by the Authority or the nature of the expenses the Authority incurs.

The attestation of the Authority shall establish the amount to be paid to it by each person, partnership and other entity under this section.

2002, c. 45, s. 38; 2004, c. 37, s. 90.

38.1. The Authority shall remit half the sums collected as fines or administrative sanctions or penalties to the Minister of Finance, at the intervals the latter determines. However, the sums collected as penalties under sections 115.2 and 419 of the Act respecting the distribution of financial products and services (chapter D-9.2), except the sums collected in a case prescribed by regulation, must be remitted in full to the Minister.

2008, c. 7, s. 8; 2018, c. 23, s. 616.

38.2. Despite section 38.1, the Authority shall keep all the sums it receives under the Act respecting transparency measures in the mining, oil and gas industries (chapter M-11.5) as monetary administrative penalties or fines.

2008, c. 7, s. 8; 2008, c. 24, s. 188; 2009, c. 58, s. 33; 2011, c. 26, s. 11; 2018, c. 23, s. 616.

38.3. The Authority may also set up a contingency reserve in the pursuit of its mission.

2008, c. 7, s. 8.

38.4. The sums received by the Authority within the scope of the Acts it administers are deposited as and when they are received in an authorized bank or foreign bank listed in Schedule I, II or III to the Bank Act (Statutes of Canada, 1991, chapter 46) or in a financial services cooperative within the meaning of the Act respecting financial services cooperatives (chapter C-67.3).

2008, c. 7, s. 8.

38.5. The sums received by the Authority form part of its revenue, except contributions to an insurance fund or to the Fonds d'indemnisation des services financiers established by section 258 of the Act respecting the distribution of financial products and services (chapter D-9.2) and premiums paid into a deposit insurance fund maintained under section 52 of the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2). Those revenues are used to pay expenditures related to the administration of the Acts referred to in section 7.

For the purposes of this Act, the sums paid into the Fund or the contingency reserve provided for in sections 38.1 and 38.3 are considered to be expenditures.

2008, c. 7, s. 8.

38.6. The Authority may, in accordance with its investment policy, invest any part of its revenue that is not needed to pay its expenditures, as well as the sums making up the Fund and the contingency reserve provided for in sections 38.1 and 38.3 of this Act, the deposit insurance fund maintained under section 52 of the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2) and the Fonds d'indemnisation des services financiers established by section 258 of the Act respecting the distribution of financial products and services (chapter D-9.2)

(1) in securities issued or guaranteed by the Government of Canada, the Gouvernement du Québec, or the government of a Canadian province or territory;

(2) in the form of a deposit with financial institutions authorized to operate in Québec, or in certificates, notes or other securities issued or guaranteed by those financial institutions; or

(3) in the form of a deposit with the Caisse de dépôt et placement du Québec, to be administered by the Caisse in accordance with the investment policy determined by the Authority.

2008, c. 7, s. 8.

39. The Authority may not, without the authorization of the Government

(1) contract a loan that causes the aggregate of its outstanding loans to exceed the amount determined by the Government;

(2) make a financial commitment in excess of the limits or in contravention of the terms and conditions determined by the Government;

(3) acquire or transfer assets in excess of the limits or in contravention of the terms and conditions determined by the Government.

The Authority may not accept any gift or legacy. Nor may it receive any financial contribution except

(1) a financial contribution from the Gouvernement du Québec or from another government in Canada, a department or agency of such a government, a municipality or an agency of a municipality in order to participate in projects related to the Authority's mission within the framework of an agreement under section 33 between that government, department, municipality or agency and the Authority; or

(2) a financial contribution referred to in the second paragraph of section 38.2.

2002, c. 45, s. 39; 2004, c. 37, s. 90; 2008, c. 7, s. 9.

40. The Government may, on the conditions it determines

(1) guarantee the payment, in principal and interest, of any loan contracted by the Authority and any of its obligations;

(2) authorize the Minister of Finance to advance any amount to the Authority that is considered necessary for the performance of its obligations or the pursuit of its mission.

The sums required for the purposes of this section shall be taken out of the Consolidated Revenue Fund.

2002, c. 45, s. 40; 2004, c. 37, s. 90.

41. The fiscal year of the Authority ends on 31 March.

2002, c. 45, s. 41; 2004, c. 37, s. 90.

42. The Authority must file with the Minister, no later than 31 July each year, its financial statements and a report on its activities for the previous fiscal year.

The financial statements and activity report must contain all the information required by the Minister.

The activity report of the Authority may assemble all the activity reports that must be filed by the Authority under any Act.

2002, c. 45, s. 42; 2004, c. 37, s. 90.

43. The Minister shall table the activity report and the financial statements of the Authority before the National Assembly within 30 days of their receipt or, if the Assembly is not sitting, within 30 days of resumption.

2002, c. 45, s. 43; 2004, c. 37, s. 90.

43.1. The Authority shall provide the Minister with any information and any other report required by the Minister concerning its activities.

2008, c. 7, s. 10.

43.2. *(Repealed).*

2012, c. 25, s. 28; 2017, c. 27, s. 157.

44. The books and accounts of the Authority shall be audited by the Auditor General each year and whenever the Government so orders.

The Auditor General's report must be filed with the activity report and financial statements of the Authority.

2002, c. 45, s. 44; 2004, c. 37, s. 90; 2012, c. 25, s. 29; 2017, c. 27, s. 158.

45. The Authority must furnish to the Minister any information required by the Minister concerning its activities.

2002, c. 45, s. 45; 2004, c. 37, s. 90.

46. The Authority shall send the Minister an activity plan according to the form, content and timetable the Minister determines.

The advisory opinion of the Conseil consultatif de régie administrative, provided for in paragraph 2 of section 57, must be attached to the activity plan.

2002, c. 45, s. 46; 2004, c. 37, s. 90; 2018, c. 23, s. 617.

47. Every year, the Authority shall submit to the Minister its budget estimates for the following fiscal year, at the time, and according to the form and content determined by the Minister.

The estimates require the approval of the Government.

2002, c. 45, s. 47; 2004, c. 37, s. 90.

TITLE II

CONSEIL CONSULTATIF DE RÉGIE ADMINISTRATIVE

CHAPTER I

ESTABLISHMENT

48. The "Conseil consultatif de régie administrative", hereinafter called the "Council", is established within the Authority.

2002, c. 45, s. 48; 2004, c. 37, s. 90.

49. The Council is composed of seven members, including a chair, appointed by the Minister.

These persons are chosen for their expertise in administrative management and their knowledge of the financial sector.

However, a person holding employment or an office or exercising a function that may, directly or indirectly, place the person's interest in conflict with the person's duties as a member of the Council may not be appointed to the Council.

2002, c. 45, s. 49; 2018, c. 23, s. 618.

50. The members of the Council shall be appointed for a term of not more than three years, which may be renewed twice only. Their terms must be staggered so as to tend toward not more than a third of them expiring in the same year.

At the end of the term, the members of the Council remain in office until they are reappointed or replaced.

2002, c. 45, s. 50; 2011, c. 26, s. 12.

51. Any vacancy occurring during a term of office shall be filled by the Minister for the time specified in section 50.

2002, c. 45, s. 51.

52. The members of the Council shall receive no remuneration except in the cases, on the conditions and to the extent determined by the Government.

The members are, however, entitled to the reimbursement of expenses incurred in the exercise of their functions on the conditions and to the extent determined by the Government.

2002, c. 45, s. 52.

53. The Council meets as often as necessary, at the request of the chair or of a majority of the members.

The Council may sit anywhere in Québec.

2002, c. 45, s. 53.

54. No instrument, document or writing binds the Council unless it has been signed by the chair or by a member of the Council authorized to do so in the by-laws of the Council.

2002, c. 45, s. 54.

55. The minutes of the sittings of the Council, approved by the latter and certified true by the chair or by a member of the Council authorized to do so in the by-laws of the Council, are authentic. The same applies to

the documents and copies emanating from the Council or forming part of its records when signed and certified true by any of those persons.

2002, c. 45, s. 55.

56. No member of the Council may, unless duly authorized, disclose or communicate to any other person confidential information that has come to his or her knowledge in the exercise of or in connection with the exercise of the member's functions. No member shall use information so obtained for personal benefit or that of a third person.

2002, c. 45, s. 56.

CHAPTER II

FUNCTIONS

57. With respect to the Authority, the functions of the Council are

(1) to advise the Authority on the compatibility of its actions with its mission;

(2) to advise the Authority on its corporate governance, in particular as regards its budget estimates, staffing plan and activity plan;

(3) to make recommendations to the President and Chief Executive Officer of the Authority concerning the appointment of superintendents of the Authority;

(4) to report to the Minister on any matter submitted to it by the Minister and make recommendations concerning the administration of the Authority and the efficient use of its resources.

2002, c. 45, s. 57; 2004, c. 37, s. 90; I.N. 2015-06-01.

57.1. The Council may, in exercising its functions, require any document or information relating to the administration of the Authority. The officers, employees and mandataries of the Authority must, on request, communicate such documents or information to the Council and facilitate their examination.

2011, c. 26, s. 13.

58. Not later than 31 July each year, the Council must submit a report to the Minister on its activities for the previous fiscal year. The Council's report shall be appended to the activity report of the Authority.

2002, c. 45, s. 58; 2004, c. 37, s. 90.

TITLE II.1

COMITÉ CONSULTATIF DES CONSOMMATEURS DE PRODUITS ET UTILISATEURS DE SERVICES FINANCIERS

2018, c. 23, s. 619.

CHAPTER I

ESTABLISHMENT

2018, c. 23, s. 619.

58.1. The "Comité consultatif des consommateurs de produits et utilisateurs de services financiers", hereinafter called "the Committee", is established within the Authority.

2018, c. 23, s. 619.

58.2. The Committee is composed of not fewer than five or more than nine members.

The President and Chief Executive Officer shall appoint the members of the Committee after consultation with the Council and designate the chair of the Committee from among them.

Sections 50 and 56 apply, with the necessary modifications, to the Committee members.

2018, c. 23, s. 619.

58.3. Any vacancy occurring during a term of office is filled by the chair of the Committee, after consultation with the Council, for the unexpired portion of the term of the member to be replaced.

Absence from the number of Committee meetings determined by the Committee's by-laws constitutes a vacancy, in the cases and circumstances indicated in the by-laws.

2018, c. 23, s. 619.

58.4. The Committee shall meet at least once every three months and more often if necessary, at the request of the chair or a majority of the members. However, it may not meet more than 12 times per year.

The Committee may hold its meetings anywhere in Québec.

2018, c. 23, s. 619.

58.5. Committee members receive no remuneration, except in the cases, on the conditions and to the extent determined by a regulation of the Authority.

However, Committee members are entitled to the reimbursement of expenses incurred in the exercise of their functions, on the conditions and to the extent determined by the regulation.

2018, c. 23, s. 619.

58.6. The Authority may make a regulation with respect to the Committee for the purpose of

(1) determining the criteria for selecting its members;

(2) establishing its rules of governance;

(3) determining the role and responsibilities of its chair;

(4) determining the rules of ethics and professional conduct and confidentiality rules applicable to its members; and

(5) determining the conditions and terms applicable to the services and equipment it is required to provide to the Committee under section 58.11.

2018, c. 23, s. 619.

58.7. A draft regulation made under section 58.5 or 58.6 must be sent to the Minister. The Authority may not make the regulation before the expiry of a period of 30 days after receipt of the draft regulation by the Minister; during that period, the Minister may indicate to the Authority any changes it must make to the draft regulation.

2018, c. 23, s. 619.

CHAPTER II

MISSION AND FUNCTIONS

2018, c. 23, s. 619.

58.8. The mission of the Committee is to present the opinion of financial product consumers and financial service users before the Authority.

2018, c. 23, s. 619.

58.9. In the pursuit of its mission, the functions of the Committee are

(1) to comment on the Authority's policies, rules, guidelines and other publications, in cases where they are likely to affect financial product consumers and financial service users, and to make any recommendations on them that the Committee considers useful; and

(2) to make its observations and recommendations to the Authority on any subject that concerns those consumers and users.

2018, c. 23, s. 619.

58.10. The Committee may, in the exercise of its functions, require that any research paper or information used by the Authority in drafting its policies, rules, guidelines or other publications that affect financial product consumers and financial service users be communicated to the Committee.

The Authority's officers, employees and mandataries must, on request, communicate such papers or information to the Committee and facilitate their examination.

2018, c. 23, s. 619.

58.11. The Authority must provide the Committee with the services and equipment it requires to exercise its functions.

2018, c. 23, s. 619.

58.12. Not later than 30 June each year, the Committee must submit a report to the Authority on its activities for the previous fiscal year. The Committee's report must be appended to the Authority's activity report.

2018, c. 23, s. 619.

TITLE III

SELF-REGULATORY ORGANIZATIONS

CHAPTER I

RECOGNITION OF SELF-REGULATORY ORGANIZATIONS

59. A legal person, a partnership or any other entity whose objectives are related to the mission of the Authority may, on the conditions determined by the latter, be recognized as a self-regulatory organization responsible for supervising an activity governed by an Act referred to in Schedule 1.

2002, c. 45, s. 59; 2004, c. 37, s. 90.

60. A legal person, a partnership or any other entity may monitor or supervise the conduct of its members or participants as regards the carrying on, in Québec, of an activity governed by an Act referred to in Schedule 1 only if it is recognized by the Authority as a self-regulatory organization, on the conditions determined by the Authority.

2002, c. 45, s. 60; 2004, c. 37, s. 90.

61. Subject to the applicable legislative provisions, the Authority may, on the conditions it determines, delegate to a recognized organization the exercise of all or part of the functions and powers conferred on it by law.

Such a delegation of functions and powers shall be subject to the approval of the Government, except where it concerns an exchange or clearing house that is subject to section 17 of the Derivatives Act (chapter I-14.01) or where it concerns the carrying on of securities exchange or clearing activities and is made to a legal person, a partnership or any other entity referred to in the second paragraph of section 170 of the Securities Act (chapter V-1.1) that carries on securities exchange or clearing activities.

The Authority's powers to make regulations, define a policy statement or establish a guideline that are provided for in an Act referred to in section 7 may not, however, be delegated.

2002, c. 45, s. 61; 2004, c. 37, s. 90; 2006, c. 50, s. 114; 2009, c. 58, s. 34.

62. The recognized organization may, with prior authorization from the Authority, delegate its functions and powers to a committee formed by it or to a member of its staff.

2002, c. 45, s. 62; 2004, c. 37, s. 90.

62.1. If a recognized organization conducts an investigation, within the meaning of its rules of operation, into the conduct of its members or participants as regards the carrying on, in Québec, of an activity governed by an Act referred to in Schedule 1, it may request any person to communicate any document or information relating to the member or participant concerned that it considers useful to the investigation.

2018, c. 23, s. 620.

62.2. A recognized organization hearing a disciplinary matter, within the meaning of its rules of operation, may call the witnesses it or the other party considers useful to have them give an account of the facts of which they have personal knowledge or produce any document relating to the matter.

2018, c. 23, s. 620.

62.3. The persons designated by a recognized organization to hear a disciplinary matter referred to in section 62.2 and the organization's personnel members assisting them must take the oath set out in Schedule II to the Professional Code (chapter C-26).

2018, c. 23, s. 620.

62.4. If a person fails to respond to a request under section 62.1 or to attend in response to a subpoena under section 62.2, the recognized organization may request the Financial Markets Administrative Tribunal to order the person to comply with the request or subpoena.

2018, c. 23, s. 620.

63. No proceedings may be brought against a recognized organization, the members of its board of directors, a committee formed by the organization, or the organization's personnel for acts performed in good faith in the exercise of the functions or powers delegated to them in accordance with this chapter or in the exercise of functions relating to the supervision or regulation of the conduct of the organization's members or participants.

The same rule applies to every person or organization referred to in Chapter II of Title X of the Securities Act (chapter V-1.1) when that person or organization exercises a function or power of a person referred to in the first paragraph.

2002, c. 45, s. 63; 2004, c. 37, s. 90; 2006, c. 50, s. 115; 2018, c. 23, s. 621.

63.1. Except on a question of jurisdiction, no application for judicial review under the Code of Civil Procedure (chapter C-25.01) may be exercised, nor any injunction granted, against a self-regulatory organization, the members of its board of directors, a committee formed by the organization, or the organization's personnel in the exercise of the functions and powers delegated to them in accordance with this chapter or in the exercise of functions relating to the supervision or regulation of the conduct of the organization's members or participants.

Any judge of the Court of Appeal may, on an application, summarily annul any decision, order or injunction made or granted contrary to the first paragraph.

2007, c. 15, s. 22; I.N. 2016-01-01 (NCCP); 2018, c. 23, s. 622.

64. The recognized organization may not renounce the exercise of functions or powers without prior authorization from the Authority. The Authority may make its authorization subject to the conditions it considers necessary for the protection of the members or participants of the organization, or of the public.

2002, c. 45, s. 64; 2004, c. 37, s. 90.

65. An application for recognition or for a delegation of functions or powers, or an application for the modification of a recognition decision or a delegation of functions or powers, must be filed with the documents and information required by the Authority.

2002, c. 45, s. 65; 2004, c. 37, s. 90; 2008, c. 24, s. 189.

66. The Authority shall publish in its bulletin a notice of the application and invite interested parties to submit their observations in writing.

The first paragraph does not apply to an application for the modification of a recognition decision that does not significantly alter the activities exercised by the applicant.

2002, c. 45, s. 66; 2004, c. 37, s. 90; 2008, c. 24, s. 190; 2013, c. 18, s. 8.

67. The recognition of a legal person, partnership or other entity is subject to the discretion of the Authority.

The Authority shall exercise its discretion in the public interest. Recognition must, in particular, secure effective supervision of the financial industry in Québec, promote the development and soundness in the operation of the financial industry and foster the protection of the public.

2002, c. 45, s. 67; 2004, c. 37, s. 90.

68. The Authority shall grant recognition to a legal person, a partnership or an entity if it considers that the legal person, partnership or entity has the administrative structure and the financial resources and other resources necessary to carry on its activities in an objective, fair and efficient manner.

Before granting recognition to a legal person, a partnership or an entity, the Authority must

(1) ascertain that its constituting documents, by-laws and operating rules comply with sections 69 and 70; and

(2) make sure that the provisions applicable to its members or subscribers will ensure its compliance with sections 70.1 and 71.

2002, c. 45, s. 68; 2004, c. 37, s. 90; 2013, c. 18, s. 9; 2018, c. 23, s. 623.

69. The Authority must be satisfied that the constituting documents, by-laws and operating rules of the legal person, partnership or entity allow the power to make decisions relating to the supervision of an activity governed by an Act referred to in Schedule 1 to be exercised mainly by persons residing in Québec.

2002, c. 45, s. 69; 2004, c. 37, s. 90.

70. In the case of a legal person, partnership or entity referred to in section 60, the constituting documents, by-laws and operating rules must allow the imposition of disciplinary sanctions for any violation of the by-laws or operating rules or contravention of the law.

2002, c. 45, s. 70; 2013, c. 18, s. 10.

70.1. A recognized organization must

(1) allow unrestricted membership for any person who meets the admission criteria;

(2) ensure equal access to the services offered; and

(3) be able to carry on its activities while avoiding and regulating conflicts of interest.

2013, c. 18, s. 11; 2018, c. 23, s. 624.

71. A recognized organization cannot, by any provision or practice, restrict competition between its members or its participants unless the provision or practice has been authorized by the Authority.

The Authority shall only authorize provisions or practices it considers necessary for the protection of the public. The Authority may subject its authorization to the conditions and restrictions it determines.

2002, c. 45, s. 71; 2004, c. 37, s. 90; 2013, c. 18, s. 12.

72. The Authority may, by regulation, confer on some of the rules or standards established by a recognized organization, and any amendments made thereto, the force and effect of a regulation made under an Act referred to in Schedule 1.

A regulation made under this section requires the approval of the Government with or without amendment.

A draft regulation shall also be published in the Authority's bulletin, accompanied with the notice required under section 10 of the Regulations Act (chapter R-18.1).

A draft regulation may not be submitted for approval before the expiry of a period of 30 days from the day of its publication.

The regulation comes into force on the date of its publication in the *Gazette officielle du Québec* or on any later date specified in the regulation. It shall also be published in the Authority's bulletin.

2002, c. 45, s. 72; 2004, c. 37, s. 90.

73. The Authority may, on the conditions it determines, exempt a legal person, partnership, an entity or a recognized organization from all or part of the requirements of this Title where it considers that the exemption does not adversely affect the protection of the public.

Such an exemption must be submitted to the Government for approval, except where it concerns an exchange or clearing house that is subject to section 17 of the Derivatives Act (chapter I-14.01) or where it concerns a securities exchange or clearing activity and where it is granted to a legal person, partnership or other entity referred to in section 170 of the Securities Act (chapter V-1.1) that carries on a securities exchange or clearing activity.

2002, c. 45, s. 73; 2004, c. 37, s. 90; 2006, c. 50, s. 116; 2009, c. 58, s. 35; 2013, c. 18, s. 13.

CHAPTER II

CONTROL EXERCISED BY THE AUTHORITY

2004, c. 37, s. 90.

74. Every draft amendment pertaining to the constituting documents, the by-laws or the operating rules of a recognized organization requires the approval of the Authority.

The same rule applies to any draft amendment pertaining to a practice or provision of a document, other than those referred to in the first paragraph, if the practice or provision was authorized by the Authority under section 71.

2002, c. 45, s. 74; 2004, c. 37, s. 90; 2013, c. 18, s. 14.

75. The amendment is deemed to be approved on the expiry of a period of 30 days, or any other period agreed with the organization concerned, unless the Authority has invited it to present observations on the merits of the proposed amendment.

2002, c. 45, s. 75; 2004, c. 37, s. 90.

76. The Authority may, at any time, suspend, according to the terms and conditions it considers appropriate, the application of a provision of the by-laws or operating rules of a recognized organization.

2002, c. 45, s. 76; 2004, c. 37, s. 90.

77. The Authority may order a recognized organization to amend a provision or practice where it considers that an amendment is necessary to render such provision or practice consistent with the applicable legislative provisions.

2002, c. 45, s. 77; 2004, c. 37, s. 90; 2013, c. 18, s. 15.

78. The Authority has the power to inspect the affairs of a recognized organization to ascertain the extent to which it complies with the provisions of the Acts and recognition requirements that are applicable to it and the decisions of the Authority and the manner in which it exercises its functions and powers.

2002, c. 45, s. 78; 2004, c. 37, s. 90.

79. Sections 9 to 11 and sections 18 and 19 apply, with the necessary modifications, to the inspection of a recognized organization.

2002, c. 45, s. 79.

80. The Authority may order a recognized organization to take a course of action if the Authority considers it necessary for the soundness of operation of that organization or the protection of the public.

2002, c. 45, s. 80; 2004, c. 37, s. 90.

81. In carrying on its activities, a recognized organization must, before rendering a decision unfavourably affecting the rights of a person, partnership or entity, give the person, partnership or entity an opportunity to present observations.

The second, third and fourth paragraphs of section 90 apply, with the necessary modifications.

2002, c. 45, s. 81; 2018, c. 23, s. 625.

82. A recognized organization examining a disciplinary matter must do so at a public sitting.

However, it may, on its own initiative or on request, order a closed-door hearing or prohibit the publication or release of information or documents indicated by it in the interest of good morals or public order.

2002, c. 45, s. 82.

82.1. Once the time allotted for applying for a review of a decision by a recognized organization calling for a disciplinary sanction has expired, the decision may be homologated by the Superior Court or the Court of Québec according to their respective jurisdictions.

Once homologated, the decision becomes enforceable as a judgment of that Court.

2013, c. 18, s. 16.

83. A recognized organization shall, as soon as possible, communicate to the Authority its decisions rendered in carrying on its activities concerning the admission of a member or a disciplinary matter.

2002, c. 45, s. 83; 2004, c. 37, s. 90; 2018, c. 23, s. 626.

84. A person, partnership or other entity directly affected by a decision rendered in the exercise of a power sub-delegated pursuant to section 62 may within 30 days apply for a review of the decision by the recognized organization.

2002, c. 45, s. 84.

85. A person, partnership or other entity directly affected by a decision rendered by a recognized organization may within 30 days apply for a review of the decision by the Authority.

The Authority may review such a decision on its own initiative.

2002, c. 45, s. 85; 2004, c. 37, s. 45.

86. A recognized organization shall file with the Authority, within 90 days after the end of its fiscal year, the financial statements, the auditor's report and any other information, according to the requirements set by the Authority.

2002, c. 45, s. 86; 2004, c. 37, s. 90.

87. A recognized organization shall keep and maintain the books, registers or other documents determined by the Authority.

2002, c. 45, s. 87; 2004, c. 37, s. 90.

88. A recognized organization that wishes to terminate its activities must apply for authorization to the Authority.

The Authority shall give the authorization on the conditions it determines where it believes the interests of the organization's members and the public are sufficiently protected.

2002, c. 45, s. 88; 2004, c. 37, s. 90.

89. The Authority may, at any time, modify, suspend or withdraw all or part of the recognition granted to an organization if it considers that the organization has failed to comply with undertakings given to the Authority or is of the opinion that the interests of the organization's members or the public would be better protected.

The Authority may also, for the same reasons, modify, suspend or withdraw an exemption granted to a legal person, a partnership, an entity or a recognized organization.

2002, c. 45, s. 89; 2004, c. 37, s. 90; 2013, c. 18, s. 17.

90. The Authority must, before making a decision or an order under section 76, 77, 80 or 89, give the organization concerned notice in writing of its intentions indicating the grounds on which it is based, the date on which the order is to take effect and the right of the organization to present observations or produce documents to complete the file.

However, the Authority may, without prior notice, make a decision or a provisional order valid for a period not exceeding 15 days if the Authority is of the opinion that there is urgency or that any period of time granted to the organization concerned to present observations may be detrimental.

The decision or order must state the reasons on which it is based and becomes effective on the day it is served on the organization to which it applies. That organization may, within six days of receiving the decision or order, present observations to the Authority.

The Authority may revoke a decision or order made under those sections.

2002, c. 45, s. 90; 2004, c. 37, s. 90.

91. The costs incurred by the Authority for the administration of this Title shall be borne by the recognized self-regulatory organizations.

Such costs, established for each self-regulatory organization by the Authority at the end of its fiscal year, shall comprise a minimum contribution fixed by the Authority and the amount, if any, by which actual costs exceed the contribution. The actual costs shall be established on the basis of the rate schedule established by regulation.

A regulation made pursuant to this section requires the approval of the Government, which may approve it with or without amendment.

The amount to be paid by each organization is set out in a certificate issued by the Authority.

2002, c. 45, s. 91; 2004, c. 37, s. 90; 2008, c. 24, s. 191.

TITLE IV

FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

2009, c. 58, s. 36; 2016, c. 7, s. 179.

CHAPTER I

ESTABLISHMENT AND JURISDICTION

2009, c. 58, s. 37; 2018, c. 23, s. 627.

92. A Tribunal called the "Financial Markets Administrative Tribunal" is hereby established.

2002, c. 45, s. 92; 2009, c. 58, s. 38; 2016, c. 7, ss. 172 and 179.

93. The function of the Tribunal is to make determinations with respect to matters brought under this Act, the Money-Services Businesses Act (chapter E-12.000001) and the Acts listed in Schedule I. Except where otherwise provided by law, the Tribunal shall exercise its jurisdiction to the exclusion of any other tribunal or adjudicative body.

The Tribunal shall exercise its discretion in the public interest.

In reviewing a decision rendered by the Authority under the Securities Act (chapter V-1.1) or the Derivatives Act (chapter I-14.01), the Tribunal may not, when assessing the facts or the law for the purposes of those Acts, substitute its assessment of the public interest for that made by the Authority in making a decision.

In this Title, unless the context indicates otherwise, "matters" also includes any application, complaint, contestation or motion, as well as any action falling within the jurisdiction of the Tribunal.

2002, c. 45, s. 93; 2004, c. 37, s. 90; 2006, c. 50, s. 117; 2008, c. 7, s. 11; 2008, c. 24, s. 192; 2009, c. 58, s. 39; 2011, c. 26, s. 14; 2010, c. 40, Sch. I, s. 79; 2016, c. 7, s. 179; 2018, c. 23, s. 628.

94. At the request of the Authority, the Tribunal may take any measure conducive to ensuring compliance with an undertaking given to the Authority under any of the Acts listed in the first paragraph of section 93 or compliance with those Acts.

2002, c. 45, s. 94; 2004, c. 37, s. 90; 2008, c. 24, s. 193; 2009, c. 58, s. 40; 2010, c. 40, Sch. I, s. 80; 2016, c. 7, s. 179; 2018, c. 23, s. 629.

95. The head office of the Tribunal shall be situated at the place determined by the Government; notice of the address of the head office shall be published in the *Gazette officielle du Québec* and in the bulletin published under section 34.

2002, c. 45, s. 95; 2009, c. 58, s. 41; 2016, c. 7, s. 179.

96. The Tribunal shall be composed of members appointed by the Government, the number of which it shall determine.

2002, c. 45, s. 96; 2009, c. 58, s. 42; 2018, c. 23, s. 630.

97. The Tribunal has the power to decide any issue of law or fact necessary for the exercise of its jurisdiction.

In addition to the other powers conferred on it by law, the Tribunal may

(1) summarily reject any matter it considers abusive or dilatory, or make it subject to conditions;

(2) render a decision on any pre-hearing application;

(3) make any order, including a provisional order, it considers appropriate to safeguard the parties' rights or if required to protect the public;

(4) confirm, vary or quash the contested decision or order and, if appropriate, render or make the decision or order that, in its opinion, should have been rendered or made initially;

(5) order that a party pay costs determined by law or by regulation;

(6) ratify an agreement, if it is in compliance with the law; and

(7) render any other decision it considers appropriate.

2002, c. 45, s. 97; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

97.1. *(Replaced).*

2016, c. 7, s. 173; 2018, c. 23, s. 631.

98. The Tribunal and its members have the powers and immunity conferred on commissioners appointed under the Act respecting public inquiry commissions (chapter C-37), except the power to order imprisonment.

2002, c. 45, s. 98; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

CHAPTER II

PROCEDURE

2018, c. 23, s. 631.

DIVISION I

COMMENCEMENT

2018, c. 23, s. 631.

99. A matter is commenced by a pleading, called the originating pleading, being filed at the secretariat of the Tribunal in accordance with the Tribunal's rules of evidence and procedure.

2002, c. 45, s. 99; 2016, c. 7, ss. 174 and 179; 2018, c. 23, s. 631.

100. The originating pleading must specify the conclusions sought and set out the grounds invoked in support of them.

It must also contain any other information required by the Tribunal's rules of evidence and procedure.

2002, c. 45, s. 100; 2016, c. 7, s. 176; 2018, c. 23, s. 631.

101. The Tribunal may accept a pleading despite a defect of form or an irregularity.

2002, c. 45, s. 101; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

102. The Tribunal may extend a time limit or relieve a person from the consequences of failing to act within the allotted time if it is shown that the person could not reasonably have acted within that time and if, in the Tribunal's opinion, no other party suffers serious injury as a result.

2002, c. 45, s. 102; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

103. A proceeding before the Tribunal does not suspend the execution of the contested decision, unless a provision of law provides otherwise or, on a motion heard and judged by preference, a member of the Tribunal orders otherwise because of the urgency of the situation or because of the risk of irreparable injury.

If the law provides that the proceeding suspends the execution of the decision, or if the Tribunal issues such an order, the proceeding is heard and judged by preference.

2002, c. 45, s. 103; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

104. The rules pertaining to the notices provided for in articles 76 and 77 of the Code of Civil Procedure (chapter C-25.01) apply, with the necessary modifications, to matters brought before the Tribunal.

2002, c. 45, s. 104; 2004, c. 37, s. 46; 2006, c. 50, s. 118; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

104.1. *(Replaced).*

2004, c. 37, s. 47; I.N. 2016-01-01 (NCCP); 2016, c. 7, s. 179; 2018, c. 23, s. 631.

104.2. *(Replaced).*

2004, c. 37, s. 47; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

104.3. *(Replaced).*

2004, c. 37, s. 47; 2016, c. 7, ss. 175, 176 and 179; 2018, c. 23, s. 631.

105. The notification of pleadings must be made in accordance with the rules established by the Tribunal.

2002, c. 45, s. 105; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

106. Whether or not the same parties are involved, matters in which the issues in dispute are substantially the same or could fittingly be combined may be joined by order of the president of the Tribunal or a person designated by the president, on specified conditions.

On its own initiative or at a party's request, the Tribunal may revoke such an order if, on hearing the matter, it is of the opinion that the interests of justice will thus be better served.

The Tribunal may also order that a matter be separated into different matters if it considers it advisable in order to protect the parties' rights.

2002, c. 45, s. 106; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

DIVISION II

PRE-HEARING CONFERENCE

2018, c. 23, s. 631.

107. The Tribunal may call the parties to a pre-hearing conference.

2002, c. 45, s. 107; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

108. The pre-hearing conference is held by a Tribunal member. Its purpose is

(1) to define the issues to be argued at the hearing;

(2) to assess the advisability of clarifying and specifying the parties' contentions and the conclusions sought;

(3) to ensure that all documentary evidence is exchanged by the parties;

(4) to plan the conduct of the proceeding and the order of presentation of evidence at the hearing;

(5) to examine the possibility for the parties of admitting certain facts or of proving them by means of sworn statements; and

(6) to examine any other matter likely to simplify or accelerate the conduct of the hearing.

The pre-hearing conference may also allow the parties to come to an agreement and thus terminate the matter.

2002, c. 45, s. 108; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

109. Minutes of the pre-hearing conference must be drawn up in accordance with the Tribunal's rules of evidence and procedure. The points on which the parties have reached an agreement, the facts admitted, and the decisions made by the member are recorded in the minutes. The minutes must be filed in the record and a copy of them sent to the parties.

Agreements, admissions and decisions recorded in the minutes govern, as far as they may apply, the conduct of the proceeding, unless the Tribunal, when hearing the matter, permits a departure from them to prevent an injustice.

2002, c. 45, s. 109; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

110. If the parties fail to comply with the timetable, the member may make the appropriate determinations, including foreclosure. The member may, on request, relieve a defaulting party from default if he considers doing so required in the interest of justice.

2002, c. 45, s. 110; 2011, c. 18, s. 102; 2016, c. 7, ss. 176 and 179; 2018, c. 23, s. 631.

DIVISION III

HEARING

2018, c. 23, s. 631.

111. Every matter is heard by a Tribunal member.

If the president considers it appropriate, the president may assign a matter to a panel of not more than three members.

The president or the member designated by the president to preside the hearing may conduct the hearing and decide any application made in the course of the proceeding alone.

2002, c. 45, s. 111; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

112. A member hearing a matter whose sole object is sanctioning a violation of the rules of ethics applicable to mortgage brokers that are determined by regulation under section 202.1 of the Act respecting the

distribution of financial products and services (chapter D-9.2) is assisted by two assessors appointed under section 115.15.42, who shall advise the member on any issue of a professional nature.

2002, c. 45, s. 112; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

113. The president may, in the interests of the sound administration of justice, determine that a matter must be heard and decided by preference or as a matter of priority.

2002, c. 45, s. 113; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

114. A member who has knowledge of a valid cause for recusation must declare that cause in a writing filed in the record and advise the parties of it.

2002, c. 45, s. 114; 2004, c. 37, s. 90; 2009, c. 58, s. 43; 2011, c. 18, s. 103; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115. A party may, at any time before the decision and provided the party acts with dispatch, apply for the recusation of a member seized of the matter if the party has serious reasons to believe that there is a cause for recusation.

The application for recusation must be addressed to the president. Unless the member removes himself or herself from the matter, the application is decided by the president, or by a member designated by the president, in particular when the matter concerns the president personally.

2002, c. 45, s. 115; 2009, c. 58, s. 44; 2011, c. 18, s. 104; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.1. Before rendering its decision, the Tribunal shall allow the parties to be heard by any means provided for in its rules of evidence and procedure. However, with the parties' consent, the Tribunal may proceed on the record if it considers doing so appropriate.

However, a decision adversely affecting the rights of a person may, if urgent action is required or to prevent irreparable injury, be rendered without a prior hearing.

In such a case, the person concerned has 15 days after the decision is rendered to file a notice of contestation with the Tribunal.

2009, c. 58, s. 45; 2010, c. 40, Sch. I, s. 81; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.2. Except in the cases and on the conditions provided for by the Tribunal's rules of evidence and procedure, the Tribunal shall hold its hearings at its head office.

If the Tribunal holds a hearing in a locality where a court of justice sits, the court clerk shall allow the Tribunal to use court premises unless they are being used for court sittings.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.3. Notice must be sent to the parties, in accordance with the Tribunal's rules of evidence and procedure, within a reasonable time before the hearing, stating

(1) the purpose, date, time and place of the hearing;

(2) that the parties have the right to be assisted or represented; and

(3) that the Tribunal has the authority to proceed without further delay or notice despite a party's failure to appear at the stated time and place if no valid excuse is provided.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.4. If a duly notified party does not appear at the time set for the hearing and has not provided a valid excuse for the party's absence, or chooses not to be heard, the Tribunal may proceed with hearing the matter and render a decision.

2009, c. 58, s. 45; 2018, c. 23, s. 631.

115.5. A party who wishes to have witnesses heard and to produce documents shall proceed in the manner prescribed by the rules of evidence and procedure.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.6. The Tribunal may reject any evidence that is irrelevant or that was obtained under such circumstances that fundamental rights and freedoms are violated and whose use could bring the administration of justice into disrepute.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.7. The Tribunal's sittings are public. The Tribunal may, however, on its own initiative or at a party's request, order a closed-door hearing in the interest of good morals or public order.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.8. The Tribunal may, on its own initiative or at a party's request and where necessary to maintain good morals or public order, prohibit or restrict the disclosure, publication or release of information or documents it specifies.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.9. A member may order an expert appraisal by a qualified person the member designates to examine and assess the facts relating to a matter that is before the member. In such a case, the member shall specify the mission entrusted to the expert, give the expert the instructions needed to carry out the appraisal, set the time within which the expert must file his or her report, and rule on the expert's fees and how they are to be paid. The decision must be notified to the expert without delay.

2009, c. 58, s. 45; 2011, c. 26, s. 15; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.10. The mission of an expert whose services have been retained by a single party or by the parties jointly or who has been appointed by the Tribunal is to enlighten the Tribunal in its decision-making. This mission overrides the parties' interests.

Experts must fulfill their mission objectively, impartially and thoroughly.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.11. If a member cannot continue a hearing owing to an inability to act, another member designated by the president may, with the parties' consent, continue the hearing and rely, as regards testimonial evidence, on the notes and minutes of the hearing or, if applicable, on the stenographer's notes or the recording of the hearing, subject to a witness being recalled or other evidence being required if the member finds the notes or the recording insufficient.

The same rule applies to the continuance of a hearing after a member ceases to hold office and to any matter heard but not yet determined at the time a member is removed from the matter.

If a matter is heard by more than one member, the hearing is continued by the remaining members.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.12. In the absence of provisions applicable to a particular case, the Tribunal may remedy the inadequacy by any procedure consistent with this Act and its rules of evidence and procedure.

2009, c. 58, s. 45; 2011, c. 26, s. 16; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

DIVISION IV

DECISION

2018, c. 23, s. 631.

115.13. A matter is decided by the member who heard it. If a matter is heard by more than one member, the decision is made by the majority.

If opinions are equally divided on an issue, the issue is referred to the president or a member designated by the president, to be decided according to law. In such a case, the president or designated member may, with the parties' consent, rely, as regards testimonial evidence, on the notes and minutes of the hearing or, if applicable, on the stenographer's notes or the recording of the hearing, subject to a witness being recalled or other evidence being required if the president or designated member finds the notes or the recording insufficient.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.14. In all matters, whatever their nature, the decision must be rendered within six months after the matter is taken under advisement.

The president may extend the time limit for rendering a decision. Before doing so, the president must take the parties' circumstances and interests into account.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.15. Failure by the Tribunal to observe either of the time limits provided for in section 115.14 does not cause the matter to be withdrawn from the member or invalidate a decision or order rendered or made by the member after the expiry of the time limit.

However, if a member to whom a matter is referred does not render a decision within the applicable time limit, the president may, on his or her own initiative or at a party's request, remove the member from the matter.

Before taking such action, the president must take the parties' circumstances and interests into account.

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 631.

115.15.1. Where a member is removed from a matter, the matter may be continued in the manner provided for in section 115.11.

2018, c. 23, s. 631.

115.15.2. A member who, after taking a matter under advisement, notes that a rule of law or a principle material to the outcome of the case was not debated during the hearing and that he or she must make a determination on the relevant issue in order to decide the dispute must give the parties an opportunity to make submissions in the manner the member considers most appropriate.

Alternatively, the hearing may be ordered reopened on the member's own initiative or at a party's request. Such a decision must give reasons and state how the reopened hearing is to be conducted. The member must send the decision without delay to the president of the Tribunal and to the parties.

2018, c. 23, s. 631.

115.15.3. The Tribunal's decisions must be communicated in clear and concise terms.

A decision which terminates a matter must give reasons and be set out in writing, signed and sent to the interested parties.

The Tribunal may, on the conditions it determines, ask a party to notify the decision that was rendered following an *ex parte* hearing. In such a case and on receiving proof of the notification, the Tribunal is not required to send the decision to the interested parties.

2018, c. 23, s. 631.

115.15.4. Unless an order of the Tribunal states otherwise, decisions of the Tribunal are published in the bulletin provided for in section 34.

The full text of a decision of the Tribunal need not be published in the bulletin if it is published on the Société's website in accordance with the regulation made under section 21 of the Act respecting the Société québécoise d'information juridique (chapter S-20). In such a case, a mention of the decision and a reference to the text so published must nevertheless be published in the bulletin.

2018, c. 23, s. 631.

115.15.5. The Tribunal or any interested person may file an authentic copy of a decision of the Tribunal at the office of the clerk of the Superior Court of the district in which the residence or domicile of the person who is the subject of the decision is situated or, if the person has neither residence nor domicile in Québec, at the office of the Superior Court of the district of Montréal.

The decision, on being filed, becomes enforceable in the same way as, and has all the effects of, a decision of the Superior Court.

2018, c. 23, s. 631.

115.15.6. A decision containing an error in writing or calculation or any other clerical error may be corrected on the record and without further formality by the member who rendered the decision, on the member's own initiative or on request; the same applies to a decision which, through obvious inadvertence, grants more than was sought or fails to rule on part of the matter.

If the person is unable to act or has ceased to hold office, another Tribunal member designated by the president may correct the decision.

2018, c. 23, s. 631.

115.15.7. The Tribunal may, on application, review or revoke a decision or an order it has rendered or made

(1) if a new fact is discovered which, had it been known in sufficient time, could have warranted a different decision;

(2) if an interested party, owing to reasons considered sufficient, could not make representations or be heard; or

(3) if a substantive or procedural defect is of a nature likely to invalidate the decision.

In the case described in subparagraph 3 of the first paragraph, the decision or order may not be reviewed or revoked by the member who rendered or made it.

2018, c. 23, s. 631.

115.15.8. An application to the Tribunal for a review of a decision does not suspend the execution of the decision, unless the Tribunal decides otherwise.

2018, c. 23, s. 631.

CHAPTER II.1

TRIBUNAL MEMBERS

2018, c. 23, s. 631.

DIVISION I

RECRUITING AND SELECTION

2018, c. 23, s. 631.

115.15.9. Only a person who, in addition to having the qualifications required by law, has 10 years' experience relevant to the exercise of the Tribunal's functions may be a member of the Tribunal.

2018, c. 23, s. 631.

115.15.10. Tribunal members appointed by the Government under section 96 are chosen from among persons declared qualified according to the recruiting and selection procedure established by government regulation.

The regulation must, in particular,

(1) determine the publicity to be made for recruitment purposes and its content;

(2) determine the application procedure to be followed by candidates;

(3) authorize the establishment of selection committees to assess the qualifications of candidates and formulate an opinion concerning them;

(4) determine the composition of the committees and the mode of appointment of committee members, ensuring, where applicable, adequate representation of the sectors concerned;

(5) determine the selection criteria to be taken into account by a committee; and

(6) determine the information a committee may require from a candidate and the consultations it may hold.

2018, c. 23, s. 631.

115.15.11. The names of the persons declared qualified are recorded in a register kept at the Ministère du Conseil exécutif.

2018, c. 23, s. 631.

115.15.12. A certificate of qualification is valid for a period of 18 months or for any other period determined by government regulation.

2018, c. 23, s. 631.

115.15.13. The members of a selection committee receive no remuneration except in the cases, on the conditions and to the extent that may be determined by the Government.

They are, however, entitled to the reimbursement of any expenses incurred in the exercise of their functions, on the conditions and to the extent determined by the Government.

2018, c. 23, s. 631.

115.15.14. No legal proceedings may be brought against members of a selection committee for acts performed in good faith in the exercise of their functions.

2018, c. 23, s. 631.

DIVISION II

TERM AND RENEWAL

2018, c. 23, s. 631.

115.15.15. Tribunal members are appointed for a term of five years.

However, the Government may determine a shorter term of a fixed duration in a member's instrument of appointment if the candidate so requests for serious reasons or if special circumstances stated in the instrument of appointment require it.

2018, c. 23, s. 631.

115.15.16. The term of a Tribunal member that has terminated because it has expired is renewed for five years according to the procedure provided for in section 115.15.17,

(1) unless the member is otherwise notified by the agent authorized for that purpose by the Government, at least three months before the expiry of the member's term; or

(2) unless the member requests otherwise and so notifies the Minister at least three months before the expiry of the member's term.

A variation of the term is valid only for a fixed period of less than five years determined in the instrument of renewal and, unless it is requested by the member for serious reasons, only if special circumstances stated in the instrument of renewal require it.

2018, c. 23, s. 631.

115.15.17. The renewal of a Tribunal member's term must be examined according to the procedure established by government regulation. The regulation may, in particular,

(1) authorize the establishment of committees;

(2) determine the composition of the committees and the mode of appointment of committee members, who must not belong to the Administration within the meaning of the Public Administration Act (chapter A-6.01) or represent it;

(3) determine the criteria to be taken into account by a committee; and

(4) determine the information a committee may require from a Tribunal member and the consultations it may hold.

An examination committee may not make a recommendation against the renewal of a Tribunal member's term without first informing the member of its intention to do so and its reasons for doing so, and without giving the member an opportunity to make representations.

2018, c. 23, s. 631.

115.15.18. The members of an examination committee receive no remuneration except in the cases and on the conditions that may be determined by the Government.

They are, however, entitled to the reimbursement of any expenses incurred in the exercise of their functions, on the conditions determined by the Government.

2018, c. 23, s. 631.

115.15.19. No proceedings may be brought against members of an examination committee for acts performed in good faith in the exercise of their functions.

2018, c. 23, s. 631.

DIVISION III

REMUNERATION AND OTHER CONDITIONS OF EMPLOYMENT

2018, c. 23, s. 631.

115.15.20. The Government shall make regulations determining

(1) the mode of remuneration of the members and the applicable standards and scales as well as the method for determining the annual percentage of salary advancement up to the maximum salary rate and the annual percentage of the adjustment of the remuneration of members whose salary has reached the maximum rate; and

(2) the conditions under which and the extent to which a member may be reimbursed for expenses incurred in the exercise of the functions of office.

The Government may also make regulations determining other conditions of employment applicable to all or some members, including employee benefits other than a pension plan.

Regulatory provisions may vary according to whether they apply to a full-time or part-time member or a member holding an administrative office referred to in section 115.15.38.

The regulations come into force on the 15th day following the date of their publication in the *Gazette officielle du Québec* or on a later date specified in the regulations.

2018, c. 23, s. 631.

115.15.21. The Government shall determine the members' remuneration, employee benefits and other conditions of employment in accordance with the regulations.

2018, c. 23, s. 631.

115.15.22. Once a member's remuneration has been set, it may not be reduced.

However, additional remuneration attaching to an administrative office within the Tribunal ceases on termination of the office.

2018, c. 23, s. 631.

115.15.23. The pension plan of full-time members of the Tribunal is determined pursuant to the Act respecting the Pension Plan of Management Personnel (chapter R-12.1).

2018, c. 23, s. 631.

DIVISION IV

ETHICS AND IMPARTIALITY

2018, c. 23, s. 631.

115.15.24. Before entering office, members shall take an oath, solemnly affirming the following: "I (...) swear that I will exercise the powers and fulfill the duties of my office impartially and honestly and to the best of my knowledge and abilities."

Members shall take the oath before the president of the Tribunal; the president takes the oath before a judge of the Court of Québec.

2018, c. 23, s. 631.

115.15.25. The Government shall, after consultation with the president, establish a code of ethics applicable to the members.

The Tribunal must publish the code on its website.

2018, c. 23, s. 631.

115.15.26. The code of ethics must set out the rules of conduct of members and their duties toward the public, the parties, the parties' witnesses and the persons representing the parties; it must define, in particular, conduct that is derogatory to the honour, dignity or integrity of members. In addition, it may determine the activities or situations that are incompatible with their office, their obligations concerning the disclosure of interests, and the functions they may exercise free of charge.

The code of ethics may provide specific rules for part-time members.

2018, c. 23, s. 631.

115.15.27. A member may not, on pain of forfeiture of office, have a direct or indirect interest in an enterprise that may cause the member's personal interest to conflict with the duties of office, unless the interest devolves to the member by succession or gift and the member renounces it or disposes of it with dispatch.

2018, c. 23, s. 631.

115.15.28. In addition to complying with conflict of interest requirements and the rules of conduct and duties imposed by the code of ethics established under this Title, members must refrain from engaging in activities or placing themselves in situations that are incompatible, within the meaning of that code, with the exercise of their functions.

2018, c. 23, s. 631.

115.15.29. Full-time members must devote themselves exclusively to their office, but may, with the president's written consent, engage in teaching activities for which they may be remunerated. They may also carry out any mandate conferred on them by the Government after consultation with the president.

2018, c. 23, s. 631.

DIVISION V

END OF TERM AND SUSPENSION

2018, c. 23, s. 631.

115.15.30. A member's term may terminate prematurely only if the member retires or resigns or is dismissed or otherwise removed from office in the circumstances described in this division.

2018, c. 23, s. 631.

115.15.31. To resign, a member must give the Minister reasonable notice in writing and send a copy to the president.

2018, c. 23, s. 631.

115.15.32. The Government may dismiss a Tribunal member if the Conseil de la justice administrative (the council) so recommends, following an inquiry into a complaint for a breach of the code of ethics, of a duty under this Act or of the requirements relating to conflicts of interest or incompatible functions. It may also suspend or reprimand the member.

Any person may lodge a complaint with the council against a Tribunal member for such a breach. The complaint must be in writing, briefly state the grounds on which it is based and be sent to the seat of the council.

2018, c. 23, s. 631.

115.15.33. When examining a complaint brought against a Tribunal member, the council shall act in accordance with sections 184 to 192 of the Act respecting administrative justice (chapter J-3), with the necessary modifications.

However, if the council forms an inquiry committee for the purposes of section 186 of that Act, two committee members, at least one of whom neither practises a legal profession nor is a member of a body of the Administration whose president or chair is a member of the council, must be chosen from among the council members referred to in paragraphs 1 to 4 and 7 to 9 of section 167 of that Act. The third member of the inquiry committee is the council member referred to in paragraph 4.2 of that section or is chosen from a list drawn up by the president of the Tribunal, after consultation with all the members of the Tribunal. In the latter case, if the inquiry committee finds the complaint to be justified, the third member shall take part in the deliberations of the council for the purpose of determining a penalty.

2018, c. 23, s. 631.

115.15.34. The Government may remove a Tribunal member from office for loss of a qualification required by law to exercise the functions of office or if in its opinion a permanent disability prevents the member from satisfactorily performing the duties of office. Permanent disability is ascertained by the council after an inquiry is conducted at the request of the Minister or of the president of the Tribunal.

When conducting an inquiry to determine whether a member has a permanent disability, the council shall act in accordance with sections 193 to 197 of the Act respecting administrative justice (chapter J-3), with the

necessary modifications; however, the formation of an inquiry committee is subject to the rules set out in the second paragraph of section 115.15.33.

2018, c. 23, s. 631.

115.15.35. A Tribunal member who has been replaced and whose term has terminated otherwise than by the member's resignation, dismissal or because he or she was otherwise removed from office may, with the authorization of and for the time determined by the president of the Tribunal, continue to exercise the functions of office in order to conclude the matters the member has begun to hear but has yet to determine; in such instances, the member is considered to be a supernumerary member for the time required.

2018, c. 23, s. 631.

CHAPTER II.2

CONDUCT OF TRIBUNAL'S BUSINESS

2018, c. 23, s. 631.

DIVISION I

ADMINISTRATIVE OFFICE

2018, c. 23, s. 631.

115.15.36. The Government shall designate a president and vice-presidents from among the Tribunal members or the other persons declared qualified according to the recruiting and selection procedure referred to in section 115.15.10.

Those persons must meet the requirements set out in section 115.15.9. On being appointed, they become Tribunal members holding an administrative office.

2018, c. 23, s. 631.

115.15.37. The Minister shall designate a vice-president to temporarily replace the president or another vice-president when required.

If the vice-president so designated is absent or unable to act, the Minister shall designate another vice-president as a replacement.

2018, c. 23, s. 631.

115.15.38. The administrative office of the president or a vice-president is of a fixed duration of up to five years determined in the instrument of appointment or renewal.

2018, c. 23, s. 631.

115.15.39. The administrative office of the president or a vice-president may terminate prematurely only if they relinquish that office, if their appointment as member expires, or if they are dismissed or removed from administrative office in the circumstances described in section 115.15.40.

2018, c. 23, s. 631.

115.15.40. The Government may remove the president or a vicepresident from administrative office for loss of a qualification required by law to hold that office.

The Government may also remove those persons from administrative office if the Conseil de la justice administrative so recommends, after an inquiry conducted at the Minister's request concerning a breach pertaining only to their administrative powers and duties. The council shall act in accordance with sections 193 to 197 of the Act respecting administrative justice (chapter J-3), with the necessary modifications; however, the formation of an inquiry committee is subject to the rules set out in the second paragraph of section 115.15.33.

2018, c. 23, s. 631.

DIVISION II

MANAGEMENT AND ADMINISTRATION

2018, c. 23, s. 631.

115.15.41. In addition to the powers and duties that may otherwise be assigned to the president, the president is responsible for the Tribunal's administration and general management.

The president's functions include

(1) directing the Tribunal's personnel and ensuring that they carry out their functions;

(2) fostering members' participation in the formulation of guiding principles for the Tribunal so as to maintain a high level of quality and coherence in its decisions;

(3) designating a member to be responsible for the administration of the Tribunal;

(4) coordinating the work of and assigning work to the Tribunal members, who must comply with the president's orders and directives in that regard;

(5) seeing that standards of ethical conduct are complied with;

(6) promoting the professional development of Tribunal members and personnel as regards the exercise of their functions; and

(7) periodically evaluating the knowledge and skills of the members in the exercise of their functions as well as their contribution to processing the cases before the Tribunal and to achieving the objectives of this Act.

2018, c. 23, s. 631.

115.15.42. To expedite Tribunal business involving disciplinary matters, the president shall appoint part-time or temporary assessors and determine their fees.

Assessors are not members of the Tribunal's personnel.

2018, c. 23, s. 631.

115.15.43. Assessors are chosen from among mortgage brokers within the meaning of the Act respecting the distribution of financial products and services (chapter D-9.2) who

(1) have 10 years' experience relevant to the exercise of the Tribunal's disciplinary functions; and

(2) are declared qualified according to the recruiting and selection procedure established by the president.

The recruiting and selection procedure must be published in the bulletin provided for in section 34.

2018, c. 23, s. 631.

115.15.44. The names of the representatives declared qualified are recorded in a register kept at the Tribunal; a certificate of qualification is valid for a period of three years.

2018, c. 23, s. 631.

115.15.45. The president must establish a code of ethics applicable to assessors and see that it is observed.

The code comes into force on the 15th day following the date of its publication in the bulletin provided for in section 34 or on any later date specified in the bulletin. It must also be published on the Tribunal's website.

2018, c. 23, s. 631.

115.15.46. The president may delegate all or some of the president's powers and duties to the vice-presidents.

In addition to the powers and duties that may be delegated to them by the president or otherwise be assigned to them, the vice-presidents shall assist and advise the president in the exercise of the president's functions and perform their administrative functions under the president's authority.

2018, c. 23, s. 631.

DIVISION III

PERSONNEL AND MATERIAL AND FINANCIAL RESOURCES

2018, c. 23, s. 631.

115.15.47. The secretary and the other members of the Tribunal's personnel are appointed in accordance with the Public Service Act (chapter F-3.1.1).

2018, c. 23, s. 631.

115.15.48. The secretary has custody of the Tribunal's records.

2018, c. 23, s. 631.

115.15.49. Documents emanating from the Tribunal are authentic if they are signed or, in the case of copies, if they are certified by the president, a vice-president or the secretary or by a person designated by the president for that purpose.

2018, c. 23, s. 631.

115.15.50. The Financial Markets Administrative Tribunal Fund is established.

The Fund is dedicated to financing the Tribunal's activities.

2018, c. 23, s. 631.

115.15.51. The following are credited to the Fund:

(1) the sums transferred by the Minister out of the appropriations granted for that purpose by Parliament;

(2) the sums paid by the Authority in the amount and according to the terms and conditions determined by the Government;

(3) the sums collected pursuant to the tariff of administrative fees, professional fees and other charges related to matters heard by the Tribunal; and

(4) the sums transferred to it by the Minister of Finance under the first paragraph of section 54 of the Financial Administration Act (chapter A-6.001).

Despite section 51 of the Financial Administration Act, the books of account of the Financial Markets Administrative Tribunal Fund need not be kept separately from the Tribunal's books and accounts. In addition, section 53, the second paragraph of section 54 and section 56 of that Act do not apply to the Fund.

2018, c. 23, s. 631.

115.15.52. The sums required for the purposes of this Title are debited from the Fund.

2018, c. 23, s. 631.

115.15.53. The Tribunal's fiscal year ends on 31 March.

2018, c. 23, s. 631.

115.15.54. Each year, the president of the Tribunal shall submit the Tribunal's budgetary estimates for the following fiscal year to the Minister according to the form and content and at the time determined by the Minister. The estimates are submitted to the Government for approval.

The Tribunal's budgetary estimates must include, in relation to the Financial Markets Administrative Tribunal Fund, the elements listed in subparagraphs 1 to 5 of the second paragraph of section 47 of the Financial Administration Act (chapter A-6.001) and, if applicable, the excess amount referred to in section 52 of that Act.

The third paragraph of section 47 of the Financial Administration Act does not apply to the Financial Markets Administrative Tribunal Fund.

Once approved by the Government, the Tribunal's budgetary estimates are sent to the Minister of Finance, who shall include the elements relating to the Financial Markets Administrative Tribunal Fund in the special funds budget.

2018, c. 23, s. 631.

115.15.55. The Tribunal's books and accounts are audited by the Auditor General each year and whenever the Government so orders.

2018, c. 23, s. 631.

115.15.56. Not later than 31 July each year, the Tribunal must submit to the Minister its financial statements as well as a report on its activities for the previous fiscal year.

The report must not refer by name to any person involved in matters heard by the Tribunal.

2018, c. 23, s. 631.

115.15.57. The Minister shall table the Tribunal's activity report and financial statements before the National Assembly within 30 days of receiving them or, if the Assembly is not sitting, within 30 days of resumption.

The Auditor General's report must accompany those documents.

2018, c. 23, s. 631.

DIVISION IV

REGULATIONS

2018, c. 23, s. 631.

115.15.58. In a regulation passed by a majority of its members, the Tribunal may make rules of evidence and procedure specifying the manner in which the rules established by this Act or by the Acts under which matters are heard by the Tribunal are to be applied.

2018, c. 23, s. 631.

115.15.59. The Government may, by regulation, determine the tariff of administrative fees, professional fees and other charges relating to matters heard by the Tribunal, as well as the classes of persons who may be exempted from such fees and charges.

2018, c. 23, s. 631.

DIVISION V

IMMUNITY AND RECOURSES

2018, c. 23, s. 631.

115.15.60. No proceedings may be brought against the Tribunal, its members, members of its personnel, or assessors for acts performed in good faith in the exercise of their functions.

The same applies to any person or organization governed by Chapter II of Title X of the Securities Act (chapter V-1.1) when that person or organization exercises the functions or powers of a person mentioned in the first paragraph.

2018, c. 23, s. 631.

115.15.61. If proceedings are brought against a Tribunal member by a third party for an act performed in the exercise of the functions of office, the Tribunal shall assume the member's defence and pay any damages awarded as compensation for the injury resulting from the act, unless the member committed a gross fault or a personal fault separable from the exercise of those functions.

However, in penal or criminal proceedings, the Tribunal shall pay the defence costs of a Tribunal member only if the member had reasonable grounds to believe that his or her conduct was in conformity with the law, or if the member was discharged or acquitted.

2018, c. 23, s. 631.

115.15.62. If the Tribunal brings proceedings against a Tribunal member for an act performed in the exercise of the functions of office and loses its case, it shall pay the member's defence costs if a court of justice so decides.

If the Tribunal wins its case only in part, a court of justice may determine the amount of the defence costs it must pay.

2018, c. 23, s. 631.

115.15.63. Except on a question of jurisdiction, no application for judicial review under the Code of Civil Procedure (chapter C-25.01) may be exercised nor any injunction granted against the Tribunal or Tribunal members acting in their official capacity.

A judge of the Court of Appeal may, on an application, summarily annul any decision, order or injunction made or granted contrary to this section.

2018, c. 23, s. 631.

CHAPTER III

APPEAL

2009, c. 58, s. 45.

115.16. Any person directly interested in a final decision of the Tribunal may appeal the decision to the Court of Québec.

2009, c. 58, s. 45; 2016, c. 7, s. 179.

115.17. The appeal is brought by filing a notice to that effect with the Court of Québec within 30 days after the date the parties receive the final decision.

The notice of appeal must be filed at the office of the Court of Québec in the judicial district of Québec or Montréal, depending on whether the district in which the Tribunal held its hearings is under the territorial jurisdiction of the Court of Appeal sitting at Québec or at Montréal under article 40 of the Code of Civil Procedure (chapter C-25.01).

2009, c. 58, s. 45; 2016, c. 7, s. 179; 2018, c. 23, s. 632.

115.18. The notice of appeal must be served on the parties and notified to the Tribunal within 10 days after it is filed at the office of the Court of Québec.

At the request of the clerk of the Court of Québec, the secretary of the Tribunal shall send the office a copy and list of the exhibits in the record.

2009, c. 58, s. 45; 2018, c. 23, s. 632.

115.19. The appeal is governed by articles 351 to 390 of the Code of Civil Procedure (chapter C-25.01), with the necessary modifications. However, the parties are required to file only two copies of the factum of their pretensions.

2009, c. 58, s. 45; I.N. 2016-01-01 (NCCP).

115.20. The clerk of the Court of Québec shall, without delay, send the decision on the appeal to the secretary of the Tribunal.

2009, c. 58, s. 45; I.N. 2016-01-01 (NCCP); 2016, c. 7, s. 179; 2018, c. 23, s. 633.

115.20.1. The Court of Québec may, in the manner prescribed in the Courts of Justice Act (chapter T-16), adopt the regulations considered necessary for the application of this chapter.

2018, c. 23, s. 633.

115.21. An appeal does not suspend the execution of the contested decision, unless the Tribunal or a judge of the Court of Québec decides otherwise.

2009, c. 58, s. 45; 2016, c. 7, s. 179.

115.22. The decision of the Court of Québec may be appealed to the Court of Appeal with leave of a judge of that court.

2009, c. 58, s. 45.

TITLE V

Repealed, 2018, c. 23, s. 634.

2002, c. 45, Title V; 2018, c. 23, s. 634.

CHAPTER I

Repealed, 2018, c. 23, s. 634.

2002, c. 45, c. I; 2018, c. 23, s. 634.

116. *(Repealed).*

2002, c. 45, s. 116; 2018, c. 23, s. 634.

117. *(Repealed).*

2002, c. 45, s. 117; 2018, c. 23, s. 634.

118. *(Repealed).*

2002, c. 45, s. 118; 2018, c. 23, s. 634.

119. *(Repealed).*

2002, c. 45, s. 119; 2018, c. 23, s. 634.

120. *(Repealed).*

2002, c. 45, s. 120; 2018, c. 23, s. 634.

121. *(Repealed).*

2002, c. 45, s. 121; 2018, c. 23, s. 634.

122. *(Repealed).*

2002, c. 45, s. 122; 2018, c. 23, s. 634.

123. *(Repealed).*

2002, c. 45, s. 123; 2018, c. 23, s. 634.

124. *(Repealed).*

2002, c. 45, s. 124; 2018, c. 23, s. 634.

125. *(Repealed).*

2002, c. 45, s. 125; 2018, c. 23, s. 634.

126. *(Repealed).*

2002, c. 45, s. 126; 2018, c. 23, s. 634.

127. *(Repealed).*

2002, c. 45, s. 127; 2018, c. 23, s. 634.

128. *(Repealed).*

2002, c. 45, s. 128; 2018, c. 23, s. 634.

129. *(Repealed).*

2002, c. 45, s. 129; 2018, c. 23, s. 634.

130. *(Repealed).*

2002, c. 45, s. 130; 2018, c. 23, s. 634.

131. *(Repealed).*

2002, c. 45, s. 131; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

CHAPTER II

Repealed, 2018, c. 23, s. 634.

2002, c. 45, c. II; 2018, c. 23, s. 634.

132. *(Repealed).*

2002, c. 45, s. 132; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

CHAPTER III

Repealed, 2018, c. 23, s. 634.

2002, c. 45, c. III; 2018, c. 23, s. 634.

DIVISION I

Repealed, 2018, c. 23, s. 634.

2002, c. 45, Div. I; 2018, c. 23, s. 634.

133. *(Repealed).*

2002, c. 45, s. 133; 2018, c. 23, s. 634.

134. *(Repealed).*

2002, c. 45, s. 134; 2018, c. 23, s. 634.

135. *(Repealed).*

2002, c. 45, s. 135; 2018, c. 23, s. 634.

136. *(Repealed).*

2002, c. 45, s. 136; 2018, c. 23, s. 634.

137. *(Repealed).*

2002, c. 45, s. 137; 2018, c. 23, s. 634.

138. *(Repealed).*

2002, c. 45, s. 138; 2018, c. 23, s. 634.

139. *(Repealed).*

2002, c. 45, s. 139; 2018, c. 23, s. 634.

140. *(Repealed).*

2002, c. 45, s. 140; 2018, c. 23, s. 634.

141. *(Repealed).*

2002, c. 45, s. 141; 2018, c. 23, s. 634.

142. *(Repealed).*

2002, c. 45, s. 142; 2018, c. 23, s. 634.

143. *(Repealed).*

2002, c. 45, s. 143; 2018, c. 23, s. 634.

144. *(Repealed).*

2002, c. 45, s. 144; 2018, c. 23, s. 634.

145. *(Repealed).*

2002, c. 45, s. 145; 2018, c. 23, s. 634.

DIVISION II

Repealed, 2018, c. 23, s. 634.

2002, c. 45, Div. II; 2018, c. 23, s. 634.

146. *(Repealed).*

2002, c. 45, s. 146; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

147. *(Repealed).*

2002, c. 45, s. 147; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

148. *(Repealed).*

2002, c. 45, s. 148; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

149. *(Repealed).*

2002, c. 45, s. 149; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

150. *(Repealed).*

2002, c. 45, s. 150; 2018, c. 23, s. 634.

151. *(Repealed).*

2002, c. 45, s. 151; 2018, c. 23, s. 634.

152. *(Repealed).*

2002, c. 45, s. 152; 2004, c. 37, s. 90; 2018, c. 23, s. 634.

153. *(Repealed).*

2002, c. 45, s. 153; 2018, c. 23, s. 634.

154. *(Repealed).*

2002, c. 45, s. 154; 2018, c. 23, s. 634.

155. *(Repealed).*

2002, c. 45, s. 155; 2018, c. 23, s. 634.

156. *(Repealed).*

2002, c. 45, s. 156; 2018, c. 23, s. 634.

TITLE VI

AMENDING PROVISIONS

157. *(Omitted).*

2002, c. 45, s. 157.

158. *(Omitted).*

2002, c. 45, s. 158.

159. *(Omitted).*

2002, c. 45, s. 159.

160. *(Omitted).*

2002, c. 45, s. 160.

161. *(Omitted).*

2002, c. 45, s. 161.

FINANCIAL ADMINISTRATION ACT

162. *(Amendment integrated into c. A-6.001, Schedule 1).*

2002, c. 45, s. 162.

163. *(Amendment integrated into c. A-6.001, Schedule 2).*

2002, c. 45, s. 163.

164. *(Amendment integrated into c. A-6.001, Schedule 3).*

2002, c. 45, s. 164.

AUTOMOBILE INSURANCE ACT

165. *(Amendment integrated into c. A-25, s. 93).*

2002, c. 45, s. 165.

166. *(Amendment integrated into c. A-25, s. 97.1).*

2002, c. 45, s. 166.

167. *(Amendment integrated into c. A-25, s. 156).*

2002, c. 45, s. 167.

168. *(Amendment integrated into c. A-25, s. 161).*

2002, c. 45, s. 168.

169. *(Amendment integrated into c. A-25, heading of Title VII).*

2002, c. 45, s. 169.

170. *(Amendment integrated into c. A-25, s. 177).*

2002, c. 45, s. 170.

171. *(Amendment integrated into c. A-25, s. 178).*

2002, c. 45, s. 171.

172. *(Amendment integrated into c. A-25, s. 179).*

2002, c. 45, s. 172.

173. *(Amendment integrated into c. A-25, s. 179.1).*

2002, c. 45, s. 173.

174. *(Amendment integrated into c. A-25, s. 179.2).*

2002, c. 45, s. 174.

175. *(Amendment integrated into c. A-25, s. 180).*

2002, c. 45, s. 175.

176. *(Amendment integrated into c. A-25, s. 181).*

2002, c. 45, s. 176.

177. *(Amendment integrated into c. A-25, s. 182).*

2002, c. 45, s. 177.

178. *(Amendment integrated into c. A-25, s. 183).*

2002, c. 45, s. 178.

DEPOSIT INSURANCE ACT

179. *(Amendment integrated into c. A-26, s. 1).*

2002, c. 45, s. 179.

180. *(Amendment integrated into c. A-26, heading of Division II).*

2002, c. 45, s. 180.

181. *(Omitted).*

2002, c. 45, s. 181.

182. *(Amendment integrated into c. A-26, s. 2.1).*

2002, c. 45, s. 182.

183. *(Omitted).*

2002, c. 45, s. 183.

184. *(Amendment integrated into c. A-26, s. 17).*

2002, c. 45, s. 184.

185. *(Omitted).*

2002, c. 45, s. 185.

186. *(Amendment integrated into c. A-26, s. 20).*

2002, c. 45, s. 186.

187. *(Omitted).*

2002, c. 45, s. 187.

188. *(Amendment integrated into c. A-26, s. 26).*

2002, c. 45, s. 188.

189. *(Amendment integrated into c. A-26, s. 31.4).*

2002, c. 45, s. 189.

190. *(Amendment integrated into c. A-26, s. 34.2).*

2002, c. 45, s. 190.

191. *(Amendment integrated into c. A-26, heading of Division VI).*

2002, c. 45, s. 191.

192. *(Amendment integrated into c. A-26, s. 42).*

2002, c. 45, s. 192.

193. *(Amendment integrated into c. A-26, s. 43).*

2002, c. 45, s. 193.

194. *(Amendment integrated into c. A-26, s. 45).*

2002, c. 45, s. 194.

195. *(Amendment integrated into c. A-26, s. 51).*

2002, c. 45, s. 195.

196. *(Amendment integrated into c. A-26, s. 52).*

2002, c. 45, s. 196.

197. *(Amendment integrated into c. A-26, s. 56).*

2002, c. 45, s. 197.

198. *(Amendment integrated into c. A-26).*

2002, c. 45, s. 198.

ACT RESPECTING PRESCRIPTION DRUG INSURANCE

199. *(Amendment integrated into c. A-29.01, s. 4).*

2002, c. 45, s. 199.

ACT RESPECTING INSURANCE

200. *(Amendment integrated into c. A-32, s. 1).*

2002, c. 45, s. 200.

201. *(Amendment integrated into c. A-32, s. 15).*

2002, c. 45, s. 201.

202. *(Amendment integrated into c. A-32, s. 16).*

2002, c. 45, s. 202.

203. *(Inoperative, 2002, c. 70, s. 8).*

2002, c. 45, s. 203.

204. *(Inoperative, 2002, c. 70, s. 20).*

2002, c. 45, s. 204.

205. *(Inoperative, 2002, c. 70, s. 21).*

2002, c. 45, s. 205.

206. *(Amendment integrated into c. A-32, s. 41).*

2002, c. 45, s. 206.

207. *(Amendment integrated into c. A-32, s. 77).*

2002, c. 45, s. 207.

208. *(Amendment integrated into c. A-32, s. 93.20).*

2002, c. 45, s. 208.

209. *(Amendment integrated into c. A-32, s. 93.27).*

2002, c. 45, s. 209.

210. *(Amendment integrated into c. A-32, s. 93.27.2).*

2002, c. 45, s. 210.

211. *(Amendment integrated into c. A-32, s. 93.117).*

2002, c. 45, s. 211.

212. *(Amendment integrated into c. A-32, s. 93.120).*

2002, c. 45, s. 212.

213. *(Amendment integrated into c. A-32, s. 93.165.1).*

2002, c. 45, s. 213.

214. *(Amendment integrated into c. A-32, s. 93.192).*

2002, c. 45, s. 214.

215. *(Amendment integrated into c. A-32, s. 93.197).*

2002, c. 45, s. 215.

216. *(Amendment integrated into c. A-32, s. 93.202).*

2002, c. 45, s. 216.

217. *(Amendment integrated into c. A-32, s. 93.212).*

2002, c. 45, s. 217.

218. *(Amendment integrated into c. A-32, s. 93.214).*

2002, c. 45, s. 218.

219. *(Amendment integrated into c. A-32, s. 93.217).*

2002, c. 45, s. 219.

220. *(Amendment integrated into c. A-32, s. 93.245).*

2002, c. 45, s. 220.

221. *(Amendment integrated into c. A-32, s. 93.269).*

2002, c. 45, s. 221.

222. *(Amendment integrated into c. A-32, s. 93.271).*

2002, c. 45, s. 222.

223. *(Inoperative, 2002, c. 70, s. 61).*

2002, c. 45, s. 223.

224. *(Inoperative, 2002, c. 70, s. 61).*

2002, c. 45, s. 224.

225. *(Amendment integrated into c. A-32, s. 121).*

2002, c. 45, s. 225.

226. *(Amendment integrated into c. A-32, s. 188).*

2002, c. 45, s. 226.

227. *(Inoperative, 2002, c. 70, s. 72).*

2002, c. 45, s. 227.

228. *(Amendment integrated into c. A-32, s. 197).*

2002, c. 45, s. 228.

229. *(Inoperative, 2002, c. 70, s. 78).*

2002, c. 45, s. 229.

230. *(Inoperative, 2002, c. 70, s. 83).*

2002, c. 45, s. 230.

231. *(Amendment integrated into c. A-32, s. 211).*

2002, c. 45, s. 231.

232. *(Inoperative, 2002, c. 70, s. 101).*

2002, c. 45, s. 232.

233. *(Amendment integrated into c. A-32, Chapter III.2, ss. 285.27 to 285.34).*

2002, c. 45, s. 233.

234. *(Amendment integrated into c. A-32, s. 318).*

2002, c. 45, s. 234.

235. *(Amendment integrated into c. A-32, heading of Chapter V.1 of Title IV).*

2002, c. 45, s. 235.

236. *(Amendment integrated into c. A-32, ss. 325.0.1 to 325.0.3).*

2002, c. 45, s. 236.

237. *(Amendment integrated into c. A-32, s. 325.1).*

2002, c. 45, s. 237.

238. *(Amendment integrated into c. A-32, s. 358).*

2002, c. 45, s. 238.

239. *(Amendment integrated into c. A-32, s. 378).*

2002, c. 45, s. 239.

240. *(Amendment integrated into c. A-32, s. 387).*

2002, c. 45, s. 240.

241. *(Amendment integrated into c. A-32, s. 395).*

2002, c. 45, s. 241.

242. *(Amendment integrated into c. A-32, s. 420).*

2002, c. 45, s. 242.

243. *(Amendment integrated into c. A-32).*

2002, c. 45, s. 243.

ACT RESPECTING THE CAISSES D'ENTRAIDE ÉCONOMIQUE

244. *(Amendment integrated into c. C-3, s. 17).*

2002, c. 45, s. 244.

245. *(Amendment integrated into c. C-3, s. 18).*

2002, c. 45, s. 245.

246. *(Amendment integrated into c. C-3, s. 22).*

2002, c. 45, s. 246.

247. *(Amendment integrated into c. C-3, s. 31).*

2002, c. 45, s. 247.

ACT RESPECTING CERTAIN CAISSES D'ENTRAIDE ÉCONOMIQUE

248. *(Amendment integrated into c. C-3.1, ss. 107 and 108).*

2002, c. 45, s. 248.

249. *(Amendment integrated into c. C-3.1, s. 146.1).*

2002, c. 45, s. 249.

250. *(Amendment integrated into c. C-3.1, ss. 105, 106 and 109).*

2002, c. 45, s. 250.

ACT RESPECTING CERTAIN INTERNATIONAL FINANCIAL CENTRES

251. *(Amendment integrated into c. C-8.3, s. 4).*

2002, c. 45, s. 251.

CHARTER OF VILLE DE QUÉBEC

252. *(Amendment integrated into c. C-11.5, s. 35.9).*

2002, c. 45, s. 252.

253. *(Amendment integrated into c. C-11.5, s. 35.11).*

2002, c. 45, s. 253.

254. *(Amendment integrated into c. C-11.5, s. 35.13).*

2002, c. 45, s. 254.

255. *(Amendment integrated into c. C-11.5, s. 35.14).*

2002, c. 45, s. 255.

CINEMA ACT

256. *(Amendment integrated into c. C-18.1, s. 144.4).*

2002, c. 45, s. 256.

CITIES AND TOWNS ACT

257. *(Amendment integrated into c. C-19, s. 465.5).*

2002, c. 45, s. 257.

258. *(Amendment integrated into c. C-19, s. 465.6).*

2002, c. 45, s. 258.

259. *(Amendment integrated into c. C-19, s. 465.13).*

2002, c. 45, s. 259.

260. *(Amendment integrated into c. C-19, s. 465.15).*

2002, c. 45, s. 260.

261. *(Amendment integrated into c. C-19, ss. 458.16, 458.17.2, 458.18, 458.19, 458.21, 458.40, 465.8 and 465.9).*

2002, c. 45, s. 261.

FISH AND GAMES CLUBS ACT

262. *(Amendment integrated into c. C-22, s. 1).*

2002, c. 45, s. 262.

263. *(Amendment integrated into c. C-22, ss. 2, 4).*

2002, c. 45, s. 263.

264. *(Amendment integrated into c. C-22, ss. 7, 8).*

2002, c. 45, s. 264.

AMUSEMENT CLUBS ACT

265. *(Amendment integrated into c. C-23, ss. 1, 1.2 and 4).*

2002, c. 45, s. 265.

266. *(Amendment integrated into c. C-23, ss. 11, 12).*

2002, c. 45, s. 266.

CODE OF CIVIL PROCEDURE

267. *(Amendment integrated into c. C-25, a. 833).*

2002, c. 45, s. 267.

PROFESSIONAL CODE

268. *(Amendment integrated into c. C-26, s. 16.8).*

2002, c. 45, s. 268.

LABOUR CODE

269. *(Amendment integrated into c. C-27, s. 149).*

2002, c. 45, s. 269.

MUNICIPAL CODE OF QUÉBEC

270. *(Amendment integrated into c. C-27.1, a. 711.7).*

2002, c. 45, s. 270.

271. *(Amendment integrated into c. C-27.1, a. 711.14).*

2002, c. 45, s. 271.

272. *(Amendment integrated into c. C-27.1, a. 711.16).*

2002, c. 45, s. 272.

273. *(Amendment integrated into c. C-27.1, aa. 649, 650.2, 651, 652, 654 and 673).*

2002, c. 45, ss. 273.

274. *(Amendment integrated into c. C-27.1, aa. 711.6, 711.9 and 711.10).*

2002, c. 45, s. 274.

COMPANIES ACT

Not in force

275. *(Not in force).*

2002, c. 45, s. 275.

276. *(Amendment integrated into c. C-38, s. 31).*

2002, c. 45, s. 276.

277. *(Amendment integrated into c. C-38, s. 134).*

2002, c. 45, s. 277.

278. *(Amendment integrated into c. C-38).*

2002, c. 45, s. 278.

CEMETERY COMPANIES ACT

279. *(Amendment integrated into c. C-40, ss. 1, 3.1, 4, 5 and 11).*

2002, c. 45, s. 279.

280. *(Amendment integrated into c. C-40, ss. 14, 15).*

2002, c. 45, s. 280.

ACT RESPECTING ROMAN CATHOLIC CEMETERY COMPANIES

281. *(Amendment integrated into c. C-40.1, ss. 2, 7.1, 8, 29, 30, 46 and 50).*

2002, c. 45, s. 281.

282. *(Amendment integrated into c. C-40.1, ss. 52, 53).*

2002, c. 45, s. 282.

TIMBER-DRIVING COMPANIES ACT

283. *(Amendment integrated into c. C-42, ss. 6, 30, 56, 64 and 65).*

2002, c. 45, s. 283.

GAS, WATER AND ELECTRICITY COMPANIES ACT

284. *(Amendment integrated into c. C-44, s. 8).*

2002, c. 45, s. 284.

285. *(Amendment integrated into c. C-44, ss. 98, 99).*

2002, c. 45, s. 285.

TELEGRAPH AND TELEPHONE COMPANIES ACT

286. *(Amendment integrated into c. C-45, ss. 4, 6, 14 and 25).*

2002, c. 45, s. 286.

Not in force

287. *(Not in force).*

2002, c. 45, s. 287.

288. *(Amendment integrated into c. C-45, s. 28).*

2002, c. 45, s. 288.

MINING COMPANIES ACT

289. *(Amendment integrated into c. C-47, ss. 5, 8, 11, 12, 13, 14, 15, 17 and 23).*

2002, c. 45, s. 289.

Not in force

290. *(Not in force).*

2002, c. 45, s. 290.

ACT RESPECTING THE CONSEIL DES ARTS ET DES LETTRES DU QUÉBEC

291. *(Amendment integrated into c. C-57.02, s. 25).*

2002, c. 45, s. 291.

ACT RESPECTING THE CONSERVATOIRE DE MUSIQUE ET D'ART DRAMATIQUE DU QUÉBEC

292. *(Amendment integrated into c. C-62.1, s. 61).*

2002, c. 45, s. 292.

ACT RESPECTING THE CONSTITUTION OF CERTAIN CHURCHES

293. *(Amendment integrated into c. C-63, ss. 4, 5).*

2002, c. 45, s. 293.

294. *(Amendment integrated into c. C-63, ss. 15, 16).*

2002, c. 45, s. 294.

COOPERATIVES ACT

295. *(Amendment integrated into c. C-67.2, ss. 13, 19, 121, 162.1, 171.1, 181.1, 182, 185.4, 189, 189.1, 190, 193, 211.6, 221.8, 226.10, 226.12, 226.13, 253 and 266).*

2002, c. 45, s. 295.

ACT RESPECTING FINANCIAL SERVICES COOPERATIVES

296. *(Amendment integrated into c. C-67.3, s. 11).*

2002, c. 45, s. 296.

297. *(Amendment integrated into c. C-67.3, s. 15).*

2002, c. 45, s. 297.

298. *(Amendment integrated into c. C-67.3, s. 20).*

2002, c. 45, s. 298.

299. *(Amendment integrated into c. C-67.3, s. 25).*

2002, c. 45, s. 299.

300. *(Amendment integrated into c. C-67.3, ss. 25.1 to 25.4).*

2002, c. 45, s. 300.

301. *(Amendment integrated into c. C-67.3, s. 27).*

2002, c. 45, s. 301.

302. *(Amendment integrated into c. C-67.3, s. 31).*

2002, c. 45, s. 302.

303. *(Amendment integrated into c. C-67.3, s. 37).*

2002, c. 45, s. 303.

304. *(Amendment integrated into c. C-67.3, s. 39).*

2002, c. 45, s. 304.

305. *(Amendment integrated into c. C-67.3, s. 43).*

2002, c. 45, s. 305.

306. *(Amendment integrated into c. C-67.3, s. 70).*

2002, c. 45, s. 306.

307. *(Amendment integrated into c. C-67.3, s. 81).*

2002, c. 45, s. 307.

308. *(Amendment integrated into c. C-67.3, s. 100).*

2002, c. 45, s. 308.

309. *(Amendment integrated into c. C-67.3, chapter V.1, ss. 131.1 to 131.7).*

2002, c. 45, s. 309.

310. *(Amendment integrated into c. C-67.3, s. 162).*

2002, c. 45, s. 310.

311. *(Amendment integrated into c. C-67.3, s. 167).*

2002, c. 45, s. 311.

312. *(Amendment integrated into c. C-67.3, s. 171).*

2002, c. 45, s. 312.

313. *(Amendment integrated into c. C-67.3, s. 183).*

2002, c. 45, s. 313.

314. *(Amendment integrated into c. C-67.3, s. 187).*

2002, c. 45, s. 314.

315. *(Amendment integrated into c. C-67.3, s. 258).*

2002, c. 45, s. 315.

316. *(Amendment integrated into c. C-67.3, s. 280).*

2002, c. 45, s. 316.

317. *(Amendment integrated into c. C-67.3, s. 333).*

2002, c. 45, s. 317.

318. *(Amendment integrated into c. C-67.3, s. 377).*

2002, c. 45, s. 318.

319. *(Amendment integrated into c. C-67.3, s. 436).*

2002, c. 45, s. 319.

320. *(Amendment integrated into c. C-67.3, s. 480).*

2002, c. 45, s. 320.

321. *(Amendment integrated into c. C-67.3, s. 495).*

2002, c. 45, s. 321.

322. *(Amendment integrated into c. C-67.3, s. 505).*

2002, c. 45, s. 322.

323. *(Amendment integrated into c. C-67.3, s. 528).*

2002, c. 45, s. 323.

324. *(Amendment integrated into c. C-67.3, s. 532).*

2002, c. 45, s. 324.

325. *(Omitted).*

2002, c. 45, s. 325.

326. *(Amendment integrated into c. C-67.3, s. 548).*

2002, c. 45, s. 326.

327. *(Amendment integrated into c. C-67.3, s. 549).*

2002, c. 45, s. 327.

328. *(Amendment integrated into c. C-67.3, s. 556).*

2002, c. 45, s. 328.

329. *(Amendment integrated into c. C-67.3, s. 560).*

2002, c. 45, s. 329.

330. *(Amendment integrated into c. C-67.3, s. 567).*

2002, c. 45, s. 330.

331. *(Amendment integrated into c. C-67.3, s. 585).*

2002, c. 45, s. 331.

332. *(Amendment integrated into c. C-67.3, s. 586).*

2002, c. 45, s. 332.

333. *(Amendment integrated into c. C-67.3, s. 588).*

2002, c. 45, s. 333.

334. *(Amendment integrated into c. C-67.3, s. 599).*

2002, c. 45, s. 334.

335. *(Amendment integrated into c. C-67.3, s. 721).*

2002, c. 45, s. 335.

336. *(Amendment integrated into c. C-67.3, s. 727).*

2002, c. 45, s. 336.

337. *(Amendment integrated into c. C-67.3, s. 731).*

2002, c. 45, s. 337.

338. *(Amendment integrated into c. C-67.3).*

2002, c. 45, s. 338.

RELIGIOUS CORPORATIONS ACT

339. *(Amendment integrated into c. C-71, ss. 2, 5, 5.1, 6, 7, 15 and 16).*

2002, c. 45, s. 339.

340. *(Amendment integrated into c. C-71, ss. 19, 20).*

2002, c. 45, s. 340.

341. *(Amendment integrated into c. C-71, form 1).*

2002, c. 45, s. 341.

REAL ESTATE BROKERAGE ACT

342. *(Inoperative, 2008, c. 9, s. 158).*

2002, c. 45, s. 342.

343. *(Inoperative, 2008, c. 9, s. 158).*

2002, c. 45, s. 343.

344. *(Amendment integrated into c. C-73.1, s. 25).*

2002, c. 45, s. 344.

345. *(Amendment integrated into c. C-73.1, heading of Chapter VII).*

2002, c. 45, s. 345.

346. *(Amendment integrated into c. C-73.1, ss. 61, 62, 75, 79, 101, 105, 106, 142, 144, 146 to 154, 160.3, 164, 166 and 189).*

2002, c. 45, s. 346.

347. *(Inoperative, 2008, c. 9, s. 158).*

2002, c. 45, s. 347.

FORESTRY CREDIT ACT

348. *(Amendment integrated into c. C-78, s. 46.5).*

2002, c. 45, s. 348.

ACT TO PROMOTE FOREST CREDIT BY PRIVATE INSTITUTIONS

349. *(Amendment integrated into c. C-78.1, s. 58).*

2002, c. 45, s. 349.

DEPOSIT ACT

350. *(Amendment integrated into c. D-5, s. 8).*

2002, c. 45, s. 350.

ACT RESPECTING THE DISTRIBUTION OF FINANCIAL PRODUCTS AND SERVICES

351. *(Amendment integrated into c. D-9.2, s. 5).*

2002, c. 45, s. 351.

352. *(Amendment integrated into c. D-9.2, s. 17).*

2002, c. 45, s. 352.

353. *(Amendment integrated into c. D-9.2, s. 28).*

2002, c. 45, s. 353.

354. *(Amendment integrated into c. D-9.2, s. 56).*

2002, c. 45, s. 354.

355. *(Omitted).*

2002, c. 45, s. 355.

356. *(Amendment integrated into c. D-9.2, s. 59).*

2002, c. 45, s. 356.

357. *(Amendment integrated into c. D-9.2, s. 72).*

2002, c. 45, s. 357.

358. *(Amendment integrated into c. D-9.2, s. 77).*

2002, c. 45, s. 358.

359. *(Amendment integrated into c. D-9.2, s. 81).*

2002, c. 45, s. 359.

360. *(Amendment integrated into c. D-9.2, s. 83).*

2002, c. 45, s. 360.

361. *(Repealed).*

2002, c. 45, s. 361; 2008, c. 9, s. 142.

362. *(Amendment integrated into c. D-9.2, ss. 103 to 103.4).*

2002, c. 45, s. 362.

363. *(Omitted).*

2002, c. 45, s. 363.

364. *(Omitted).*

2002, c. 45, s. 364.

365. *(Omitted).*

2002, c. 45, s. 365.

366. *(Amendment integrated into c. D-9.2, s. 119).*

2002, c. 45, s. 366.

367. *(Omitted).*

2002, c. 45, s. 367.

368. *(Amendment integrated into c. D-9.2, s. 121).*

2002, c. 45, s. 368.

369. *(Amendment integrated into c. D-9.2, s. 122).*

2002, c. 45, s. 369.

370. *(Omitted).*

2002, c. 45, s. 370.

371. *(Amendment integrated into c. D-9.2, s. 124).*

2002, c. 45, s. 371.

372. *(Omitted).*

2002, c. 45, s. 372.

373. *(Amendment integrated into c. D-9.2, s. 133).*

2002, c. 45, s. 373.

374. *(Amendment integrated into c. D-9.2, s. 135).*

2002, c. 45, s. 374.

375. *(Amendment integrated into c. D-9.2, s. 136).*

2002, c. 45, s. 375.

376. *(Omitted).*

2002, c. 45, s. 376.

377. *(Amendment integrated into c. D-9.2, s. 146).*

2002, c. 45, s. 377.

378. *(Repealed).*

2002, c. 45, s. 378; 2008, c. 9, s. 142.

379. *(Omitted).*

2002, c. 45, s. 379.

380. *(Amendment integrated into c. D-9.2, heading of Chapter II of Title III).*

2002, c. 45, s. 380.

381. *(Amendment integrated into c. D-9.2, s. 184).*

2002, c. 45, s. 381.

382. *(Amendment integrated into c. D-9.2, s. 186).*

2002, c. 45, s. 382.

383. *(Amendment integrated into c. D-9.2, s. 186.1).*

2002, c. 45, s. 383.

384. *(Repealed).*

2002, c. 45, s. 384; 2009, c. 25, s. 113.

385. *(Amendment integrated into c. D-9.2, s. 188).*

2002, c. 45, s. 385.

386. *(Amendment integrated into c. D-9.2, s. 189).*

2002, c. 45, s. 386.

387. *(Amendment integrated into c. D-9.2, s. 189.1).*

2002, c. 45, s. 387.

388. *(Amendment integrated into c. D-9.2, s. 191).*

2002, c. 45, s. 388.

389. *(Amendment integrated into c. D-9.2, s. 192).*

2002, c. 45, s. 389.

390. *(Repealed).*

2002, c. 45, s. 390; 2009, c. 25, s. 113.

391. *(Amendment integrated into c. D-9.2, s. 194).*

2002, c. 45, s. 391.

392. *(Omitted).*

2002, c. 45, s. 392.

393. *(Amendment integrated into c. D-9.2, s. 196).*

2002, c. 45, s. 393.

394. *(Amendment integrated into c. D-9.2, s. 198).*

2002, c. 45, s. 394.

395. *(Amendment integrated into c. D-9.2, s. 200).*

2002, c. 45, s. 395.

396. *(Amendment integrated into c. D-9.2, s. 201).*

2002, c. 45, s. 396.

397. *(Amendment integrated into c. D-9.2, s. 202).*

2002, c. 45, s. 397.

398. *(Amendment integrated into c. D-9.2, s. 202.1).*

2002, c. 45, s. 398.

399. *(Amendment integrated into c. D-9.2, s. 203).*

2002, c. 45, s. 399.

400. *(Repealed).*

2002, c. 45, s. 400; 2008, c. 9, s. 142.

401. *(Amendment integrated into c. D-9.2, s. 204).*

2002, c. 45, s. 401.

402. *(Amendment integrated into c. D-9.2, s. 205).*

2002, c. 45, s. 402.

403. *(Repealed).*

2002, c. 45, s. 403; 2008, c. 9, s. 142.

404. *(Amendment integrated into c. D-9.2, s. 207).*

2002, c. 45, s. 404.

405. *(Amendment integrated into c. D-9.2, s. 217).*

2002, c. 45, s. 405.

406. *(Omitted).*

2002, c. 45, s. 406.

407. *(Amendment integrated into c. D-9.2, s. 223).*

2002, c. 45, s. 407.

408. *(Amendment integrated into c. D-9.2, s. 224).*

2002, c. 45, s. 408.

409. *(Amendment integrated into c. D-9.2, s. 224.1).*

2002, c. 45, s. 409.

410. *(Amendment integrated into c. D-9.2, s. 225).*

2002, c. 45, s. 410.

411. *(Amendment integrated into c. D-9.2, s. 226).*

2002, c. 45, s. 411.

412. *(Amendment integrated into c. D-9.2, s. 227).*

2002, c. 45, s. 412.

413. *(Amendment integrated into c. D-9.2, s. 228).*

2002, c. 45, s. 413.

414. *(Amendment integrated into c. D-9.2, s. 230).*

2002, c. 45, s. 414.

415. *(Omitted).*

2002, c. 45, s. 415.

416. *(Repealed).*

2002, c. 45, s. 416; 2009, c. 25, s. 113.

417. *(Omitted).*

2002, c. 45, s. 417.

418. *(Repealed).*

2002, c. 45, s. 418; 2008, c. 9, s. 142.

419. *(Amendment integrated into c. D-9.2, s. 244).*

2002, c. 45, s. 419.

420. *(Omitted).*

2002, c. 45, s. 420.

421. *(Amendment integrated into c. D-9.2, s. 248).*

2002, c. 45, s. 421.

422. *(Omitted).*

2002, c. 45, s. 422.

423. *(Amendment integrated into c. D-9.2, s. 256).*

2002, c. 45, s. 423.

424. *(Amendment integrated into c. D-9.2, s. 258).*

2002, c. 45, s. 424.

425. *(Amendment integrated into c. D-9.2, s. 258.1).*

2002, c. 45, s. 425.

426. *(Omitted).*

2002, c. 45, s. 426.

427. *(Amendment integrated into c. D-9.2, ss. 274, 274.1).*

2002, c. 45, s. 427.

428. *(Omitted).*

2002, c. 45, s. 428.

429. *(Amendment integrated into c. D-9.2, s. 276).*

2002, c. 45, s. 429.

430. *(Amendment integrated into c. D-9.2, s. 277).*

2002, c. 45, s. 430.

431. *(Amendment integrated into c. D-9.2, s. 278).*

2002, c. 45, s. 431.

432. *(Amendment integrated into c. D-9.2, s. 279).*

2002, c. 45, s. 432.

433. *(Omitted).*

2002, c. 45, s. 433.

434. *(Omitted).*

2002, c. 45, s. 434.

435. *(Amendment integrated into c. D-9.2, s. 293).*

2002, c. 45, s. 435.

436. *(Amendment integrated into c. D-9.2, s. 294).*

2002, c. 45, s. 436.

437. *(Amendment integrated into c. D-9.2, s. 295).*

2002, c. 45, s. 437.

438. *(Amendment integrated into c. D-9.2, s. 296).*

2002, c. 45, s. 438.

439. *(Amendment integrated into c. D-9.2, s. 297).*

2002, c. 45, s. 439.

440. *(Amendment integrated into c. D-9.2, s. 298).*

2002, c. 45, s. 440.

441. *(Amendment integrated into c. D-9.2, s. 300).*

2002, c. 45, s. 441.

442. *(Amendment integrated into c. D-9.2, s. 312).*

2002, c. 45, s. 442; O.C. 1366-2003, s. 6.

443. *(Amendment integrated into c. D-9.2, s. 313).*

2002, c. 45, s. 443.

444. *(Amendment integrated into c. D-9.2, s. 315).*

2002, c. 45, s. 444.

445. *(Amendment integrated into c. D-9.2, ss. 320-320.5).*

2002, c. 45, s. 445.

446. *(Omitted).*

2002, c. 45, s. 446.

447. *(Omitted).*

2002, c. 45, s. 447.

448. *(Omitted).*

2002, c. 45, s. 448.

449. *(Omitted).*

2002, c. 45, s. 449.

450. *(Amendment integrated into c. D-9.2, s. 327).*

2002, c. 45, s. 450.

451. *(Amendment integrated into c. D-9.2, s. 328).*

2002, c. 45, s. 451.

452. *(Amendment integrated into c. D-9.2, s. 329).*

2002, c. 45, s. 452.

453. *(Amendment integrated into c. D-9.2, s. 330).*

2002, c. 45, s. 453.

454. *(Amendment integrated into c. D-9.2, s. 331).*

2002, c. 45, s. 454.

455. *(Amendment integrated into c. D-9.2, s. 332).*

2002, c. 45, s. 455.

456. *(Amendment integrated into c. D-9.2, s. 333).*

2002, c. 45, s. 456.

457. *(Amendment integrated into c. D-9.2, s. 334).*

2002, c. 45, s. 457.

458. *(Amendment integrated into c. D-9.2, s. 335).*

2002, c. 45, s. 458.

459. *(Amendment integrated into c. D-9.2, s. 336).*

2002, c. 45, s. 459.

460. *(Amendment integrated into c. D-9.2, s. 337).*

2002, c. 45, s. 460.

461. *(Amendment integrated into c. D-9.2, s. 338).*

2002, c. 45, s. 461.

462. *(Amendment integrated into c. D-9.2, s. 339).*

2002, c. 45, s. 462.

463. *(Amendment integrated into c. D-9.2, s. 343).*

2002, c. 45, s. 463.

464. *(Amendment integrated into c. D-9.2, s. 344).*

2002, c. 45, s. 464.

465. *(Amendment integrated into c. D-9.2, s. 345).*

2002, c. 45, s. 465.

466. *(Amendment integrated into c. D-9.2, s. 347).*

2002, c. 45, s. 466.

467. *(Amendment integrated into c. D-9.2, ss. 348-350).*

2002, c. 45, s. 467.

468. *(Amendment integrated into c. D-9.2, s. 351).*

2002, c. 45, s. 468.

469. *(Amendment integrated into c. D-9.2, Title V.1, ss. 351.1-351.3).*

2002, c. 45, s. 469.

470. *(Amendment integrated into c. D-9.2, s. 359).*

2002, c. 45, s. 470.

471. *(Amendment integrated into c. D-9.2, s. 366.1).*

2002, c. 45, s. 471.

472. *(Amendment integrated into c. D-9.2, s. 379).*

2002, c. 45, s. 472.

473. *(Omitted).*

2002, c. 45, s. 473.

474. *(Amendment integrated into c. D-9.2, s. 381).*

2002, c. 45, s. 474.

475. *(Amendment integrated into c. D-9.2, s. 382).*

2002, c. 45, s. 475.

476. *(Amendment integrated into c. D-9.2, s. 383).*

2002, c. 45, s. 476.

477. *(Omitted).*

2002, c. 45, s. 477.

478. *(Omitted).*

2002, c. 45, s. 478.

479. *(Amendment integrated into c. D-9.2, s. 419).*

2002, c. 45, s. 479.

480. *(Amendment integrated into c. D-9.2, s. 449).*

2002, c. 45, s. 480.

481. *(Amendment integrated into c. D-9.2, s. 454).*

2002, c. 45, s. 481.

482. *(Amendment integrated into c. D-9.2, s. 456).*

2002, c. 45, s. 482.

483. *(Repealed).*

2002, c. 45, s. 483; 2008, c. 9, s. 142.

484. *(Repealed).*

2002, c. 45, s. 484; 2008, c. 9, s. 142.

485. *(Amendment integrated into c. D-9.2, s. 483).*

2002, c. 45, s. 485.

486. *(Omitted).*

2002, c. 45, s. 486.

487. *(Amendment integrated into c. D-9.2, s. 492).*

2002, c. 45, s. 487.

488. *(Omitted).*

2002, c. 45, s. 488.

489. *(Amendment integrated into c. D-9.2, s. 494).*

2002, c. 45, s. 489.

490. *(Amendment integrated into c. D-9.2, Title IX.1, s. 494.1).*

2002, c. 45, s. 490.

491. *(Repealed).*

2002, c. 45, s. 491; 2008, c. 9, s. 142.

492. *(Amendment integrated into c. D-9.2, s. 553).*

2002, c. 45, s. 492.

493. *(Amendment integrated into c. D-9.2, s. 559).*

2002, c. 45, s. 493.

494. *(Amendment integrated into c. D-9.2, s. 560).*

2002, c. 45, s. 494.

495. *(Amendment integrated into c. D-9.2, s. 561).*

2002, c. 45, s. 495.

496. *(Omitted).*

2002, c. 45, s. 496.

497. *(Amendment integrated into c. D-9.2, s. 566).*

2002, c. 45, s. 497.

498. *(Amendment integrated into c. D-9.2, s. 580.1).*

2002, c. 45, s. 498.

499. *(Amendment integrated into c. D-9.2).*

2002, c. 45, s. 499.

500. *(Amendment integrated into c. D-9.2, ss. 53 to 55, 98, 99, 214 and 319).*

2002, c. 45, s. 500.

ROMAN CATHOLIC BISHOPS ACT

501. *(Amendment integrated into c. E-17, ss. 2.2, 3, 6, 13, 17 and 19).*

2002, c. 45, s. 501.

502. *(Amendment integrated into c. E-17, ss. 22 and 23).*

2002, c. 45, s. 502.

ACT RESPECTING NASDAQ STOCK EXCHANGE ACTIVITIES IN QUÉBEC

503. *(Amendment integrated into c. E-20.01, s. 2).*

2002, c. 45, s. 503.

504. *(Amendment integrated into c. E-20.01, s. 5).*

2002, c. 45, s. 504.

505. *(Amendment integrated into c. E-20.01, s. 6).*

2002, c. 45, s. 505.

506. *(Amendment integrated into c. E-20.01, s. 7).*

2002, c. 45, s. 506.

507. *(Amendment integrated into c. E-20.01, s. 8).*

2002, c. 45, s. 507.

ACT RESPECTING FABRIQUES

508. *(Amendment integrated into c. F-1, ss. 2, 11, 16 and 21).*

2002, c. 45, s. 508.

509. *(Amendment integrated into c. F-1, ss. 75 and 76).*

2002, c. 45, s. 509.

ACT TO ESTABLISH FONDACTION, LE FONDS DE DÉVELOPPEMENT DE LA CONFÉDÉRATION DES SYNDICATS NATIONAUX POUR LA COOPÉRATION ET L'EMPLOI

510. *(Amendment integrated into c. F-3.1.2, s. 7).*

2002, c. 45, s. 510.

511. *(Amendment integrated into c. F-3.1.2, s. 21).*

2002, c. 45, s. 511.

512. *(Amendment integrated into c. F-3.1.2, s. 37).*

2002, c. 45, s. 512.

ACT TO ESTABLISH THE FONDS DE SOLIDARITÉ DES TRAVAILLEURS DU QUÉBEC (F.T.Q.)

513. *(Amendment integrated into c. F-3.2.1, s. 6).*

2002, c. 45, s. 513.

514. *(Amendment integrated into c. F-3.2.1, s. 16).*

2002, c. 45, s. 514.

515. *(Amendment integrated into c. F-3.2.1, s. 29).*

2002, c. 45, s. 515.

516. *(Amendment integrated into c. F-3.2.1, s. 30).*

2002, c. 45, s. 516.

TAXATION ACT

517. *(Amendment integrated into c. I-3, s. 1).*

2002, c. 45, s. 517.

518. *(Amendment integrated into c. I-3, s. 895).*

2002, c. 45, s. 518; 2003, c. 9, s. 463.

519. *(Amendment integrated into c. I-3, s. 897).*

2002, c. 45, s. 519.

520. *(Amendment integrated into c. I-3, ss. 346.2, 998, 999.0.1 and 1175.1).*

2002, c. 45, s. 520.

521. *(Amendment integrated into c. I-3, ss. 965.1, 965.6.23.1, 965.7, 965.9.2, 965.9.7.0.2, 965.9.7.1, 965.9.7.2, 965.9.7.3, 965.24.2, 965.28, 965.28.1, 965.28.2, 965.31.5, 979.1, 1029.8.36.95, 1029.8.36.147, 1049.2.8 and 1049.2.9).*

2002, c. 45, s. 521.

ACT RESPECTING THE DISCLOSURE OF THE COMPENSATION RECEIVED BY THE EXECUTIVE OFFICERS OF CERTAIN LEGAL PERSONS

522. *(Amendment integrated into c. I-8.01, s. 3).*

2002, c. 45, s. 522.

523. *(Amendment integrated into c. I-8.01, s. 6).*

2002, c. 45, s. 523.

524. *(Amendment integrated into c. I-8.01, s. 7).*

2002, c. 45, s. 524.

ACT RESPECTING THE ENTERPRISE REGISTRAR

525. *(Amendment integrated into c. R-17.1, title).*

2002, c. 45, s. 525.

526. *(Amendment integrated into c. R-17.1, s. 1).*

2002, c. 45, s. 526.

527. *(Amendment integrated into c. R-17.1 s. 8).*

2002, c. 45, s. 527.

528. *(Amendment integrated into c. R-17.1, s. 18).*

2002, c. 45, s. 528.

529. *(Amendment integrated into c. R-17.1, s. 26).*

2002, c. 45, s. 529.

530. *(Omitted).*

2002, c. 45, s. 530.

531. *(Omitted).*

2002, c. 45, s. 531.

532. *(Amendment integrated into c. R-17.1, s. 32).*

2002, c. 45, s. 532.

533. *(Omitted).*

2002, c. 45, s. 533.

534. *(Amendment integrated into c. R-17.1, s. 42).*

2002, c. 45, s. 534.

535. *(Amendment integrated into c. R-17.1, s. 44).*

2002, c. 45, s. 535.

536. *(Amendment integrated into c. R-17.1, s. 45).*

2002, c. 45, s. 536.

537. *(Amendment integrated into c. R-17.1, s. 46).*

2002, c. 45, s. 537.

538. *(Omitted).*

2002, c. 45, s. 538.

539. *(Inoperative, 2010, c. 7, s. 281).*

2002, c. 45, s. 539.

540. *(Amendment integrated into c. R-17.1, ss. 2 to 7, 9, 9.1, 10 to 14, 16, 17, 20 to 25, 29 to 31, 34, 35 and 43).*

2002, c. 45, s. 540.

ACT RESPECTING THE INSTITUT DE LA STATISTIQUE DU QUÉBEC

541. *(Amendment integrated into c. I-13.011, s. 39).*

2002, c. 45, s. 541.

THE EDUCATION ACT FOR CREE, INUIT AND NASKAPI NATIVE PERSONS

542. *(Amendment integrated into c. I-14, s. 233).*

2002, c. 45, s. 542.

WINDING-UP ACT

543. *(Amendment integrated into c. L-4, ss. 9, 17, 18, 19, 25.1, 32 and 32.1).*

2002, c. 45, s. 543.

544. *(Amendment integrated into c. L-4, ss. 34 and 35).*

2002, c. 45, s. 544.

ACT RESPECTING THE MINISTÈRE DE LA CULTURE ET DES COMMUNICATIONS

545. *(Amendment integrated into c. M-17.1, s. 18).*

2002, c. 45, s. 545.

546. *(Amendment integrated into c. M-17.1, s. 38).*

2002, c. 45, s. 546.

ACT RESPECTING THE SPECIAL POWERS OF LEGAL PERSONS

547. *(Amendment integrated into c. P-16, ss. 5, 7, 14, 17, 19, 20, 24 and 53).*

2002, c. 45, s. 547.

Not in force

548. *(Not in force).*

2002, c. 45, s. 548.

PUBLIC PROTECTOR ACT

549. *(Amendment integrated into c. P-32, s. 15).*

2002, c. 45, s. 549.

CONSUMER PROTECTION ACT

550. *(Amendment integrated into c. P-40.1, s. 321).*

2002, c. 45, s. 550.

ACT RESPECTING THE LEGAL PUBLICITY OF SOLE PROPRIETORSHIPS, PARTNERSHIPS AND LEGAL PERSONS

551. *(Amendment integrated into c. P-45).*

2002, c. 45, s. 551.

552. *(Inoperative, 2010, c. 7, s. 281).*

2002, c. 45, s. 552.

553. *(Amendment integrated into c. P-45, Schedule 1).*

2002, c. 45, s. 553.

ACT RESPECTING THE PROCESS OF NEGOTIATION OF COLLECTIVE AGREEMENTS IN THE PUBLIC AND PARAPUBLIC SECTORS

554. *(Amendment integrated into c. R-8.2, Schedule C).*

2002, c. 45, s. 554.

ACT RESPECTING THE GOVERNMENT AND PUBLIC EMPLOYEES RETIREMENT PLAN

555. *(Amendment integrated into c. R-10, Schedule I).*

2002, c. 45, s. 555.

ACT RESPECTING HEALTH SERVICES AND SOCIAL SERVICES

556. *(Amendment integrated into c. S-4.2, ss. 318, 321, 322, 328, 331, 333, 451.14, 533 and 548).*

2002, c. 45, s. 556.

ACT RESPECTING HEALTH SERVICES AND SOCIAL SERVICES FOR CREE NATIVE PERSONS

557. *(Amendment integrated into c. S-5, ss. 64, 66 to 67 and 119 to 121).*

2002, c. 45, s. 557.

558. *(Amendment integrated into c. S-5, s. 134).*

2002, c. 45, s. 558.

ACT RESPECTING THE SOCIÉTÉ DES LOTERIES DU QUÉBEC

559. *(Amendment integrated into c. S-13.1, s. 18).*

2002, c. 45, s. 559.

ACT RESPECTING THE SOCIÉTÉ NATIONALE DU CHEVAL DE COURSE

560. *(Amendment integrated into c. S-18.2.0.1, s. 17).*

2002, c. 45, s. 560.

ACT RESPECTING FARMERS' AND DAIRYMEN'S ASSOCIATIONS

561. *(Amendment integrated into c. S-23, ss. 4, 5.3, 5.5, 5.8 and 5.10).*

2002, c. 45, s. 561.

ACT RESPECTING MIXED ENTERPRISE COMPANIES IN THE MUNICIPAL SECTOR

562. *(Amendment integrated into c. S-25.01, s. 17).*

2002, c. 45, s. 562.

ACT RESPECTING THE SOCIÉTÉS D'ENTRAIDE ÉCONOMIQUE

563. *(Amendment integrated into c. S-25.1, s. 112).*

2002, c. 45, s. 563.

564. *(Amendment integrated into c. S-25.1).*

2002, c. 45, s. 564.

HORTICULTURAL SOCIETIES ACT

565. *(Amendment integrated into c. S-27, ss. 3.1 and 10.1).*

2002, c. 45, s. 565.

566. *(Amendment integrated into c. S-29.01, s. 2).*

2002, c. 45, s. 566.

567. *(Amendment integrated into c. S-29.01, s. 3).*

2002, c. 45, s. 567.

568. *(Amendment integrated into c. S-29.01, s. 13).*

2002, c. 45, s. 568.

569. *(Amendment integrated into c. S-29.01, s. 15).*

2002, c. 45, s. 569.

570. *(Amendment integrated into c. S-29.01, s. 16).*

2002, c. 45, s. 570.

571. *(Amendment integrated into c. S-29.01, s. 18).*

2002, c. 45, s. 571.

572. *(Amendment integrated into c. S-29.01, s. 19).*

2002, c. 45, s. 572.

573. *(Amendment integrated into c. S-29.01, s. 24).*

2002, c. 45, s. 573.

574. *(Amendment integrated into c. S-29.01, s. 30).*

2002, c. 45, s. 574.

575. *(Amendment integrated into c. S-29.01, s. 37).*

2002, c. 45, s. 575.

576. *(Amendment integrated into c. S-29.01, s. 43).*

2002, c. 45, s. 576.

577. *(Amendment integrated into c. S-29.01, s. 50).*

2002, c. 45, s. 577.

578. *(Amendment integrated into c. S-29.01, s. 56).*

2002, c. 45, s. 578.

579. *(Amendment integrated into c. S-29.01, s. 97).*

2002, c. 45, s. 579.

580. *(Amendment integrated into c. S-29.01, s. 102).*

2002, c. 45, s. 580.

581. *(Amendment integrated into c. S-29.01, s. 125).*

2002, c. 45, s. 581.

582. *(Amendment integrated into c. S-29.01, Chapter XI.1, ss. 153.1 to 153.7).*

2002, c. 45, s. 582.

583. *(Amendment integrated into c. S-29.01, s. 155).*

2002, c. 45, s. 583.

584. *(Amendment integrated into c. S-29.01, s. 163).*

2002, c. 45, s. 584.

585. *(Amendment integrated into c. S-29.01, s. 169.1).*

2002, c. 45, s. 585.

586. *(Amendment integrated into c. S-29.01, s. 169.2).*

2002, c. 45, s. 586.

587. *(Amendment integrated into c. S-29.01, s. 172).*

2002, c. 45, s. 587.

588. *(Amendment integrated into c. S-29.01, s. 177).*

2002, c. 45, s. 588.

589. *(Amendment integrated into c. S-29.01, s. 194).*

2002, c. 45, s. 589.

590. *(Amendment integrated into c. S-29.01, s. 203).*

2002, c. 45, s. 590.

591. *(Amendment integrated into c. S-29.01, s. 216).*

2002, c. 45, s. 591.

592. *(Amendment integrated into c. S-29.01, s. 226).*

2002, c. 45, s. 592.

593. *(Amendment integrated into c. S-29.01, s. 227).*

2002, c. 45, s. 593.

594. *(Amendment integrated into c. S-29.01, s. 234).*

2002, c. 45, s. 594.

595. *(Amendment integrated into c. S-29.01, s. 236).*

2002, c. 45, s. 595.

596. *(Amendment integrated into c. S-29.01, s. 242).*

2002, c. 45, s. 596.

597. *(Amendment integrated into c. S-29.01, s. 244).*

2002, c. 45, s. 597.

598. *(Amendment integrated into c. S-29.01, heading of Division IV of Chapter XVI).*

2002, c. 45, s. 598.

599. *(Amendment integrated into c. S-29.01, s. 293).*

2002, c. 45, s. 599.

600. *(Amendment integrated into c. S-29.01, s. 295).*

2002, c. 45, s. 600.

601. *(Amendment integrated into c. S-29.01, heading of Division VI of Chapter XVI).*

2002, c. 45, s. 601.

602. *(Amendment integrated into c. S-29.01, s. 313).*

2002, c. 45, s. 602.

603. *(Amendment integrated into c. S-29.01, s. 314).*

2002, c. 45, s. 603.

604. *(Amendment integrated into c. S-29.01, heading of Division VII of Chapter XVI).*

2002, c. 45, s. 604.

605. *(Amendment integrated into c. S-29.01, ss. 314.1 and 314.2).*

2002, c. 45, s. 605.

606. *(Amendment integrated into c. S-29.01, s. 315).*

2002, c. 45, s. 606.

607. *(Amendment integrated into c. S-29.01, s. 333).*

2002, c. 45, s. 607.

608. *(Amendment integrated into c. S-29.01, s. 351).*

2002, c. 45, s. 608.

609. *(Omitted).*

2002, c. 45, s. 609.

610. *(Amendment integrated into c. S-29.01, s. 408).*

2002, c. 45, s. 610.

611. *(Amendment integrated into c. S-29.01).*

2002, c. 45, s. 611.

LOAN AND INVESTMENT SOCIETIES ACT

612. *(Omitted).*

2002, c. 45, s. 612.

NATIONAL BENEFIT SOCIETY ACT

613. *(Amendment integrated into c. S-31, s. 1.2).*

2002, c. 45, s. 613.

614. *(Amendment integrated into c. S-31, ss. 7 and 8).*

2002, c. 45, s. 614.

ACT RESPECTING SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS

615. *(Amendment integrated into c. S-32, ss. 1 and 1.2).*

2002, c. 45, s. 615.

616. *(Amendment integrated into c. S-32, ss. 4 and 5).*

2002, c. 45, s. 616.

PROFESSIONAL SYNDICATES ACT

617. *(Amendment integrated into c. S-40, s. 9).*

2002, c. 45, s. 617.

618. *(Amendment integrated into c. S-40, s. 20).*

2002, c. 45, s. 618.

619. *(Amendment integrated into c. S-40, ss. 1, 10, 11 and 26).*

2002, c. 45, s. 619.

620. *(Amendment integrated into c. S-40, ss. 30 and 31).*

2002, c. 45, s. 620.

ACT RESPECTING THE QUÉBEC SALES TAX

621. *(Amendment integrated into c. T-0.1, s. 1).*

2002, c. 45, s. 621.

622. *(Amendment integrated into c. T-0.1, s. 519).*

2002, c. 45, s. 622.

SECURITIES ACT

623. *(Amendment integrated into c. V-1.1, s. 3).*

2002, c. 45, s. 623.

624. *(Amendment integrated into c. V-1.1, s. 44).*

2002, c. 45, s. 624.

625. *(Amendment integrated into c. V-1.1, s. 92).*

2002, c. 45, s. 625.

626. *(Amendment integrated into c. V-1.1, s. 151.1.1).*

2002, c. 45, s. 626.

627. *(Amendment integrated into c. V-1.1, s. 154).*

2002, c. 45, s. 627.

628. *(Amendment integrated into c. V-1.1, s. 156).*

2002, c. 45, s. 628.

629. *(Amendment integrated into c. V-1.1, heading of Chapter III of Title V).*

2002, c. 45, s. 629.

630. *(Amendment integrated into c. V-1.1, ss. 168.1.1 to 168.1.5).*

2002, c. 45, s. 630.

631. *(Amendment integrated into c. V-1.1, ss. 169-172).*

2002, c. 45, s. 631; O.C. 1366-2003, s. 7.

632. *(Amendment integrated into c. V-1.1, s. 195).*

2002, c. 45, s. 632.

633. *(Amendment integrated into c. V-1.1, s. 195.2).*

2002, c. 45, s. 633.

634. *(Amendment integrated into c. V-1.1, s. 204).*

2002, c. 45, s. 634.

635. *(Amendment integrated into c. V-1.1, s. 208.1).*

2002, c. 45, s. 635.

636. *(Amendment integrated into c. V-1.1, s. 234).*

2002, c. 45, s. 636.

637. *(Amendment integrated into c. V-1.1, s. 235).*

2002, c. 45, s. 637.

638. *(Amendment integrated into c. V-1.1, s. 236).*

2002, c. 45, s. 638.

639. *(Amendment integrated into c. V-1.1, s. 249).*

2002, c. 45, s. 639.

640. *(Amendment integrated into c. V-1.1, s. 253).*

2002, c. 45, s. 640.

641. *(Amendment integrated into c. V-1.1, s. 273.1).*

2002, c. 45, s. 641.

642. *(Amendment integrated into c. V-1.1, heading of Chapter III of Title IX).*

2002, c. 45, s. 642.

643. *(Amendment integrated into c. V-1.1, heading of Chapter I of Title X).*

2002, c. 45, s. 643.

644. *(Amendment integrated into c. V-1.1, s. 276).*

2002, c. 45, s. 644.

645. *(Omitted).*

2002, c. 45, s. 645.

646. *(Amendment integrated into c. V-1.1, s. 276.4).*

2002, c. 45, s. 646.

647. *(Omitted).*

2002, c. 45, s. 647.

648. *(Amendment integrated into c. V-1.1, s. 283).*

2002, c. 45, s. 648.

649. *(Amendment integrated into c. V-1.1, s. 284).*

2002, c. 45, s. 649.

650. *(Omitted).*

2002, c. 45, s. 650.

651. *(Amendment integrated into c. V-1.1, s. 292).*

2002, c. 45, s. 651.

652. *(Amendment integrated into c. V-1.1, s. 293).*

2002, c. 45, s. 652.

653. *(Amendment integrated into c. V-1.1, s. 295.2).*

2002, c. 45, s. 653.

654. *(Omitted).*

2002, c. 45, s. 654.

655. *(Amendment integrated into c. V-1.1, s. 302).*

2002, c. 45, s. 655.

656. *(Amendment integrated into c. V-1.1, s. 303).*

2002, c. 45, s. 656.

657. *(Omitted).*

2002, c. 45, s. 657.

658. *(Amendment integrated into c. V-1.1, s. 307).*

2002, c. 45, s. 658.

659. *(Amendment integrated into c. V-1.1, s. 308).*

2002, c. 45, s. 659.

660. *(Amendment integrated into c. V-1.1, heading of Chapter III of Title X).*

2002, c. 45, s. 660.

661. *(Amendment integrated into c. V-1.1, s. 309).*

2002, c. 45, s. 661.

662. *(Amendment integrated into c. V-1.1, s. 310).*

2002, c. 45, s. 662.

663. *(Amendment integrated into c. V-1.1, s. 311).*

2002, c. 45, s. 663.

664. *(Amendment integrated into c. V-1.1, heading of Chapter IV of Title X).*

2002, c. 45, s. 664.

665. *(Amendment integrated into c. V-1.1, s. 312).*

2002, c. 45, s. 665.

666. *(Amendment integrated into c. V-1.1, s. 312.1).*

2002, c. 45, s. 666.

667. *(Amendment integrated into c. V-1.1, s. 313).*

2002, c. 45, s. 667.

668. *(Omitted).*

2002, c. 45, s. 668.

669. *(Amendment integrated into c. V-1.1, s. 314.1).*

2002, c. 45, s. 669.

670. *(Omitted).*

2002, c. 45, s. 670.

671. *(Amendment integrated into c. V-1.1, chapter V).*

2002, c. 45, s. 671.

672. *(Omitted).*

2002, c. 45, s. 672.

673. *(Amendment integrated into c. V-1.1, s. 318).*

2002, c. 45, s. 673.

674. *(Amendment integrated into c. V-1.1, s. 319).*

2002, c. 45, s. 674.

675. *(Amendment integrated into c. V-1.1, s. 320).*

2002, c. 45, s. 675.

676. *(Amendment integrated into c. V-1.1, s. 320.1).*

2002, c. 45, s. 676.

677. *(Amendment integrated into c. V-1.1, s. 320.2).*

2002, c. 45, s. 677.

678. *(Amendment integrated into c. V-1.1, s. 321.1).*

2002, c. 45, s. 678.

679. *(Amendment integrated into c. V-1.1, s. 322).*

2002, c. 45, s. 679.

680. *(Amendment integrated into c. V-1.1, chapter V).*

2002, c. 45, s. 680.

681. *(Amendment integrated into c. V-1.1, s. 323).*

2002, c. 45, s. 681.

682. *(Amendment integrated into c. V-1.1, ss. 323.1-323.13).*

2002, c. 45, s. 682; O.C. 1366-2003, s. 8.

683. *(Amendment integrated into c. V-1.1, heading of Chapter VII of Title X).*

2002, c. 45, s. 683.

684. *(Amendment integrated into c. V-1.1, s. 330.1).*

2002, c. 45, s. 684.

685. *(Amendment integrated into c. V-1.1, s. 330.3).*

2002, c. 45, s. 685.

686. *(Amendment integrated into c. V-1.1, s. 330.5).*

2002, c. 45, s. 686.

687. *(Omitted).*

2002, c. 45, s. 687.

688. *(Amendment integrated into c. V-1.1, s. 330.9).*

2002, c. 45, s. 688.

689. *(Amendment integrated into c. V-1.1, s. 330.10).*

2002, c. 45, s. 689.

690. *(Amendment integrated into c. V-1.1, s. 331).*

2002, c. 45, s. 690.

691. *(Amendment integrated into c. V-1.1, s. 331.1).*

2002, c. 45, s. 691.

692. *(Amendment integrated into c. V-1.1, s. 332).*

2002, c. 45, s. 692.

693. *(Amendment integrated into c. V-1.1, s. 334).*

2002, c. 45, s. 693.

694. *(Omitted).*

2002, c. 45, s. 694.

695. *(Amendment integrated into c. V-1.1, s. 348).*

2002, c. 45, s. 695.

696. *(Amendment integrated into c. V-1.1).*

2002, c. 45, s. 696.

697. *(Omitted).*

2002, c. 45, s. 697.

698. *(Omitted).*

2002, c. 45, s. 698.

ACT RESPECTING TRANSPORTATION SERVICES BY TAXI

699. *(Amendment integrated into c. S-6.01, s. 135).*

2002, c. 45, s. 699.

700. *(Amendment integrated into c. S-6.01, s. 138).*

2002, c. 45, s. 700.

ACT RESPECTING PUBLIC TRANSIT AUTHORITIES

701. *(Amendment integrated into c. S-30.01, ss. 1, 83, 160, 164.1, 167 and 175).*

2002, c. 45, s. 701.

702. *(Amendment integrated into c. S-30.01, s. 71).*

2002, c. 45, s. 702.

ACT RESPECTING THE PENSION PLAN OF MANAGEMENT PERSONNEL

703. *(Amendment integrated into c. R-12.1, Schedule II).*

2002, c. 45, s. 703.

ACT CONSTITUTING CAPITAL RÉGIONAL ET COOPÉRATIF DESJARDINS

704. *(Amendment integrated into c. C-6.1, s. 20).*

2002, c. 45, s. 704.

705. *(Amendment integrated into c. C-6.1, s. 33).*

2002, c. 45, s. 705.

706. *(Amendment integrated into c. C-6.1, s. 43).*

2002, c. 45, s. 706.

TITLE VII

TRANSITIONAL AND FINAL PROVISIONS

707. The Autorité des marchés financiers established by section 1 replaces the Bureau des services financiers and the Fonds d'indemnisation des services financiers established by the Act respecting the distribution of financial products and services (chapter D-9.2) and acquires the rights and assumes the obligations thereof.

2002, c. 45, s. 707; 2004, c. 37, s. 90.

708. The Autorité des marchés financiers established by section 1 replaces the Commission des valeurs mobilières du Québec established by the Securities Act (chapter V-1.1) and acquires the rights and assumes the obligations thereof.

2002, c. 45, s. 708; 2004, c. 37, s. 90.

709. The Autorité des marchés financiers established by section 1 replaces the Régie de l'assurance-dépôts du Québec established by the Deposit Insurance Act (chapter A-26) and acquires the rights and assumes the obligations thereof.

2002, c. 45, s. 709; 2004, c. 37, s. 90.

710. The Autorité des marchés financiers established by section 1 replaces the Inspector General of Financial Institutions with respect to the duties and powers exercised by the latter under the Acts listed in Schedule 1 as they read on 31 January 2004 and acquires the rights and assumes the obligations thereof.

2002, c. 45, s. 710; 2004, c. 37, s. 90.

711. The files, records and other documents of the Bureau des services financiers, the Fonds d'indemnisation des services financiers, the Commission des valeurs mobilières du Québec and the Régie de l'assurance-dépôts du Québec become the files, records and documents of the Autorité des marchés financiers.

2002, c. 45, s. 711; 2004, c. 37, s. 90.

712. The Government may, to the extent and on the conditions it determines, transfer to the Authority any file, record or document as well as any property in the possession of the Inspector General of Financial Institutions on 31 January 2004 required for the purposes of the exercise by the latter of the duties and powers provided for in the Acts listed in Schedule 1.

2002, c. 45, s. 712; 2004, c. 37, s. 90.

713. Matters commenced by the Bureau des services financiers, the Fonds d'indemnisation des services financiers, the Commission des valeurs mobilières du Québec and the Régie de l'assurance-dépôts du Québec shall be continued by the Autorité des marchés financiers.

2002, c. 45, s. 713; 2004, c. 37, s. 90.

714. Matters commenced by the Inspector General of Financial Institutions with respect to the duties and powers exercised by the latter under the Acts listed in Schedule 1, as they read on 31 January 2004 shall be continued by the Autorité des marchés financiers.

2002, c. 45, s. 714; 2004, c. 37, s. 90.

715. The Autorité des marchés financiers becomes, without continuance of suit, a party to all proceedings to which the Bureau des services financiers, the Fonds d'indemnisation des services financiers, the Commission des valeurs mobilières du Québec or the Régie de l'assurance-dépôts du Québec was a party.

2002, c. 45, s. 715; 2004, c. 37, s. 90.

716. The Autorité des marchés financiers becomes, without continuance of suit, a party to all proceedings to which the Inspector General of Financial Institutions was a party with respect to the duties and powers exercised by the latter under the Acts listed in Schedule 1, as they read on 31 January 2004.

2002, c. 45, s. 716; 2004, c. 37, s. 90.

717. The employees of the Bureau des services financiers and the Fonds d'indemnisation des services financiers, established under the Act respecting the distribution of financial products and services (chapter D-9.2) in office on 8 May 2002 become employees of the Autorité des marchés financiers without other formalities. They shall hold the position and exercise the functions that are assigned to them by the Bureau de transition on behalf of the Authority.

2002, c. 45, s. 717; 2004, c. 37, s. 90.

718. The employees of the Commission des valeurs mobilières du Québec, established by the Securities Act (chapter V-1.1), in office on 8 May 2002 become employees of the Autorité des marchés financiers without other formalities. They shall hold the position and exercise the functions that are assigned to them by the Bureau de transition on behalf of the Authority, subject to the provisions of a collective agreement.

2002, c. 45, s. 718; 2004, c. 37, s. 90.

719. The employees of the Régie de l'assurance-dépôts du Québec, established under the Deposit Insurance Act (chapter A-26), in office on 31 January 2004 become, subject to the conditions of employment applicable to them, employees of the Autorité des marchés financiers insofar as a decision by the Conseil du trésor providing for their transfer is made before 1 February 2006.

2002, c. 45, s. 719; 2004, c. 37, s. 90.

720. The employees of the Inspector General of Financial Institutions assigned to the Direction du développement des normes and to the Direction générale de la surveillance et du contrôle, with the exception of the employees of the Direction de l'encadrement des pratiques commerciales et du courtage immobilier assigned more specifically to matters of real estate brokerage, in office on 31 January 2004 become, subject to the conditions of employment applicable to them, employees of the Autorité des marchés financiers insofar as a decision by the Conseil du trésor providing for their transfer is made before 1 February 2006.

The other employees of the Inspector General of Financial Institutions in office on 31 January 2004 become, without other formalities, employees of the enterprise registrar except if they consent to become employees of the Autorité des marchés financiers and insofar as a decision of the Conseil du trésor providing for their transfer is made before 1 February 2006.

2002, c. 45, s. 720; 2004, c. 37, s. 90.

721. Any employee transferred to the Autorité des marchés financiers pursuant to section 719 or 720 may request a transfer to a position in the public service or take part in a promotion-only qualification process for such a position in accordance with the Public Service Act (chapter F-3.1.1) if, at the date of the transfer to the Authority, the employee was a permanent public servant assigned to the Inspector General of Financial Institutions or the Régie de l'assurance-dépôts du Québec.

Section 35 of the Public Service Act applies to an employee who takes part in such a promotion-only qualification process.

2002, c. 45, s. 721; 2004, c. 37, s. 90; 2013, c. 25, s. 34.

722. An employee referred to in section 721, who applies for a transfer or a promotion-only qualification process, may require from the Chair of the Conseil du trésor an assessment of the classification that would be assigned to him or her in the public service. The assessment must take account of the classification that the employee had in the public service on the date of the transfer, as well as the experience and training acquired in the course of his or her employment at the Authority.

In the case where an employee is transferred pursuant to section 721, the deputy minister or the President and Chief Executive Officer shall establish a classification in accordance with the assessment provided for in the first paragraph.

In the case where an employee is promoted pursuant to section 721, the classification must take into account the criteria provided for in the first paragraph.

2002, c. 45, s. 722; 2004, c. 37, s. 90; 2013, c. 25, s. 34; I.N. 2015-06-01.

723. In the event of the partial or full discontinuance of the activities of the Autorité des marchés financiers or if there is a shortage of work, an employee referred to in section 721 is entitled to be placed on reserve in the public service with the classification the employee had prior to the date of the transfer.

In such a case, the Chair of the Conseil du trésor shall, where applicable, establish the employee's classification, taking into account the criteria provided for in the first paragraph of section 722.

2002, c. 45, s. 723; 2004, c. 37, s. 90.

724. Any person referred to in section 719 or the first paragraph of section 720 who refuses, in accordance with the applicable conditions of employment, to be transferred to the Autorité des marchés financiers, shall be assigned thereto until such time as the Chair of the Conseil du trésor is able to place the person in accordance with section 100 of the Public Service Act (chapter F-3.1.1). The same applies to a person who is placed on reserve pursuant to section 723, and the person shall remain in the employ of the Authority.

2002, c. 45, s. 724; 2004, c. 37, s. 90.

725. Sections 16 to 21 of chapter 36 of the statutes of 1997 continue to apply to the employees of the Commission des valeurs mobilières du Québec who are transferred to the Autorité des marchés financiers, with the necessary modifications.

2002, c. 45, s. 725; 2004, c. 37, s. 90.

726. The employees of the Bureau des services financiers, the Fonds d'indemnisation des services financiers, the Inspector General of Financial Institutions, the Régie de l'assurance-dépôts du Québec and the Commission des valeurs mobilières du Québec who are transferred to the Autorité des marchés financiers pursuant to this Act may not be laid off or dismissed solely by reason of the establishment of the Authority, before 1 February 2006.

2002, c. 45, s. 726; 2004, c. 37, s. 90.

727. *(Repealed).*

2002, c. 45, s. 727; 2008, c. 9, s. 142.

728. *(Repealed).*

2002, c. 45, s. 728; 2004, c. 37, s. 90; 2008, c. 9, s. 142.

729. *(Repealed).*

2002, c. 45, s. 729; 2008, c. 9, s. 142.

730. The amount of the annual dues determined by the Minister under section 569 of the Act respecting the distribution of financial products and services (chapter D-9.2) which must be paid for each representative pursuant to section 320 of that Act, as it read prior to being replaced by section 445 of this Act, is the amount that a contributor must pay pursuant to the said section 320 until the amount is modified by regulation.

2002, c. 45, s. 730.

731. The syndic may file a complaint before the discipline committee with respect to an offence under the provisions of the Act respecting the distribution of financial products and services (chapter D-9.2) or its regulations committed before 1 February 2004 by a securities representative.

2002, c. 45, s. 731.

732. A member of a professional order entered on 10 December 2002 in the register kept in accordance with section 67 of the Act respecting the distribution of financial products and services (chapter D-9.2) and referred to in the third paragraph of section 59 of that Act shall be authorized to use the title of financial planner until 31 May 2004, to the extent that the agreement governing the member remains in force or is renewed and the member meets the requirements and complies with the rules determined by the member's order.

Sections 65 to 68 of the said Act apply to such a member.

2002, c. 45, s. 732.

733. *(Repealed).*

2002, c. 45, s. 733; 2004, c. 37, s. 90; 2018, c. 23, s. 635.

734. For the purposes of sections 131.2 to 131.6 of the Act respecting financial services cooperatives (chapter C-67.3) as they read on 11 December 2002, "Autorité des marchés financiers" or "Authority" shall designate the Inspector General of Financial Institutions until 1 February 2004.

2002, c. 45, s. 734; O.C. 1366-2003, s. 1; 2004, c. 37, s. 90.

735. For the purposes of sections 59, 81, 103.1 to 103.3, 186.1, 189.1, 223, 224.1 and 336 of the Act respecting the distribution of financial products and services (chapter D-9.2) as they read on 11 December 2002, "Autorité des marchés financiers" or "Authority" shall designate the Bureau des services financiers until 1 February 2004.

2002, c. 45, s. 735; O.C. 1366-2003, s. 2; 2004, c. 37, s. 90.

736. For the purposes of sections 153.2 to 153.6, 226, 227, 244, 314.1, 315 and 351 of the Act respecting trust companies and savings companies (chapter S-29.01) as they read on 11 December 2002, "Autorité des marchés financiers" or "Authority" shall designate the Inspector General of Financial Institutions until 1 February 2004.

2002, c. 45, s. 736; O.C. 1366-2003, s. 3; 2004, c. 37, s. 90.

737. For the purposes of section 20 of the Act constituting Capital régional et coopératif Desjardins (chapter C-6.1) as it reads on 11 December 2002, the Autorité des marchés financiers means the Régie de l'assurance-dépôts du Québec until 1 February 2004.

2002, c. 45, s. 737; 2004, c. 37, s. 90.

738. For the purposes of sections 92, 151.1.1, 168.1.2 to 168.1.4, 195, 236, 273.1, 295.2, 331, 331.1 and 334 of the Securities Act (chapter V-1.1) as they read on 11 December 2002, "Autorité des marchés

financiers" or "Authority" shall designate the Commission des valeurs mobilières du Québec until 1 February 2004.

2002, c. 45, s. 738; O.C. 1366-2003, s. 4; 2004, c. 37, s. 90.

739. *(Repealed).*

2002, c. 45, s. 739; 2004, c. 37, s. 90; 2018, c. 23, s. 635.

740. A stock exchange, securities clearing-house or professional association recognized as a self-regulatory organization under Title VI of the Securities Act (chapter V-1.1) or any other Act on 1 February 2004 shall be authorized to continue to carry on its activity in Québec in accordance with the prescribed conditions.

The same applies to a stock exchange, securities clearing-house or professional association which, on that date, is benefiting from an exemption granted by the Commission des valeurs mobilières du Québec pursuant to section 263 of that Act.

Sections 74 to 91 of this Act apply to a self-regulatory organization recognized by the Commission before 31 January 2004.

2002, c. 45, s. 740.

741. Notwithstanding section 60 of this Act, the self-regulatory organizations referred to in section 351 of the Securities Act (chapter V-1.1), as it read before being repealed by section 694 of this Act, may continue to carry on their activities for a period of six months from 1 February 2004.

2002, c. 45, s. 741.

742. The terms of office of the Inspector General of Financial Institutions, of the Deputy Inspector General, of the members of the Commission des valeurs mobilières du Québec, of the members of the board of the Bureau des services financiers and of the directors of the Régie de l'assurance-dépôts du Québec, in office on 31 January 2004 shall terminate on 1 February 2004. The persons who, at the time of their appointment, were members of the public service shall be returned to the public service on the conditions fixed at the time of their respective appointment. As for the others, their terms of office shall terminate without compensation, subject to the compensation provided for in their deed of appointment.

A person referred to in the first paragraph shall continue to exercise his or her functions in order to conclude the matters that the person has yet to determine; in such circumstances, the person shall receive from the Authority, during the required period, the same remuneration as the remuneration the person was receiving before the end of his or her term.

2002, c. 45, s. 742; 2004, c. 37, s. 90.

743. The Regulation respecting the compulsory professional development of financial planners (Order in Council 1451-2001 dated 5 December 2001) made by the Institut québécois de planification financière and approved by the Government under section 58 of the Act respecting the distribution of financial products and services (chapter D-9.2), as it read before 1 February 2004 is deemed to be a regulation made by the Autorité des marchés financiers pursuant to section 200 of that Act.

2002, c. 45, s. 743; 2004, c. 37, s. 90.

744. The provisions of the regulations made by the Bureau des services financiers, the Commission des valeurs mobilières du Québec, the Chambre de la sécurité financière and the Chambre de l'assurance de dommages, respectively, under section 200, subparagraphs 1 and 3 to 6 of the first paragraph of section 203, sections 205, 209 and 210, subparagraphs 1, 4, 5 and 13 to 15 of the first paragraph of section 223, subparagraph 3 of the first paragraph of section 228 and sections 315 and 423 of the Act respecting the

distribution of financial products and services (chapter D-9.2) which are in force on 31 January 2004 continue to have effect until they are replaced or repealed by regulation of the Autorité des marchés financiers.

2002, c. 45, s. 744; 2004, c. 37, s. 90.

745. Notwithstanding the provisions of sections 298, 568 and 568.1 of the Act respecting the distribution of financial products and services (chapter D-9.2), a Chamber may, in its by-laws, extend the term of office of any member of its board of directors in office on 11 December 2002 for one year.

2002, c. 45, s. 745.

746. The Government may, by regulation made before 11 December 2004, adopt any other transitional provision or measure that is expedient for the carrying out of this Act.

A regulation made under the first paragraph shall not be subject to the publication requirement provided for in section 8 of the Regulations Act (chapter R-18.1) and shall enter into force on the date of its publication in the *Gazette officielle du Québec* or at any later date indicated therein. The regulation may also, if it provides therefor, apply from any date not prior to 11 December 2002.

2002, c. 45, s. 746.

747. The Government may, by order made before 11 December 2004, amend any provision of an Act to provide for the transfer of duties and powers relating to the regulation of the financial sector to the Autorité des marchés financiers in order to attain the object of this Act.

Sections 707 to 726 apply to the transfer to the Autorité des marchés financiers of any of such duties and powers.

2002, c. 45, s. 747; 2004, c. 37, s. 90.

748. The sums required for the carrying out of this Act during the 2002/2003 fiscal year shall be taken out of the Consolidated Revenue Fund, to such extent as is determined by the Government.

2002, c. 45, s. 748.

749. The Minister of Finance is responsible for the application of this Act.

2002, c. 45, s. 749; 2012, c. 25, s. 30; 2017, c. 27, s. 159.

750. *(Omitted).*

2002, c. 45, s. 750; 2002, c. 70, s. 178.

SCHEDULE 1

(section 7)

DEPOSIT INSTITUTIONS AND DEPOSIT PROTECTION ACT (chapter I-13.2.2)

DERIVATIVES ACT (chapter I-14.01)

INSURERS ACT (chapter A-32.1)

AN ACT RESPECTING FINANCIAL SERVICES COOPERATIVES (chapter C-67.3)

AN ACT RESPECTING THE DISTRIBUTION OF FINANCIAL PRODUCTS AND SERVICES (chapter D-9.2)

TRUST COMPANIES AND SAVINGS COMPANIES ACT (chapter S-29.02)

SECURITIES ACT (chapter V-1.1)

AN ACT RESPECTING THE MOUVEMENT DESJARDINS (2000, chapter 77)

TITLE VII OF THE AUTOMOBILE INSURANCE ACT (chapter A-25)

SECTIONS 14, 28 TO 44, 107 TO 109, 114, 115, SUBPARAGRAPH 6 OF THE FIRST PARAGRAPH OF SECTION 117 IN RESPECT OF INFORMATION PROVIDED TO THE AUTORITÉ DES MARCHÉS FINANCIERS, SUBPARAGRAPH 8 OF THE FIRST PARAGRAPH OF THAT SECTION AND SECTIONS 122, 139 AND 143 OF THE VOLUNTARY RETIREMENT SAVINGS PLANS ACT (chapter R-17.0.1)

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2002, c. 45, Schedule 1; 2008, c. 24, s. 194; 2011, c. 26, s. 17; 2013, c. 26, s. 130.

SCHEDULE 2

(section 116)

BUREAU DES SERVICES FINANCIERS

CHAMBRE DE L'ASSURANCE DE DOMMAGES

CHAMBRE DE LA SÉCURITÉ FINANCIÈRE

COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC

FONDS D'INDEMNISATION DES SERVICES FINANCIERS

THE INSPECTOR GENERAL OF FINANCIAL INSTITUTIONS

INSTITUT QUÉBÉCOIS DE PLANIFICATION FINANCIÈRE

RÉGIE DE L'ASSURANCE-DÉPÔTS DU QUÉBEC

2002, c. 45, Schedule 2.

SCHEDULE 3

(section 134)

BUREAU DES SERVICES FINANCIERS

COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC

FONDS D'INDEMNISATION DES SERVICES FINANCIERS

THE INSPECTOR GENERAL OF FINANCIAL INSTITUTIONS

RÉGIE DE L'ASSURANCE-DÉPÔTS DU QUÉBEC

2002, c. 45, Schedule 3.

REPEAL SCHEDULES

In accordance with section 9 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), chapter A-7.03 of the Revised Statutes, in force on 1 March 2005, is repealed effective from the coming into force of chapter A-33.2 of the Revised Statutes.

In accordance with section 9 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), the first paragraph of section 104, paragraph 1 of section 358, paragraph 2 of section 359, section 373, paragraph 2 of section 374, section 445 and section 730 of chapter 45 of the statutes of 2002, in force on 1 March 2005, are repealed effective from the coming into force of the updating to 1 March 2005 of chapter A-33.2 of the Revised Statutes.

Updated to December 10, 2020
This document has official status.

chapter V-1.1

SECURITIES ACT

TABLE OF CONTENTS

TITLE I

GENERAL PROVISIONS

1982, c. 48; 2001, c. 38, s. 1.

CHAPTER I

SCOPE

1. This Act applies to the following forms of investment:

(1) any security recognized as such in the trade, more particularly, a share, bond, capital stock of an entity constituted as a legal person, or a subscription right or warrant;

(2) an instrument, other than a bond, evidencing a loan of money;

(3) a deposit of money, whether or not evidenced by a certificate except a deposit received by the Gouvernement du Québec, the Government of Canada, or one of their departments or agencies;

(4) *(subparagraph repealed);*

(5) *(subparagraph repealed);*

(6) a share in an investment club;

(7) an investment contract;

(8) *(subparagraph repealed);*

(8.1) an option or other non-traded derivative whose value is derived from, referenced to or based on the value or market price of a security, granted as compensation or as payment for a good or service;

(9) any other form of investment determined by regulation of the Government.

An investment contract is a contract whereby a person, having been led to expect profits, undertakes to participate in the risk of a venture by a contribution of capital or loan, without having the required knowledge to carry on the venture or without obtaining the right to participate directly in decisions concerning the carrying on of the venture.

1982, c. 48, s. 1; 1999, c. 40, s. 327; 2001, c. 38, s. 2; 2008, c. 7, s. 137; 2008, c. 24, s. 196.

2. The scheme of securities regulation established by this Act and the regulations applies, with the necessary modifications, to the other forms of investment listed in section 1, subject to any express exemption.

1982, c. 48, s. 2.

2.1. This Act does not apply to derivatives within the meaning of the Derivatives Act (chapter I-14.01).

2008, c. 24, s. 197.

Not in force

2.2. *(Not in force).*

2009, c. 27, s. 10.

3. The following forms of investment are exempt from the application of Titles II to VIII, except that mentioned in paragraph 10, which remains subject to Titles V and VII:

(1) a debt security issued by the Gouvernement du Québec, the Government of Canada or the government of a Canadian province or territory;

(2) *(paragraph repealed);*

(3) a security issued by a non-profit legal person, provided that its distribution entails no remuneration;

(4) a qualifying share or a debt security issued by a financial services cooperative within the meaning of the Act respecting financial services cooperatives (chapter C-67.3), provided that the subscription was neither solicited nor received by a remunerated salesman or canvasser, and that the share was fully paid at the time of subscription;

(4.1) *(paragraph repealed)*;

(4.2) a share, other than a qualifying share, issued by a federation within the meaning of the Act respecting financial services cooperatives and distributed to the member credit unions of such a federation;

(4.3) an investment fund share issued by a federation within the meaning of the Act respecting financial services cooperatives and distributed to the member credit unions of such a federation;

(4.4) a share, other than a qualifying share, issued by a federation within the meaning of the Act respecting financial services cooperatives and distributed to a legal person belonging to a financial group referred to in section 6.3 of the Act respecting financial services cooperatives;

(4.5) a share, other than a qualifying share, issued by the Fédération des caisses Desjardins du Québec and distributed to a legal person belonging to the financial group referred to in the second paragraph of section 6.3 of the Act respecting financial services cooperatives or to a federation of credit unions, whether or not established under that Act, that is an auxiliary member of the Fédération des caisses Desjardins du Québec;

(5) a common or preferred share in a cooperative or a cooperative federation, and a common or preferred share in the Coopérative fédérée du Québec, issued to a member or a person wishing to become a member, provided that the subscription was neither solicited nor received by a remunerated salesman or canvasser;

(5.1) a share in a mutual company within the meaning of the Insurers Act (chapter A-32.1), issued to a member or a person wishing to become a member;

(6) a debt security issued only to a member by a person referred to in paragraph 5, according to the same conditions;

(7) an instrument evidencing a debt and issued in settlement of a credit sale or conditional sale, as long as it is not transferred to a natural person;

(8) an instrument evidencing a debt, including a bond, as long as the issue and transfer thereof constitute, for the issuer as well as for the subscriber, and any subsequent purchaser, isolated transactions;

(9) a deposit of money within the meaning of the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2), provided that it is received by a deposit institution authorized under that Act or by a bank or an authorized foreign bank listed in Schedule I, II or III to the Bank Act (S.C. 1991, c. 46);

(10) a credit balance referred to in section 168;

(11) a security of a mutual fund, provided that the mutual fund is established and administered by a trust company authorized under the Trust Companies and Savings Companies Act (chapter S-29.02), that the

securities of the mutual fund are distributed by such a trust company and that the assets of the mutual fund are composed exclusively of unsolicited funds received from tutors to property, curators to property, liquidators, syndics, sequestrators, advisers to persons of full age, trustees or administrators of the property of others and commingled with the authorization of the depositor or his agent for the purpose of investment;

(12) a share in an investment club defined by regulation;

(13) an insurance or annuity contract issued by an insurer authorized under the Insurers Act, except an individual variable contract that is not an individual variable life annuity or that does not guarantee payment at maturity of a benefit equal to at least 75% of the premiums paid before 75 years of age;

(14) a debt security issued or guaranteed by a bank or an authorized foreign bank listed in Schedule I, II or III to the Bank Act, except a debt security conferring a right of payment ranking lower than a deposit contemplated in paragraph 9 and entrusted to the issuer or the guarantor of the debt security;

(15) a debt security issued or guaranteed by the International Bank for Reconstruction and Development, the Asian Development Bank or the Inter-American Development Bank, as long as it is payable in Canadian or American currency;

(15.1) any other form of investment prescribed by regulation;

(16) *(paragraph repealed)*.

1982, c. 48, s. 3; 1982, c. 48, s. 339; 1984, c. 41, s. 1; 1985, c. 17, s. 96; 1987, c. 95, s. 402; 1988, c. 64, s. 561, s. 587; 1990, c. 77, s. 1; 1999, c. 40, s. 327; 2000, c. 29, s. 674; 2001, c. 38, s. 3; 2002, c. 45, s. 623; 2002, c. 70, s. 186; O.C. 1366-2003, s. 13; 2004, c. 37, s. 1; 2006, c. 50, s. 1; 2018, c. 23, s. 803.

4. Every agency that is a mandatary of the State, whether it is an agency of the Gouvernement du Québec, of the Government of Canada or of the government of any Canadian province or territory, or a fund established or administered by any of such governments which exercises control over more than 10% of the voting rights attaching to the outstanding securities of a reporting issuer shall declare such control to the Autorité des marchés financiers within 10 days from the end of the month in which the acquisition was made, in the form determined by section 89.3.

The agency or fund shall similarly declare any change in its control greater than 1% of the voting rights attaching to the outstanding securities within 10 days of the end of the month in which the change occurred, and any other change, within 60 days after the end of the year.

1982, c. 48, s. 4; 1999, c. 40, s. 327; 2002, c. 45, s. 696; 2004, c. 37, s. 2; 2006, c. 50, s. 2.

4.1. *(Repealed)*.

2001, c. 38, s. 4; 2009, c. 25, s. 1.

CHAPTER II

INTERPRETATION

5. In this Act, unless the context indicates otherwise,

"adviser" means a person engaging in or holding themself out as engaging in the business of advising another with respect to investment in or the purchase or sale of securities, or the business of managing a securities portfolio;

"associate" , where used to indicate a relationship with a person, means

(1) any company in which the person owns securities assuring him of more than 10% of a class of shares to which are attached voting rights or an unlimited right to participate in earnings and in the assets upon winding-up;

(2) any partner of that person;

(3) any trust or succession in which the person has a substantial ownership interest or to which he fulfils the functions of a trustee or liquidator or similar functions;

(4) the spouse of that person and his children, as well as his relatives and his spouse's relatives, if they share his residence;

"benchmark" means a price, estimate, rate, index or value that is regularly determined by applying a formula or method to one or more underlying interests or by evaluating those interests, that is published or made available to the public by onerous or gratuitous title, and that is used as a reference for such purposes as setting the interest or any other sum payable under a contract or a financial instrument, including a derivative within the meaning of the Derivatives Act (chapter I-14.01), setting the purchase or sale price or the value of a contract or a financial instrument, including such a derivative, or measuring the performance of a financial instrument or of an investment fund;

"benchmark administrator" means a person who controls the creation or provision of a benchmark;

"closed company" , for the purposes of paragraph 5 of section 141 of the Charter of the French language (chapter C-11), means a company, other than an investment fund, that is not a reporting issuer and that meets the conditions determined by regulation;

"credit rating" means an assessment, disclosed publicly or distributed by subscription, of the creditworthiness of an issuer as an entity or with respect to specific securities or a specific portfolio of securities or assets;

"credit rating organization" means any person that issues credit ratings;

"dealer" means a person engaging in or holding themself out as engaging in the business of

(1) trading in securities as principal or agent;

(2) distributing a security for their own account or for another's account; or

(3) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of an activity described in paragraph 1 or 2;

"director" means a director of a legal person, or a natural person acting in a similar capacity for another person;

"distribution" means

(1) the endeavour to obtain, or the obtaining, by an issuer, of subscribers or acquirers of his securities;

(2) the endeavour to obtain, or the obtaining, by a firm underwriter, of purchasers for securities he has underwritten;

(3) the endeavour to obtain, or the obtaining, by a subscriber or purchaser of securities which he acquired under an exemption, of purchasers for such securities without the benefit of a final exemption from a prospectus;

(4) the endeavour to obtain, or the obtaining, by a subscriber or purchaser of securities which he acquired through a transaction for which no prospectus was prepared as required by law and no exemption was granted, of purchasers for such securities;

(4.1) the endeavour to obtain or the obtaining of purchasers for securities acquired from a company whose constituting documents provide for restrictions on the free transfer of shares, prohibit the distribution of securities to the public and limit the number of shareholders to 50, exclusive of present or former employees of the company or a subsidiary, by a subscriber or purchaser of such securities;

(5) the endeavour to obtain, or the obtaining, by a subscriber or purchaser of securities which he acquired outside Québec, of purchasers for such securities in Québec, except on a stock exchange or on the over-the-counter market;

(6) the endeavour to obtain or the obtaining of purchasers for securities, not previously the subject of a prospectus, of a company whose constituting documents provided for restrictions on the free transfer of

shares, prohibited the distribution of securities to the public and limited the number of shareholders to 50, exclusive of present or former employees of the company or a subsidiary;

(7) the endeavour to obtain, or the obtaining, by an agent, of subscribers or purchasers of securities being distributed in accordance with subparagraphs 1 to 6;

(8) the giving in guarantee by an issuer of securities issued by him for that purpose;

(9) the disposal, by a control person of an issuer or a person holding more than a determined portion of an issuer's securities, of the securities held by that control person or that person or a determined portion of them according to the portion and in the manner prescribed by regulation;

"forward-looking information" means disclosure regarding possible events, situations or operating results that is based on assumptions about future economic conditions and courses of action, and includes financial information about prospective operating results, financial position or cash flows that is presented either as a forecast or a projection;

"insider" means an insider within the meaning of section 89;

"investment fund" means a mutual fund or a non-redeemable investment fund;

"investment fund manager" means a person who directs the business, operations and affairs of an investment fund;

"issuer" means any person who has outstanding securities, or issues or proposes to issue securities;

"material fact" means a fact that may reasonably be expected to have a significant effect on the market price or value of securities issued or securities proposed to be issued;

"misrepresentation" means any misleading information on a material fact as well as any pure and simple omission of a material fact;

"mutual fund" means

(1) an issuer whose primary purpose is to invest money provided by its security holders and whose securities entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer; or

(2) a mutual fund designated under section 272.2 or determined by regulation;

"non-redeemable investment fund" means an issuer having all the following characteristics:

(1) its primary purpose is to invest money provided to it by its security holders;

(2) it does not invest for the following purposes:

(a) exercising or seeking to exercise control of an issuer, except any issuer that is a mutual fund or a non-redeemable investment fund; or

(b) being actively involved in the management of any issuer in which it invests, except any issuer that is a mutual fund or a non-redeemable investment fund; and

(3) it is not a mutual fund;

"offering memorandum" means a document purporting to describe the business and internal affairs of an issuer that has been prepared primarily for delivery to a prospective subscriber or purchaser so as to assist the prospective subscriber or purchaser to make an investment decision about securities being sold in a distribution in connection with which a prospectus would have been filed but for an exemption under this Act or the regulations, but does not include a document setting out current information about an issuer for the benefit of a prospective subscriber or purchaser familiar with the issuer through prior investment or business dealings;

"officer" means the chair or vice-chair of the board of directors, the chief executive officer, the chief operating officer, the chief financial officer, the president, the vice-president, the secretary, the assistant

secretary, the treasurer, the assistant treasurer or the general manager of an issuer or of a registrant, or any natural person designated as such by the issuer or the registrant or acting in a similar capacity;

"privileged information" means any information that has not been disclosed to the public and that could affect the decision of a reasonable investor;

"reporting issuer" means an issuer contemplated in section 68;

"voting security" means any security other than a debt security carrying a voting right that may be exercised either under all circumstances or under some circumstances that have occurred and are continuing.

1982, c. 48, s. 5; 1984, c. 41, s. 2; 1987, c. 40, s. 1; 1990, c. 77, s. 2; 2001, c. 38, s. 5; 2004, c. 37, s. 3; 2006, c. 50, s. 3; 2009, c. 25, s. 2; 2009, c. 58, s. 91; 2018, c. 23, s. 682.

5.1. For the purposes of this Act and the regulations, "person" includes, in addition to a natural person and a legal person, a partnership, a trust, a fund, an association, a syndicate, a body and any other group of persons that is not constituted as a legal person as well as any person acting as a trustee, liquidator, executor or legal representative.

2006, c. 50, s. 4.

5.2. "Control person" means a person that, alone or with other persons acting in concert by virtue of an agreement, holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer. If the person, alone or with other persons acting in concert by virtue of an agreement, holds more than 20% of those voting rights, the person is presumed to hold a sufficient number of the voting rights to affect materially the control of the issuer.

2006, c. 50, s. 4.

5.3. When used in relation to an issuer other than an investment fund, "material change" means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or a decision to implement such a change made by the directors or by senior management of the issuer who believe that confirmation of the decision by the directors is probable.

When used in relation to an investment fund, "material change" means a change in the business, operations or affairs of the investment fund that would be considered important by a reasonable investor in determining whether to subscribe for, purchase or continue to hold securities of the investment fund, or a decision to implement such a change made by the directors of the investment fund or its investment fund manager, by senior management of the investment fund who believe that confirmation of the decision by the directors is probable, or by senior management of the investment fund manager who believe that confirmation of the decision by the directors of the investment fund manager is probable.

2006, c. 50, s. 4.

5.4. If a document, a part of a document or a provision of Québec securities laws or of extra-provincial securities laws is described as being incorporated by reference in another document or in another provision of Québec securities laws or of extra-provincial securities laws, it is deemed to be an integral part of that document or those laws.

2006, c. 50, s. 4.

5.5. In this Act, the words and expressions defined in sections 5.1 to 5.4 have the meaning assigned to them by those sections unless the context indicates otherwise.

2006, c. 50, s. 4.

5.6. In this Act, the expressions "mutual fund dealer" and "scholarship plan dealer" have the meaning assigned to them by regulation.

2009, c. 25, s. 3.

6. In the case of a patrimony endowed with a certain degree of autonomy, such as a retirement fund, partnership, trust or group without legal personality, this Act and the regulations apply as if the patrimony had such personality, but their observance is the responsibility of the persons in charge of the patrimony, and both civil and penal actions connected with this Act may be brought against them for acts relating to such patrimony.

In the case of a partnership, actions referred to in the first paragraph may also be brought against the partnership or against the partners, except the special partners.

1982, c. 48, s. 6; 1984, c. 41, s. 3; 2001, c. 38, s. 6; 2006, c. 50, s. 5; 2009, c. 25, s. 4.

7. In the case of an investment contract, the required disclosure relates to the venture and it is the responsibility of the promoter of the venture and the persons in charge of it to make the disclosure, unless the Authority specially designates a person in virtue of section 66.

1982, c. 48, s. 7; 1984, c. 41, s. 3; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 6.

7.1. *(Repealed).*

2001, c. 38, s. 7; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 7.

8. The person owning securities entitling him to elect in all cases a majority of the directors of a company has the control of that company.

1982, c. 48, s. 8; 1984, c. 41, s. 3.

9. A company is the subsidiary of another company when it is controlled by it or by companies controlled by it.

A subsidiary of a company that is itself a subsidiary of another company is deemed to be a subsidiary of that other company.

Two companies are affiliates if one is the subsidiary of the other or if both are subsidiaries of the same company or are controlled by the same person.

1982, c. 48, s. 9; 1984, c. 41, s. 3.

10. Whenever the question of the ownership of securities arises, any agreement by the effect of which the ownership of the securities is ascribed to a holder other than their true owner is disregarded.

1982, c. 48, s. 10.

10.1. For the purposes of application of this Act, the transfer of ownership in any purchase or disposition is deemed accomplished upon acceptance of the subscription or of the offer of sale or purchase.

1984, c. 41, s. 4.

10.1.1. *(Repealed).*

2011, c. 26, s. 70; 2015, c. 8, s. 370.

10.2. *(Repealed).*

1984, c. 41, s. 4; 1992, c. 57, s. 708; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 20, s. 170.

10.3. *(Repealed).*

1984, c. 41, s. 4; 2008, c. 20, s. 170.

10.4. *(Repealed).*

1984, c. 41, s. 4; 1992, c. 57, s. 709; 2008, c. 20, s. 170.

10.5. *(Repealed).*

1984, c. 41, s. 4; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 20, s. 170.

10.6. Documents required to be filed or transmitted under this Act must, where so determined by regulation of the Authority, be filed or transmitted in the medium or by the technological means indicated in the regulations of the Authority.

2001, c. 38, s. 8; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 8.

10.7. The Authority may, by regulation, determine conditions for transmitting and receiving documents referred to in this Act or a regulation made under this Act.

2006, c. 50, s. 9.

TITLE II

DISTRIBUTION OF SECURITIES TO THE PUBLIC

CHAPTER I

DISTRIBUTION OF SECURITIES

DIVISION I

PROSPECTUS

11. Every person intending to make a distribution of securities shall prepare a prospectus that shall be subject to a receipt issued by the Authority. The application for a receipt must be accompanied with the documents prescribed by regulation.

Notwithstanding the foregoing, in the case of a distribution made by a dealer acting as firm underwriter, the issuer is responsible for preparing the prospectus.

1982, c. 48, s. 11; 1984, c. 41, s. 5; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 10.

12. Every person intending to make, from Québec, a distribution of securities to persons established outside Québec shall prepare a prospectus and obtain a receipt therefor from the Authority.

No prospectus is required, however, where the Authority agrees or does not object within 15 days after receiving the information required by regulation.

1982, c. 48, s. 12; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

13. A prospectus must contain the information and certificates prescribed by regulation.

It must provide full, true and plain disclosure of all material facts relating to the securities issued or proposed to be distributed.

1982, c. 48, s. 13; 2006, c. 50, s. 12.

14. The Authority shall issue a receipt except in the cases prescribed in section 15 or in the regulations or unless it is not in the public interest to do so.

The Authority may subject the issue of a receipt to the fulfilment of an undertaking or to any other condition.

1982, c. 48, s. 14; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 13.

15. The Authority shall refuse to issue a receipt if it believes it should do so for one of the following reasons:

(1) the prospectus or any document filed with it fails to comply with this Act or the regulations, contains any statement, promise, estimate or forward-looking information that is misleading, including through plain and simple omission, or contains a misrepresentation;

(2) an unconscionable consideration has been paid or is intended to be paid for promotional purposes or for a service or the acquisition of property;

(3) the proceeds from the distribution of the securities that are to be paid into the treasury of the issuer, together with other resources of the issuer, are insufficient to accomplish the purpose of the distribution stated in the prospectus;

(4) the issuer cannot be expected to have the financial resources necessary to operate the business given the financial situation of the issuer, an officer, director or promoter of the issuer, the investment fund manager of the issuer, an officer or director of the investment fund manager of the issuer or a control person of the issuer or of the investment fund manager of the issuer;

(5) the past conduct of the issuer, an officer, director or promoter of the issuer, the investment fund manager of the issuer, an officer or director of the investment fund manager of the issuer or a control person of the issuer or of the investment fund manager of the issuer is such that the business of the issuer may not be conducted with the integrity necessary to safeguard the interests of its security holders;

(6) a person that has prepared or certified any part of the prospectus or is named as having prepared or certified a valuation or report in connection with the prospectus does not have the required competence or integrity; or

(7) adequate arrangements have not been made for the holding in trust of the proceeds of the distribution pending the distribution of the securities.

1982, c. 48, s. 15; 1990, c. 77, s. 4; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 14.

16. Only the following documents may be used in the course of a distribution:

(1) a prospectus for which a receipt has been issued;

(2) a document filed with the prospectus and mentioned therein;

(3) an advertising document not prohibited by regulation, provided it adequately reflects the information presented in the documents contemplated in paragraphs 1 and 2, without distorting it by selective presentation or by adding misleading statements.

1982, c. 48, s. 16.

17. The document mentioned in paragraph 3 of section 16 must refer to the prospectus in the manner prescribed by regulation and give the conditions under which the prospectus is available to the public.

1982, c. 48, s. 17.

DIVISION II

SIMPLIFIED PROSPECTUS

18. A distribution of securities may be made by way of a simplified prospectus if the reporting issuer meets the conditions fixed by regulation.

1982, c. 48, s. 18; 1984, c. 41, s. 6; 2001, c. 38, s. 9.

18.1. In addition to its own content, a simplified prospectus includes, as integral parts, all the documents which, by regulation, are required to be incorporated by reference, and any other documents to be incorporated by reference under its own terms.

1984, c. 41, s. 7; 2006, c. 50, s. 15.

19. The rules governing a prospectus apply, with the necessary modifications, to a simplified prospectus.

1982, c. 48, s. 19; 2006, c. 50, s. 16.

DIVISION III

PRELIMINARY PROSPECTUS

20. A preliminary prospectus may be filed before the prospectus contemplated in section 11 or in section 18.

The preliminary prospectus must contain the information that is to be set forth in the final version of the prospectus except such information as may be omitted under the regulations.

The Authority shall issue a receipt upon the filing of a preliminary prospectus.

1982, c. 48, s. 20; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

21. From the time a receipt for a preliminary prospectus is obtained, and until a receipt for the prospectus in its final version is obtained, it is permissible, notwithstanding sections 11, 12 and 16,

(1) to forward a preliminary prospectus to any person;

(2) to distribute an advertising document not prohibited by regulation, provided it adequately reflects the information presented in the preliminary prospectus, without distorting it by selective presentation or by adding misleading statements;

(3) to solicit prospective subscribers or purchasers without accepting any undertaking on their part.

1982, c. 48, s. 21.

22. The document mentioned in paragraph 2 of section 21 must refer to the preliminary prospectus in the manner prescribed by regulation and give the conditions under which the preliminary prospectus is available to the public.

1982, c. 48, s. 22.

23. *(Repealed).*

1982, c. 48, s. 23; 2006, c. 50, s. 17.

24. *(Repealed).*

1982, c. 48, s. 24; 2006, c. 50, s. 17.

DIVISION III.1

Repealed, 2001, c. 38, s. 10.

1984, c. 41, s. 8; 2001, c. 38, s. 10.

24.1. *(Repealed).*

1984, c. 41, s. 8; 2001, c. 38, s. 10.

24.2. *(Repealed).*

1984, c. 41, s. 8; 2001, c. 38, s. 10.

DIVISION IV

AMENDMENT TO THE PROSPECTUS

25. An amendment to a prospectus or preliminary prospectus is to be made in accordance with the conditions determined by regulation.

The distribution of additional securities through an amendment to a prospectus filed for that purpose is to be conducted in accordance with the conditions determined by regulation.

1982, c. 48, s. 25; 1990, c. 77, s. 5; 2006, c. 50, s. 18.

26. *(Repealed).*

1982, c. 48, s. 26; 2006, c. 50, s. 19.

27. *(Repealed).*

1982, c. 48, s. 27; 1984, c. 41, s. 9; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 19.

28. *(Repealed).*

1982, c. 48, s. 28; 1984, c. 41, s. 10; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 19.

DIVISION V

SENDING OF PROSPECTUS, RIGHT OF RESCISSION AND DISTRIBUTION PROCESS

2006, c. 50, s. 20.

29. A dealer who receives an order to subscribe for or purchase a security offered in a distribution made in accordance with this chapter shall send to the applicant a copy of the prospectus and any amendment thereto, not later than the second working day after the subscription or purchase.

However, a dealer acting solely as agent for his client and who receives no remuneration, even indirectly, from the issuer or the vendor is not bound by the first paragraph.

This section does not apply to an order to subscribe for or purchase a security of a mutual fund traded on an exchange or an alternative trading system.

1982, c. 48, s. 29; 2016, c. 7, s. 155.

30. A person who subscribes for or purchases from a dealer securities offered in a distribution may unilaterally rescind the subscription or the contract merely by transmitting a notice of rescission to the dealer within two days after receipt of the prospectus, any other document, prescribed by regulation, standing in lieu of a prospectus or any amendment to the prospectus or to such a document. The rescission has effect by operation of law from receipt of the notice.

1982, c. 48, s. 30; 1987, c. 40, s. 2; 2011, c. 26, s. 71.

31. Section 30 has no effect if the subscriber or purchaser is himself a dealer or if he disposes of the securities during the time for rescission.

1982, c. 48, s. 31.

32. The addressee is presumed to have received, in the ordinary course of mail, the copy of the prospectus or the notice of rescission mailed to him.

1982, c. 48, s. 32.

DIVISION VI

Heading repealed, 2009, c. 25, s. 7.

2009, c. 25, s. 7.

33. *(Repealed).*

1982, c. 48, s. 33; 1990, c. 77, s. 6; 1992, c. 35, s. 1; 2001, c. 38, s. 11; 2006, c. 50, s. 23.

34. *(Repealed).*

1982, c. 48, s. 34; 1990, c. 77, s. 7; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 23.

35. *(Repealed).*

1982, c. 48, s. 35; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 23.

36. *(Repealed).*

1982, c. 48, s. 36; 2006, c. 50, s. 23.

37. In case of doubt, the Authority shall decide whether a distribution of a security has ceased or is still in progress.

No appeal lies from the decision.

1982, c. 48, s. 37; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

38. The Authority may order that a distribution cease in the cases prescribed in section 15 or if it is in the public interest to do so.

1982, c. 48, s. 38; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 24; 2009, c. 25, s. 8.

39. The Authority may require that the content of the order made under section 38 be communicated under such conditions as it may determine to all the persons to whom the prospectus has been sent.

1982, c. 48, s. 39; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

40. Where a third person proposes to make a distribution of the securities of an issuer, the Authority may order the issuer to provide the documents and information necessary to prepare the prospectus or any other document in lieu thereof.

1982, c. 48, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

40.1. Every prospectus of any type, document authorized by the Authority for use in lieu of a prospectus, offering memorandum prescribed by regulation, risk acknowledgment form prescribed by regulation, take-over bid circular, take-over bid, directors' circular and individual officer's or director's circular regarding a take-over bid or issuer bid as well as any document required by regulation to be incorporated by reference shall be drawn up in French only or in French and English.

1983, c. 56, s. 44; 1984, c. 41, s. 12; 2002, c. 45, s. 696; 2004, c. 37, s. 4; 2006, c. 50, s. 25.

CHAPTER II

EXEMPTIONS

DIVISION I

EXEMPTIONS DUE TO THE NATURE OF THE SECURITIES

41. No prospectus is required for the distribution of the following securities:

(1) a debt security guaranteed by the Gouvernement du Québec, the Government of Canada or the government of a Canadian province or territory;

(2) a debt security issued or guaranteed by

(a) a municipality, a metropolitan community, a school service centre, a school board or the Comité de gestion de la taxe scolaire de l'île de Montréal;

(b) a transit authority established under an Act of Québec;

(c) a public institution or regional council within the meaning of the Act respecting health services and social services for Cree Native persons (chapter S-5) or a public institution or a health and social services agency referred to in the Act respecting health services and social services (chapter S-4.2);

(d) a Québec university;

(e) a general and vocational college;

(f) a *fabrique* constituted under the Act respecting fabriques (chapter F-1);

(g) an intermunicipal management board;

(3) *(paragraph repealed)*.

1982, c. 48, s. 41; 1984, c. 41, s. 13; 1988, c. 84, s. 700; 1990, c. 85, s. 120; 1992, c. 21, s. 357, s. 375; 1993, c. 67, s. 122; 1994, c. 23, s. 23; 1996, c. 2, s. 988; 1999, c. 40, s. 327; 1999, c. 34, s. 60; 2000, c. 56, s. 218; 2002, c. 75, s. 33; 2004, c. 37, s. 5; 2005, c. 32, s. 300, s. 308; 2011, c. 16, s. 194; 2013, c. 18, s. 102; 2020, c. 1, s. 309.

42. The exemption provided for in paragraph 2 of section 41 presupposes the existence of one of the following conditions:

(1) the person concerned has the power to levy a tax on landed property located in a Canadian province or territory;

(2) the person concerned may issue debt only under the supervision of a department or public body established pursuant to an Act of Canada or of a Canadian province or territory;

(3) the National Assembly votes annual appropriations for repayment of the debt and payment of interest.

1982, c. 48, s. 42; 1982, c. 62, s. 143; 1999, c. 40, s. 327; 2004, c. 37, s. 6.

DIVISION II

EXEMPTIONS DUE TO THE NATURE OF THE DISTRIBUTION

43. No prospectus is required where a distribution of securities is made to an accredited investor determined by regulation and the distribution meets the conditions prescribed by regulation.

1982, c. 48, s. 43; 1999, c. 40, s. 327; 2004, c. 37, s. 7; 2006, c. 50, s. 27.

44. *(Repealed).*

1982, c. 48, s. 44; 1987, c. 95, s. 402; 1988, c. 64, s. 587; 1988, c. 84, s. 700; 1989, c. 38, s. 319; 1990, c. 85, s. 121; 1996, c. 2, s. 989; 1999, c. 40, s. 327; 2000, c. 56, s. 218; 2000, c. 29, s. 675; 2002, c. 45, s. 624; 2002, c. 75, s. 33; 2002, c. 45, s. 624; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

45. *(Repealed).*

1982, c. 48, s. 45; 1987, c. 95, s. 402; 2004, c. 37, s. 8.

46. *(Repealed).*

1982, c. 48, s. 46; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

47. *(Repealed).*

1982, c. 48, s. 47; 1984, c. 41, s. 14; 1987, c. 40, s. 3; 1990, c. 77, s. 8; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

47.1. *(Repealed).*

1984, c. 41, s. 14; 1985, c. 30, s. 98; 2004, c. 37, s. 8.

48. *(Repealed).*

1982, c. 48, s. 48; 1984, c. 41, s. 15; 1990, c. 77, s. 9; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

48.1. *(Repealed).*

1984, c. 41, s. 15; 1990, c. 77, s. 10; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

48.2. *(Repealed).*

1984, c. 41, s. 15; 2004, c. 37, s. 8.

49. *(Repealed).*

1982, c. 48, s. 49; 1984, c. 41, s. 16; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

50. *(Repealed).*

1982, c. 48, s. 50; 2001, c. 38, s. 14; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

51. *(Repealed).*

1982, c. 48, s. 51; 1984, c. 41, s. 17; 2004, c. 37, s. 8.

52. *(Repealed).*

1982, c. 48, s. 52; 1984, c. 41, s. 18; 1990, c. 77, s. 12; 2000, c. 29, s. 676; 2004, c. 37, s. 8.

53. *(Repealed).*

1982, c. 48, s. 53; 1990, c. 77, s. 13; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

53.1. *(Repealed).*

1990, c. 77, s. 14; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

54. *(Repealed).*

1982, c. 48, s. 54; 1992, c. 35, s. 3; 2004, c. 37, s. 8.

55. *(Repealed).*

1982, c. 48, s. 55; 2004, c. 37, s. 8.

56. *(Repealed).*

1982, c. 48, s. 56; 2004, c. 37, s. 8.

56.1. *(Repealed).*

1984, c. 41, s. 19; 2004, c. 37, s. 8.

DIVISION III

Repealed, 2004, c. 37, s. 8.

2004, c. 37, s. 8.

57. *(Repealed).*

1982, c. 48, s. 57; 1984, c. 41, s. 20; 2001, c. 38, s. 15; 2004, c. 37, s. 8.

58. *(Repealed).*

1982, c. 48, s. 58; 1984, c. 41, s. 21; 1990, c. 77, s. 15; 2001, c. 38, s. 16; 2004, c. 37, s. 8.

59. *(Repealed).*

1982, c. 48, s. 59; 2001, c. 38, s. 17; 2004, c. 37, s. 8.

59.1. *(Repealed).*

1984, c. 41, s. 22; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 8.

60. *(Repealed).*

1982, c. 48, s. 60; 2001, c. 38, s. 18; 2004, c. 37, s. 8.

61. *(Repealed).*

1982, c. 48, s. 61; 2001, c. 38, s. 19; 2004, c. 37, s. 8.

62. *(Repealed).*

1982, c. 48, s. 62; 2004, c. 37, s. 8.

63. *(Repealed).*

1982, c. 48, s. 63; 1987, c. 40, s. 4; 2004, c. 37, s. 8.

CHAPTER III

SPECIAL REGULATORY SCHEMES

64. A securities distribution to which a special disclosure scheme established by regulation applies may be made by an issuer, provided that the issuer complies with the requirements of the special scheme concerning the information that must be contained in the documents to be filed with the Authority or sent to investors and with the conditions subject to which a document may stand in lieu of a prospectus.

1982, c. 48, s. 64; 2001, c. 38, s. 20; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

65. *(Repealed).*

1982, c. 48, s. 65; 1984, c. 41, s. 23.

66. In the case of an investment contract, the Authority may designate the persons who are to be liable for the obligations imposed on the issuer.

1982, c. 48, s. 66; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

67. *(Repealed).*

1982, c. 48, s. 67; 1987, c. 40, s. 5; 1992, c. 35, s. 4; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 138; 2008, c. 24, s. 198.

TITLE III

DISCLOSURE REQUIREMENTS

CHAPTER I

REPORTING ISSUER

68. A reporting issuer is an issuer that has made a distribution of securities to the public; a reporting issuer is subject to the continuous disclosure requirements of Chapter II of this title.

An issuer is deemed to have made a distribution of securities to the public where

(1) a prospectus has been filed in respect of one of its securities and a receipt issued by the Authority;

(2) its securities, offered as consideration in a take-over bid, have been described in a circular filed with the Authority;

(3) any of its securities has been listed on a stock exchange in Québec at any time from 6 April 1983;

(4) its securities have been distributed pursuant to an agreement, merger, amalgamation or reorganization or a similar operation involving at least one reporting issuer;

(5) its existence is the result of the continuance of an issuer contemplated in subparagraphs 1 to 4;

(6) it is contemplated in section 68.1 or 338;

(7) it is so determined by regulation;

(8) it is so designated by the Authority in accordance with section 272.2 or criteria determined by regulation.

An issuer who files a prospectus subject to a receipt issued by the Authority for the sole purpose of becoming a reporting issuer is also deemed to have made a distribution of securities to the public. The prospectus must contain the information and certificates prescribed by regulation and disclose all the material facts about the securities already issued. The rules specified for a prospectus in Title II do not apply to the prospectus.

1982, c. 48, s. 68; 1984, c. 41, s. 24; 1990, c. 77, s. 16; 2001, c. 38, s. 21; 2002, c. 45, s. 696; 2004, c. 37, s. 9; 2006, c. 50, s. 28; 2008, c. 7, s. 139; 2013, c. 18, s. 103.

68.1. An issuer subject to equivalent continuous disclosure requirements established by another legislative authority may apply to the Authority to become a reporting issuer and to have the period for which it has fulfilled the requirements taken into account.

The issuer shall attach to its application the continuous disclosure documents already filed, since the beginning of the last financial year, with the competent authorities, and a certificate from them establishing that it is subject to the continuous disclosure requirements and the number of years for which it has fulfilled the requirements.

Upon approval of the application, holders of securities of the issuer may avail themselves of the exemptions prescribed by regulation. If the issuer has already filed a prospectus in the regular form in another province or a territory of Canada, and has been meeting the continuous disclosure requirements of that province for one year, the Authority may authorize it to prepare a simplified prospectus, provided the additional information required by the Authority is included therein.

1984, c. 41, s. 25; 2002, c. 45, s. 696; 2004, c. 37, s. 10.

69. On application by a reporting issuer, the Authority may revoke the issuer's status as a reporting issuer or, on the conditions it determines, release the issuer from all or part of the continuous disclosure requirements of Chapter II of this Title.

1982, c. 48, s. 69; 1984, c. 41, s. 26; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 29.

69.1. An issuer that has become a reporting issuer following the filing of a prospectus for which a receipt was issued by the Authority may, where the distribution in question does not result in the anticipated issue of securities, apply to the Authority to have his status as a reporting issuer revoked.

An issuer that has become a reporting issuer as a result of a take-over bid circular filed with the Authority may, where the take-over bid does not result in the anticipated take-over, apply to the Authority to have his status as a reporting issuer revoked.

In each of the above cases, the Authority may revoke the issuer's status as a reporting issuer or, on such conditions as it may determine, release the issuer from all or part of the continuous disclosure requirements of Chapter II of this Title.

1990, c. 77, s. 17; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 30.

70. The Authority shall keep a public register of reporting issuers.

1982, c. 48, s. 70; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

71. The Authority may publish a list of reporting issuers that have been determined to be in default of a requirement of this Act or a regulation made under this Act.

1982, c. 48, s. 71; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 31.

71.1. In accordance with the rules applicable to an accountant's audit of the affairs of any person subject to this Act, an accounting firm that audits the financial statements of a reporting issuer must participate in the inspection program of a body that has entered into an agreement to that effect with the Authority.

2009, c. 58, s. 92.

71.2. Sections 74 to 84 and 86 to 91 of the Act respecting the regulation of the financial sector (chapter E-6.1) apply to the body described in section 71.1, with the necessary modifications and in accordance with the terms of the agreement mentioned in section 71.1.

2009, c. 58, s. 92; 2018, c. 23, s. 811.

71.3. An accounting firm that is directly affected by a decision made by a body described in section 71.1 may, within 30 days, apply for a review of the decision to the Financial Markets Administrative Tribunal established under section 92 of the Act respecting the regulation of the financial sector (chapter E-6.1).

2009, c. 58, s. 92; 2016, c. 7, s. 179; 2018, c. 23, s. 811.

72. *(Repealed).*

1982, c. 48, s. 72; 2006, c. 50, s. 32.

CHAPTER II

CONTINUOUS DISCLOSURE AND GOVERNANCE

2009, c. 58, s. 93.

73. A reporting issuer shall provide periodic disclosure about its business and internal affairs, including its governance practices, timely disclosure of a material change and any other disclosure prescribed by regulation in accordance with the conditions determined by regulation.

1982, c. 48, s. 73; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2001, c. 38, s. 22; 2007, c. 15, s. 1; 2006, c. 50, s. 33; 2009, c. 58, s. 94.

73.1. A reporting issuer must organize its affairs in accordance with the governance rules prescribed by regulation.

2009, c. 58, s. 95.

74. An issuer that is not a reporting issuer shall provide any disclosure prescribed by regulation in accordance with the conditions determined by regulation.

1982, c. 48, s. 74; 2006, c. 50, s. 33.

75. *(Replaced).*

1982, c. 48, s. 75; 1984, c. 41, s. 27; 2001, c. 38, s. 24; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

76. *(Replaced).*

1982, c. 48, s. 76; 1984, c. 41, s. 28; 2001, c. 38, s. 25; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

77. *(Replaced).*

1982, c. 48, s. 77; 2001, c. 38, s. 26; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

78. *(Replaced).*

1982, c. 48, s. 78; 1984, c. 41, s. 29; 2001, c. 38, s. 27; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

79. *(Replaced).*

1982, c. 48, s. 79; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

80. *(Replaced).*

1982, c. 48, s. 80; 1984, c. 41, s. 30; 2001, c. 38, s. 28; 2006, c. 50, s. 33.

80.1. *(Repealed).*

1990, c. 77, s. 18; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2004, c. 37, s. 11.

80.2. *(Replaced).*

1992, c. 35, s. 5; 2006, c. 50, s. 33.

81. *(Replaced).*

1982, c. 48, s. 81; 1999, c. 40, s. 327; 2006, c. 50, s. 33.

82. *(Replaced).*

1982, c. 48, s. 82; 1984, c. 41, s. 31; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 33.

82.1. *(Replaced).*

1984, c. 41, s. 32; 1990, c. 77, s. 19; 1999, c. 40, s. 327; 2006, c. 50, s. 33.

83. *(Replaced).*

1982, c. 48, s. 83; 2006, c. 50, s. 33.

83.1. *(Replaced).*

1990, c. 77, s. 20; 2006, c. 50, s. 33.

CHAPTER III

Heading repealed, 2006, c. 50, s. 34.

2001, c. 38, s. 29; 2007, c. 15, s. 2; 2006, c. 50, s. 34.

84. *(Repealed).*

1982, c. 48, s. 84; 2001, c. 38, s. 30; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2007, c. 15, s. 2; 2006, c. 50, s. 35.

85. *(Repealed).*

1982, c. 48, s. 85; 1984, c. 41, s. 33; 2001, c. 38, s. 31; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2007, c. 15, s. 2; 2006, c. 50, s. 35.

86. *(Repealed).*

1982, c. 48, s. 86; 2001, c. 38, s. 32.

87. *(Repealed).*

1982, c. 48, s. 87; 2001, c. 38, s. 33; 2006, c. 50, s. 35.

88. *(Repealed).*

1982, c. 48, s. 88; 2001, c. 38, s. 34.

CHAPTER IV

INSIDER REPORTS

89. "Insider" means

(1) every director or officer of an issuer;

(2) every director or officer of a subsidiary of an issuer;

(3) a person that exercises control over more than 10% of the voting rights attached to all outstanding voting securities of an issuer other than securities underwritten in the course of a distribution;

(4) an issuer that holds any of its securities; or

(5) a person prescribed by regulation or designated as an insider under section 272.2.

"Insider" also means a director or officer of an insider of an issuer.

1982, c. 48, s. 89; 1984, c. 41, s. 34; 2006, c. 50, s. 36.

89.1. "Economic interest" means a right to receive or the opportunity to participate in a reward, benefit or return from a security, or exposure to a risk of a financial loss in respect of a security.

2006, c. 50, s. 36.

89.2. "Related financial instrument" means

(1) any instrument, agreement or security whose value, market price or payment obligations are based on the value, market price or payment obligations of a security; and

(2) any other instrument, agreement or understanding that affects, directly or indirectly, a person's economic interest in a security.

2006, c. 50, s. 36.

89.3. An insider of a reporting issuer other than a mutual fund shall, in accordance with the conditions determined by regulation, file a report disclosing, in particular, any control exercised by the insider over the reporting issuer's securities, any interest in, or right or obligation associated with, a related financial instrument of the issuer's securities and make other disclosure prescribed by regulation

2006, c. 50, s. 36.

90. The person who is the owner of securities or has direction over them is the person who exercises control over them.

1982, c. 48, s. 90.

91. Every person who may exercise as he sees fit voting rights attaching to securities he does not own is deemed to exercise control over those securities.

1982, c. 48, s. 91.

92. An insider of a reporting issuer who acquires or disposes of a related financial instrument in respect of a security of that issuer is deemed to effect a change in his control of the security. The same applies to an insider of a reporting issuer who purchases or disposes of a derivative within the meaning of the Derivatives Act (chapter I-14.01) whose underlying interest is a security of the reporting issuer.

The Authority may, by regulation, determine any other securities transaction effecting a change in the control of a security.

1982, c. 48, s. 92; 2002, c. 45, s. 625; 2004, c. 37, s. 90; 2008, c. 24, s. 199; 2006, c. 50, s. 37.

93. *(Repealed).*

1982, c. 48, s. 93; 1984, c. 41, s. 35.

94. When an issuer, reporting or not, becomes an insider of a reporting issuer, the officers and the directors of the former issuer are deemed to have been insiders of the other reporting issuer for the previous 6 months or for such shorter period as they have been officers or directors of the former issuer.

If the former issuer is a reporting issuer, the officers and the directors of the latter issuer are also deemed to be insiders of the former issuer, and the same conditions apply.

1982, c. 48, s. 94; 2008, c. 7, s. 140; 2009, c. 25, s. 9.

95. The amalgamation of issuers or the purchase by an issuer of all or substantially all of the assets of another issuer or of a subsidiary thereof, gives rise, in respect of officers and directors, to the presumptions set forth in section 94.

Section 94 applies only when at least one reporting issuer was a party to the amalgamation or reorganization.

1982, c. 48, s. 95; 2008, c. 7, s. 141; 2009, c. 25, s. 9.

96. A person who becomes an insider of a reporting issuer shall disclose to the Authority, if such is the case, his control over the securities of the issuer, according to the terms and conditions, in the form and within the time prescribed by regulation.

1982, c. 48, s. 96; 2001, c. 38, s. 35; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

97. An insider of a reporting issuer shall file a report in accordance with the conditions, in the form and within the time prescribed by regulation, disclosing any change in his control over the securities of the issuer.

1982, c. 48, s. 97; 1987, c. 40, s. 6.

98. Officers and directors deemed to be insiders under section 94 or 95 shall, within the time fixed by regulation, file the report that sections 96 and 97 would have required for the period covered by the presumption.

1982, c. 48, s. 98; 2001, c. 38, s. 36; 2008, c. 7, s. 142; 2009, c. 25, s. 9.

99. *(Repealed).*

1982, c. 48, s. 99; 1984, c. 41, s. 36; 1987, c. 40, s. 30; 2006, c. 50, s. 38.

100. *(Repealed).*

1982, c. 48, s. 100; 1984, c. 41, s. 36; 2006, c. 50, s. 38.

101. *(Repealed).*

1982, c. 48, s. 101; 1984, c. 41, s. 37.

102. *(Repealed).*

1982, c. 48, s. 102; 2006, c. 50, s. 38.

103. *(Repealed).*

1982, c. 48, s. 103; 2006, c. 50, s. 38.

CHAPTER V

Repealed, 2006, c. 50, s. 39.

2006, c. 50, s. 39.

103.1. *(Repealed).*

1984, c. 41, s. 38; 1999, c. 40, s. 327; 2001, c. 38, s. 37; 2006, c. 50, s. 39.

104. *(Repealed).*

1982, c. 48, s. 104; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 39.

105. *(Repealed).*

1982, c. 48, s. 105; 1999, c. 40, s. 327; 2006, c. 50, s. 39.

106. *(Repealed).*

1982, c. 48, s. 106; 1999, c. 40, s. 327; 2006, c. 50, s. 39.

107. *(Repealed).*

1982, c. 48, s. 107; 2006, c. 50, s. 39.

108. *(Repealed).*

1982, c. 48, s. 108; 1984, c. 41, s. 39; 2001, c. 38, s. 38; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 39.

109. *(Repealed).*

1982, c. 48, s. 109; 2006, c. 50, s. 39.

TITLE III.1

INVESTMENT FUNDS

2006, c. 50, s. 40.

CHAPTER I

GENERAL PROVISIONS

2016, c. 7, s. 156.

109.1. *(Repealed).*

2006, c. 50, s. 40; 2009, c. 25, s. 10.

109.2. *(Repealed).*

2006, c. 50, s. 40; 2009, c. 25, s. 10.

109.3. *(Repealed).*

2006, c. 50, s. 40; 2009, c. 25, s. 10.

109.4. *(Repealed).*

2006, c. 50, s. 40; 2009, c. 25, s. 10.

109.5. An investment fund shall comply with the operating rules prescribed by regulation for the management, stewardship, safekeeping and composition of the assets of investment funds, including governance rules and conflict of interest management rules.

2006, c. 50, s. 40.

109.6. Despite the Trust Companies and Savings Companies Act (chapter S-29.02), the Authority may authorize a legal person other than a trust company governed by that Act to act as trustee of an investment fund in accordance with the Civil Code.

2006, c. 50, s. 40; 2018, c. 23, s. 811.

109.6.1. Any document referred to in this Title that is sent by mail is presumed to have been received by the addressee in the ordinary course of mail.

2016, c. 7, s. 157.

CHAPTER II

SENDING OF DOCUMENTS DURING SUBSCRIPTION FOR OR PURCHASE OF CERTAIN SECURITIES

2016, c. 7, s. 157.

109.7. A dealer who receives, on behalf of a client, an order to subscribe for or purchase securities of a mutual fund traded on an exchange or an alternative trading system is required to send the document prescribed by regulation to the client within the time set by the regulation.

2016, c. 7, s. 157.

CHAPTER III

RIGHTS OF HOLDERS OF MUTUAL FUND SECURITIES

2016, c. 7, s. 157.

109.8. A holder of mutual fund securities may unilaterally demand the purchase or repurchase of his securities by sending a notice to that effect

(1) to the dealer referred to in section 109.7 who sent the notice of execution prescribed by regulation to the holder; or

(2) to the dealer who sent the notice of execution prescribed by regulation to the holder in any other case.

The notice must be sent to the dealer within two days after receipt of the notice of execution.

This section does not apply to holders who are themselves dealers.

2016, c. 7, s. 157.

109.9. The purchase or repurchase of securities under section 109.8 is carried out by operation of law on receipt of the holder's notice by the dealer.

The dealer shall pay the holder the price paid for the securities at the time of the subscription or purchase or, if it is less, the securities' net asset value at the time the dealer received the holder's notice. The dealer shall also reimburse the commissions and subscription fees paid by the holder.

2016, c. 7, s. 157.

TITLE IV

TAKE-OVER BIDS AND ISSUER BIDS

1984, c. 41, s. 40; 2006, c. 50, s. 41.

110. "Take-over bid" means a direct or indirect offer to acquire securities that is made by a person other than the issuer of the securities and that falls in a class of offers to acquire determined by regulation.

1982, c. 48, s. 110; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

111. "Issuer bid" means a direct or indirect offer to acquire or redeem securities or a direct or indirect transaction to that end that is made by the issuer of the securities and that falls in a class of offers to acquire or redeem determined by regulation.

1982, c. 48, s. 111; 1984, c. 41, s. 40; 1999, c. 40, s. 327; 2006, c. 50, s. 41.

112. A person making a take-over bid or issuer bid, alone or with other persons acting in concert, shall conduct the bid in accordance with the conditions determined by regulation.

1982, c. 48, s. 112; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

113. When a take-over bid has been made, the directors of the offeree issuer shall determine whether to recommend acceptance or rejection of the bid or determine not to make a recommendation, and shall make the recommendation or issue a statement that they are not making a recommendation, in accordance with the conditions determined by regulation.

1982, c. 48, s. 113; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

114. An individual director or officer of the offeree issuer may recommend acceptance or rejection of the bid in accordance with the conditions determined by regulation.

1982, c. 48, s. 114; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

115. A person that, by directly or indirectly acquiring ownership of, or control over, the securities of a class or type prescribed by regulation of a reporting issuer, comes to hold, with another person acting in concert, the percentage prescribed by regulation of outstanding securities of that class or type shall, with that other person, make and file disclosure in accordance with the conditions determined by regulation and comply with any prohibitions determined by regulation on transactions in securities of the reporting issuer.

1982, c. 48, s. 115; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

116. *(Repealed)*.

1982, c. 48, s. 116; 1984, c. 41, s. 40; 1990, c. 77, s. 21.

117. *(Replaced)*.

1982, c. 48, s. 117; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

118. *(Replaced)*.

1982, c. 48, s. 118; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

119. *(Replaced)*.

1982, c. 48, s. 119; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

120. *(Replaced)*.

1982, c. 48, s. 120; 1984, c. 41, s. 40; 1990, c. 77, s. 22; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

121. *(Replaced)*.

1982, c. 48, s. 121; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 1992, c. 35, s. 6; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

122. *(Replaced)*.

1982, c. 48, s. 122; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 2006, c. 50, s. 41.

123. *(Replaced)*.

1982, c. 48, s. 123; 1984, c. 41, s. 40; 1987, c. 40, s. 7; 2006, c. 50, s. 41.

124. *(Replaced)*.

1982, c. 48, s. 124; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

125. *(Replaced)*.

1982, c. 48, s. 125; 1984, c. 41, s. 40; 1999, c. 40, s. 327; 2006, c. 50, s. 41.

126. *(Replaced)*.

1982, c. 48, s. 126; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 2001, c. 38, s. 39; 2006, c. 50, s. 41.

127. *(Replaced)*.

1982, c. 48, s. 127; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

128. *(Replaced)*.

1982, c. 48, s. 128; 1984, c. 41, s. 40; 2001, c. 38, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

129. *(Replaced)*.

1982, c. 48, s. 129; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

129.1. *(Replaced)*.

2001, c. 38, s. 41; 2006, c. 50, s. 41.

130. *(Replaced)*.

1982, c. 48, s. 130; 1984, c. 41, s. 40; 1987, c. 40, s. 8; 2001, c. 38, s. 42; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

131. *(Replaced)*.

1982, c. 48, s. 131; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

132. *(Replaced)*.

1982, c. 48, s. 132; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

133. *(Replaced)*.

1982, c. 48, s. 133; 1984, c. 41, s. 40; 2001, c. 38, s. 43; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

134. *(Replaced)*.

1982, c. 48, s. 134; 1984, c. 41, s. 40; 2001, c. 38, s. 44; 2006, c. 50, s. 41.

135. *(Replaced)*.

1982, c. 48, s. 135; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

136. *(Replaced)*.

1982, c. 48, s. 136; 1984, c. 41, s. 40; 2001, c. 38, s. 45; 2006, c. 50, s. 41.

137. *(Replaced)*.

1982, c. 48, s. 137; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

138. *(Replaced)*.

1982, c. 48, s. 138; 1984, c. 41, s. 40; 1990, c. 77, s. 23; 2001, c. 38, s. 46; 2006, c. 50, s. 41.

139. *(Replaced)*.

1982, c. 48, s. 139; 1984, c. 41, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

140. *(Replaced)*.

1982, c. 48, s. 140; 1984, c. 41, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

141. *(Replaced)*.

1982, c. 48, s. 141; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

142. *(Replaced)*.

1982, c. 48, s. 142; 1984, c. 41, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

142.1. *(Replaced)*.

1987, c. 40, s. 9; 2006, c. 50, s. 41.

143. *(Replaced)*.

1982, c. 48, s. 143; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 2006, c. 50, s. 41.

144. *(Replaced)*.

1982, c. 48, s. 144; 1984, c. 41, s. 40; 1987, c. 40, s. 31; 2006, c. 50, s. 41.

145. *(Replaced)*.

1982, c. 48, s. 145; 1984, c. 41, s. 40; 1992, c. 35, s. 7; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

146. *(Replaced)*.

1982, c. 48, s. 146; 1984, c. 41, s. 40; 2006, c. 50, s. 41.

147. *(Replaced)*.

1982, c. 48, s. 147; 1984, c. 41, s. 40; 1992, c. 35, s. 8; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

147.1. *(Replaced)*.

1984, c. 41, s. 40; 2006, c. 50, s. 41.

147.2. *(Replaced)*.

1984, c. 41, s. 40; 2006, c. 50, s. 41.

147.3. *(Replaced)*.

1984, c. 41, s. 40; 2001, c. 38, s. 47; 2006, c. 50, s. 41.

147.4. *(Replaced)*.

1984, c. 41, s. 40; 2001, c. 38, s. 48; 2006, c. 50, s. 41.

147.5. *(Replaced)*.

1984, c. 41, s. 40; 1987, c. 40, s. 10; 2001, c. 38, s. 49; 2006, c. 50, s. 41.

147.6. *(Replaced)*.

1984, c. 41, s. 40; 1987, c. 40, s. 11; 2001, c. 38, s. 50; 2006, c. 50, s. 41.

147.7. *(Replaced)*.

1984, c. 41, s. 40; 2001, c. 38, s. 51; 2006, c. 50, s. 41.

147.8. *(Replaced)*.

1984, c. 41, s. 40; 1987, c. 40, s. 12; 2001, c. 38, s. 52; 2006, c. 50, s. 41.

147.9. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 13; 2001, c. 38, s. 53; 2006, c. 50, s. 41.

147.10. *(Replaced).*

1984, c. 41, s. 40; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

147.11. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 14; 1999, c. 40, s. 327; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

147.12. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 15; 2006, c. 50, s. 41.

147.13. *(Repealed).*

1984, c. 41, s. 40; 1987, c. 40, s. 31.

147.14. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 31; 2006, c. 50, s. 41.

147.15. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 16; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

147.16. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 17; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 41.

147.17. *(Repealed).*

1984, c. 41, s. 40; 1987, c. 40, s. 31.

147.18. *(Repealed).*

1984, c. 41, s. 40; 1987, c. 40, s. 31.

147.19. *(Replaced).*

1984, c. 41, s. 40; 2006, c. 50, s. 41.

147.20. *(Replaced).*

1984, c. 41, s. 40; 1987, c. 40, s. 18; 1990, c. 77, s. 24; 2006, c. 50, s. 41.

147.21. *(Replaced).*

1984, c. 41, s. 40; 2001, c. 38, s. 54; 2004, c. 37, s. 12; 2006, c. 50, s. 41.

147.22. *(Replaced).*

1984, c. 41, s. 40; 2006, c. 50, s. 41.

147.23. *(Replaced).*

1984, c. 41, s. 40; 2006, c. 50, s. 41.

TITLE V

REGISTRATION

2009, c. 25, s. 11.

CHAPTER I

GENERAL PROVISIONS

2009, c. 25, s. 12.

148. No person may act as a dealer, adviser or investment fund manager unless the person is registered as such.

1982, c. 48, s. 148; 1998, c. 37, s. 533; 2002, c. 45, s. 696; O.C. 1366-2003, s. 14; 2004, c. 37, s. 90; 2009, c. 25, s. 13.

148.1. The Authority may require that the securities activities of a candidate or class of candidates be pursued through a subsidiary.

2001, c. 38, s. 55; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 24, s. 200.

148.2. The first paragraph of section 77 and the second paragraph of section 81 of the Act respecting the distribution of financial products and services (chapter D-9.2) apply, with the necessary modifications, to dealers registered as mutual fund dealers or scholarship plan dealers.

2009, c. 25, s. 14.

148.3. Despite section 23 of the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2), a dealer registered as a mutual fund dealer or scholarship plan dealer may receive deposits on behalf of a deposit institution authorized under that Act or a member bank of the Canada Deposit Insurance Corporation through the dealer's representative. No cash deposit may be received by such a representative.

All deposits so received must be deposited with the deposit institution or bank on whose behalf the dealer is acting.

2009, c. 25, s. 14; 2018, c. 23, s. 683.

149. A natural person may not act as a dealer or adviser for the account of a person subject to registration under section 148, unless the natural person is registered as a representative of that person.

The chief compliance officer or ultimate designated person of a person registered under section 148 must be registered as such. The chief compliance officer or ultimate designated person shall perform the functions prescribed by regulation.

Subject to such remunerated business as may be carried on under a government regulation made under this Act, the representative of an investment dealer, within the meaning assigned by regulation, shall not concurrently act as a representative in a financial institution's place of business in Québec and be employed by the financial institution, unless he is a representative specialized in mutual funds or scholarship plans.

1982, c. 48, s. 149; 1989, c. 48, s. 254; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2009, c. 25, s. 15.

149.1. A representative of a mutual fund dealer or a representative of a scholarship plan dealer may, on the conditions prescribed by regulation, distribute shares, other than qualifying shares, issued by a financial services cooperative governed by the Act respecting financial services cooperatives (chapter C-67.3) that are not exempted from the application of Titles II to VIII.

2009, c. 25, s. 16.

149.2. Titles V to VI of the Act respecting the distribution of financial products and services (chapter D-9.2) apply to representatives of a mutual fund dealer and representatives of a scholarship plan dealer.

2009, c. 25, s. 16.

150. The categories of registration, the conditions to be met by candidates, the duration of registration and the rules governing the activities of registrants shall be established by regulation.

1982, c. 48, s. 150; 2001, c. 38, s. 56.

151. The Authority, after verifying that the candidate meets the conditions fixed by regulation, shall grant registration where, in its opinion,

(1) the candidate or, in the case of a legal person, its officers and directors have the competence and integrity to ensure the protection of investors;

(2) the candidate is solvent and, in the case of a legal person, has adequate financial resources to ensure the viability of his business.

The Authority may impose any restriction or condition it determines on the registration of a candidate, including limiting its duration.

1982, c. 48, s. 151; 1984, c. 41, s. 41; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 42, s. 111.

151.0.1. The Authority may revoke, suspend or impose restrictions or conditions on a registration if

(1) the representative, chief compliance officer or ultimate designated person has made an assignment of property or been placed under a receiving order pursuant to the Bankruptcy and Insolvency Act (R.S.C. 1985, c. B-3);

(2) the representative, chief compliance officer or ultimate designated person has been convicted by a court inside or outside Canada of an act or offence which, in the opinion of the Authority, is related to the activity of the representative, chief compliance officer or ultimate designated person, or has pleaded guilty to such an act or offence;

(3) the representative, chief compliance officer or ultimate designated person has been assigned a tutor, curator or adviser; or

(4) the registration or right to transact business has been revoked or suspended, or restrictions or conditions have been imposed on the registration or right to transact business, by the discipline committee of the Chambre de la sécurité financière established under section 284 of the Act respecting the distribution of financial products and services (chapter D-9.2) or by a body in or outside Québec that is responsible for supervising and monitoring persons authorized to act as representatives, chief compliance officers or ultimate designated persons.

As well, the Authority may suspend the registration of a representative of a mutual fund dealer or a representative of a scholarship plan dealer if the representative fails to comply with the liability insurance requirements prescribed by regulation or the compulsory professional development requirements set out in the Act respecting the distribution of financial products and services.

2009, c. 25, s. 17.

151.1. The Authority has the power to make an inspection of the affairs of a registered dealer or adviser in order to ascertain the extent to which he complies with this Act, the regulations and the policy statements.

1990, c. 77, s. 25; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

151.1.1. The Authority may inspect the affairs of an investment fund, a person acting as depositary, trustee or manager of such a fund or any other market participant determined by regulation to assess compliance with a provision of this Act or a regulation or check how any functions and powers delegated by the Authority are being exercised.

In addition, the Authority may inspect the affairs of a contingency fund in which brokers are required to participate under section 168.1 in order to verify compliance with their obligations under this Act or a regulation made under this Act.

Sections 151.2 to 151.4 apply to an inspection, with the necessary modifications.

2002, c. 45, s. 626; 2004, c. 37, s. 90; 2006, c. 50, s. 43; 2013, c. 18, s. 104.

151.2. The inspector shall, on request, justify his quality.

1990, c. 77, s. 25.

151.3. In carrying out his inspection, the inspector has the power

(1) to enter the establishment of any dealer or adviser, during normal business hours;

(2) to take a copy of the books, registers or other documents relating to the carrying on of the activity of dealer or adviser;

(3) to require any information relating to the carrying on of the activity of dealer or adviser and the production of any relevant document.

1990, c. 77, s. 25.

151.4. The dealer or adviser shall give the inspector access to all books, registers or other documents relating to the carrying on of his activities.

1990, c. 77, s. 25.

151.5. The Authority may order a dealer, adviser or investment fund manager to direct an auditor, at the dealer's, adviser's or investment fund manager's expense, to conduct any audit or review required by the Authority and deliver the audit or review to the Authority as soon as practicable.

2009, c. 25, s. 18.

152. The Financial Markets Administrative Tribunal may revoke or suspend the rights granted by registration, or impose restrictions or conditions on their exercise where, in its opinion, a registrant fails to comply with this Act or regulations made thereunder or if it is in the public interest to do so.

1982, c. 48, s. 152; 2002, c. 45, s. 696; 2009, c. 25, s. 19; 2009, c. 58, s. 96; 2016, c. 7, s. 179.

152.1. Despite section 318, the Authority shall suspend or, if the offence is not a first offence, may revoke the registration of a mutual fund dealer or scholarship plan dealer if the dealer fails to maintain liability insurance as prescribed by regulation.

The Authority may also suspend or, if the offence is not a first offence, revoke the registration of a mutual fund dealer or scholarship plan dealer if a representative of the dealer, other than an employee, fails to maintain liability insurance as prescribed by regulation.

2009, c. 25, s. 20.

153. A registrant wishing to cease carrying on business shall apply to the Authority to surrender his registration.

The Authority may, on the conditions it determines, suspend the registration or impose conditions or restrictions on the registration during examination of the application for surrender.

The Authority may impose such conditions as it may determine on the surrender, and shall accept it where, in its opinion, the interests of clients and investors are sufficiently protected.

The Authority remains competent in respect of any acts prior to the surrender.

1982, c. 48, s. 153; 1984, c. 41, s. 42; 1990, c. 77, s. 26; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 44.

CHAPTER II

Repealed, 2006, c. 50, s. 45.

2006, c. 50, s. 45.

154. *(Repealed).*

1982, c. 48, s. 154; 1984, c. 41, s. 43; 1987, c. 95, s. 402; 1988, c. 64, s. 562, s. 587; 1990, c. 77, s. 27; 1999, c. 40, s. 327; 2000, c. 29, s. 677; 2002, c. 45, s. 627; 2006, c. 50, s. 45.

155. *(Repealed).*

1982, c. 48, s. 155; 2006, c. 50, s. 45.

155.1. *(Repealed).*

1984, c. 41, s. 44; 1992, c. 35, s. 9; 2001, c. 38, s. 57; 2004, c. 37, s. 13.

156. *(Repealed).*

1982, c. 48, s. 156; 1987, c. 40, s. 19; 1987, c. 95, s. 402; 1988, c. 64, s. 563, s. 587; 1999, c. 40, s. 327; 2000, c. 29, s. 678; 2002, c. 45, s. 628; 2004, c. 37, s. 13.

156.1. *(Repealed).*

1987, c. 40, s. 20; 1999, c. 40, s. 327; 2004, c. 37, s. 13.

157. *(Repealed).*

1982, c. 48, s. 157; 1990, c. 77, s. 28; 2004, c. 37, s. 13.

CHAPTER III

INFORMATION TO BE FURNISHED TO THE AUTHORITY

2002, c. 45, s. 629; 2004, c. 37, s. 90.

158. Every dealer, adviser or investment fund manager shall keep the books, records and other documents required by regulation.

1982, c. 48, s. 158; 2001, c. 38, s. 59; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2009, c. 25, s. 21.

159. In the cases and within the time determined by regulation, the registrant shall notify the Authority of any change in the information furnished at the time of registration.

In the cases determined by regulation, a change may be made only if the Authority agrees, or does not object, within the time and in the form prescribed by regulation. If the Authority objects, it may prescribe what is to be done.

1982, c. 48, s. 159; 2002, c. 45, s. 696; 2004, c. 37, s. 14; 2009, c. 25, s. 22.

159.0.1. The Authority may determine by regulation, in the case of a dealer, adviser or investment fund manager, which natural persons must disclose the information and documents prescribed by regulation to the Authority.

2009, c. 25, s. 23.

CHAPTER IV

OBLIGATIONS OF REGISTRANTS

2009, c. 25, s. 24.

159.1. An investment fund manager shall provide any disclosure required of an investment fund under this Act or the regulations.

2009, c. 25, s. 25.

159.2. An investment fund manager shall, in the exercise of its functions, comply with the obligations set out in its constituting document, its by-laws and the law, and act within the limits of the powers conferred on it.

2009, c. 25, s. 25.

159.3. An investment fund manager shall, in the best interests of the fund and its beneficiaries or in the interest of the fulfilment of its purpose, exercise prudence, diligence and skill, and discharge its functions loyally, honestly and in good faith.

2009, c. 25, s. 25.

160. All persons registered as dealers, advisers or representatives are required to deal fairly, honestly, loyally and in good faith with their clients.

1982, c. 48, s. 160; 2001, c. 38, s. 60; 2009, c. 25, s. 26.

160.1. In their dealings with clients and in the execution of the mandates entrusted to them by their clients, all persons registered as dealers, advisers or representatives are required to act with all the care that may be expected of a knowledgeable professional acting in the same circumstances.

2001, c. 38, s. 61; 2009, c. 25, s. 27.

160.1.1. A dealer registered as a mutual fund dealer or scholarship plan dealer may share a commission the dealer receives only with another dealer or adviser governed by this Act, a firm, an independent representative or independent partnership governed by the Act respecting the distribution of financial products and services (chapter D-9.2), a broker's or agency licence holder governed by the Real Estate Brokerage Act (chapter C-73.2), a dealer or adviser governed by the Derivatives Act (chapter I-14.01), a deposit institution authorized under the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2), a bank, an authorized foreign bank, a trust company authorized under the Trust Companies and Savings Companies Act (chapter S-29.02), an insurer authorized under the Insurers Act (chapter A-32.1) or a federation within the meaning of the Act respecting financial services cooperatives (chapter C-67.3).

The commission is to be shared in the manner determined by regulation of the Authority.

The dealer shall enter every sharing of a commission in a register, in accordance with the regulations.

2018, c. 23, s. 684.

Not in force

160.2. *(Not in force).*

2004, c. 37, s. 15.

160.3. *(Repealed).*

2004, c. 37, s. 15; 2009, c. 25, s. 29.

161. *(Repealed).*

1982, c. 48, s. 161; 2009, c. 25, s. 29.

162. *(Repealed).*

1982, c. 48, s. 162; 2009, c. 25, s. 29.

163. *(Repealed).*

1982, c. 48, s. 163; 2009, c. 25, s. 29.

163.1. *(Repealed).*

1990, c. 77, s. 29; 2006, c. 50, s. 46; 2009, c. 25, s. 29.

164. No dealer may vote for his own account securities registered in his name but not owned by him.

A dealer shall carry out the written instructions of the owner as to the voting of securities or as to the giving of a proxy to vote.

1982, c. 48, s. 164.

165. A dealer or any other person holding the securities of a reporting issuer on behalf of clients shall forward to the owner of the securities all the documents received concerning the securities at the expense of the person designated, at the rate fixed, in the circumstances and according to the other conditions prescribed by regulation.

On request, the author of the documents shall without delay and at his own expense send the number of copies required by the dealer to discharge his obligation.

1982, c. 48, s. 165; 2001, c. 38, s. 62.

165.1. A dealer or any other person holding the securities of a reporting issuer on behalf of clients is required to provide the issuer with a list of the names and addresses of those clients, where the issuer so requests in order to discharge its obligation to send documents to those clients, and to specify the number of securities held by each client and the preferred language of correspondence, except where a client has given written instructions that such information is not to be disclosed to the issuer.

2001, c. 38, s. 63.

166. A registrant must make the statements prescribed by regulation concerning existing conflicts of interest and conflicts of interest the registrant, acting reasonably, would expect to arise between the registrant and the registrant's clients.

1982, c. 48, s. 166; 2006, c. 50, s. 47, s. 111; 2009, c. 25, s. 30; 2009, c. 58, s. 97.

167. *(Repealed).*

1982, c. 48, s. 167; 2008, c. 24, s. 201.

168. Credit balances appearing in the accounts of clients and not given in guarantee are funds payable on demand; in no case may a dealer use them except to finance his working capital on the conditions prescribed by regulation.

1982, c. 48, s. 168.

168.1. A dealer shall participate in a contingency fund in the cases and on the conditions determined by regulation.

The Government may, by order, exempt any contingency fund approved by the Authority for this purpose from the application of the Insurers Act (chapter A-32.1).

1990, c. 77, s. 30; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2018, c. 23, s. 811.

168.1.1. All dealers and advisers must process the complaints filed with them in a fair manner. To that end, they must

(1) follow a policy for processing complaints filed by their clients and resolving disputes with them; and

(2) keep a complaints register.

Unless such a policy is fully set out in a regulation made under paragraph 27.0.4 of section 331.1, dealers and advisers must adopt one themselves.

2002, c. 45, s. 630; 2009, c. 25, s. 31; 2018, c. 23, s. 685.

168.1.2. The complaint processing and dispute resolution policy adopted under subparagraph 1 of the first paragraph of section 168.1.1 must, in particular,

(1) set out the characteristics that make a communication to a dealer or adviser a complaint that must be registered in the complaints register kept under subparagraph 2 of the first paragraph of section 168.1.1; and

(2) provide for a record to be opened for each complaint and prescribe rules for keeping such records.

Dealers and advisers must make a summary of the policy, including the elements specified in subparagraphs 1 and 2 of the first paragraph, publicly available on their website, if they have one, and disseminate it by any appropriate means to reach the clientele concerned.

2002, c. 45, s. 630; 2004, c. 37, s. 90; 2008, c. 7, s. 145; 2009, c. 25, s. 32; 2018, c. 23, s. 685.

168.1.3. Within 10 days after a complaint is registered in the complaints register, the dealer or adviser must send the complainant a notice stating the complaint registration date and the complainant's right, under section 168.1.4, to have the complaint record examined.

2002, c. 45, s. 630; 2004, c. 37, s. 16; 2008, c. 7, s. 146; 2009, c. 25, s. 32; 2018, c. 23, s. 685.

168.1.4. A complainant whose complaint has been registered in the complaints register may, if dissatisfied with the dealer's or adviser's processing of the complaint or the outcome, request the dealer or adviser to have the complaint record examined by the Authority.

The dealer or adviser is required to comply with the complainant's request and send the record to the Authority.

2002, c. 45, s. 630; 2004, c. 37, s. 90; 2009, c. 25, s. 32; 2018, c. 23, s. 685.

168.1.5. The Authority shall examine the complaint records that are sent to it.

It may, with the parties' consent, act as conciliator or mediator or designate a person to act as such.

Conciliation or mediation may not, alone or in combination, continue for more than 60 days after the date of the first conciliation or mediation session, as the case may be, unless the parties consent to it.

Conciliation and mediation are free of charge.

2002, c. 45, s. 630; 2018, c. 23, s. 685.

168.1.6. Unless the parties agree otherwise, nothing that is said or written in the course of a conciliation or mediation session may be admitted into evidence before a court of justice or before a person or body of the administrative branch exercising adjudicative functions.

A conciliator or mediator may not be compelled to disclose anything revealed or learned in the exercise of conciliation or mediation functions or to produce a document prepared or obtained in the course of such functions before a court of justice or before a person or body of the administrative branch exercising adjudicative functions.

Despite section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), no one has a right of access to a document contained in the conciliation or mediation record.

2018, c. 23, s. 685.

168.1.7. Despite sections 9 and 83 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), the Authority may not communicate a complaint record without the authorization of the dealer or adviser that has sent it.

2018, c. 23, s. 685.

168.1.8. On the date set by the Authority, dealers and advisers shall send it a report on the complaint processing and dispute resolution policy adopted pursuant to subparagraph 1 of the first paragraph of section 168.1.1 stating the number of complaints they have registered in the complaints register and their nature.

The report must cover the period determined by the Authority.

2018, c. 23, s. 685.

CHAPTER V

Repealed, 2006, c. 50, s. 48.

2001, c. 38, s. 64; 2006, c. 50, s. 48.

168.2. *(Repealed).*

2001, c. 38, s. 64; 2006, c. 50, s. 48.

168.3. *(Repealed).*

2001, c. 38, s. 64; 2006, c. 50, s. 48.

168.4. *(Repealed).*

2001, c. 38, s. 64; 2006, c. 50, s. 48.

TITLE VI

SELF-REGULATORY ORGANIZATIONS, SECURITIES EXCHANGE OR CLEARING ACTIVITIES , CREDIT RATING ORGANIZATIONS, BENCHMARKS AND BENCHMARK ADMINISTRATORS

2002, c. 45, s. 631; 2006, c. 50, s. 49; 2009, c. 58, s. 98; 2018, c. 23, s. 686.

169. No exchange, clearing house, central securities depositary, settlement system, information processor, matching service utility or regulation services provider may carry on securities activities in Québec unless it is recognized by the Authority.

1982, c. 48, s. 169; 2002, c. 45, s. 631; 2004, c. 37, s. 90; 2006, c. 50, s. 50; 2008, c. 24, s. 202; 2013, c. 18, s. 105.

169.1. An application for recognition or for the modification of a recognition decision must be filed with the documents and information required by the Authority.

The Authority shall publish a notice of the application in its Bulletin and invite interested persons to make representations in writing.

The second paragraph does not apply to an application for the modification of a recognition decision that does not significantly alter the activities carried on by the applicant.

2008, c. 24, s. 203; 2013, c. 18, s. 106.

170. The Authority may recognize a person referred to in section 169 on the conditions it determines.

The Authority may also require that the person be recognized as a self-regulatory organization under Title III of the Act respecting the regulation of the financial sector (chapter E-6.1) in order to carry on the person's activities.

The organization referred to in the second paragraph shall also be subject to the provisions of this Act which are applicable to a self-regulatory organization.

Despite section 60 of the Act respecting the regulation of the financial sector, a person recognized as an exchange, a clearing house, a central securities depositary or a settlement system may include provisions

governing the business or professional conduct of its members or participants and their representatives in its constituting documents, by-laws or operating rules.

1982, c. 48, s. 170; 2001, c. 38, s. 65; 2002, c. 45, s. 631; 2004, c. 37, s. 90; 2006, c. 50, s. 51; 2008, c. 24, s. 204; 2013, c. 18, s. 107; 2018, c. 23, s. 811.

170.1. *(Replaced).*

1990, c. 77, s. 31; 2002, c. 45, s. 631.

170.2. *(Replaced).*

2001, c. 38, s. 66; 2002, c. 45, s. 631.

171. The Authority may recognize an alternative trading system as an exchange or register it as a dealer.

1982, c. 48, s. 171; 2002, c. 45, s. 631; 2004, c. 37, s. 90; 2006, c. 50, s. 52; 2008, c. 24, s. 205.

171.1. Sections 70 to 71, 74 to 79 and 81 to 91 of the Act respecting the regulation of the financial sector (chapter E-6.1) apply, with the necessary modifications, to an exchange, a recognized clearing house, a central securities depositary and a recognized settlement system.

Sections 78 to 80, 87 and 89 of the Act respecting the regulation of the financial sector apply to information processors and matching service utilities.

2004, c. 37, s. 17; 2006, c. 50, s. 53; 2008, c. 24, s. 206; 2013, c. 18, s. 108; 2018, c. 23, s. 811.

171.1.1. *(Replaced).*

2006, c. 50, s. 54; 2008, c. 24, s. 207; 2013, c. 18, s. 109.

Note *See section 171.2.*

171.2. The Authority may, by regulation, establish the rules applicable to persons referred to in section 169 or 171, including rules concerning review or approval of their operating rules or restrictions relating to ownership of or control over such persons.

2006, c. 50, s. 54; 2008, c. 24, s. 207; 2013, c. 18, s. 109.

172. The Financial Markets Administrative Tribunal may prescribe a course of action to a person recognized under section 169 where it considers it necessary for the proper operation of the person or for public protection.

1982, c. 48, s. 172; 2002, c. 45, s. 631; O.C. 1366-2003, s. 7; 2006, c. 50, s. 55; 2008, c. 24, s. 208; 2009, c. 58, s. 99; 2016, c. 7, s. 179.

173. *(Replaced).*

1982, c. 48, s. 173; 2002, c. 45, s. 631.

174. *(Replaced).*

1982, c. 48, s. 174; 2002, c. 45, s. 631.

175. *(Replaced).*

1982, c. 48, s. 175; 2002, c. 45, s. 631.

176. *(Replaced).*

1982, c. 48, s. 176; 2002, c. 45, s. 631.

177. *(Replaced).*

1982, c. 48, s. 177; 2002, c. 45, s. 631.

178. *(Replaced).*

1982, c. 48, s. 178; 2002, c. 45, s. 631.

179. *(Replaced).*

1982, c. 48, s. 179; 2002, c. 45, s. 631.

180. *(Replaced).*

1982, c. 48, s. 180; 2002, c. 45, s. 631.

180.1. *(Replaced).*

1990, c. 77, s. 32; 2002, c. 45, s. 631.

180.2. *(Replaced).*

1990, c. 77, s. 32; 2002, c. 45, s. 631.

180.3. *(Replaced).*

1990, c. 77, s. 32; 2002, c. 45, s. 631.

180.4. *(Replaced).*

1990, c. 77, s. 32; 2002, c. 45, s. 631.

181. *(Replaced).*

1982, c. 48, s. 181; 2002, c. 45, s. 631.

182. *(Replaced).*

1982, c. 48, s. 182; 2002, c. 45, s. 631.

182.1. *(Replaced).*

1992, c. 35, s. 10; 2002, c. 45, s. 631.

183. *(Replaced).*

1982, c. 48, s. 183; 2002, c. 45, s. 631.

184. *(Replaced).*

1982, c. 48, s. 184; 2002, c. 45, s. 631.

185. *(Replaced).*

1982, c. 48, s. 185; 2002, c. 45, s. 631.

186. *(Replaced).*

1982, c. 48, s. 186; 2002, c. 45, s. 631.

186.1. The Authority may, in accordance with the criteria and conditions determined by regulation, designate a credit rating organization as being subject to this Act.

It may also, in accordance with the criteria and conditions determined by regulation, make this Act applicable to a benchmark and designate the benchmark. In such a case, the benchmark administrator becomes subject to this Act.

For the purposes of section 35 of the Act respecting the regulation of the financial sector (chapter E-6.1), the decision to make this Act applicable to a benchmark is deemed to be an individual decision in respect of the benchmark administrator. The administrator is deemed to be a citizen within the meaning of the Act respecting administrative justice (chapter J-3).

2009, c. 58, s. 100; 2018, c. 23, ss. 687 and 811.

186.2. A designated credit rating organization must comply with the requirements set by regulation, including requirements relating to

(1) the establishment, publication and enforcement of a code of conduct applicable to its directors, officers and employees, including the minimum requirements for such a code;

(2) a prohibition to issue or maintain a credit rating;

(3) procedures regarding conflicts of interest between the designated credit rating organization and the person whose securities are being rated;

(4) the keeping of the books and registers necessary for the conduct of its business;

(5) the disclosure of information to the Authority, the public and the person whose securities are being rated; and

(6) the appointment of a compliance officer.

2009, c. 58, s. 100.

186.2.1. A benchmark administrator subject to this Act must comply with the requirements set by regulation, including requirements relating to

(1) governance, internal controls and conflict of interest management;

(2) the establishment, publication and enforcement of a code of conduct for contributors as well as the minimum requirements of such a code;

(3) the integrity and reliability of the designated benchmarks that the administrator administers;

(4) any restriction or prohibition relating to the provision and administration of a designated benchmark;

(5) the keeping of the books and registers necessary for the conduct of its business;

(6) the disclosure of information to the Authority, the public or the users of a designated benchmark that the administrator administers;

(7) the methods used to establish the designated benchmarks that the administrator administers; and

(8) the control framework for its activities, in particular operational risk management, business continuity and disaster recovery.

2018, c. 23, s. 688.

186.3. The Authority has the power to inspect the affairs of a designated credit rating organization and the affairs of a benchmark administrator subject to this Act to verify compliance with the law.

Sections 151.2 to 151.4 apply, with the necessary modifications, to such an inspection.

2009, c. 58, s. 100; 2018, c. 23, s. 689.

186.4. A designated credit rating organization, a benchmark administrator subject to this Act or another person acting on their behalf may not make any representation, written or oral, that the Authority has in any way passed upon the merits of the designated credit rating organization or the benchmark administrator subject to this Act.

2009, c. 58, s. 100; 2018, c. 23, s. 690.

186.5. The Authority may not regulate the content of a credit rating or the methodology used by a designated credit rating organization.

2009, c. 58, s. 100.

186.6. The Authority may impose changes in the practices and procedures of a designated credit rating organization or of a benchmark administrator subject to this Act if it considers that such a measure is necessary to protect the public.

2009, c. 58, s. 100; 2018, c. 23, s. 691.

TITLE VII

PROHIBITIONS AND PENALTIES

CHAPTER I

USE OF PRIVILEGED INFORMATION AND MISCELLANEOUS PROHIBITIONS

187. No insider of a reporting issuer having privileged information relating to securities of the issuer may trade in such securities or change an economic interest in a related financial instrument, except if he can prove that:

(1) he is justified in believing that the information is generally known or known to the other party;

(2) he is availing himself of an automatic dividend reinvestment plan, automatic subscription plan or any other automatic plan established by a reporting issuer, according to conditions set down in writing, before he learned the information; or

(3) he is required to do so under a contract the terms of which are set out in writing and which was entered into before he became aware of the information.

In the case described in subparagraph 1 of the first paragraph, the insider may not trade in the securities if the other party to the transaction is the reporting issuer and the transaction is not necessary in the course of the issuer's business.

1982, c. 48, s. 187; 1984, c. 41, s. 45; 1987, c. 40, s. 21; 1990, c. 77, s. 33; 2009, c. 25, s. 33; 2006, c. 50, s. 56; 2011, c. 26, s. 72.

188. No insider of a reporting issuer having privileged information relating to securities of the issuer may disclose that information or recommend that another party trade in the securities of the issuer, except in the following cases:

(1) he is justified in believing that the information is generally known or known to the other party;

(2) he must disclose the information in the course of business, having no ground to believe it will be used or disclosed contrary to section 187, 189 or 189.1 or to this section.

1982, c. 48, s. 188; 1984, c. 41, s. 46; 2009, c. 58, s. 101.

189. The prohibitions set out in sections 187 and 188 also apply to the following persons:

(1) the officers and directors referred to in Chapter IV of Title III;

(2) affiliates of the reporting issuer;

(3) an investment fund manager or a person responsible for providing financial advice to an investment fund or for investing its shares or units and every person who is an insider of the investment fund manager or of that person;

(4) every person who has acquired privileged information in the course of his relations with or of working for the reporting issuer, as a result of that person's functions or of his engaging in business or professional activities;

(5) every person having privileged information that, to his knowledge, was disclosed by an insider or a person referred to in this section;

(6) every person who has acquired privileged information that he knows to be such concerning a reporting issuer;

(7) every person who is an associate of the reporting issuer, of an insider of the latter or of a person contemplated in this section.

1982, c. 48, s. 189; 1984, c. 41, s. 47; 1999, c. 40, s. 327; 2006, c. 50, s. 57.

189.1. No person prohibited from trading in securities of a reporting issuer or from changing an economic interest in a related financial instrument by the effect of section 187 or 189 may use the privileged information in any other manner unless he is justified in believing that the information is generally known to the public. Thus, no such person may trade in options or in other derivatives within the meaning of the Derivatives Act (chapter I-14.01) concerning the securities of the issuer. Nor may the person trade in the securities of another issuer, in options or in other derivatives within the meaning of the Derivatives Act or in futures contracts concerning an index, once their market prices are likely to be influenced by the price fluctuations of the issuer's securities.

1984, c. 41, s. 48; 2008, c. 24, s. 209; 2006, c. 50, s. 58.

190. No person informed of the investment program established by an investment fund or by an adviser who manages a portfolio may use the information for his own benefit in trading in securities of an issuer included in the program.

1982, c. 48, s. 190; 2006, c. 50, s. 59; 2009, c. 25, s. 34.

191. In addition to the adviser, the following persons are deemed to have knowledge of the investment program of an adviser who manages a portfolio, if they participate in formulating his investment decisions or his recommendations to the client for whom he manages the portfolio, or learn of them before they are implemented:

(1) every partner of the adviser;

(2) every legal person that is an affiliate of the adviser;

(3) every officer or director of the adviser or of a legal person that is an affiliate of the adviser;

(4) every member of the personnel of the adviser or of a legal person that is an affiliate of the adviser.

1982, c. 48, s. 191; 2006, c. 50, s. 60, s. 111; 2009, c. 25, s. 34.

191.1. No person with knowledge of material order information may trade in a security that is the subject of the material order information, recommend that another party do so or disclose the information to anyone, except in the following cases:

(1) the person is justified in believing that the other party already knew of the material order information;

(2) the person must disclose the material order information in the course of business, and there are no grounds for the person to be justified in believing the material order information will be used or disclosed contrary to this section;

(3) the person enters into a transaction under a written automatic dividend reinvestment plan, written automatic purchase plan or other similar written automatic plan in which the person agreed to participate before obtaining knowledge of the material order information;

(4) the person entered into a transaction as a result of a written obligation that the person entered into before obtaining knowledge of the material order information; or

(5) the person entered into a sale or purchase as agent under the specific unsolicited instructions of the principal, or under instructions that the agent solicited from the principal before obtaining knowledge of the material order information.

For the purposes of this section, “material order information” means any information relating to an order, a projected or unexecuted order to purchase or trade a security, or even an intention to place such an order, that is likely to have a significant effect on the market price of the security.

2009, c. 58, s. 102.

192. No person may make any representation that the Authority has passed upon the merits of any security or upon the financial situation, fitness or conduct of any registrant.

1982, c. 48, s. 192; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

192.1. No person shall represent that the person is registered under this Act unless the representation is true.

No registered person shall represent that the person is registered without specifying the category of registration.

2009, c. 25, s. 35; 2011, c. 26, s. 73.

193. No dealer or adviser may multiply transactions for the account of a client solely to increase his remuneration.

1982, c. 48, s. 193.

194. No person may sell a security short without previously notifying the dealer responsible for carrying out the transaction.

1982, c. 48, s. 194.

CHAPTER II

OFFENCES

195. It is an offence

(1) to contravene a decision of the Authority or the Financial Markets Administrative Tribunal;

(2) to fail to fulfil an undertaking with the Authority or the Financial Markets Administrative Tribunal;

(3) to fail to furnish, within the prescribed time, information or a document required by this Act or the regulations;

(4) to fail to appear after summons, to refuse to testify or to refuse to send or remit any document or thing required by the Authority or an agent appointed by it in the course of an investigation;

(5) to attempt, in any manner, to hinder a representative of the Authority in the exercise of his or her functions in the course or for the purposes of an inspection or an investigation;

(6) to provide false documents or information, or access to false documents or information, to the Authority or a member of the personnel of the Authority in the course of activities governed by this Act.

1982, c. 48, s. 195; 2002, c. 45, s. 632; 2004, c. 37, s. 90; 2008, c. 7, s. 147; 2009, c. 58, s. 103; 2011, c. 26, s. 74; 2016, c. 7, s. 179.

195.1. Every registered dealer or adviser who employs as his representative a person who is not registered with the Authority as a representative of that dealer or adviser is guilty of an offence.

1984, c. 41, s. 49; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

195.2. Influencing or attempting to influence the market price or the value of securities by means of unfair, improper or fraudulent practices is an offence.

2002, c. 45, s. 633.

196. Every person who makes a misrepresentation in any of the following is guilty of an offence:

(1) a prospectus of any type or an offering memorandum provided for in this Act or the regulations;

(2) the information incorporated by reference in a simplified prospectus;

(2.1) a document prepared under a special disclosure scheme referred to in section 64;

(3) *(paragraph repealed);*

(4) *(paragraph repealed);*

(5) the disclosure provided by an issuer under section 73 or 74;

(6) *(paragraph replaced);*

(7) *(paragraph replaced);*

(8) a take-over bid circular or issuer bid circular.

1982, c. 48, s. 196; 2006, c. 50, s. 61; 2008, c. 24, s. 210.

197. Every person is guilty of an offence who in any manner not specified in section 196 makes a misrepresentation

(1) in respect of a transaction in a security;

(2) in the course of soliciting proxies or sending a circular to security holders;

(3) in the course of a take-over bid or an issuer bid;

(4) *(subparagraph repealed);*

(5) in any document forwarded or record kept by any person pursuant to this Act.

For the purposes of this section, a misrepresentation is any misleading information on a fact that is likely to affect the decision of a reasonable investor as well as any pure and simple omission of such a fact.

1982, c. 48, s. 197; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 62; 2011, c. 26, s. 75.

198. *(Repealed).*

1982, c. 48, s. 198; 2001, c. 38, s. 67.

199. It is an offence, in effecting a transaction in a security,

(1) to represent that it will be resold or repurchased, except where it carries such a right;

(2) to represent that all or part of the purchase price will be refunded, except where the security carries such a right;

(3) to give an undertaking relating to the future value or price of the security, except so far as that value is guaranteed on the security itself;

(4) to declare that the security will be listed or that an application has been or will be made to that end, except in the following cases:

(a) the Authority expressly authorized such a declaration;

(a.1) the declaration is authorized by regulation;

(b) the declaration appears in a preliminary or final prospectus for which the Authority has issued a receipt;

(c) the declaration appears in an offering memorandum prescribed by this Act or the regulations;

(d) an application to have the security listed has been made and securities of the same issuer are already listed; or

(e) the stock exchange has already conditionally or otherwise approved the listing of the issuer's securities or agreed to their being traded, or consented or indicated that it did not object to such a declaration.

However, a person may, in the case of a transaction for more than $50,000, undertake, by a written instrument, to resell, repurchase or refund securities.

In addition, certain distributions may be exempted from the application of subparagraphs 1 and 2 of the first paragraph with the authorization of the Authority and on the conditions that it determines.

1982, c. 48, s. 199; 2001, c. 38, s. 68; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2009, c. 58, s. 104; 2018, c. 23, s. 692.

199.1. A person who directly or indirectly engages or participates in any transaction or series of transactions in securities or any trading method relating to a transaction in securities, or in any act, practice or course of conduct is guilty of an offence if the person knows, or ought reasonably to know, that the transaction, series of transactions, trading method, act, practice or course of conduct

(1) creates or contributes to a misleading appearance of trading activity in, or an artificial price for, a security; or

(2) perpetrates a fraud on any person.

A person who attempts to commit an offence described in the first paragraph is also guilty of an offence.

2011, c. 26, s. 76; 2018, c. 23, s. 693.

199.2. A person who directly or indirectly engages or participates in any act, practice or course of conduct is guilty of an offence if the person knows, or ought reasonably to know, that the act, practice or course of conduct

(1) constitutes or contributes to providing false or misleading information or data to be used in establishing a designated benchmark; or

(2) constitutes or contributes to manipulating the computation of a designated benchmark.

A person who attempts to commit an offence described in the first paragraph is also guilty of an offence.

2018, c. 23, s. 694.

200. Every person who, not being registered as a dealer, adviser or representative, gives out information to investors which could influence their investment decisions and derives an advantage therefrom separate from his ordinary remuneration, is guilty of an offence.

1982, c. 48, s. 200; 1990, c. 77, s. 34.

201. *(Repealed).*

1982, c. 48, s. 201; 2006, c. 50, s. 63, s. 111; 2009, c. 25, s. 38.

CHAPTER III

PENAL PROVISIONS

202. Unless otherwise specially provided, every person that contravenes a provision of this Act commits an offence and is liable to a minimum fine of $2,000 in the case of a natural person and $3,000 in the case of a legal person or double the profit realized, whichever is the greatest amount. The maximum fine is $150,000 in the case of a natural person and $200,000 in the case of a legal person, or four times the profit realized, whichever is the greater amount.

In determining the penalty, the court shall take particular account of the harm done to the investors and the advantages derived from the offence.

1982, c. 48, s. 202; 1990, c. 4, s. 897; 1992, c. 35, s. 11; 2008, c. 7, s. 148.

203. Every contravention of a regulation made under this Act is an offence subject to the same provisions as offences under this Act.

1982, c. 48, s. 203.

204. In the case of an offence under any of sections 187 to 191.1, the minimum fine is $5,000, double the profit eventually realized or one fifth of the sums invested or, in the case of trading in a related financial instrument or in derivatives, the sums allocated to the transaction or series of transactions, whichever is the greatest amount. The maximum fine is $5,000,000, four times the profit eventually realized or half the sums invested or, in the case of trading in a related financial instrument or in derivatives, the sums allocated to the transaction or series of transactions, whichever is the greatest amount.

Where the person who committed the offence traded in a security relying on privileged information, profit that may be realized means the difference between the price at which the initial trade was effected and the average market price of the security in the 10 trading days following general disclosure of the information; if, however, the position is liquidated within those 10 trading days, the average market price is replaced by the price actually obtained to the extent that that price yields a greater profit than what would be obtained at the average market price.

Where the person who committed the offence communicated privileged information, profit that may be realized means the consideration received for having communicated the information.

1982, c. 48, s. 204; 1987, c. 40, s. 22; 1990, c. 4, s. 898; 1992, c. 35, s. 12; 2002, c. 45, s. 634; 2004, c. 37, s. 18; 2008, c. 7, s. 149; 2008, c. 24, s. 211; 2009, c. 58, s. 105.

204.1. In the case of a distribution without a prospectus in contravention of section 11 or 12 or an offence under section 195.2, 196, 197, 199.1 or 199.2, the minimum fine is $5,000, double the profit realized or one fifth of the sums invested, whichever is the greatest amount. The maximum fine is $5,000,000, four times the profit realized or half the sums invested, whichever is the greatest amount.

2008, c. 7, s. 150; 2011, c. 26, s. 77; 2018, c. 23, s. 695.

205. Every officer, director or employee of the principal offender, including a person remunerated on commission, who authorizes or permits an offence under this Act is liable to the same penalties as the principal offender.

1982, c. 48, s. 205; 2006, c. 50, s. 64, s. 111.

206. *(Repealed).*

1982, c. 48, s. 206; 2001, c. 38, s. 69.

207. Every conspiracy to commit an offence under this Act is an offence punishable by the penalties provided in section 202, 204 or 204.1, according to the offence.

1982, c. 48, s. 207; 2009, c. 58, s. 106.

208. Every person who, by act or omission, aids a person in the commission of an offence is guilty of the offence as if he had committed it himself. He is liable to the penalties provided in section 202, 204 or 204.1 according to the nature of the offence.

The same rule applies to a person who, by incitation, counsel or order induces a person to commit an offence.

1982, c. 48, s. 208; 1987, c. 40, s. 23; 2009, c. 58, s. 107.

208.1. Every person who makes a distribution of securities in contravention of section 11 or 12 or who contravenes any of sections 187 to 191.1, 195.2, 196 and 197, the first paragraph of sections 199.1 and 199.2

or any of sections 205, 207 and 208 is liable, regardless of the fine provided for in the applicable penal provision, to imprisonment not exceeding five years less one day, notwithstanding articles 231 and 348 of the Code of Penal Procedure (chapter C-25.1).

2002, c. 45, s. 635; 2002, c. 70, s. 176; 2008, c. 7, s. 151; 2009, c. 58, s. 108; 2018, c. 23, s. 696.

209. *(Repealed).*

1982, c. 48, s. 209; 1984, c. 41, s. 50; 1990, c. 4, s. 899.

210. Penal proceedings for an offence under a provision of this Act may be instituted by the Authority.

1982, c. 48, s. 210; 1992, c. 61, s. 622; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

210.1. The fine imposed by a court belongs to the Authority where the Authority has taken charge of the prosecution.

2001, c. 38, s. 70; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

211. Penal proceedings for an offence under a provision of sections 11, 12, 25 to 27, 29, 64, 67, 73, 75 to 78, 80 to 82.1, 89.3, 96 to 98, 102 to 103.1, 108, 109.2 to 109.5, 112, 113, 115, 148, 149, 151.4, 158 to 168.1.4, 169, 187 to 191.1, 192 to 197, 199 to 203 and 207 shall be prescribed by five years from the date on which the investigation record relating to the offence was opened.

The certificate of the secretary of the Authority indicating the date on which the investigation record was opened constitutes, failing any evidence to the contrary, conclusive proof of such fact.

1982, c. 48, s. 211; 1990, c. 77, s. 35; 1992, c. 61, s. 623; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 152; 2009, c. 58, s. 109; 2018, c. 23, s. 697.

212. The Authority may recover its costs for an investigation from any person found guilty of an offence under this Act or under the securities legislation of another legislative authority.

The Authority shall prepare a statement of costs and present it to a judge of the Court of Québec after giving the interested parties five days' advance notice of the date of presentation.

The judge shall determine the costs, and his decision may be appealed with leave of a judge of the Court of Appeal.

1982, c. 48, s. 212; 1988, c. 21, s. 66; 2002, c. 45, s. 696; 2004, c. 37, s. 90; I.N. 2016-01-01 (NCCP).

213. A judge of the Court of Québec may, upon satisfactory proof of the authenticity of the signature thereon, endorse a warrant of arrest issued by a judge of another province or a territory against any person on a charge of contravening the securities legislation of that province or territory.

The warrant so endorsed is sufficient authority to the bearer or any peace officer of Québec to execute it and take the person arrested to the place indicated in the warrant.

1982, c. 48, s. 213; 1988, c. 21, s. 144; 2004, c. 37, s. 19.

TITLE VIII

CIVIL ACTIONS

213.1. This Title sets rules applicable to certain actions for rescission, for revision of the price or for damages. It also sets rules applicable when privileged information is used in contravention of certain provisions concerning insiders, and rules applicable when this Act or a regulation made under this Act is contravened in connection with a take-over bid or issuer bid.

More particularly, Chapters I and II of this Title establish rules relating to actions for damages resulting from the subscription, acquisition or disposition of securities to which this Title applies. They do not prevent an action for damages from being brought under ordinary civil liability rules.

2007, c. 15, s. 3.

CHAPTER I

TRANSACTIONS EFFECTED WITHOUT A PROSPECTUS, CIRCULAR OR OTHER DOCUMENT

2016, c. 7, s. 158.

214. Every person who has subscribed for or acquired securities in a distribution of securities effected without the prospectus required under Title II may apply to have the transaction rescinded or the price revised, at his option, without prejudice to his claim for damages.

The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed without a prospectus from the promoter of the venture, from their officers or directors, or from the dealer responsible for the distribution.

However, if the plaintiff did not receive the prospectus he was entitled to receive, he has no claim in damages except against the dealer or the person prescribed who is required to send the prospectus to him pursuant to section 29.

For the purposes of this section, a reference to a prospectus includes a document, prescribed by regulation, standing in lieu of a prospectus.

1982, c. 48, s. 214; 1990, c. 77, s. 36; 2006, c. 50, s. 66; 2011, c. 26, s. 78.

214.1. The holder of mutual fund securities traded on an exchange or an alternative trading system who did not receive the document referred to in section 109.7 may only claim damages from a dealer who is required to send the document to the holder in accordance with that section.

2016, c. 7, s. 159.

215. Every person who has disposed of securities in response to a take-over bid or issuer bid effected without a take-over bid or issuer bid circular may apply to have the disposal rescinded or the price revised, at his option. In addition, the plaintiff may claim damages from the offeror, its officers and its directors.

If a holder did not receive the take-over bid or issuer bid circular he was entitled to receive, he may claim damages from the offeror, its officers and its directors.

1982, c. 48, s. 215; 2006, c. 50, s. 67; 2007, c. 15, s. 4; 2006, c. 50, s. 67.

215.1. The plaintiff in an action for damages is not required to prove that the plaintiff subscribed for, acquired or disposed of securities because the distribution, take-over bid or issuer bid was made without a prospectus or without a circular, or because the plaintiff did not receive a prospectus or a circular that the plaintiff was entitled to receive.

2007, c. 15, s. 5.

216. The defendant in an action for damages under section 214 or 215 is liable for damages unless it is proved that the absence of a prospectus or take-over bid or issuer bid circular was not imputable to any act on his part.

1982, c. 48, s. 216; 1999, c. 40, s. 327; 2006, c. 50, s. 68.

CHAPTER II

MISREPRESENTATION

2007, c. 15, s. 6.

DIVISION I

PRIMARY MARKET AND TAKE-OVER OR ISSUER BIDS

2007, c. 15, s. 9.

217. A person who has subscribed for or acquired securities in a distribution effected with a prospectus containing a misrepresentation may apply to have the contract rescinded or the price revised, without prejudice to his claim for damages.

The defendant may defeat the application only if it is proved that the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

1982, c. 48, s. 217.

218. The plaintiff may claim damages from the issuer or the holder, as the case may be, whose securities were distributed, from its officers or directors, the dealer under contract to the issuer or holder whose securities were distributed and any person who is required to sign an attestation in the prospectus, in accordance with the conditions prescribed by regulation.

1982, c. 48, s. 218; 2006, c. 50, s. 69, s. 111; 2008, c. 7, s. 153.

219. The plaintiff may also claim damages from the expert whose opinion, containing a misrepresentation, appeared, with his consent, in the prospectus.

1982, c. 48, s. 219.

220. The defendant in an action provided for in sections 218 and 219 is liable for damages unless it is proved that

(1) he acted with prudence and diligence, except in an action brought against the issuer or the holder whose securities were distributed, or that

(2) the plaintiff knew, at the time of the transaction, of the alleged misrepresentation.

1982, c. 48, s. 220; 1999, c. 40, s. 327.

221. Rights of action established under sections 217 to 219 may also be exercised if a misrepresentation is contained in

(1) the information incorporated by reference in the simplified prospectus;

(2) the offering memorandum prescribed by regulation;

(3) any other document authorized by the Authority for use in lieu of a prospectus.

1982, c. 48, s. 221; 1984, c. 41, s. 52; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 70.

222. A person who has disposed of securities in response to a take-over bid or issuer bid effected with a circular containing a misrepresentation may apply to have the disposal rescinded or the price revised.

The defendant may defeat the application only if it is proved that, at the time of the disposal, the plaintiff knew of the alleged misrepresentation.

1982, c. 48, s. 222; 1984, c. 41, s. 53; 2007, c. 15, s. 7; 2006, c. 50, s. 71.

223. The plaintiff may also claim damages from the offeror, its officers and its directors, and from the expert whose opinions, containing a misrepresentation, appeared, with his consent, in the take-over bid or issuer bid circular, and any person who is required to sign an attestation in the take-over bid circular, in accordance with the conditions prescribed by regulation.

1982, c. 48, s. 223; 2006, c. 50, s. 72; 2008, c. 7, s. 154.

224. The defendant in an action provided for in section 223 is liable for damages unless it is proved that

(1) he acted with prudence and diligence, except in the case of the offeror, or that

(2) the plaintiff knew, at the time of the disposal, of the alleged misrepresentation.

1982, c. 48, s. 224; 1999, c. 40, s. 327; 2007, c. 15, s. 8.

225. Any misrepresentation contained in any of the documents prepared for a take-over bid by the board of directors, a director or an officer of the offeree issuer gives rise to a right of action in damages, in favour of all the holders of securities of the offeree issuer at the time of the bid, against the signatory or signatories of the document.

The defendant is liable for damages, subject to the grounds for defence set forth in section 224.

1982, c. 48, s. 225; 1984, c. 41, s. 54; 1999, c. 40, s. 327; 2006, c. 50, s. 73.

225.0.1. A defendant may defeat an action based on a misrepresentation in forward-looking information by proving that

(1) the document containing the forward-looking information contained, proximate to that information,

(a) reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and

(b) a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection; and

(2) the defendant had a reasonable basis for drawing the conclusions or making the forecasts or projections set out in the forward-looking information.

This section does not apply to forward-looking information in a financial statement required to be filed under this Act or the regulations or in a document released in connection with an initial public offering.

2007, c. 15, s. 10.

225.0.2. The plaintiff is not required to prove that the plaintiff relied on the document containing a misrepresentation when the plaintiff subscribed for, acquired or disposed of a security.

2007, c. 15, s. 10.

225.1. *(Repealed)*.

1987, c. 40, s. 24; 2006, c. 50, s. 74.

DIVISION II

SECONDARY MARKET

2007, c. 15, s. 11.

§ 1. — *Scope and interpretation*

2007, c. 15, s. 11.

225.2. This division applies to any person who acquires or disposes of a security of a reporting issuer or of any issuer closely connected to Québec whose securities are publicly traded.

However, this division does not apply to a person that subscribes for or acquires a security during the period of a distribution of securities made with a prospectus or, unless otherwise provided by regulation, under a prospectus exemption granted by this Act, a regulation made under this Act or a decision of the Authority; nor does it apply to a person that acquires or disposes of a security in connection with or pursuant to a take-over bid or issuer bid, unless otherwise provided by regulation, or to a person that makes any other transaction determined by regulation.

2007, c. 15, s. 11.

225.3. In this division, unless the context indicates otherwise,

"core document" means a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, a proxy solicitation circular, the issuer's annual and interim financial statements and any other document determined by regulation, and a material change report, but only where used in relation to the issuer or the investment fund manager and their officers;

"document" means any writing that is filed or required to be filed with the Authority, with a government or an agency of a government under applicable securities or corporate law, or with a stock exchange or quotation and trade reporting system under its by-laws, or the content of which would reasonably be expected to affect the market price or value of a security of the issuer;

"expert" means a person whose profession gives authority to a statement made in a professional capacity by the person, including an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist, advocate or notary, but not including an entity that is a designated credit rating organization defined by regulation;

"influential person" means, in respect of an issuer, a control person, a promoter, an insider who is not a director or officer of the issuer, or an investment fund manager, if the issuer is an investment fund;

"issuer's security" means a security of an issuer and includes a security the market price or value of which, or payment obligations under which, are derived from or based on a security of the issuer and which is created by a person acting on behalf of the issuer or is guaranteed by the issuer;

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial situation and operating results of an issuer as required under this Act or the regulations;

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; and

"release" means, with respect to information or a document, to file with a stock exchange, the Authority or an extra-provincial securities commission within the meaning of section 305.1, or to otherwise make available to the public.

2007, c. 15, s. 11; 2011, c. 18, s. 81.

§ 2. — *Actions for damages and burden of proof*

2007, c. 15, s. 11.

I. — *Prior authorization and other general conditions*

2007, c. 15, s. 11.

225.4. No action for damages may be brought under this division without the prior authorization of the court.

The request for authorization must state the facts giving rise to the action. It must be filed together with the projected statement of claim and be served by bailiff to the parties concerned, with a notice of at least 10 days of the date of presentation.

The court grants authorization if it deems that the action is in good faith and there is a reasonable possibility that it will be resolved in favour of the plaintiff.

The request for authorization and, if applicable, the application for authorization to institute a class action required under article 574 of the Code of Civil Procedure (chapter C-25.01) must be made to the court concomitantly.

2007, c. 15, s. 11; I.N. 2016-01-01 (NCCP); 2018, c. 23, s. 699.

225.5. On filing the request for authorization with the court, the plaintiff must send a copy to the Authority.

If authorization is granted by the court, the plaintiff must promptly issue a press release disclosing that fact. Within seven days after authorization is granted, the plaintiff must send a written notice to the Authority, together with a copy of the press release. In addition, on filing the statement of claim with the court, the plaintiff must send a copy to the Authority.

2007, c. 15, s. 11.

225.6. Any interested party may request that the court declare an authorization perempted if the plaintiff does not commence the action within three months after authorization is granted.

Such a request must be served on the parties together with a notice of at least 30 days of the date of presentation.

2007, c. 15, s. 11.

225.7. An action may not be abandoned or settled except on the terms set by the court, including terms as to legal costs.

When setting the terms, the court considers whether there are any other actions outstanding under this division or under comparable provisions of extra-provincial securities laws within the meaning of section 305.1 in respect of the same misrepresentation or failure to make timely disclosure.

2007, c. 15, s. 11; I.N. 2016-01-01 (NCCP).

II. — *Persons liable to action*

2007, c. 15, s. 11.

225.8. A person that acquires or disposes of an issuer's security during the period between the time when the issuer or a mandatary or other representative of the issuer released a document containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against

(1) the issuer, each director of the issuer at the time the document was released, and each officer of the issuer who authorized, permitted or acquiesced in the release of the document;

(2) each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer to release the document or a director or officer of the issuer to authorize, permit or acquiesce in the release of the document; and

(3) each expert whose report, statement or opinion containing the misrepresentation was included, summarized or quoted from in the document and, if the document was released by a person other than the expert, who consented in writing to the use of the report, statement or opinion in the document.

2007, c. 15, s. 11.

225.9. A person that acquires or disposes of an issuer's security during the period between the time when a mandatary or other representative of the issuer made a public oral statement relating to the issuer's business or affairs and containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against

(1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the making of the public oral statement;

(2) the person who made the public oral statement;

(3) each influential person, and each director and officer of an influential person, who knowingly influenced the person who made the public oral statement to make the public oral statement or a director or officer of the issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(4) each expert whose report, statement or opinion containing the misrepresentation was included, summarized or quoted from in the public oral statement and, if the public oral statement was made by a person other than the expert, who consented in writing to the use of the report, statement or opinion in the public oral statement.

2007, c. 15, s. 11.

225.10. A person that acquires or disposes of an issuer's security during the period between the time when an influential person or a mandatary or other representative of the influential person released a document or made a public oral statement relating to the issuer and containing a misrepresentation and the time when the misrepresentation was publicly corrected may bring an action against

(1) the issuer, if a director or officer of the issuer or the investment fund manager authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(2) the person who made the public oral statement;

(3) each director and officer of the issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;

(4) the influential person and each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and

(5) each expert whose report, statement or opinion containing the misrepresentation was included, summarized or quoted from in the document or public oral statement and, if the document was released or the public oral statement was made by a person other than the expert, who consented in writing to the use of the report, statement or opinion in the document or public oral statement.

2007, c. 15, s. 11.

225.11. A person that acquires or disposes of an issuer's security during the period between the time when the issuer failed to make timely disclosure of a material change and the time when the material change was disclosed in the manner required under this Act or the regulations may bring an action against

(1) the issuer and each director and officer of the issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and

(2) each influential person, and each director and officer of an influential person, who knowingly influenced the issuer or a mandatary or other representative of the issuer in the failure to make timely disclosure or a director or officer of the issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

2007, c. 15, s. 11.

III. — *Plaintiff's burden of proof*

2007, c. 15, s. 11.

225.12. The plaintiff is not required to prove that the plaintiff relied on the document or public oral statement containing a misrepresentation or on the issuer having complied with its timely disclosure obligations when the plaintiff acquired or disposed of the issuer's security.

2007, c. 15, s. 11.

225.13. For the purposes of sections 225.8 to 225.10, unless the defendant is an expert or the misrepresentation was contained in a core document, the plaintiff must prove that the defendant

(1) knew, at the time that the document was released or the public oral statement was made, that the document or public oral statement contained a misrepresentation or deliberately avoided acquiring such knowledge at or before that time; or

(2) was guilty of a gross fault in connection with the release of the document or the making of the public oral statement.

2007, c. 15, s. 11.

225.14. For the purposes of section 225.11, unless the defendant is the issuer, the investment fund manager or an officer of the issuer or the investment fund manager, the plaintiff must prove that the defendant

(1) knew, at the time that a material change report should have been filed, of the change and that the change was a material change, or deliberately avoided acquiring such knowledge at or before that time; or

(2) was guilty of a gross fault in connection with the failure to make timely disclosure.

2007, c. 15, s. 11.

225.15. In determining whether a gross fault was committed, the court must consider all relevant circumstances, including

(1) the nature of the issuer;

(2) the knowledge, experience and function of the defendant;

(3) the office held, if the defendant was an officer;

(4) the presence or absence of another relationship with the issuer, if the defendant was a director;

(5) the existence and the nature of any system designed to ensure that the issuer meets its continuous disclosure obligations, and the reasonableness of reliance by the defendant on that system;

(6) the reasonableness of reliance by the defendant on the issuer's officers and employees and on others whose duties would in the ordinary course have given them knowledge of the relevant facts;

(7) the period within which disclosure was required to be made under this Act or the regulations;

(8) in respect of a report, statement or opinion of an expert, any standards, rules or practices applicable to the expert;

(9) the extent to which the defendant knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;

(10) the role and responsibility of the defendant in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or in the ascertaining of the facts contained in that document or public oral statement; and

(11) the role and responsibility of the defendant in the decision not to disclose the material change.

2007, c. 15, s. 11.

225.16. The court seized of the action may decide that multiple misrepresentations having common subject matter or content may be treated as a single misrepresentation or that multiple instances of failure to make timely disclosure concerning common subject matter may be treated as a single failure to make timely disclosure.

2007, c. 15, s. 11.

IV. — *Defendant's burden of proof*

2007, c. 15, s. 11.

225.17. A defendant may defeat an action by proving that, at the time of the transaction, the plaintiff knew that the document or public oral statement contained a misrepresentation or was aware of the material change that should have been disclosed.

An action may also be defeated by proving that the defendant conducted or caused to be conducted a reasonable investigation and had no reasonable grounds to believe that the document or public oral statement would contain a misrepresentation or that the failure to make timely disclosure would occur.

2007, c. 15, s. 11.

225.18. In determining whether an investigation was reasonable under the second paragraph of section 225.17, the court must consider all relevant circumstances, including those listed in paragraphs 1 to 11 of section 225.15.

2007, c. 15, s. 11.

225.19. A defendant may defeat an action by proving that

(1) the misrepresentation was also contained in a document filed by or on behalf of a third person, other than the issuer, with the Authority or an extra-provincial securities commission within the meaning of section 305.1 or a stock exchange, and was not corrected in another document filed by or on behalf of that third person with the Authority, commission or stock exchange before the issuer or the mandatary or other representative of the issuer released the document or made the public oral statement;

(2) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and

(3) when the document was released or the public oral statement was made, the defendant did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

2007, c. 15, s. 11.

225.20. A defendant, other than the issuer, may defeat an action by proving that

(1) the document was released, the public oral statement was made or the failure to make timely disclosure occurred without the defendant's knowledge or consent; and

(2) after the defendant became aware of the misrepresentation or the failure to make timely disclosure but before the misrepresentation was corrected or the material change was disclosed in the manner required under this Act or the regulations,

(a) the defendant promptly notified the board of directors of the issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and

(b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act or the regulations was made by the issuer within two working days after the notification under subparagraph *a*, the defendant, unless prohibited by law or by professional confidentiality rules, promptly notified the Authority, in wriating, of the misrepresentation in the document or public oral statement or failure to make timely disclosure.

2007, c. 15, s. 11; I.N. 2016-01-01 (NCCP).

225.21. For the purposes of sections 225.9 and 225.10, a defendant other than the person who made the public oral statement may defeat an action by proving that the defendant did not become, or should not reasonably have become, aware of the misrepresentation before the plaintiff acquired or disposed of the issuer's securities and by proving that the person who made the public oral statement had no authority other than apparent authority to do so.

2007, c. 15, s. 11.

225.22. A defendant may defeat an action for a misrepresentation in forward-looking information in a document or a public oral statement by proving that

(1) the document or public oral statement containing the forward-looking information contained, proximate to that information,

(a) reasonable cautionary language clearly identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information; and

(b) a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection; and

(2) the defendant had a reasonable basis for drawing the conclusions or making the forecasts or projections set out in the forward-looking information.

This section does not apply to forward-looking information in a financial statement required to be filed under this Act or the regulations or in a document released in connection with an initial public offering.

2007, c. 15, s. 11.

225.23. A defendant is deemed to have satisfied the requirements of subparagraph 1 of the first paragraph of section 225.22 with respect to a public oral statement containing forward-looking information if the person who made the public oral statement

(1) made a cautionary statement that the public oral statement contains forward-looking information;

(2) stated that the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information and that certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and

(3) stated that additional information about the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information and about the material factors or assumptions applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information is contained in a readily-available document, and has identified that document.

For the purposes of subparagraph 3 of the first paragraph, a document filed with the Authority, or otherwise generally disclosed, is deemed to be readily available.

2007, c. 15, s. 11.

225.24. A defendant, other than an expert, may defeat an action for a misrepresentation in a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, with the expert's written consent to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, by proving that

(1) the defendant did not know and had no reasonable grounds to believe that there was a misrepresentation in the report, statement or opinion of the expert that was included, summarized or quoted from in the document or public oral statement; and

(2) that the report, statement or opinion of the expert was fairly represented in the document or public oral statement.

2007, c. 15, s. 11.

225.25. An expert who is the defendant in an action may defeat the action by proving that the written consent previously provided to the use of a report, statement or opinion made by the expert was withdrawn in writing before the document was released or the public oral statement was made.

2007, c. 15, s. 11.

225.26. A defendant may defeat an action for a misrepresentation in a document other than a document that is required to be filed with the Authority by proving that, at the time that the document was released, the defendant did not know and had no reasonable grounds to believe that the document would be released.

2007, c. 15, s. 11.

225.27. A defendant may defeat an action under section 225.11 by proving that

(1) the issuer, in accordance with this Act or the regulations, filed a material change report with the Authority without making the report public and the issuer had a reasonable basis to file the report on a confidential basis;

(2) if the change remains material, the issuer promptly made the material change public when the basis for confidentiality ceased to exist;

(3) the defendant or issuer did not release a document or make a public oral statement that, due to the undisclosed material change report, contained a misrepresentation; and

(4) if the material change became publicly known in a manner other than the manner required under this Act or the regulations, the issuer promptly disclosed the material change in accordance with this Act or the regulations.

2007, c. 15, s. 11.

§ 3. — *Assessment of damages and apportionment of liability*

2007, c. 15, s. 11.

225.28. Damages are assessed as follows in favour of a plaintiff that acquired an issuer's securities:

(1) in respect of securities that the plaintiff has not disposed of, assessed damages are to be equal to the number of securities acquired and not disposed of, multiplied by the difference between the average price paid per security (including commissions) and, if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations or, if there is no organized market, the amount that the court considers just;

(2) in respect of securities that the plaintiff subsequently disposed of on or before the last of the 10 trading days referred to in paragraph 1, assessed damages are to be equal to the difference between the average price paid for those securities (including commissions) and the price received on the disposition of those securities (without deducting commissions), calculated taking into account the result of hedging or other risk limitation transactions; and

(3) in respect of securities that the plaintiff subsequently disposed of after the last of the 10 trading days referred to in paragraph 1, assessed damages are to be equal to the lesser of

(a) the number of those securities, multiplied by the difference determined under paragraph 1; and

(b) the difference determined under paragraph 2.

2007, c. 15, s. 11; 2008, c. 7, s. 155.

225.29. Damages are assessed as follows in favour of a plaintiff that disposed of an issuer's securities:

(1) in respect of securities that the plaintiff has not subsequently repurchased, assessed damages are to be equal to the number of securities disposed of and not repurchased, multiplied, if the issuer's securities trade on a published market, by the difference between the trading price of the issuer's securities on the principal market for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or, if there is no organized market, the amount that the court considers just, and the average price received per security on the disposition of those securities (deducting commissions paid determined on a per security basis);

(2) in respect of securities that the plaintiff subsequently repurchased on or before the last of the 10 trading days referred to in paragraph 1, assessed damages are to be equal to the difference between the price paid for those securities (excluding commissions) and the average price received on the disposition of those securities (deducting commissions), calculated taking into account the result of hedging or other risk limitation transactions; and

(3) in respect of securities that the plaintiff repurchased after the last of the 10 trading days referred to in paragraph 1, assessed damages are to be equal to the lesser of

(a) the number of those securities, multiplied by the difference determined under paragraph 1; and

(b) the difference determined under paragraph 2.

2007, c. 15, s. 11; 2008, c. 7, s. 155.

225.30. Assessed damages are not to include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

2007, c. 15, s. 11.

225.31. The court determines each defendant's responsibility for the damages assessed and orders each defendant to pay that portion of those damages that corresponds to the defendant's responsibility.

However, if the court determines that a particular defendant, other than the issuer, authorized, permitted or acquiesced in the release of the document or making of the public oral statement containing the misrepresentation, or the failure to make timely disclosure, while knowing it to be a misrepresentation or a failure to make timely disclosure, it may order that defendant to pay the whole amount of the damages.

If two or more defendants are so determined to be responsible for all the damages assessed, they are solidarily liable for the whole amount of the damages.

2007, c. 15, s. 11.

225.32. A defendant who is a director or officer of an influential person is not liable in that capacity if the defendant is liable as a director or officer of the issuer.

2007, c. 15, s. 11.

225.33. Unless the plaintiff proves that the defendant, other than the issuer, authorized, permitted or acquiesced in the release of the document or making of the public oral statement containing the misrepresentation, or the failure to make timely disclosure, while knowing it to be a misrepresentation or a failure to make timely disclosure, the damages payable are the lesser of

(1) the amount determined under section 225.28 or 225.29; and

(2) the maximum amount determined under the second paragraph less any damages the defendant has been ordered to pay by a judgment that has become *res judicata* in any other actions brought against the defendant under this division or comparable provisions of extra-provincial securities laws within the meaning of section 305.1 in respect of the same misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of such actions.

For the purposes of subparagraph 2 of the first paragraph, the maximum amount is,

(1) in the case of the issuer or an influential person that is not a natural person, the greater of 5% of its market capitalization and $1,000,000;

(2) in the case of a natural person other than an expert, the greater of 50% of the aggregate of that person's compensation from the issuer and its affiliates and $25,000 or, if the person is a director or officer of an influential person, the greater of 50% of the aggregate of that person's compensation from the influential person and its affiliates and $25,000; and

(3) in the case of an expert, the greater of the revenue that the expert and the affiliates of the expert earned from the issuer and its affiliates during the 12-month period preceding the misrepresentation and $1,000,000.

For the purposes of subparagraph 2 of the second paragraph, "compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded.

2007, c. 15, s. 11.

CHAPTER III

USE OF PRIVILEGED INFORMATION

226. Every person who carries out a transaction contrary to section 187, 189, 189.1 or 190 is responsible for any injury suffered by the other party to the transaction.

1982, c. 48, s. 226; 1984, c. 41, s. 55; 1999, c. 40, s. 327.

227. Every person who discloses privileged information in contravention of section 188 or 189 is responsible for any injury caused to a third person as a result of a transaction effected with the person who used the information so disclosed.

1982, c. 48, s. 227; 1999, c. 40, s. 327.

228. Every person using privileged information contrary to section 187, 189, 189.1 or 190 is also accountable for the benefit accruing to him from the prohibited transactions, after repairing the harm caused, to the following persons:

(1) the issuer of the securities concerned, in the case of an offence under section 187, 189 or 189.1;

(2) the investment fund or the client for whom the portfolio is managed, in the case of an offence under section 190.

1982, c. 48, s. 228; 1984, c. 41, s. 56; 2006, c. 50, s. 75.

229. With the authorization of the court, obtained on an application served on the issuer or the investment fund, the rights of action for recovery under section 228 may be exercised, in the name of and for the account of the persons entitled to the action, by a person who was at the time of the prohibited transaction or is at the time of the application a holder of outstanding securities of the issuer or the investment fund.

1982, c. 48, s. 229; 2004, c. 37, s. 20; 2006, c. 50, s. 76; I.N. 2016-01-01 (NCCP).

230. Every holder who satisfies the conditions set forth in section 229 may also intervene in an action instituted under section 228 or 229.

1982, c. 48, s. 230.

231. To obtain the authorization provided for in section 229, it must be established that the officers and the directors of the issuer or the investment fund have failed to institute the action, or have failed to prosecute it diligently.

1982, c. 48, s. 231; 2006, c. 50, s. 77, s. 111.

232. The court may make any necessary order to facilitate the timely exercise of a holder's right to institute or intervene in an action. In particular, it may charge the holder's costs to the issuer.

1982, c. 48, s. 232.

233. The Authority has an interest to bring an action under section 229 or 230 in the same manner as a holder.

1982, c. 48, s. 233; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

CHAPTER III.1

IRREGULAR TAKE-OVER BIDS OR ISSUER BIDS

1984, c. 41, s. 58.

233.1. The offeree issuer, the offeror, their officers, their directors and persons holding their securities at the time of the transaction or action may move that the court make any order of such a nature as to rectify the consequences of a contravention of the Act or the regulations regarding a take-over bid or issuer bid. A copy of the application requesting the order is sent to the Authority.

They may in particular move that the court cancel a transaction or an issue, order a party to dispose of securities purchased during a bid, prohibit a holder from exercising voting rights attached to securities purchased during a bid, or order that compensation be paid to an interested person for any damage resulting from a contravention of the Act or the regulations regarding a take-over bid or issuer bid.

1984, c. 41, s. 58; 2006, c. 50, s. 78; I.N. 2016-01-01 (NCCP).

233.2. On application by an interested person, the Financial Markets Administrative Tribunal may, if it considers that a person has not complied or is not complying with this Act or the regulations in the context of a take-over bid or an issuer bid, make an order

(1) restraining the distribution of any document used or issued;

(2) requiring an amendment to any document used or issued and requiring the distribution of any amended or corrected document;

(3) directing a person to comply with this Act or the regulations, restraining a person from contravening this Act or the regulations or directing the directors and officers of the person to cause the person to comply with or to cease contravening this Act or the regulations.

2006, c. 50, s. 79; 2009, c. 58, s. 110; 2016, c. 7, s. 179.

CHAPTER IV

PRESCRIPTION AND MISCELLANEOUS PROVISIONS

1987, c. 40, s. 25.

234. Any action for rescission or for revision of the price under this title is prescribed by the lapse of three years from the date of the transaction.

1982, c. 48, s. 234; 2002, c. 45, s. 636.

235. Any action for damages under this title is prescribed by the lapse of three years from knowledge of the facts giving rise to the action, except on proof that tardy knowledge is imputable to the negligence of the plaintiff.

However, in the case of an action under Division II of Chapter II, the plaintiff is deemed to have knowledge of the facts as of the date on which the document containing the misrepresentation was first released, the oral public statement containing the misrepresentation was made or the material change should have been disclosed.

The prescription provided for by this section is suspended by the filing of a request for authorization with the court under section 225.4; moreover, the suspension of prescription provided for by article 2908 of the Civil Code is effective only as of the filing of that request. The suspension ceases, as the case may be,

(1) when the court has rendered its decision on the request for authorization and the decision can no longer be appealed;

(2) when the plaintiff has discontinued the action; or

(3) at the time provided for in article 2908 of the Civil Code, with respect to a member of the group that is the object of a class action who is excluded from the class action by a judgment subsequent to that authorizing the action under section 225.4.

1982, c. 48, s. 235; 2002, c. 45, s. 637; 2007, c. 15, s. 12; 2018, c. 23, s. 700.

236. However, the prescriptive periods under section 235 are subordinate to the following limitations:

(1) five years from the transaction, in the case of actions for damages provided for in sections 214, 215, 226, 227 and 228;

(2) five years from the filing of the information document with the Authority, in the case of actions under sections 218, 219, 221, 223 and 225;

(3) six months from the publication of the press release announcing that authorization has been granted by the court to bring an action under Division II of Chapter II or comparable provisions of extra-provincial securities laws within the meaning of section 305.1 regarding the same misrepresentation or failure to make timely disclosure, in the case of actions under that division.

1982, c. 48, s. 236; 1990, c. 77, s. 37; 2002, c. 45, s. 638; 2004, c. 37, s. 90; 2007, c. 15, s. 13.

236.1. Any action under this Title or any action under the ordinary rules of law in respect of facts related to the distribution of a security or to a take-over bid or issuer bid may be brought before the court of the plaintiff's residence.

In matters pertaining to the distribution of a security, the laws of Québec are applicable where the subscriber or purchaser resides in Québec, regardless of the place of the contract.

Any contrary stipulation as to the jurisdiction of the courts or the applicable legislation is without effect.

1987, c. 40, s. 26; 1999, c. 40, s. 327.

TITLE IX

ENFORCEMENT

CHAPTER I

POWERS OF INVESTIGATION

237. The Authority or its appointed agent may require any document or information it considers expedient for the discharge of its functions to be submitted to it by any of the following persons:

(1) a registrant;

(2) a recognized self-regulatory organization or one of its members;

(2.1) a recognized stock exchange or one of its participants;

(2.2) a recognized clearing house or a person who has an account with such a clearing house;

(2.3) a person who operates an alternative trading system that is recognized as a stock exchange or registered as a dealer, or one of its subscribers;

(2.3.1) a recognized regulation services provider;

(2.4) a recognized securities information processor or one of its users;

(2.5) a recognized matching service utility or one of its users;

(3) a reporting issuer;

(4) *(subparagraph repealed);*

(5) a person submitting an application to the Authority, or filing with it documents required by the Act or the regulations, and the issuer to whom the application or the documents relate;

(6) a person referred to in section 151.1.1;

(7) a designated credit rating organization;

(8) a recognized settlement system or one of its subscribers;

(9) a recognized central securities depositary or one of its subscribers;

(10) a person to whom a decision under section 263 applies;

(11) a benchmark administrator subject to this Act, a person whose activities are governed by an Act listed in Schedule 1 to the Act respecting the regulation of the financial sector (chapter E-6.1) or by an equivalent Act of another legislative authority in Canada and who provides information or data applied to establish a designated benchmark, or a person responsible for the computation of a designated benchmark.

In addition, the Authority or its agent may require such persons to confirm by affidavit the authenticity or veracity of submitted documents or information.

In the case of members of a self-regulatory organization, of their officers, of their directors and of their representatives subject to registration, the Authority may, on the conditions it determines, delegate its powers under this section and section 238 to the self-regulatory organization.

1982, c. 48, s. 237; 1984, c. 41, s. 59; 1999, c. 40, s. 327; 2002, c. 45, s. 696; 2004, c. 37, s. 21; 2006, c. 50, s. 81, s. 111; 2008, c. 7, s. 156; 2008, c. 24, s. 212; 2009, c. 58, s. 111; 2013, c. 18, s. 110; 2018, c. 23, ss. 701 and 811.

238. The Authority or its appointed agent may require any person referred to in section 237 or any officer, director or employee thereof to submit to examination under oath.

1982, c. 48, s. 238; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 82, s. 111.

239. The Authority may order an investigation

(1) to ascertain whether the Act and the regulations are complied with;

(2) to repress contraventions to the Act or the regulations;

(3) to repress contraventions to the securities legislation of another legislative authority;

(4) within the scope of an agreement entered into under the second paragraph of section 33 of the Act respecting the regulation of the financial sector (chapter E-6.1);

(5) to ascertain whether it would be advisable to request the Superior Court to order the appointment of a receiver in accordance with section 19.1 of the Act respecting the regulation of the financial sector.

1982, c. 48, s. 239; 1990, c. 77, s. 38; 2001, c. 38, s. 71; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 157; 2018, c. 23, s. 811.

240. The first paragraph of section 6, and sections 9, 10, 11, 12, 13 and 16 of the Act respecting public inquiry commissions (chapter C-37) apply, with the necessary modifications, to investigations under this chapter.

The Authority has, for the purposes of an investigation, all the powers of a judge of the Superior Court, except to order imprisonment.

1982, c. 48, s. 240; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

241. No person called upon to testify in the course of an investigation or being examined under oath may refuse to answer or to produce any document on the ground that he might thereby be incriminated or exposed to a penalty or civil proceedings, subject to the Canada Evidence Act (Revised Statutes of Canada, 1985, chapter C-5).

1982, c. 48, s. 241; 1984, c. 41, s. 60.

242. The Authority may require the submission or delivery of any document related to the object of the investigation. The Authority has the power to return the documents remitted to it or to determine whether or not it is advisable to do so.

1982, c. 48, s. 242; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

243. A person who has remitted documents to the Authority pursuant to section 242 may inspect them or copy them at his own expense, by arrangement with the Authority.

1982, c. 48, s. 243; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

244. Investigations made under section 239 are held in camera.

1982, c. 48, s. 244.

245. The Authority may forbid a person to disclose any information relating to an investigation to anyone but his advocate.

1982, c. 48, s. 245; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

246. A person called on to testify at an investigation or on an examination may be assisted by the advocate of his choice.

1982, c. 48, s. 246.

247. The Authority shall designate a member of its personnel to carry out the investigation.

The Authority may also appoint a person who is not a member of its personnel to carry out the investigation. The appointed person must be sworn before a judge of the Court of Québec or before a member of the Authority in the manner provided in section 2 of the Act respecting public inquiry commissions (chapter C-37), with the necessary modifications.

1982, c. 48, s. 247; 1984, c. 41, s. 61; 1988, c. 21, s. 66; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

248. The investigator must prove his appointment on request.

For the purposes of the investigation, the investigator has all the powers of the Authority, except to cite for contempt of court.

The investigator shall report to the Authority, and place the transcript of testimony and the documents relating to the investigation at its disposal.

1982, c. 48, s. 248; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

CHAPTER II

CONSERVATORY MEASURES

DIVISION I

FREEZE ORDERS

249. The Authority may, for the purposes of or in the course of an investigation, request the Financial Markets Administrative Tribunal to

(1) order the person who is or is about to be under investigation not to dispose of the funds, securities or other assets in his possession;

(2) order the person who is or is about to be under investigation to refrain from withdrawing funds, securities or other assets from any other person having them on deposit, under control or in safekeeping;

(3) order any other person not to dispose of the funds, securities or other assets referred to in paragraph 2.

1982, c. 48, s. 249; 2002, c. 45, s. 639; 2004, c. 37, s. 90; 2009, c. 58, s. 112; 2016, c. 7, s. 179.

250. An order made under section 249 is effective from the time the person concerned is notified and, unless otherwise provided, remains binding for a 12-month period; it may be revoked or otherwise amended during that period.

The person concerned shall be notified not less than 15 days before any hearing during which the Financial Markets Administrative Tribunal is to consider an extension. The Financial Markets Administrative Tribunal may grant the extension if the person concerned does not indicate his intention to be heard or if he fails to establish that the reasons for the initial order have ceased to exist.

1982, c. 48, s. 250; 1990, c. 77, s. 39; 2002, c. 45, s. 696; 2008, c. 24, s. 213; 2009, c. 58, s. 113; 2016, c. 7, s. 179; 2018, c. 23, s. 702.

251. If the person named in an order under paragraph 3 of section 249 has leased a safety deposit box to the person concerned or put it at his disposal, he must immediately notify the Authority.

At the request of the Authority, the person shall break open the safety deposit box in the presence of an agent of the Authority, draw up an inventory of the contents in triplicate, and give one copy to the Authority and one copy to the person concerned.

1982, c. 48, s. 251; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

252. No order made under section 249 applies to funds or securities in a clearing-house or with a transfer agent, unless it so states.

1982, c. 48, s. 252.

253. Where an order made under paragraph 3 of section 249 concerns a bank or a financial institution, it applies only to the branches or agencies mentioned therein.

1982, c. 48, s. 253; 2002, c. 45, s. 640; 2011, c. 26, s. 79.

254. An order made under section 249 applies also to funds, securities and other assets received after the effective date of the order.

1982, c. 48, s. 254.

255. Every person directly affected by an order made under section 249, if in doubt as to the application of the order to particular funds, securities or other assets, may apply to the Financial Markets Administrative Tribunal for clarification; the person may also apply for an amendment to or the revocation of the order.

A written notice stating the reasons for the application for amendment or revocation must be filed with the Tribunal. The notice must be served on the Authority not less than 15 days before the hearing set to hear the application.

1982, c. 48, s. 255; 2002, c. 45, s. 696; 2009, c. 58, s. 114; 2016, c. 7, s. 179; 2018, c. 23, s. 703.

256. An order issued under section 239 or 249 is admissible for publication in the same register as that in which rights in the funds, securities or other assets covered by the order are required to be published or admissible for publication.

Likewise, the order may be published in a register kept outside Québec if such orders are admissible for publication under the Act governing the register.

1982, c. 48, s. 256; 1994, c. 13, s. 15; 2003, c. 8, s. 6; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 3, s. 35; 2011, c. 26, s. 80.

DIVISION II

Repealed, 2008, c. 7, s. 158.

2008, c. 7, s. 158.

257. *(Repealed)*.

1982, c. 48, s. 257; 1990, c. 77, s. 40; 1999, c. 40, s. 327; 2002, c. 45, s. 696; 2006, c. 50, s. 83, s. 111; 2008, c. 7, s. 158.

258. *(Repealed)*.

1982, c. 48, s. 258; 1990, c. 77, s. 41; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 158.

258.1. *(Repealed)*.

1990, c. 77, s. 42; 2008, c. 7, s. 158.

259. *(Repealed)*.

1982, c. 48, s. 259; 1990, c. 77, s. 43; 2008, c. 7, s. 158.

259.1. *(Repealed)*.

1990, c. 77, s. 44; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 158.

259.2. *(Repealed)*.

1990, c. 77, s. 44; 2008, c. 7, s. 158.

260. *(Repealed)*.

1982, c. 48, s. 260; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 158.

261. *(Repealed)*.

1982, c. 48, s. 261; 1990, c. 77, s. 45; 2002, c. 45, s. 696; 2008, c. 7, s. 158.

261.1. *(Repealed)*.

1990, c. 77, s. 45; 2008, c. 7, s. 158.

262. *(Repealed)*.

1982, c. 48, s. 262; 1990, c. 77, s. 46; 1995, c. 33, s. 29; 2008, c. 7, s. 158.

DIVISION II.1

PUBLIC INTEREST MEASURES AND REMEDIAL POWERS

2008, c. 7, s. 159.

262.1. Following a failure to comply with a requirement under securities legislation, the Authority may request the Financial Markets Administrative Tribunal to issue one or more of the following orders against any person in order to remedy the situation or to deprive a person of the profit realized as a result of the non-compliance:

(1) an order requiring the person to comply with

(a) any provision of this Act or the regulations or any other Act or regulation governing securities;

(b) any decision of the Authority under this Act or the regulations;

(c) any regulation, rule or policy of a self-regulating organization or securities exchange, or any decision or order rendered by the Tribunal on the basis of such a regulation, rule or policy;

(2) an order requiring the person to submit to a review by the Authority of the person's practices and procedures and to institute such changes as may be directed by the Authority;

(3) an order rescinding any transaction entered into by the person relating to trading in securities, and directing the person to repay to a security holder any part of the money paid by the security holder for securities;

(4) an order requiring the person to issue, purchase, exchange or dispose of securities;

(5) an order prohibiting the voting or exercise of any other right attaching to securities by the person;

(6) an order requiring the person to produce financial statements in the form required by securities legislation, or an accounting in such other form as may be determined by the Tribunal;

(7) an order directing the person to hold a shareholders' meeting;

(8) an order directing rectification of the registers or other records of the person;

(9) an order requiring the person to disgorge to the Authority amounts obtained as a result of the non-compliance.

2008, c. 7, s. 159; 2009, c. 58, s. 115; 2016, c. 7, s. 179.

262.2. If the Tribunal issues an order under paragraph 9 of section 262.1, the Tribunal must, if the proof justifying the order shows that persons sustained a loss in the course of the non-compliance referred to in that paragraph 9, order the Authority to submit to the Tribunal the terms under which the amounts disgorged to the

Authority will be administered and may be distributed to the persons who have sustained a loss, unless it is shown to the Tribunal that the amounts so disgorged are less than those to be incurred for their distribution.

The terms must provide the following at a minimum:

(1) the rules according to which the amounts will be deposited with a deposit institution authorized under the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2) or a bank or otherwise invested until the distribution ends;

(2) the conditions to meet to be entitled to participate in the distribution of the amounts disgorged, including the time limit after which a person may not participate;

(3) the means that must be taken to notify the persons concerned of the possibility of participating in the distribution of the amounts; and

(4) the date on which the distribution is to end should the amounts disgorged not be distributed in their entirety.

2018, c. 23, s. 704.

262.3. The Authority must publish the terms that it proposes in its bulletin at least 30 days before submitting them to the Tribunal.

Any interested person may contest the terms before the Tribunal, except the person responsible for the non-compliance against whom the order was issued under paragraph 9 of section 262.1.

The Tribunal shall approve the terms submitted by the Authority with or without amendments; it may also order the Authority to submit new terms.

2018, c. 23, s. 704.

262.4. The Authority shall administer and distribute the amounts in accordance with the terms approved by the Tribunal.

The rules for the simple administration of the property of others apply to the Authority with respect to the amounts disgorged to it while the terms of their administration and distribution have not been approved by the Tribunal.

The Authority may amend the terms by following the procedure provided for in section 262.3.

2018, c. 23, s. 704.

262.5. If the Tribunal issues an order under paragraph 9 of section 262.1 directing that amounts be disgorged to the Authority without ordering the Authority to submit terms of administration and distribution, the Authority must pay the amounts to the Minister of Finance.

The same applies to the balance of the amounts disgorged to the Authority remaining, if any, on the date on which a distribution ends.

2018, c. 23, s. 704.

CHAPTER III

OTHER POWERS OF THE AUTHORITY AND THE FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

2002, c. 45, s. 642; 2004, c. 37, s. 91; 2004, c. 37, s. 22; 2009, c. 58, s. 116; 2016, c. 7, s. 179.

263. The Authority may, on such conditions as it may determine, exempt a person or a group of persons from any or all of the requirements under Titles II to VI or the regulations where it considers the exemption not to be detrimental to the protection of investors.

The decision is without appeal.

1982, c. 48, s. 263; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

264. The Financial Markets Administrative Tribunal may deny the benefit of an exemption contained in this Act or the regulations where it considers it necessary to do so to protect investors.

In particular, the Financial Markets Administrative Tribunal may deny the benefit of an exemption to any person who has

(1) made improper use of such an exemption;

(2) contravened this Act or the regulations;

(3) contravened any other provision regarding securities;

(4) contravened the rules of a recognized stock exchange.

1982, c. 48, s. 264; 2002, c. 45, s. 696; 2009, c. 58, s. 117; 2016, c. 7, s. 179.

265. The Financial Markets Administrative Tribunal may order a person to cease any activity in respect of a transaction in securities.

The Financial Markets Administrative Tribunal may, furthermore, order any person or category of persons to cease any activity in respect of a transaction in a particular security.

In the case of failure by a reporting issuer to provide periodic disclosure about its business and internal affairs in accordance with the conditions determined by regulation or failure by an issuer or another person to provide any other disclosure prescribed by regulation in accordance with the conditions determined by regulation, the power to order a person to cease any activity in respect of a transaction in securities shall be exercised by the Authority.

Despite the first paragraph of section 318, the Authority may exercise the power conferred on it by the third paragraph without allowing the person to present observations or submit documents to complete the person's record.

1982, c. 48, s. 265; 2002, c. 45, s. 696; O.C. 46-2004, s. 1; 2004, c. 37, s. 90; 2006, c. 50, s. 84; 2009, c. 58, s. 117; 2016, c. 7, ss. 160 and 179.

266. The Financial Markets Administrative Tribunal may also order a person to cease acting as an adviser or as an investment fund manager.

1982, c. 48, s. 266; 2002, c. 45, s. 696; 2009, c. 25, s. 39; 2009, c. 58, s. 118; 2016, c. 7, s. 179.

267. An order made under section 265 or 266 has effect from the time the person concerned is notified or becomes aware of it.

In the case of an order concerning a category of persons, publication of the order in the Bulletin or its distribution by any other medium ordinarily available to the persons concerned in the exercise of their profession is valid as notification under the first paragraph.

1982, c. 48, s. 267.

268. The Authority may apply to a judge of the Superior Court for an injunction in respect of any matter relating to this Act or the regulations.

The application for an injunction is an action.

The procedure prescribed in the Code of Civil Procedure (chapter C-25.01) applies, except that the Authority is not required to give security.

1982, c. 48, s. 268; 2002, c. 45, s. 696; 2004, c. 37, s. 90; I.N. 2016-01-01 (NCCP).

269. The Authority may, of its own initiative and without notice, intervene in any civil action relating to any provision of this Act or the regulations.

1982, c. 48, s. 269; 1987, c. 40, s. 27; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

269.1. The Authority has an interest to bring any action provided for by section 233.1.

1984, c. 41, s. 62; 1987, c. 40, s. 28; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

269.2. The Authority may, where it considers it to be in the public interest, apply to the court for a declaration to the effect that a person has failed to discharge an obligation under this Act or a regulation, and that the person be condemned to pay damages up to the amount of the damage caused to other persons.

The court may also impose punitive damages, or order the person to repay the profits derived as a result of the failure.

An application by the Authority under this section shall be filed in the district in which the residence or principal establishment of the person concerned is situated or, if the person has neither residence nor establishment in Québec, in the district of Montréal.

2001, c. 38, s. 72; 2002, c. 45, s. 696; 2004, c. 37, s. 90; I.N. 2016-01-01 (NCCP).

270. The Financial Markets Administrative Tribunal may prohibit or place restrictions on representations in view of a transaction in a particular security.

1982, c. 48, s. 270; 2002, c. 45, s. 696; 2009, c. 58, s. 119; 2016, c. 7, s. 179.

271. The Authority may order a registrant to submit any advertising document to it before using it.

The Authority may prohibit the use of the advertising document or require it to be changed.

1982, c. 48, s. 271; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

272. The Authority may refuse the filing of documents part or all of which were prepared or signed by a person who during the five years preceding the date of the filing has been convicted of a disciplinary, penal or indictable offence in a matter pertaining to securities, unless he has obtained a pardon therefor.

1982, c. 48, s. 272; 1990, c. 4, s. 900; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

272.1. The Authority may, of its own initiative or upon application by an interested person, take any steps to ensure compliance with an undertaking given to the Authority and with the provisions of this Act and the regulations.

It may, in particular, require changes to any document established under this Act or the regulations, prohibit circulation of a document or order circulation of any changes to an existing document or information.

1990, c. 77, s. 47; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 85; 2008, c. 24, s. 214.

272.2. Of its own initiative or on application by an interested person, the Authority may designate a person to be a non-redeemable investment fund, a mutual fund, an insider or a reporting issuer for the purposes of this Act or decide that a person does not have such a status, if it considers it to be in the public interest to do so.

2006, c. 50, s. 86.

273. The Financial Markets Administrative Tribunal may reprimand a registrant or a self-regulatory organization.

The Financial Markets Administrative Tribunal must give the person concerned prior opportunity to be heard.

1982, c. 48, s. 273; 2002, c. 45, s. 696; 2009, c. 58, s. 119; 2016, c. 7, s. 179.

273.1. Where the Financial Markets Administrative Tribunal becomes aware of facts establishing that a person has, by an act or omission, contravened, or aided in the contravention of, a provision under this Act or a regulation made under its authority, the Tribunal may impose an administrative penalty on the offender and have it collected by the Authority.

The amount of the penalty may in no case exceed $2,000,000 for each contravention.

2001, c. 38, s. 73; 2002, c. 45, s. 641; O.C. 1366-2003, s. 15; 2004, c. 37, s. 23; 2006, c. 50, s. 87, s. 111; 2008, c. 7, s. 160; 2009, c. 58, s. 120; 2011, c. 26, s. 81; 2016, c. 7, s. 179.

273.2. The Financial Markets Administrative Tribunal may impose on a person referred to in section 273.1, in addition to a penalty provided for therein, the obligation to repay to the Authority the cost of any inspection or investigation that provided proof of the facts establishing the failure to comply with the provision concerned, according to the rate established by regulation.

2001, c. 38, s. 73; 2002, c. 45, s. 696; O.C. 46-2004, s. 2; 2004, c. 37, s. 90; 2009, c. 58, s. 121; 2016, c. 7, s. 179.

273.3. The Financial Markets Administrative Tribunal may prohibit a person from acting as a director or officer of an issuer, dealer, adviser or investment fund manager on the grounds set out in article 329 of the Civil Code, or where a penalty has been imposed on the person under this Act, the Act respecting the distribution of financial products and services (chapter D-9.2) or the Derivatives Act (chapter I-14.01).

The prohibition imposed by the Financial Markets Administrative Tribunal may not exceed five years.

The Financial Markets Administrative Tribunal may, at the request of the person concerned, lift the prohibition on such conditions as it considers appropriate.

2001, c. 38, s. 73; 2002, c. 45, s. 696; 2006, c. 50, s. 111; 2009, c. 25, s. 40; 2009, c. 58, s. 122; 2011, c. 26, s. 82; 2016, c. 7, s. 179.

274. The Authority may make policy statements relating to the carrying out of this Act.

The policy statements set out how the Authority intends to exercise its discretionary powers for the purposes of the administration of this Act.

1982, c. 48, s. 274; 1989, c. 48, s. 255; 2001, c. 38, s. 74; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 24, s. 215.

274.1. The Authority may impose an monetary administrative penalty penalty for a contravention of or failure to comply with the provisions of, or a regulation under, Title II or III, except section 73 as regards

timely disclosure of a material change by a reporting issuer, in the cases, on the conditions and in the amounts prescribed by regulation.

2004, c. 37, s. 24; 2006, c. 50, s. 88; 2009, c. 58, s. 123; 2018, c. 23, s. 809.

275. *(Repealed).*

1982, c. 48, s. 275; 1997, c. 36, s. 1.

TITLE X

ADMINISTRATION OF THE ACT

CHAPTER I

GENERAL PROVISIONS

2002, c. 45, s. 643.

276. The Autorité des marchés financiers established under section 1 of the Act respecting the regulation of the financial sector (chapter E-6.1) is responsible for the administration of this Act and shall discharge the functions and exercise the powers specified thereunder.

In addition, the Authority's mission is

(1) to promote efficiency in the securities market;

(2) to protect investors against unfair, improper or fraudulent practices;

(3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaging in the distribution of securities and in respect of the securities issued by these persons;

(4) to define a framework for the activities of the professionals of the securities market and organizations responsible for the operation of a stock market.

1982, c. 48, s. 276; 2002, c. 45, s. 644; 2004, c. 37, s. 90; 2018, c. 23, s. 811.

276.1. *(Repealed).*

1997, c. 36, s. 2; 1999, c. 40, s. 327; 2002, c. 45, s. 645.

276.2. The Authority may provide consulting and implementation services related to the regulation of the securities market to bodies outside Québec involved in such regulation.

1997, c. 36, s. 2; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

276.3. The Authority shall advise the Minister on any matter he submits to it concerning securities.

1997, c. 36, s. 2; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

276.4. *(Repealed).*

1997, c. 36, s. 2; 2002, c. 45, s. 646; 2004, c. 37, s. 90; 2008, c. 7, s. 162.

276.5. *(Repealed).*

1997, c. 36, s. 2; 2002, c. 45, s. 647.

277. *(Repealed).*

1982, c. 48, s. 277; 2001, c. 38, s. 75; 2002, c. 45, s. 647.

278. *(Repealed).*

1982, c. 48, s. 278; 2002, c. 45, s. 647.

278.1. *(Repealed).*

1997, c. 36, s. 3; 2002, c. 45, s. 647.

279. *(Repealed).*

1982, c. 48, s. 279; 1999, c. 40, s. 327; 2002, c. 45, s. 647.

280. *(Repealed).*

1982, c. 48, s. 280; 2002, c. 45, s. 647.

281. *(Repealed).*

1982, c. 48, s. 281; 2001, c. 38, s. 76.

281.1. *(Repealed).*

2001, c. 38, s. 77; 2002, c. 45, s. 647.

282. *(Repealed).*

1982, c. 48, s. 282; 2002, c. 45, s. 647.

283. No proceeding may be brought against the Authority, a member of its personnel, its appointed agent or any person exercising a delegated power, for official acts done in good faith in the exercise of their functions.

1982, c. 48, s. 283; 1984, c. 41, s. 63; 2001, c. 38, s. 78; 2002, c. 45, s. 648; 2004, c. 37, s. 91.

283.1. The Authority may delegate its powers to review its decisions, order an investigation under section 239, institute court proceedings under this Act in the name of the Authority or make a decision under Title VI only to a superintendent or to another officer reporting directly to the president and director general of the Authority.

The first paragraph does not prevent the Authority from delegating its powers in accordance with Chapter II of this Title.

2006, c. 50, s. 90.

284. No application for judicial review under the Code of Civil Procedure (chapter C-25.01) may be exercised nor any injunction granted against the Authority, the members of its personnel or its agents acting in their official capacity.

1982, c. 48, s. 284; 2002, c. 45, s. 649; 2004, c. 37, s. 90; I.N. 2016-01-01 (NCCP).

285. *(Inoperative).*

1982, c. 48, s. 285; 2002, c. 45, s. 696; 2004, c. 37, s. 90; I.N. 2016-01-01 (NCCP).

286. A judge of the Court of Appeal, upon an application, may annul summarily any decision rendered contrary to section 284 or 285.

1982, c. 48, s. 286; I.N. 2016-01-01 (NCCP).

287. *(Repealed).*

1982, c. 48, s. 287; 1996, c. 2, s. 990; 2002, c. 45, s. 650.

288. *(Repealed).*

1982, c. 48, s. 288; 2002, c. 45, s. 650.

289. *(Repealed).*

1982, c. 48, s. 289; 2002, c. 45, s. 650.

290. *(Repealed).*

1982, c. 48, s. 290; 2002, c. 45, s. 650.

291. *(Repealed).*

1982, c. 48, s. 291; 2002, c. 45, s. 650.

292. The Authority may appoint any expert whose assistance it deems expedient in the pursuit of the mission conferred on it by this Act.

1982, c. 48, s. 292; 2002, c. 45, s. 651; 2004, c. 37, s. 90.

293. Every document required under this Act or a regulation made hereunder must be forwarded to or deposited at the office of the Authority, at the place determined by the Authority; notice of the address of the office shall be published in the *Gazette officielle du Québec* and in the Authority's bulletin.

1982, c. 48, s. 293; 2002, c. 45, s. 652; 2004, c. 37, s. 90.

294. Documents intended for the Authority are served on the secretary.

1982, c. 48, s. 294; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

294.1. The Authority may allow a document or attestation required by the legislation of another legislative authority to be substituted for a document or attestation prescribed by this Act or a regulation made under this Act.

The Authority may also accept the substitution of other documents for such documents and attestations, provided that they contain equivalent information.

2001, c. 38, s. 79; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 92.

295. *(Repealed).*

1982, c. 48, s. 295; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2018, c. 23, s. 705.

295.1. *(Repealed).*

1990, c. 77, s. 48; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 93; 2008, c. 7, s. 162.

295.2. *(Repealed).*

2002, c. 45, s. 653; 2004, c. 37, s. 90; 2008, c. 7, s. 162.

296. Any person may have access to all documents required to be filed under this Act or the regulations, except documents filed by a registrant otherwise than pursuant to the requirements prescribed in Title III.

Where the Authority deems that the communication of a document could result in serious prejudice, it may declare the document inaccessible.

This section applies notwithstanding section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

1982, c. 48, s. 296; 1987, c. 68, s. 120; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

297. Investigation reports, inspection reports and supporting evidence may be inspected only with the authorization of the Authority, notwithstanding section 9 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1).

1982, c. 48, s. 297; 1987, c. 68, s. 121; 1990, c. 77, s. 49; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

297.1. The Authority may communicate any information, including personal information, without the consent of the person concerned, to a person or organization responsible, by law, for the prevention, detection or repression of crime or statutory offences outside Québec, if the information relates to an offence under this Act or under securities legislation applicable outside Québec.

The Authority may also communicate any information, including personal information, about an issuer, a person to which section 151.1.1 applies, an issuer's auditor, a person required to be registered under Title V, an officer, a director, an insider, a promoter or a person having, even indirectly, significant influence on an issuer, a registrant, a self-regulatory organization, a person referred to in section 169, 171 or 186.1 or a company involved in a take-over bid or issuer bid or a merger or reorganization, without the consent of the person concerned, to a person, even outside Québec, acting in the securities regulation or monitoring field or to a central bank, including for the purposes of a common database containing personal information.

Likewise, the Authority may communicate any information, including personal information, without the consent of the person concerned, to a police force if there is reasonable cause to believe that the person has committed or is about to commit a criminal or penal offence against an Act applicable in or outside Québec with respect to the Authority or one of its employees or relating to a securities provision and the information is required for the related investigation.

The Authority may also communicate any information, including personal information, to the Minister of Revenue, without the consent of the person concerned, if there is reasonable cause to believe that the person has committed or is about to commit an offence under this Act that may have an impact on the administration or enforcement of a fiscal law.

2001, c. 38, s. 80; 2002, c. 45, s. 696; 2004, c. 37, s. 27, s. 90; 2006, c. 50, s. 94; 2013, c. 18, s. 111.

297.2. In a case not provided for in section 297.1, with the authorization of a judge of the Court of Québec, the Authority may communicate any information, including personal information, without the consent of the person concerned, to a member of a police force.

The application for authorization must be made in writing and contain an affidavit that there is reasonable cause to believe the information may serve to prevent, detect or repress the commission of an indictable offence against an Act applicable in or outside Québec.

The application and the record pertaining to the hearing are confidential. The clerk of the Court of Québec shall take the necessary measures to preserve their confidentiality.

The judge to whom the application for authorization is made shall hear the application *ex parte* and *in camera*. The judge may make any order to preserve the confidentiality of the application, the record and the personal information. The record shall be sealed and kept in a place inaccessible to the public.

2004, c. 37, s. 28; I.N. 2016-01-01 (NCCP).

297.3. The Authority may communicate any information, including personal information, without the consent of the person concerned, to a person pursuant to an agreement or treaty entered into under an Act.

2004, c. 37, s. 28; 2006, c. 50, s. 95.

297.4. The Authority may, in accordance with section 68 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), enter into an agreement with a department or a body for the communication of personal information to facilitate the administration or enforcement of securities and fiscal legislation and penal or criminal legislation.

2004, c. 37, s. 28.

297.5. *(Repealed).*

2004, c. 37, s. 28; 2009, c. 25, s. 41.

297.6. Sections 297.1 to 297.5 apply despite sections 23 and 24 and subparagraphs 5 and 9 of the first paragraph of section 28 of the Act respecting Access to documents held by public bodies and the Protection of personal information (chapter A-2.1), and sections 297.1, 297.2 and 297.5 apply despite section 59 of that Act.

2004, c. 37, s. 28.

298. The Authority must publish a bulletin periodically to inform financial circles of its activities. The Bulletin must contain, in particular, applications received, decisions rendered, policy statements and information filed.

1982, c. 48, s. 298; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

299. *(Repealed).*

1982, c. 48, s. 299; 1983, c. 55, s. 161; 1997, c. 36, s. 4; 2000, c. 8, s. 223; 2002, c. 45, s. 654.

300. *(Repealed).*

1982, c. 48, s. 300; 2001, c. 38, s. 81.

301. *(Repealed).*

1982, c. 48, s. 301; 1983, c. 55, s. 161; 2001, c. 38, s. 82; 2002, c. 45, s. 654.

301.1. *(Repealed).*

1997, c. 36, s. 5; 2002, c. 45, s. 654.

302. The Authority must, no later than 31 July each year, submit to the Minister a report of its activities related to the administration of this Act for the preceding year.

The Minister shall table the Authority's activities report in the National Assembly within 30 days of its receipt or, if the Assembly is not sitting, within 30 days of resumption.

1982, c. 48, s. 302; 1982, c. 62, s. 143; 2002, c. 45, s. 655; 2004, c. 37, s. 90.

302.1. At the end of every fiscal year, the Authority shall remit to the Office québécois de la langue française a report of the use it has made of its power to grant exemptions under section 263 with regard to the obligation enacted in section 40.1.

The Office shall determine the mode of drawing up the report.

1983, c. 56, s. 45; 2002, c. 28, s. 37; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

303. *(Repealed).*

1982, c. 48, s. 303; 2002, c. 45, s. 656; 2004, c. 37, s. 90; 2008, c. 7, s. 163.

304. *(Repealed).*

1982, c. 48, s. 304; 2002, c. 45, s. 657.

305. *(Repealed).*

1982, c. 48, s. 305; 2002, c. 45, s. 657.

CHAPTER II

INTERJURISDICTIONAL COOPERATION

2006, c. 50, s. 96.

305.1. For the purposes of this chapter, section 5.4 and paragraphs 33.1 to 33.9 of section 331.1, unless the context indicates otherwise,

"extra-provincial authority" means any power or function of an extra-provincial securities commission under the extra-provincial securities laws under which that commission operates;

"extra-provincial securities commission" means a person empowered by the laws of another province or a territory of Canada to regulate the securities markets in or administer and enforce the securities laws of that province or territory;

"extra-provincial securities laws" means the laws administered by an extra-provincial securities commission that deal with regulating securities markets and are equivalent to Québec securities laws;

"Québec authority" means any power or function of the Authority or the Financial Markets Administrative Tribunal under Québec securities laws;

"Québec securities laws" means

(1) this Act;

(2) any other Québec laws governing securities markets, including the Act respecting the regulation of the financial sector (chapter E-6.1) and the Act respecting the distribution of financial products and services (chapter D-9.2);

(2.1) the Derivatives Act (chapter I-14.01);

(3) regulations under any of the Acts referred to in paragraphs 1 to 2.1;

(4) the decisions and orders of the Authority or the Financial Markets Administrative Tribunal; and

(5) the extra-provincial securities laws provisions referred to in sections 308 and 308.0.1.

Unless otherwise provided, a reference to an extra-provincial securities commission includes any person to which that securities commission delegates an authority and any other person that, in respect of that securities commission, exercises powers or performs functions substantially similar to a Québec authority.

2006, c. 50, s. 97; 2008, c. 24, s. 216; 2009, c. 58, s. 124; 2016, c. 7, s. 179; 2018, c. 23, s. 811.

DIVISION I

DELEGATION OF AUTHORITY

2006, c. 50, s. 97.

306. The Government or, with the Government's authorization, the Authority may, according to law, enter into an agreement with another government or an extra-provincial securities commission for the delegation of a Québec authority and for the exercise of an extra-provincial authority in accordance with this chapter.

1982, c. 48, s. 306; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 98.

307. The Authority may, by regulation, delegate a Québec authority to an extra-provincial securities commission and accept to exercise an extra-provincial authority.

1982, c. 48, s. 307; 1986, c. 95, s. 338; 2001, c. 38, s. 83; 2002, c. 45, s. 658; O.C. 495-2004, s. 6; 2006, c. 50, s. 99.

307.1. The Authority may also, by order or decision, to the extent and on the conditions determined by regulation, delegate a Québec authority to an extra-provincial securities commission and accept to exercise an extra-provincial authority.

2006, c. 50, s. 99.

307.2. The following powers and functions may not, however, be delegated under section 306, 307 or 307.1:

(1) the powers and functions of the Authority under Title X of this Act, except those provided for in sections 310, 320.2, 321, 322, 331 and 331.1;

(2) the powers and functions of the Authority under the Act respecting the regulation of the financial sector (chapter E-6.1), except those provided for in the third paragraph of section 24 and Title III; however, the power to make regulations under the third paragraph of section 61 in that Title may not be delegated; and

(3) the powers and functions provided for in Titles V to VI of the Act respecting the distribution of financial products and services (chapter D-9.2);

(4) the powers and functions provided for under sections 110 to 112, 174 and 175 of the Derivatives Act (chapter I-14.01).

2006, c. 50, s. 99; 2008, c. 24, s. 217; 2009, c. 25, s. 42; 2013, c. 18, s. 112; 2018, c. 23, s. 811.

307.3. The Authority may delegate or subdelegate to a member of its personnel or to a self-regulatory organization an extra-provincial authority that has been delegated to the Authority by an extra-provincial securities commission under section 306, 307 or 307.1, in the manner and to the extent that the Authority may delegate or subdelegate the equivalent Québec authority under Québec securities laws, subject to any restrictions or conditions imposed by the extra-provincial securities commission.

An extra-provincial securities commission to which a Québec authority has been delegated under section 306, 307 or 307.1 may delegate or subdelegate that Québec authority to a member of its personnel or to a self-regulatory organization, in the manner and to the extent that it may delegate or subdelegate the equivalent

extra-provincial authority under the extra-provincial securities laws under which it operates, subject to any restrictions or conditions imposed by the Authority.

2006, c. 50, s. 99.

307.4. The Authority or the Financial Markets Administrative Tribunal may call before it any matter that is before an extra-provincial securities commission exercising or intending to exercise a Québec authority delegated to it under section 306, 307 or 307.1, and may exercise that Québec authority in that commission's stead.

2006, c. 50, s. 99; 2009, c. 58, s. 125; 2016, c. 7, s. 179.

307.5. A decision made under Québec securities laws by an extra-provincial securities commission in accordance with section 306, 307, 307.1 or 307.3 of this Act is subject to section 322 of this Act and to section 85 of the Act respecting the regulation of the financial sector (chapter E-6.1), with the necessary modifications, as if the decision were made by the Authority or a recognized self-regulatory organization.

2006, c. 50, s. 99; 2018, c. 23, s. 811.

307.6. Chapter III of Title IV of the Act respecting the regulation of the financial sector (chapter E-6.1) applies to a decision made by an extra-provincial securities commission in the exercise of a Québec authority delegated under section 306, 307 or 307.1 as if the decision were made by the Financial Markets Administrative Tribunal.

The extra-provincial securities commission that made the decision under appeal is a respondent to an appeal under this section.

2006, c. 50, s. 99; 2009, c. 58, s. 126; 2013, c. 18, s. 113; 2016, c. 7, s. 179; 2018, c. 23, s. 811.

307.7. A decision made by a court in the jurisdiction of an extra-provincial securities commission on an appeal from a decision made by that securities commission in the exercise of a Québec authority delegated under section 306, 307 or 307.1 may, if authenticated by that court, be recognized by the Superior Court on the application of an interested person. The decision becomes enforceable on being so recognized.

2006, c. 50, s. 99.

307.8. Chapter III of Title IV of the Act respecting the regulation of the financial sector (chapter E-6.1) applies to a decision made by the Financial Markets Administrative Tribunal in the exercise of an extra-provincial authority under section 306, 307 or 307.1 as if the decision were made under this Act.

This section does not apply to a decision refusing to exempt a person or group of persons from a requirement of extra-provincial securities laws.

The right to appeal a decision under this section applies whether or not a right to appeal the same decision exists in another province or a territory of Canada.

2006, c. 50, s. 99; 2009, c. 58, s. 126; 2013, c. 18, s. 114; 2016, c. 7, s. 179; 2018, c. 23, s. 811.

DIVISION II

INCORPORATION BY REFERENCE, RECOGNITION AND RECIPROCITY OF CERTAIN DECISIONS OR AGREEMENTS

2006, c. 50, s. 99; 2016, c. 7, s. 161.

§ 1. — *Incorporation by reference and recognition*

2016, c. 7, s. 161.

308. The Authority may, by regulation, incorporate by reference any or all provisions of extra-provincial securities laws.

1982, c. 48, s. 308; 1992, c. 35, s. 14; 2001, c. 38, s. 84; 2002, c. 45, s. 659; 2004, c. 37, s. 31; 2006, c. 50, s. 99.

308.0.1. Subject to conditions determined by regulation, the Authority may, by order or decision, incorporate by reference any or all provisions of extra-provincial securities laws to be applied to a person or class of persons whose primary jurisdiction is the extra-provincial jurisdiction in which the provisions were first adopted, or to securities, related financial instruments or transactions involving that person or class of persons.

2006, c. 50, s. 99.

308.0.2. The Authority may, by an order, decision or regulation under section 308 or 308.0.1, incorporate by reference a provision as amended from time to time, whether amended before or after the adoption of the order, decision or regulation, and with the necessary modifications.

2006, c. 50, s. 99.

308.0.3. Subject to conditions determined by regulation, the Authority, the Financial Markets Administrative Tribunal or a recognized self-regulatory organization may make a decision or order under a Québec authority regarding a person, class of persons, security, related financial instrument or transaction on the basis of a decision considered to be the same or substantially similar made by an extra-provincial securities commission on the same matter regarding that person, class of persons, security, related financial instrument or transaction.

Despite any other provision of this Act, the Authority, the Financial Markets Administrative Tribunal or a recognized self-regulatory organization may make a decision referred to in the first paragraph without again giving the interested person an opportunity to be heard, except in the cases determined by regulation.

2006, c. 50, s. 99; 2009, c. 58, s. 127; 2016, c. 7, s. 179.

308.1. *(Repealed).*

2004, c. 37, s. 32; 2006, c. 50, s. 100; 2016, c. 7, s. 169.

308.1.1. The Authority may also, by regulation, allow an extra-provincial authority to be recognized in Québec in the areas specifically listed in the regulations, with respect to the persons or organizations subject to such authority.

A regulation under the first paragraph is applicable only if the equivalent Québec authority is recognized in the jurisdiction of the extra-provincial securities commission with respect to the persons or organizations subject to such authority.

2006, c. 50, s. 101.

308.2. This division allows an agreement or regulation to stipulate, in the areas specifically listed in the agreement or regulation,

(1) that the acts or decisions of an authority having jurisdiction in a province or territory are recognized in the other province or territory;

(2) that the powers exercised or the decisions made in a province or territory are presumed or deemed, as the case may be, to have been exercised or made in the other province or territory; and

(3) that the persons or bodies having fulfilled certain obligations in a province or territory are exempted from fulfilling them in the other province or territory.

2004, c. 37, s. 32; 2006, c. 50, s. 102.

308.2.1. The Authority may, by regulation or to the extent and on the conditions determined by regulation, decision or order, determine that

(1) a receipt is deemed to have been issued by the Authority in accordance with Title II or a regulation made under that Title for a prospectus or an amendment to a prospectus, including when a receipt has been issued for the same prospectus or the same amendment to a prospectus by an extra-provincial securities commission or under extra-provincial securities laws;

(1.1) the status of the issuer or a category of issuer as a reporting issuer is deemed to be revoked in accordance with Title III or a regulation made for the purposes of that Title, including where that status is revoked by an extra-provincial securities commission or under extra-provincial securities laws;

(2) a person or class of persons is deemed to be authorized to carry on an activity under Title V, or a regulation under that Title, including when the person or class of persons is authorized to carry on the activity by an extra-provincial securities commission or under extra-provincial securities laws;

(3) a person or class of persons is deemed to be recognized or designated in accordance with Title VI or a regulation made under that Title, including when the person or class of persons is recognized or designated by an extra-provincial securities commission or under extra-provincial securities laws;

(4) a person or class of persons is deemed to be exempted from all or part of the requirements of Québec securities laws when an exemption has been granted for the same purpose by an extra-provincial securities commission or under extra-provincial securities laws; and

(5) an activity in respect of transactions in securities or in a particular security is deemed to be prohibited under section 265, including when an extra-provincial securities commission has imposed the same prohibition under a power similar to the Authority's power under section 265.

2006, c. 50, s. 103; 2008, c. 24, s. 218; 2009, c. 25, s. 43; 2011, c. 18, s. 82; 2016, c. 7, s. 162.

§ 2. — *Reciprocity of certain decisions or agreements*

2016, c. 7, s. 163.

308.2.1.1. In this subdivision, unless the context indicates otherwise, "securities authority in Canada" means a securities commission or person empowered by law to regulate the securities markets in or to administer and enforce the securities laws of any province or territory of Canada, or a person prescribed by regulation, except a self-regulatory organization, exchange, clearing-house, quotation and trade reporting system, credit rating organization or benchmark administrator or the body referred to in section 71.1.

2016, c. 7, s. 163; 2018, c. 23, s. 706.

308.2.1.2. If it meets the conditions set out in section 308.2.1.3, a decision rendered by a securities authority in Canada and imposing sanctions, conditions, restrictions or obligations on a person entails, by operation of law, an absolute presumption that a decision having the same effect in Québec was rendered in respect of the person by the Authority or the Tribunal, according to their respective jurisdictions.

If it meets the same conditions, an agreement entered into between a securities authority in Canada and a person and imposing sanctions, conditions, restrictions or obligations on that person entails, by operation of law, an absolute presumption that an agreement having the same effect in Québec was entered into in Québec between the person and the Authority or the Tribunal, according to their respective jurisdictions.

2016, c. 7, s. 163.

308.2.1.3. Section 308.2.1.2 applies to a decision or agreement that

(1) is the result of findings or admissions of contravention of laws governing securities markets or of conduct contrary to the public interest; and

(2) is not based solely on a decision deemed to have been rendered by another securities authority in Canada or an agreement deemed to have been made with such an authority.

2016, c. 7, s. 163.

308.2.1.4. If the decision or agreement that entailed an absolute presumption under section 308.2.1.2 is amended or ceases to have effect, the decision deemed to have been rendered or the agreement deemed to have been made under that section is deemed, as the case may be, to have been amended in the same way or to cease to have effect.

2016, c. 7, s. 163.

308.2.1.5. On an application by a person who is subject to sanctions, conditions, restrictions or obligations imposed by the decision or agreement that entailed an absolute presumption under section 308.2.1.2, the Authority or the Tribunal, according to their respective jurisdictions, may clarify the application of that section to that person and thus bind the person as well as the Authority or the Tribunal, as the case may be.

The Authority may also present the application provided for in the first paragraph to the Tribunal.

2016, c. 7, s. 163.

308.2.1.6. No one may be required to pay any amount because of the application of this subdivision.

2016, c. 7, s. 163.

DIVISION III

GENERAL PROVISIONS

2006, c. 50, s. 103.

308.2.2. For the purposes of sections 307, 307.1, 307.3, 308, 308.0.1, 308.0.2 and 308.1.1, the Government shall, by order, exercise, with respect to any Québec authority of the Financial Markets Administrative Tribunal, the powers and functions specified in the order, to the extent and in accordance with the conditions it determines.

2006, c. 50, s. 103; 2009, c. 58, s. 128; 2016, c. 7, s. 179.

Not in force

308.3. The Government may, by regulation, make any provision for the carrying out of this chapter, including provisions that differ from those set out in Québec securities laws.

2004, c. 37, s. 32; 2006, c. 50, s. 104.

Not in force

308.4. An agreement made under this chapter shall be published in the *Gazette officielle du Québec*.

2004, c. 37, s. 32.

CHAPTER III

CONTROL EXERCISED BY THE AUTHORITY

2002, c. 45, s. 660; 2004, c. 37, s. 90.

309. The Authority may call before it any matter that is before a person exercising a delegated power and decide it in his stead.

1982, c. 48, s. 309; 2002, c. 45, s. 661; 2004, c. 37, s. 90.

310. Subject to section 322, the Authority may, of its own initiative, review any decision made by a person exercising a delegated power, by a person recognized under sections 169 to 171 or by a self-regulatory organization.

The Authority must give the persons referred to in the first paragraph or the self-regulatory organization an opportunity to present observations or produce documents to complete the person's record within the time prescribed in section 318.

1982, c. 48, s. 310; 2002, c. 45, s. 662; 2004, c. 37, s. 33; 2006, c. 50, s. 105; 2008, c. 24, s. 219.

311. Any person examining a matter pursuant to a delegation of power may refer it to the Authority.

1982, c. 48, s. 311; 2002, c. 45, s. 663; 2004, c. 37, s. 90.

CHAPTER IV

RULES APPLICABLE TO DECISIONS OF THE AUTHORITY

2002, c. 45, s. 664; 2004, c. 37, s. 90.

312. The Authority may, within the scope of its powers, participate in the making of any decision in conjunction with any other authority responsible for the supervision of securities trading.

1982, c. 48, s. 312; 2002, c. 45, s. 665; 2004, c. 37, s. 90.

312.1. *(Repealed).*

2001, c. 38, s. 85; 2002, c. 45, s. 666; 2004, c. 37, s. 90; 2018, c. 23, s. 707.

313. The Authority shall exercise its powers according to the rules referred to in section 35 of the Act respecting the regulation of the financial sector (chapter E-6.1).

The Authority shall determine the supplementary rules of procedure applicable to the conduct of its affairs.

1982, c. 48, s. 313; 2002, c. 45, s. 667; 2004, c. 37, s. 90; 2018, c. 23, s. 811.

314. *(Repealed).*

1982, c. 48, s. 314; 1984, c. 41, s. 64; 1986, c. 95, s. 339; 2002, c. 45, s. 668.

314.1. By way of exception, the Authority may suspend the making of a decision until the applicant undertakes to pay the cost of the research work that the Authority considers necessary in order to make a decision on the application filed with it.

Similarly, the Authority may require the applicant to pay the representation costs incurred by investors or, if it is in the public interest, it may pay such costs itself.

2001, c. 38, s. 86; 2002, c. 45, s. 669; 2004, c. 37, s. 90.

315. *(Repealed).*

1982, c. 48, s. 315; 2002, c. 45, s. 670.

316. The Authority shall exercise the discretion conferred on it in accordance with the public interest.

1982, c. 48, s. 316; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

317. *(Repealed).*

1982, c. 48, s. 317; 2002, c. 45, s. 672.

318. The Authority or a person exercising a delegated power must, before making a decision unfavourably affecting the rights of a person, give that person a 15-day prior notice of the Authority's or person's intention indicating the grounds on which it is based and the right of the person to present observations or produce documents to complete the person's record.

However, the Authority or the person exercising a delegated power may, without prior notice, make a decision valid for a period not exceeding 15 days if the Authority or person is of the opinion that there is urgency or that any period of time granted to the person concerned to present observations may be detrimental.

The decision must state the reasons on which it is based and is effective as of the time the Authority sends the notice to the person concerned. That person may, within six days of receiving the decision, present observations to the Authority or, where applicable, to the person exercising the delegated power.

The Authority or the person exercising the delegated power may revoke such a decision.

1982, c. 48, s. 318; 2002, c. 45, s. 673; 2004, c. 37, s. 34.

318.1. For the purpose of rendering a decision, the Authority or a person exercising a delegated power may, within the scope of a consultation mechanism established by regulation or an agreement under the second paragraph of section 33 of the Act respecting the regulation of the financial sector (chapter E-6.1), consider a factual analysis prepared by the personnel of an organization pursuing similar objects.

2001, c. 38, s. 87; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 7, s. 164; 2018, c. 23, s. 811.

318.2. Despite the first paragraph of section 318, the Authority may make a decision under the third paragraph of section 265, section 271, the second paragraph of section 272.1 or section 272.2 based, rather than on any facts referred to in those provisions, on a fact referred to in any of paragraphs 1 to 3, without allowing the person to present observations or submit documents to complete the file:

(1) the person was convicted, in Canada or outside Canada, of an indictable offence related to a securities transaction or activity or to conduct involving securities or of an offence under a law governing securities markets;

(2) the person contravened, according to a court in or outside Canada, a law governing securities markets;

(3) the person is subject to a decision imposing sanctions, conditions, restrictions or obligations that was rendered by one of the persons referred to below, or made an agreement with one of those persons that imposes sanctions, conditions, restrictions or obligations on the person:

(a) a securities authority in Canada, if the decision or agreement does not meet the conditions set out in paragraph 1 of section 308.2.1.3,

(b) a securities authority outside Canada,

(c) a self-regulatory organization recognized in Canada, or

(d) an exchange in Canada;

(4) *(paragraph repealed);*

(5) *(paragraph repealed).*

However, the Authority may only make a decision under the third paragraph of section 265 in a case of failure to provide disclosure that, had it occurred in Québec, could have been the subject of a decision of the Authority.

For the purposes of the first paragraph, "securities authority outside Canada" means a securities commission, self-regulatory organization, exchange or person or body empowered by law to regulate the securities markets or to administer or enforce securities laws in any jurisdiction outside of Canada.

2008, c. 7, s. 165; 2016, c. 7, s. 164.

319. The Authority or the person exercising delegated powers must give reasons for every decision that adversely affects the rights of a person.

1982, c. 48, s. 319; 2002, c. 45, s. 674; 2004, c. 37, s. 90.

320. A decision made by the Authority or a person exercising a delegated power shall be sent by the Authority to the person concerned.

However, a decision rendered by a self-regulatory organization or by a person or committee exercising a power sub-delegated by it shall be sent by the self-regulatory organization.

1982, c. 48, s. 320; 1990, c. 77, s. 50; 2002, c. 45, s. 675; 2004, c. 37, s. 90; 2008, c. 24, s. 220.

320.1. Every decision of the Authority or a person exercising a delegated power may be homologated at the request of the Authority by the Superior Court or the Court of Québec, according to their respective jurisdictions, at the expiry of the time prescribed for applying for a review of the decision before the Financial Markets Administrative Tribunal, and the decision becomes executory under the authority of the court that has homologated it.

1990, c. 77, s. 51; 2001, c. 38, s. 88; 2002, c. 45, s. 676; 2004, c. 37, s. 90; 2009, c. 58, s. 128; 2016, c. 7, s. 179.

320.2. A decision containing a clerical error, a mistake in calculation or any other error of form may be rectified on the record by the Authority or the person exercising delegated power having taken part in the decision.

2001, c. 38, s. 89; 2002, c. 45, s. 677; 2004, c. 37, s. 90.

321. A person having rendered a decision under delegated powers may review it if justified by a new fact.

1982, c. 48, s. 321; 1986, c. 95, s. 340; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2008, c. 24, s. 221; 2009, c. 58, s. 129.

321.1. For the purposes of section 81 of the Act respecting the regulation of the financial sector (chapter E-6.1) and sections 283, 318 to 319 and 321 of this Act, the person or committee exercising a power subdelegated under section 62 of the Act respecting the regulation of the financial sector is the person exercising a delegated power.

2002, c. 45, s. 678; 2004, c. 37, s. 90; 2018, c. 23, s. 811.

322. A person directly affected by a decision rendered by the Authority, by a person referred to in sections 169 to 171 or by a recognized self-regulatory organization may, within 30 days, apply for a review of the decision by the Financial Markets Administrative Tribunal established under section 92 of the Act respecting the regulation of the financial sector (chapter E-6.1).

However, a decision under which a penalty is to be imposed cannot be submitted for review until the penalty has been imposed.

1982, c. 48, s. 322; 1990, c. 77, s. 52; 2002, c. 45, s. 679; 2004, c. 37, s. 35; 2006, c. 50, s. 106; 2008, c. 24, s. 222; 2009, c. 58, s. 130; 2013, c. 18, s. 115; 2016, c. 7, s. 179; 2018, c. 23, s. 811.

CHAPTER V

RULES APPLICABLE TO HEARINGS AND DECISIONS OF THE FINANCIAL MARKETS ADMINISTRATIVE TRIBUNAL

2002, c. 45, s. 680; 2009, c. 58, s. 130; 2016, c. 7, s. 179.

323. *(Repealed).*

1982, c. 48, s. 323; 1990, c. 77, s. 53; 2002, c. 45, s. 681; 2009, c. 58, s. 131.

323.1. *(Repealed).*

1990, c. 77, s. 54; 1992, c. 35, s. 15; 2002, c. 45, s. 682; 2009, c. 58, s. 131.

323.2. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 131.

323.3. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 131.

323.4. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 131.

323.5. *(Repealed).*

2002, c. 45, s. 682; O.C. 1366-2003, s. 8; 2004, c. 37, s. 90; 2009, c. 58, s. 132; 2011, c. 26, s. 83.

323.6. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 133.

323.7. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 133.

323.8. *(Repealed).*

2002, c. 45, s. 682; 2008, c. 7, s. 166; 2009, c. 58, s. 133.

323.8.1. Despite sections 102, 107 to 110, 115, 115.1, 115.3, 115.5, 115.6 and 115.15.58 of the Act respecting the regulation of the financial sector (chapter E-6.1), the Tribunal may make a decision under section 152, paragraph 1, 2 or 3 of section 262.1, section 264, the first or second paragraph of section 265 or section 266, 270 or 273.3, based, rather than on any facts referred to in those provisions, on a fact referred to in any of paragraphs 1 to 3 of section 318.2, without hearing the person concerned again, unless it is in regard to one of those facts.

If urgent action is required or to prevent irreparable injury, the decision may be made in the absence of the person concerned. In such a case, the Tribunal must give the person the opportunity to be heard within 15 days in regard to one of the facts referred to in the first paragraph.

2008, c. 7, s. 167; 2008, c. 24, s. 223; 2009, c. 58, s. 134; 2013, c. 18, s. 116; 2016, c. 7, ss. 165 and 179; 2018, c. 23, ss. 708 and 811.

323.8.2. *(Repealed).*

2016, c. 7, s. 166; 2018, c. 23, s. 709.

323.9. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 135.

323.10. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 135.

323.11. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 135.

323.12. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 135.

323.13. *(Repealed).*

2002, c. 45, s. 682; 2009, c. 58, s. 135.

CHAPTER VI

Heading repealed, 2009, c. 58, s. 136.

2009, c. 58, s. 136.

324. *(Repealed).*

1982, c. 48, s. 324; 1988, c. 21, s. 66; 1990, c. 77, s. 55; 2001, c. 38, s. 90; 2002, c. 45, s. 696; 2009, c. 58, s. 136.

325. *(Repealed).*

1982, c. 48, s. 325; 2002, c. 45, s. 696; 2009, c. 58, s. 136.

326. *(Repealed).*

1982, c. 48, s. 326; 1984, c. 41, s. 65; 1988, c. 21, s. 66; 2009, c. 58, s. 136.

327. *(Repealed).*

1982, c. 48, s. 327; 2009, c. 58, s. 136.

328. *(Repealed).*

1982, c. 48, s. 328; 2002, c. 45, s. 696; 2009, c. 58, s. 136.

329. *(Repealed).*

1982, c. 48, s. 329; 1988, c. 21, s. 66; 2002, c. 45, s. 696; 2009, c. 58, s. 136.

330. *(Repealed).*

1982, c. 48, s. 330; 1984, c. 41, s. 67; 1988, c. 21, s. 66; 1990, c. 77, s. 56; 2009, c. 58, s. 136.

CHAPTER VII

FINANCIAL PROVISIONS

1997, c. 36, s. 6.

330.1. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 684; 2004, c. 37, s. 90; 2008, c. 7, s. 168.

330.2. The costs incurred by the Government for the administration of this Act, as determined each year by the Government, shall be borne by the Authority.

1997, c. 36, s. 6; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

330.3. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 685; 2004, c. 37, s. 90; 2007, c. 15, s. 14.

330.4. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2007, c. 15, s. 14.

330.5. *(Repealed).*

1997, c. 36, s. 6; 2000, c. 29, s. 679; 2002, c. 45, s. 686; 2004, c. 37, s. 90; 2008, c. 7, s. 168.

330.6. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 696; 2004, c. 37, s. 36; 2008, c. 7, s. 168.

330.7. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 687.

330.8. *(Repealed).*

1997, c. 36, s. 6; 2002, c. 45, s. 687.

330.9. The costs incurred by the Authority for the purposes of Title III of the Act respecting the regulation of the financial sector (chapter E-6.1) in respect of an activity governed by this Act shall be borne by the recognized self-regulatory organizations that carry on such activities.

Such costs, established for each self-regulatory organization by the Authority at the end of its fiscal year, shall comprise a minimum contribution fixed by the Authority and the amount, if any, by which actual costs exceed the contribution. The actual costs shall be established on the basis of the rate schedule established by regulation.

The amount to be paid by each self-regulatory organization is set out in a certificate issued by the Authority.

1997, c. 36, s. 6; 2002, c. 45, s. 688; 2004, c. 37, s. 90; 2008, c. 24, s. 224; 2018, c. 23, s. 811.

330.10. The costs incurred by the Authority or, as the case may be, by a person specially designated by the Authority, for the purposes of section 30 of the Act to establish the Fonds de solidarité des travailleurs du Québec (F.T.Q.) (chapter F-3.2.1), sections 37 and 38 of the Act to establish Fondaction, le Fonds de développement de la Confédération des syndicats nationaux pour la coopération et l'emploi (chapter F-3.1.2) and section 33 of the Act constituting Capital régional et coopératif Desjardins (chapter C-6.1) shall be borne by those legal persons. The costs shall be determined annually by the Authority, on the basis of the actual costs; in the case of costs incurred by the Authority, the actual costs are established on the basis of the rate schedule established by regulation.

The certificate issued by the Authority establishing the amount to be paid by each legal person in respect of the costs incurred is peremptory.

1997, c. 36, s. 6; 2002, c. 45, s. 689; 2004, c. 37, s. 90.

TITLE XI

REGULATIONS AND TRANSITIONAL AND FINAL PROVISIONS

CHAPTER I

REGULATIONS

331. The Authority may, by regulation,

(1) define the procedure to be followed in any matter relating to the application of this Act;

(1.1) determine the conditions to be met by a company for the purposes of the definition of "closed company" set out in section 5;

(2) *(subparagraph repealed);*

(3) *(subparagraph repealed);*

(4) *(subparagraph repealed);*

(5) *(subparagraph repealed);*

(6) establish the rescission rights and the commissions and other sales charges pertaining to a contractual plan for the acquisition of securities;

(6.1) determine, for the purposes of section 151.1.1, the other market participants likely to be the subject of an inspection;

(7) *(subparagraph repealed);*

(8) *(subparagraph repealed);*

(9) prescribe the fees payable for any formality provided for in this Act or the regulations and for services rendered by the Authority, and the terms and conditions of payment;

(10) prescribe the fees payable by an investor for a securities transaction, and the procedure for collecting the fees and remitting them to the Authority;

(11) establish the rates referred to in sections 212, 273.2, 330.9 and 330.10;

(11.1) determine the provisions of Title II, Title III the contravention of which may be sanctioned by an monetary administrative penalty, and prescribe the amounts and conditions of such a penalty for the purposes of section 274.1;

(12) define the terms and expressions used for the purposes of this Act or the regulations under this section.

A regulation made under this section shall be submitted to the Government for approval, with or without amendment.

The Government may make or amend a regulation under this section if the Authority does not do so within the time specified by the Government.

1982, c. 48, s. 331; 1984, c. 41, s. 68; 1987, c. 40, s. 29; 1990, c. 77, s. 57; 1992, c. 35, s. 16; 1997, c. 36, s. 7; 2001, c. 38, s. 91; 2002, c. 45, s. 690; 2004, c. 37, s. 37; 2006, c. 50, s. 107; 2009, c. 25, s. 44; 2009, c. 58, s. 137; 2016, c. 7, s. 167; 2018, c. 23, s. 809.

331.1. The Authority may, by regulation,

(1) determine the form and content of the documents, declarations, statements and attestations required under this Act or the regulations;

(2) determine, from among the documents referred to in this Act or a regulation made under this Act, those that must be filed or transmitted using the medium or technology it specifies in the regulation;

(3) fix various time limits and periods in accordance with the provisions of this Act;

(3.1) determine that a person is a non-redeemable investment fund or a mutual fund for the purposes of paragraph 2 of the definition of “non-redeemable investment fund” and paragraph 2 of the definition of “mutual fund” in section 5;

(4) determine the portion of the securities of an issuer and establish the terms and conditions for the purposes of paragraph 9 of the definition of “distribution” in section 5;

(4.1) determine conditions for transmitting and receiving documents referred to in this Act or a regulation made under this Act;

(5) determine the cases and prescribe the information and attestations to which the second paragraph of section 12 and section 40.1 apply;

(6) impose conditions or an undertaking for the issue by the Authority of a receipt in respect of a prospectus, and fix the conditions on which a security may be distributed by way of various types of prospectus;

(6.1) determine conditions for amending a prospectus or a preliminary prospectus and for distributing additional securities through an amendment to a prospectus;

(6.1.1) determine conditions relating to the right of rescission provided for in section 30;

(6.1.2) provide for a right to cancel the subscription or purchase of securities during a distribution, and determine conditions relating to that right;

(6.2) determine conditions relating to the duration or extension of a distribution;

(7) establish the rules governing the designation of securities and the changes made to their characteristics;

(8) prescribe the information concerning securities or securities transactions that must be transmitted to the Authority, self-regulatory organizations, security holders, investors, clients or the general public, and establish the management rules, including governance rules, to be complied with by a registrant in order to safeguard the interests of clients;

(9) define accounting requirements for issuers, dealers, advisers, investment fund managers and self-regulatory organizations, and the requirements relating to the books, registers and other documents they must keep and to the preparation and audit of their financial statements;

(9.1) determine the rules applicable to persons referred to in section 169 or 171, including rules concerning review or approval of their operating rules or restrictions relating to ownership of or control over such persons;

(9.2) determine the criteria and conditions in accordance with which the Authority may designate a credit rating organization;

(9.2.1) determine the criteria and conditions in accordance with which the Authority may make this Act applicable to a benchmark;

(9.3) determine the rules applicable to designated credit rating organizations or to benchmark administrators subject to this Act and to the disclosure of information to the Authority, the public, the person whose securities are being rated, or users of a designated benchmark;

(9.4) prescribe requirements in respect of designated credit rating organizations, including requirements relating to the code of conduct, a prohibition to issue or maintain a credit rating, procedures regarding conflicts of interest between a designated credit rating organization and the person whose securities are being rated, the keeping of the books and registers necessary for the conduct of its business, and the appointment of a compliance officer and of its officers;

(9.5) prescribe requirements under section 186.2.1 in respect of a benchmark administrator subject to this Act;

(9.6) determine the rules applicable to designated benchmarks, which may vary according to the classes the Authority establishes;

(10) confer on some of the rules or standards established by a self-regulatory organization or professional association, and any amendments made thereto, the force and effect of a regulation made under this Act;

(11) exempt a category of persons, securities or transactions from some or all of the requirements of this Act or the regulations, with or without conditions;

(11.1) define the expression “accredited investor” and determine the conditions for the distribution of securities made to an accredited investor for the purposes of section 43;

(12) prohibit the use of advertising documents during a distribution;

(13) define the cases in which the Authority may refuse to issue a receipt for a prospectus referred to in Title II;

(14) establish special disclosure schemes for securities distributions based on the nature of the securities involved or the categories of issuers, fix the new conditions for the use of such schemes and prescribe the documents that may stand in lieu of a prospectus in the circumstances and on the other conditions determined by the Authority;

(15) prohibit or impose conditions applicable to any operation designed to fix, stabilize or influence the quoted price of a security;

(16) establish operating rules for the management, stewardship, safekeeping and composition of the assets of investment funds, in particular, governance rules and conflict of interest management rules, including rules applicable to a committee formed for those purposes, and prohibit certain transactions for the protection of the holders of securities;

(17) prohibit or impose conditions applicable to securities transactions with and loans made to persons who are not entirely independent of an investment fund;

(18) *(paragraph repealed);*

(18.1) determine the issuers to which subparagraph 7 of the second paragraph of section 68 applies;

(18.2) determine the criteria to be used by the Authority to designate an issuer as an issuer deemed to have made a distribution of securities to the public under subparagraph 8 of the second paragraph of section 68;

(18.3) determine that a person is an insider for the purposes of subparagraph 5 of the first paragraph of section 89;

(19) establish rules concerning the financial statements and auditor's reports required under this Act or the regulations;

(19.1) determine the rules applicable to an accountant's audit of the affairs of any person subject to this Act, particularly the requirements that must be met by an accounting firm and the notices it must file with the Authority and the audit committee of such a person;

(19.2) determine the rules applicable to a committee auditing the affairs of an issuer governed by this Act;

(19.3) prescribe the obligations of reporting issuers and their signing officers with respect to information release controls and procedures and to internal control of financial information, in particular concerning the design, implementation and maintenance of such controls, the assessment of their effectiveness and the disclosure of assessment results, their documentation, the monitoring of their modifications, any fraud related to them, and audit of internal control assessment;

(19.4) establish rules relating to attestations that reporting issuers and their signing officers must provide concerning the internal control of financial information and information release controls and procedures;

(19.5) establish rules pertaining to reporting issuer governance;

(20) determine continuous disclosure requirements for the purposes of sections 73 and 74;

(20.1) determine the rules applicable to insiders for the purposes of Chapter IV of Title III;

(21) determine the rules applicable to take-over bids for the purposes of Title IV;

(22) determine disclosure requirements and impose prohibitions on securities transactions for the purposes of section 115;

(23) *(paragraph repealed);*

(24) prescribe measures to protect minority shareholders with respect to the transactions determined by the Authority that are carried out by issuers or other persons having access to the financial market and that are likely to give rise to situations of conflict of interest;

(25) determine the conditions subject to which a person resident outside Québec may apply for registration or hold an interest in the capital of a registrant;

(26) establish categories of registration, the conditions to be met by applicants, the duration of registration and the rules governing the activities of registrants;

(27) determine, for the purposes of section 159, the changes that must be notified to the Authority and those for which approval must be obtained from the Authority;

(27.0.1) determine the natural persons referred to in section 159.0.1;

(27.0.2) determine the information and documents that must be disclosed under section 159.0.1;

(27.0.3) determine the manner in which a commission is to be shared under section 160.1.1;

(27.0.4) determine the policy that dealers and advisers must adopt under section 168.1.1, or elements of that policy.

(27.1) *(paragraph repealed);*

(28) establish the obligations incumbent on registrants, persons recognized under section 169 and self-regulatory organizations following a transaction in counterfeit, lost or stolen securities;

(29) determine the cases and circumstances in which a dealer must participate in a contingency fund;

(30) establish the rules and procedures that apply to the transmission of documents referred to in section 165;

(31) *(paragraph repealed);*

(32) establish the rules governing a listed market or an over-the-counter market;

(32.0.1) make rules concerning securities offers and trades or other securities transactions, including for the purpose of promoting market efficiency and transparency or preventing fraud and manipulation;

(32.1) prescribe the cases in which Division II of Chapter II of Title VIII applies to a person that has subscribed for or acquired a security in a distribution of securities made under a prospectus exemption or in a take-over bid or issuer bid, or that makes any other transaction determined by regulation;

(32.2) determine documents other than those referred to in the definition of “core document” in section 225.3 to be core documents for the purposes of that definition;

(33) establish a mechanism for consulting with an organization pursuing similar objects, concerning matters coming under the authority of this Act and of the legislation of the legislative authority having jurisdiction over such organization;

(33.1) determine any Québec authority that may be delegated to an extra-provincial securities commission and any extra-provincial authority that may be exercised by the Authority in accordance with section 307, and the conditions for exercising such authorities;

(33.2) determine the extent and conditions applicable to the order or decision made by the Authority, for the purposes of section 307.1;

(33.3) incorporate by reference into Québec securities laws any or all provisions of extra-provincial securities laws, determine the cases in and conditions on which provisions of extra-provincial securities laws may be so incorporated for the purposes of section 308, and determine the conditions applicable to the order or decision made by the Authority, for the purposes of section 308.0.1;

(33.4) determine the conditions on which the Authority, the Financial Markets Administrative Tribunal or a recognized self-regulatory organization may make a decision or order under a Québec authority on the basis of a decision made by an extra-provincial securities commission and the cases in which the decision may not be made without again giving the interested person an opportunity to be heard, for the purposes of section 308.0.3;

(33.5) allow, in accordance with sections 308.1.1 to 308.2.1, an extra-provincial authority to be recognized in Québec in the areas specifically listed in the regulations, with respect to the persons or organizations subject to such authority;

(33.6) determine the cases in and conditions on which a receipt is deemed, under paragraph 1 of section 308.2.1, to have been issued for the purposes of Québec securities laws, including when a receipt has been issued for a prospectus or an amendment to a prospectus under extra-provincial securities laws;

(33.6.1) determine the cases in and conditions on which the status of an issuer or a category of issuer as a reporting issuer is deemed to be revoked for the purposes of Québec securities laws, including where that status is revoked under extra-provincial securities laws for the purposes of paragraph 1.1 of section 308.2.1;

(33.7) determine the cases in and conditions on which a person or class of persons is deemed, under paragraphs 2 and 3 of section 308.2.1, to be recognized, designated or authorized to carry on an activity for the purposes of Québec securities laws, including when the person or class of persons is recognized, designated or authorized under extra-provincial securities laws;

(33.8) determine the cases in and conditions on which an exemption from Québec securities laws is deemed, under paragraph 4 of section 308.2.1, to be granted by the Authority, including when an exemption has been granted under extra-provincial securities laws;

(33.9) determine the circumstances in which an activity in respect of transactions in securities or in a particular security is deemed to be prohibited under paragraph 5 of section 308.2.1, including when an extra-provincial securities commission has imposed the same prohibition under a power similar to the Authority's power under section 265;

(33.10) prescribe that a person is a securities authority in Canada for the purposes of the definition of "securities authority in Canada" in section 308.2.1.1;

(34) define the terms and expressions used for the purposes of this Act or the regulations under this section.

1997, c. 36, s. 8; 2001, c. 38, s. 92; 2002, c. 45, s. 691; 2004, c. 37, s. 38; 2006, c. 50, s. 108; 2007, c. 15, s. 15; 2006, c. 50, s. 108; 2008, c. 7, s. 170; 2006, c. 50, s. 108; 2008, c. 24, s. 225; 2009, c. 25, s. 115; 2009, c. 25, s. 45; 2009, c. 58, s. 138; 2006, c. 50, s. 108; 2011, c. 18, s. 83; 2011, c. 26, s. 84; 2009, c. 58, s. 138; 2013, c. 18, s. 117; 2016, c. 7, ss. 168 and 179; 2018, c. 23, s. 710.

331.2. Every regulation made under section 331.1 must be approved, with or without amendment, by the Minister.

The Minister may make a regulation under this section if the Authority does not do so within the time specified by the Minister.

A draft regulation shall be published in the Bulletin of the Authority, accompanied with the notice required under section 10 of the Regulations Act (chapter R-18.1).

A draft regulation may not be submitted for approval or be made before 30 days have elapsed since its publication.

The regulation comes into force on the date of its publication in the *Gazette officielle du Québec* or on any later date specified in the regulation. It shall also be published in the Bulletin.

A draft regulation under Chapter II of Title X and paragraphs 33.1 to 33.9 of section 331.1 may be submitted for approval only if accompanied by a favourable notice from the Minister responsible for Canadian Intergovernmental Affairs. The same applies if such a draft regulation is made under the second paragraph

Sections 4 to 8, 11 and 17 to 19 of the Regulations Act do not apply to a regulation made under section 331.1.

2001, c. 38, s. 93; 2002, c. 45, s. 696; 2004, c. 37, s. 90; 2006, c. 50, s. 109.

332. The Government may, by regulation,

(1) determine the other forms of investment subject to this Act;

(2) determine the remunerated business to which section 149 applies;

(3) *(paragraph repealed)*.

1982, c. 48, s. 332; 2001, c. 38, s. 94; 2002, c. 45, s. 692; 2009, c. 25, s. 46; 2018, c. 23, s. 711.

333. In exercising their regulatory powers, the Government, the Minister or the Authority may establish various classes of persons, securities and transactions and prescribe appropriate rules for each class.

1982, c. 48, s. 333; 1997, c. 36, s. 9; 2001, c. 38, s. 95; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

334. A regulation made under this Act may confer a discretionary power on the Authority.

1982, c. 48, s. 334; 2002, c. 45, s. 693; 2004, c. 37, s. 90.

335. Draft regulations and regulations made under section 331 shall be published in the *Bulletin* of the Authority.

1982, c. 48, s. 335; 1982, c. 62, s. 143; 1984, c. 41, s. 69; 1997, c. 36, s. 10; 2001, c. 38, s. 96; 2002, c. 45, s. 696; 2004, c. 37, s. 90.

335.1. The Authority shall, not later than 31 July, submit to the Minister an annual report on its regulation activities under this Act for the period ending at the end of its last fiscal year.

The report must describe regulatory amendments and their impact on the securities market and on investors, and contain any other information required by the Minister.

2006, c. 50, s. 110.

335.2. The Minister shall table the report submitted under section 335.1 in the National Assembly within 30 days of its receipt or, if the Assembly is not sitting, within 30 days of resumption.

2006, c. 50, s. 110.

335.3. The competent parliamentary committee of the National Assembly may hear the Authority at least once a year to discuss the report submitted under section 335.1 and the Authority's regulation activities.

2006, c. 50, s. 110.

CHAPTER II

TRANSITIONAL AND FINAL PROVISIONS

336. *(Omitted).*

1982, c. 48, s. 336.

337. Every registration made and permission granted to distribute securities or a prospectus under the Securities Act (chapter V-1) continues to have full effect notwithstanding the replacement of the said Act by this Act.

The first paragraph also applies to other decisions rendered under the said Act.

Every proceeding for an offence against the Securities Act (chapter V-1) is brought or continued in accordance with the said Act.

1982, c. 48, s. 337.

338. For the application of section 68, every issuer is deemed to have made a distribution of its securities to the public

(1) that was authorized by the Commission, at any time from 1 May 1955 to 19 January 1983, to make a distribution of securities under a prospectus filed with the Commission;

(2) that has filed a securities exchange take-over bid circular with the Commission, at any time from 6 July 1973 to 19 January 1983.

1982, c. 48, s. 338; 2011, c. 26, s. 85.

338.1. In the case of distributions made before 6 April 1983 without observing the formalities prescribed by the Act applicable at the time of the transaction, the Authority may regularize the situation of the securities so distributed if it deems that the Authority would have issued a receipt for the prospectus if it had been submitted or would have granted a prospectus exemption if it had been applied for.

1984, c. 41, s. 70; 2004, c. 37, s. 39.

339. *(Amendment integrated into section 3 of this Act).*

1982, c. 48, s. 339.

340. *(Amendment integrated into c. A-24, s. 19).*

1982, c. 48, s. 340.

341. *(Amendment integrated into c. I-3, s. 965.1).*

1982, c. 48, s. 341.

342. *(Amendment integrated into c. I-3, s. 965.2).*

1982, c. 48, s. 342.

343. *(Amendment integrated into c. I-3, s. 965.3).*

1982, c. 48, s. 343.

344. *(Amendment integrated into c. I-3, s. 965.6).*

1982, c. 48, s. 344.

345. *(Omitted).*

1982, c. 48, s. 345.

346. *(Amendment integrated into c. R-22, ss. 1, 2).*

1982, c. 48, s. 346.

347. *(Amendment integrated into c. S-24, s. 9).*

1982, c. 48, s. 347.

348. The Minister of Finance is responsible for the application of this Act.

1982, c. 48, s. 348; 2002, c. 45, s. 695.

349. The appropriations voted for the application of the Securities Act (chapter V-1) are transferred to permit the application of this Act.

Supplementary appropriations for the application of this Act voted for the fiscal period 1982-1983 are taken out of the Consolidated Revenue Fund.

For subsequent periods, the moneys are taken out of the moneys granted annually by Parliament.

1982, c. 48, s. 349.

350. *(Repealed).*

1982, c. 48, s. 350; 1997, c. 36, s. 11.

351. *(Repealed).*

1982, c. 48, s. 351; 1984, c. 41, s. 71; 1989, c. 48, s. 256; 2002, c. 45, s. 694.

352. The Minister shall, on or before 19 January 1988, and every five years thereafter, make a report to the Government on the implementation of this Act and on the advisability of continuing it in force and, as the case may be, of amending it.

The report must be tabled in the National Assembly within the following 15 days if it is sitting or, if it is not, within 15 days of resumption.

Within one year after the report is tabled, the competent committee of the National Assembly shall examine the advisability of maintaining this Act in force or amending it, and shall hear submissions by interested persons and bodies.

1982, c. 48, s. 352; 1982, c. 62, s. 143; 2009, c. 25, s. 47.

353. *(This section ceased to have effect on 19 January 1988).*

1982, c. 48, s. 353; U. K., 1982, c. 11, Sch. B, Part I, s. 33.

354. *(Omitted).*

1982, c. 48, s. 354.

REPEAL SCHEDULES

In accordance with section 17 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), chapter 48 of the statutes of 1982, in force on 1 July 1983, is repealed, except the second paragraph of section 336 and section 354, effective from the coming into force of chapter V-1.1 of the Revised Statutes.

In accordance with section 17 of the Act respecting the consolidation of the statutes and regulations (chapter R-3), section 339 of chapter 48 of the statutes of 1982, in force on 1 January 1984, is repealed effective from the coming into force of the updating to 1 January 1984 of chapter V-1.1 of the Revised Statutes.

Arrangement relatif à 9227-1584 Québec inc.

Jugements du Québec

Cour supérieure du Québec

District de Montréal

L'honorable Peter Kalichman J.C.S.

Entendu : les 13 et 15 octobre et 23 novembre 2020.

Rendu : le 13 avril 2021.

No : 500-11-057549-194

[2021] J.Q. no 3383 | 2021 QCCS 1342

DANS L'AFFAIRE DU PLAN DE COMPROMIS OU ARRANGEMENT DE : 9227-1584 QUÉBEC INC., et 9336-9262 QUÉBEC INC., Débitrices, et KPMG INC., ès qualité de Contrôleur, Requérante, et 9325-7277 QUÉBEC INC. et 9345-7406 QUÉBEC INC. et 9344-8181 QUÉBEC INC. et 9361-4048 QUÉBEC INC. et 9173-5670 QUÉBEC INC. et MICHEL TRUDEAU et MARC-ANDRÉ NADON et GROUPE XPANSION QUÉBEC INC., Intimés

(67 paragr.)

Avocats

Me Bernard Boucher, Me Philippe Dubois, *Blake, Cassels & Graydon LLP*, Avocats de KPMG.

Me Ari Sorek, *Dentons*, Avocat de 110302 Canada Inc. et Arthur Steckler.

Me Julien Archambault, *LCM Avocats inc.*, Avocats de 9344-8181 Québec inc., 9361-4048 Québec inc., 9345-7406 Québec inc., 9173-5670 Québec inc. et Groupe Xpansion Québec inc.

Me Stéphane Cléroux, Me Samuel Nadeau, *Arnault Thibault Cléroux Avocats s.e.n.c.*, Avocats de 9325-7277 Québec inc. et Marc-André Nadon.

Me Geneviève Cloutier, *Gowling WLG (Canada) s.e.n.c.r.l., s.r.l.*, Avocats de Caisse Desjardins de Terrebonne.

JUGEMENT

sur des moyens préliminaires

APERÇU

1 Dans le cadre de procédures introduites en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (**LACC**), un contrôleur sollicite diverses ordonnances à l'encontre des Intimés. Il fait valoir qu'en vertu de la LACC et des pouvoirs qui lui sont conférés par les ordonnances précédentes de cette Cour, il est autorisé à introduire les procédures judiciaires et à faire usage de ses pouvoirs d'enquête. Ainsi, le contrôleur dépose trois demandes distinctes au dossier de la Cour, impliquant les Intimés ou certains d'entre eux.

2 Les Intimés soutiennent que dans les circonstances particulières de ce dossier, les demandes introduites par le

contrôleur constituent un exercice inapproprié de ses pouvoirs. Ils recherchent soit le rejet, soit la suspension des demandes introduites par le contrôleur. À défaut, ils demandent le droit de terminer l'enquête entamée par le contrôleur en procédant à leurs propres interrogatoires et la scission de l'instance par rapport à une des trois demandes.

CONTEXTE

3 Les débitrices 9227-1584 Québec inc. (**9227**) et 9336-9262 Québec inc. (**9336**) (les **Débitrices**) sont copropriétaires indivises d'un projet de développement immobilier multi-usages à Candiac, au Québec, connu sous le nom de Square Candiac (le **Projet**). Certains des lots du Projet sont maintenant développés et d'autres ne le sont pas.

4 9227 est détenue en indivision par 110302 Canada inc. (**StecklerCo**), contrôlé par M. Arthur Steckler, et 9325-7277 Québec inc. (**NadonCo**), contrôlé par M. Marc-André Nadon.

5 Un conflit entre les indivisaires, M. Steckler et M. Nadon, a rendu difficile, voire impossible, la gestion du Projet. Ainsi, le 8 octobre 2019, KPMG inc. est nommée à titre d'agente administrative et gérante des Débitrices en vertu de la *Loi sur les sociétés par actions*, conformément à une ordonnance rendue par l'honorable Martin Castonguay, j.c.s. (l'**Ordonnance LSA**).

6 Peu de temps après, une demande sous le régime de la LACC est introduite et, en novembre 2019, le Tribunal rend une première ordonnance à l'égard des Débitrices (l'**Ordonnance Initiale**). Le cabinet KPMG inc. est nommé contrôleur (le **Contrôleur**). L'Ordonnance Initiale est amendée à plusieurs reprises par la suite, y compris par la *Corrected Second Amended and Restated Initial Order* du 30 janvier 2020 (l'**ARIO**).

7 Le Contrôleur procède à la vente de nombreuses parcelles de terrain faisant partie du Projet. Il espère que ce processus permettra aux Débitrices de mener à bien leur restructuration. Parmi les parcelles de terrain que le Contrôleur cherche à vendre, il y en a quatre, désignées comme étant les lots A, B, C et D, dont la valeur combinée pourrait être suffisante pour permettre le paiement de tous les créanciers ordinaires et garantis des Débitrices.

8 Dans son cinquième rapport, en date du 17 juin 2020, le Contrôleur informe le Tribunal qu'il examine la possibilité que 9227 puisse avoir droit à une participation aux profits réalisés par certains entreprises ayant acquis des terrains dans le cadre du Projet. Plus particulièrement, le Contrôleur fait valoir que M. Nadon est devenu un actionnaire de ces entreprises au bénéfice de 9227. Le Contrôleur invoque les pouvoirs d'enquête prévus dans l'ARIO et envoie des lettres à certains des Intimés afin d'obtenir des renseignements et des documents en lien avec la participation potentielle de 9227 (l'**Enquête**)[1].

9 En août et septembre 2020, le Contrôleur introduit les trois demandes qui font l'objet du présent jugement. Le contexte factuel de chaque demande est résumé ci-dessous.

> ***La Requête pour jugement déclaratoire, ordonnance de sauvegarde et déclaration d'inopposabilité*** (**la Requête pour Jugement déclaratoire**)

10 La Requête pour Jugement déclaratoire est fondée sur la prétention que 9227 a un intérêt dans les profits réalisés par un autre groupe de promoteurs, à savoir les Intimés 9344-8181 Québec inc. (**Pür Urbain**) et 9361-4048 Québec inc. (**JMJ**), lesquels ont acheté des lots faisant partie du Projet pour faire du développement résidentiel.

11 Par l'entremise de NadonCo, M. Nadon détient des actions dans JMJ. Par l'entremise d'une autre entreprise, soit 9345-7406 Québec inc. (**Pür Urbain NadonCo**), M. Nadon détient aussi un intérêt dans Pür Urbain. Toutefois, ses actions dans Pür Urbain NadonCo ont été vendues à 9173-5670 Québec inc. (**Trudeau inc**.), une compagnie contrôlée par M. Michel Trudeau.

12 Selon le Contrôleur, les profits versés ou devant être versés par Pür Urbain et JMJ aux entités détenues par M. Nadon sont au bénéfice de la Débitrice, 9227.

13 Ainsi, dans le cadre de la Requête pour Jugement déclaratoire, le Contrôleur soutient que 9227 est en droit d'obtenir les déclarations ou ordonnances suivantes :

a) Une déclaration selon laquelle les actions détenues indirectement par M. Nadon dans Pur Urbain et JMJ sont en fait détenues par 9227;

b) Une ordonnance enjoignant Pür Urbain et JMJ de lui transmettre copie de leur comptabilité complète;

c) Une ordonnance enjoignant à M. Nadon et les entités sous son contrôle, soit NadonCo et Pür Urbain NadonCo, ainsi qu'à M. Trudeau et Trudeau inc., de lui transmettre une série de documents en lien avec la cession des intérêts de M. Nadon dans Pür Urbain; et

d) Une déclaration selon laquelle le transfert d'actions en faveur de Trudeau inc. est nul.

La Requêtes pour directives

14 Entre août 2016 et février 2018, Pür Urbain et JMJ signent des offres d'achat avec 9227, portant sur différents lots faisant partie du Projet. Dans le cadre de ces transactions, Pür Urbain et JMJ formulent diverses réclamations à l'encontre de 9227, notamment par rapport aux paiements d'intérêts, l'alimentation électrique et des délais dans la réalisation d'infrastructures.

15 Le Contrôleur soutient que Pür Urbain doit de l'argent à 9227 et non le contraire. Selon lui, les différentes ententes intervenues entre 9227, Pür Urbain et JMJ soulèvent de nombreuses questions d'interprétation contractuelle qui doivent obtenir une réponse dans le cadre de la restructuration des Débitrices.

16 Ainsi, il dépose la Requête pour directives et demande à la Cour de déclarer :

a) Qu'il est en droit, à titre de contrôleur de 9227, de réclamer 490 130$ de Pür Urbain;

b) Que 9227 ne doit rien à Pür Urbain pour l'alimentation électrique; et

c) Que les travaux d'infrastructure n'incluent pas les trottoirs de béton, l'asphaltage et l'éclairage.

17 En plus des conclusions déclaratoires, le Contrôleur demande à ce que Pür Urbain soit condamnée à payer la somme de 490 130$ à 9227.

La Requête en réclamation de loyers impayés

18 La Débitrice 9336 est propriétaire d'un immeuble situé à Candiac. Un local situé dans l'immeuble est loué à Groupe Expansion Québec inc. (**Expansion**) depuis 2016. Selon le Contrôleur, Expansion occupe d'autres espaces dans l'immeuble en vertu d'un bail par tolérance.

19 Le Contrôleur réclame à l'égard d'Expansion, 327 770,69$ en loyers impayés pour le local qu'elle loue et 320 326,53$ en loyers impayés pour les espaces qu'elle occupe par tolérance.

MOYENS PRÉLIMAIRES DES INTIMÉS

20 Certains des Intimés[2] déposent une *Contestation des requêtes du Contrôleur* (la **Contestation**) à l'égard de la Requête pour Jugement déclaratoire, la Requête pour directives et la Requête en réclamation de loyers impayés

(les **Trois Demandes**). La Contestation, qui est en fait une série d'objections préliminaires et non une contestation sur le fond des Trois Demandes, vise trois conclusions alternatives.

21 Premièrement, ils recherchent la suspension temporaire des Trois Demandes du Contrôleur. L'objectif principal de la suspension serait de donner au Contrôleur le temps nécessaire pour conclure la vente des Lots A, B, C et D dont le produit permettrait de satisfaire toutes les demandes des créanciers des Débitrices et entrainer, selon eux, la fin du processus de restructuration. Selon les Intimés, une fois la restructuration terminée, les poursuites judiciaires peuvent se poursuivre directement avec 9227 et non avec le Contrôleur.

22 Deuxièmement, ils demandent le rejet des Trois Demandes[3].

23 Troisièmement, si la poursuite des Trois Demandes est autorisée, ils souhaitent que le Tribunal reconnaisse que l'Enquête menée par le Contrôleur est incomplète et qu'ils soient autorisés à la compléter. Plus particulièrement, ils veulent être autorisés à interroger le Contrôleur et les représentants des Débitrices, y compris M. Steckler, avant que les Trois Demandes ne se poursuivent.

24 Enfin, les Intimés demandent la scission de l'instance par rapport à la Requête pour Jugement déclaratoire afin qu'il soit déterminé, dans un premier temps, si 9227 a droit ou non à une part des profits réalisés par Pür Urbain et JMJ. Ensuite, si le droit de 9227 est reconnu, une deuxième étape aura lieu afin de quantifier la réclamation.

25 M. Nadon et NadonCo soutiennent les conclusions recherchées par les autres Intimés à l'égard de la Requête pour Jugement déclaratoire.

26 Le Contrôleur plaide que les moyens soulevés par les Intimés sont sans fondement et qu'il y a lieu de poursuivre les Trois Demandes dans le cadre de la restructuration.

27 Le Tribunal analysera chaque conclusion recherchée par les Intimées dans l'ordre dans lequel elles sont présentées.

(a) Y a-t-il lieu de suspendre les Trois Demandes ?

28 Le 15 octobre 2020, lors de la présentation de la Contestation, la vente des Lots A, B, C et D semblait être imminente et le Contrôleur prévoyait que le produit de cette vente permettrait à tous les créanciers ordinaires et garantis d'être payés intégralement.

29 Selon les Intimées, aucun objectif de restructuration ne peut être atteint dans la poursuite des Trois Demandes si les Débitrices ne sont plus insolvables. Elles soutiennent que dans ce contexte, les mêmes demandes peuvent et doivent être formulées en dehors du processus de restructuration. Ainsi, les Intimés demandaient une suspension jusqu'au moins le 4 novembre 2020 afin de permettre au Contrôleur de compléter la vente des Lots A, B, C et D.

30 Le Contrôleur s'est opposé à cette demande. Il a notamment fait valoir (1) que la vente des lots A, B, C et D n'était pas certaine, et (2) que même si elle avait lieu et que les Débitrices n'étaient plus insolvables, il serait toujours approprié de poursuivre les Trois Demandes dans le cadre de la LACC car cela permettrait de résoudre les questions sous-jacentes qui sont essentielles pour garantir que les affaires des Débitrices puissent être restructurées.

31 À la fin de l'audience du 15 octobre 2020, le Tribunal conclut que la possibilité que les Débitrices ne soient plus insolvables est, à tout le moins, un facteur important pour déterminer si les demandes du Contrôleur devaient être poursuivies dans le cadre de la LACC. Sur cette base, il a convenu de suspendre les Trois Demandes.

32 Toutefois, en date du 23 novembre 2020, la suspension a été levée à l'égard de la Requête pour directives et la Requête en réclamation de loyers, notamment parce que la résolution expéditive desdites requêtes est envisageable dans le cadre de la LACC, peu importe la vente éventuelle des lots A, B, C et D.

33 Le Tribunal est toujours d'avis qu'une vente qui pourrait potentiellement rapporter suffisamment de revenus pour satisfaire les réclamations des créanciers ordinaires et garantis, demeure un facteur important dans la détermination de l'opportunité pour le Contrôleur d'introduire une nouvelle demande ou d'en poursuivre une dans le contexte de la LACC.

34 Toutefois, cinq mois se sont écoulés depuis la présentation initiale de la Contestation et la vente des Lots A, B, C et D ne s'est toujours pas matérialisée[4].

35 Ainsi, à ce stade, il est inutile de suspendre davantage les Trois Demandes.

(b) Y a-t-il lieu de rejeter les Trois Demandes ?

36 Les Intimés soutiennent que le Contrôleur n'a pas le pouvoir d'introduire les Trois Demandes sans l'autorisation préalable de la Cour et que même s'il avait ce pouvoir, il l'a exercé de manière inappropriée. Ils soutiennent que le Tribunal devrait le forcer à "recommencer à zéro" en demandant une autorisation.

37 Les arguments des Intimés visent principalement la Requête pour Jugement déclaratoire. Selon eux, malgré son titre, la Requête pour Jugement déclaratoire est, en réalité, un recours en oppression que le Contrôleur introduit au nom de 9227. Ils soutiennent qu'une autorisation judiciaire est nécessaire avant qu'une telle action puisse être introduite et que le Contrôleur n'a ni demandé ni obtenu cette autorisation[5].

38 En outre, les Intimés plaident qu'en introduisant la Requête pour Jugement déclaratoire, le Contrôleur n'agit pas de manière indépendante ou impartiale. Selon eux, il se fie entièrement à ce que lui dit M. Steckler. De cette manière, ils soutiennent que le Contrôleur agit comme l'instrument de M. Steckler et de StecklerCo plutôt qu'en tant qu'officier de la Cour.

39 Enfin, ils affirment que ni la LACC, ni les ordonnances antérieures de la Cour n'autorisent le Contrôleur à mener l'Enquête. Selon eux, le Contrôleur n'était nullement habilité à formuler les demandes de renseignements aussi générales et étendues que celles énoncées dans la Requête pour Jugement déclaratoire.

40 Ainsi, ils demandent que le Tribunal rejette les Trois Demandes et déclare que le Contrôleur a outrepassé ses pouvoirs en ce qui a trait à l'Enquête.

41 Pour les motifs qui suivent, le Tribunal est d'avis que le Contrôleur agit dans le cadre de ses pouvoirs et qu'il n'y a pas lieu de rejeter les Trois Demandes.

42 Le Tribunal a autorisé le Contrôleur à percevoir les dettes des Débitrices et à entamer des poursuites en leur nom ou en rapport avec leurs biens. Plus particulièrement, selon le paragraphe 47 (h) de l'ARIO, le Contrôleur est autorisé à recevoir, collecter et prendre possession de toutes les sommes d'argent qui seront dues à une des Débitrices. De plus, le paragraphe 47 (j) de l'ARIO prévoit que le Contrôleur peut initier des demandes au nom des Débitrices.

43 La Requête en recouvrement de loyer et la Requête pour directives relèvent toutes deux des pouvoirs du Contrôleur. Il cherche à récupérer des montants qui peuvent être dus aux Débitrices. En outre, dans le cas de la Requête pour directives, le débat évoqué devra de toute façon être traité par le Tribunal dans le cadre des preuves de réclamation déposée par Pür Urbain et JMJ. Le Contrôleur les a rejetés et Pür Urbain et JMJ ont produits des avis d'appel à l'encontre de ces refus.

44 En ce qui concerne la Requête pour Jugement déclaratoire, les Intimées soutiennent que dans le cadre d'un recours en oppression, le Tribunal doit expressément autoriser un contrôleur à agir comme plaignant, ce qui n'a pas été fait en l'espèce[6].

45 Le Tribunal convient que le titre de la requête est trompeur et qu'en réalité, le Contrôleur cherche bien plus que des conclusions déclaratoires. De plus, certains aspects du litige ressemblent à ceux d'une demande en oppression, car 9227 affirme que ses droits en tant qu'actionnaire de JMJ et Pür Urbain sont injustement mis à l'écart.

46 Toutefois, l'objectif principal de la Requête pour Jugement déclaratoire est de récupérer un bien qui pourrait appartenir aux Débitrices, lequel aurait, selon le Contrôleur, une valeur considérable. À cette fin, le Contrôleur demande une déclaration confirmant l'intérêt de 9227, l'annulation du transfert de Pür Urbain NadonCo à Trudeau inc. et des renseignements permettant de déterminer la valeur de l'intérêt potentiel de 9227. Ces objectifs relèvent des pouvoirs du Contrôleur et, en particulier, des paragraphes 47 (h) et 47 (j) de l'ARIO.

47 Ainsi, le Tribunal conclut qu'en introduisant la Requête pour Jugement déclaratoire, le Contrôleur agit dans le cadre de ses pouvoirs.

48 En ce qui concerne l'Enquête, là encore, le Tribunal ne partage pas l'avis des Intimés selon lequel le Contrôleur agit sans autorisation. Les paragraphes 47 k) (i) et (ii) de l'ARIO, reproduites ci-dessous, lui confèrent explicitement le pouvoir de procéder à l'interrogatoire sous serment de toute personne ayant connaissance des Débitrices ou de leurs biens et d'enjoindre à cette personne de produire tous livres, documents, correspondance ou papiers pertinents en sa possession.

> [47] ORDERS that, in any other powers herein, notwithstanding anything to the contrary and without limiting the generality of anything herein, the Monitor is hereby authorized and empowered to :
>
> (...)
>
> k) exercise powers of investigation in respect of the Debtors by, directly or through its attorneys :
>
> i) conducting an examination under oath of any Person reasonably thought to have knowledge relating to either or both of the Debtors, the Business or the Property;
>
> ii) ordering any Person to be examined pursuant to the preceding subparagraph to disclose to the Monitor and produce any books, documents, correspondence or papers in that Person's possession or power relating to the Debtors, the Business or the Property;

49 De plus, selon l'article 23 (1) (c) de la LACC, un contrôleur est tenu de faire toute évaluation ou investigation qu'il estime nécessaire pour établir l'état des affaires financières de la débitrice.

50 Dans le cadre de la Requête pour Jugement déclaratoire, laquelle vise à faire reconnaitre l'intérêt de 9227 de participer aux profits réalisés par JMJ et de Pür Urbain, les renseignements demandés par le Contrôleur relèvent des pouvoirs qui lui sont conférés par le Tribunal et la LACC. Plus particulièrement, les questions et les demandes de documentation relatives aux ventes de JMJ et Pür Urbain sont clairement liées aux Débitrices et à leurs biens.

51 En ce qui concerne la question de la neutralité, les Intimés soutiennent que le Contrôleur a introduit la Requête pour Jugement déclaratoire uniquement sur la base des renseignements qu'il a obtenus de M. Steckler. Selon eux, il n'a pas tenu compte des renseignements pertinents qui lui ont été fournis par les Intimés. Les Intimés soulignent, en particulier, qu'en revendiquant le droit de 9227 d'être reconnue comme actionnaire de Pür Urbain et de JMJ, le Contrôleur a complètement écarté la question de la contrepartie que 9227 devait donner afin de devenir actionnaire. Les Intimés soutiennent que cette question est essentielle pour déterminer si 9227 a une réclamation valable. Selon eux, en ignorant les preuves qui lui ont été fournies, le Contrôleur a manqué de neutralité et d'indépendance, ce qui est incompatible avec un exercice approprié de ses pouvoirs.

52 Bien que le Tribunal soit sensible aux inquiétudes des Intimés, les éléments de preuve qu'ils invoquent n'étayent pas l'argument selon lequel le Contrôleur manque d'objectivité. Que le Contrôleur réussisse ou non sur le fond à établir que 9227 est en droit de partager les profits réalisés par Pür Urbain et JMJ, le Tribunal est satisfait,

au moins à ce stade, qu'il agisse sur la base de critères raisonnables et objectifs en cherchant à faire reconnaître les droits revendiqués par 9227. À cet égard, il convient de noter que les Intimés ne semblent pas nier qu'une entente visant la participation de 9227 aux profits réalisés par Pür Urbain et JMJ a été discutée. Leur position est plutôt à l'effet qu'un tel accord n'a jamais été conclu.

53 Le Tribunal estime qu'en introduisant la Requête pour Jugement déclaratoire, le Contrôleur cherche à obtenir un résultat conforme aux objectifs de la LACC. Plus précisément, le Contrôleur tente de récupérer un actif, dont il a des raisons de croire peut avoir une grande valeur pour les Débitrices.

54 La question plus fondamentale est de savoir si la poursuite de ce recours dans le contexte de la LACC serait appropriée si les réclamations de tous les créanciers ordinaires et garantis étaient ou pouvaient être satisfaites. Le Contrôleur et StecklerCo font tous deux valoir qu'une telle situation ne changerait rien et qu'il serait toujours approprié de poursuivre cette demande dans le cadre de la LACC parce qu'elle vise à résoudre un litige qui est essentiel à la capacité des Débitrices de se sortir de la restructuration[7]. Ils affirment que si cette question n'est pas résolue, la gestion du Projet serait autant paralysée qu'elle ne l'était avant l'Ordonnance LSA et les procédures relatives à la LACC.

55 Aussi intéressante que cette question hypothétique puisse être, tant que les Débitrices demeurent insolvables, ce n'est pas une question à laquelle le Tribunal doit répondre. Pour l'instant, il est satisfait que la Requête pour Jugement déclaratoire vise à atteindre un objectif de restructuration légitime.

(c) Y a-t-il lieu de permettre aux Intimés de compléter l'Enquête ?

56 Selon les Intimés, une quantité importante de renseignements a été fournie au Contrôleur concernant chacune des questions soulevées dans les Trois Demandes, et ce avant qu'elles ne soient effectivement déposées auprès de la Cour. Malgré cela, ils soutiennent que le Contrôleur n'a pas fait référence à cette preuve dans les Trois Demandes et n'a pas cherché à valider ce qui lui a été dit.

57 Ils fournissent de nombreux exemples, y compris le fait que le Contrôleur n'a pas cherché à déterminer si 9227 a fourni ou non une contrepartie afin de pouvoir participer aux profits de Pür Urbain et JMJ.

58 Selon les Intimés, le fait que le Contrôleur n'ait pas effectué une enquête approfondie justifie leur demande d'être autorisés à l'effectuer à sa place.

59 Le Tribunal n'est pas de cet avis.

60 Tel qu'indiqué ci-dessus, le Contrôleur a le pouvoir de mener l'Enquête et les objectifs qu'il cherche à atteindre se situent dans les limites des ordonnances de ce Tribunal. L'Enquête est en cours et le Tribunal n'est pas disposé à mettre un terme à celle-ci sur la base des préoccupations soulevées par les Intimés.

61 De plus, le Tribunal n'est au courant d'aucun précédent pour conférer le pouvoir de mener une enquête dans le cadre de la LACC à quelqu'un autre que le Contrôleur et les Intimés ne se réfèrent à aucun tel précédent. Contrairement au Contrôleur, les Intimés ne sont pas des officiers de la Cour. Ils sont des parties à un litige et on ne peut pas s'attendre à ce qu'ils adoptent une position neutre. Quoi qu'il en soit, le but visé par les Intimés pourra être atteint par les interrogatoires au préalable dans le cadre des Trois Demandes.

(d) Y a-t-il lieu de scinder l'instance par rapport à la Requête pour Jugement déclaratoire ?

62 Enfin, les Intimés soutiennent que si le Tribunal refuse ses autres demandes, il devrait ordonner la scission de l'instance par rapport à la Requête pour Jugement déclaratoire afin que la question de la quantification des profits ne soit traitée que si le Contrôleur réussit à établir le droit de participation de 9227. Selon eux, cela ne porterait pas préjudice au Contrôleur ni aux Débitrices. Cependant, refuser la scission obligerait les Intimés à divulguer des

renseignements hautement confidentiels qui ne seront utiles que si le Contrôleur établit le bien-fondé du recours de 9227.

63 Le Tribunal n'accepte pas de scinder l'instance.

64 À ce stade, le seul avantage clair de la scission de l'instance serait de préserver la confidentialité des renseignements financiers recherchés par le Contrôleur et que Pür Urbain et JMJ ne souhaitent pas fournir. Pour le Tribunal, il ne s'agit pas d'une justification convaincante pour s'écarter de la règle de l'unicité des procédures. De plus, l'engagement implicite de confidentialité fournit une protection contre l'utilisation détournée des renseignements fournis.

65 Finalement, rien n'indique qu'une scission de l'instance serait avantageuse. En fait, il est tout à fait possible que le contraire soit vrai et que le fait de procéder en deux étapes soit inefficace et peu pratique. Quoi qu'il en soit, sans savoir comment la preuve concernant la quantification sera présentée, il est prématuré de conclure que la scission de l'instance permettrait une administration plus efficace et saine du dossier.

POUR CES MOTIFS, LE TRIBUNAL :

66 REJETTE la Contestation des Requêtes du Contrôleur;

67 AVEC FRAIS DE JUSTICE.

L'HONORABLE PETER KALICHMAN J.C.S.

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1 Pièce A-1.

2 Pür Urbain NadonCo, Pür Urbain, JMJ, Trudeau inc., Michel Trudeau et Expansion.

3 Bien qu'une conclusion demandant le rejet soit souvent la première conclusion recherchée, les Intimés soutiennent que la suspension est prioritaire.

4 En fait, selon le dernier rapport du Contrôleur, la vente de ces lots n'est pas envisagée pour le moment.

5 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International inc.)*, *2020 QCCA 659*, par. 64-68; *Urbancorp Cumberland 2 GP Inc., (Re)*, *2017 ONSC 7649*, par. 20-23.

6 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International inc.)*, *2020 QCCA 659*, par. 64-68; *Urbancorp Cumberland 2 GP Inc., (Re)*, *2017 ONSC 7649*, par. 20-23.

7 *Arrangement relatif à Gestion Éric Savard inc.*, *2018 QCCS 6057*, par. 14-16; *Québecor World inc. (Arrangement relatif à)*, *2009 QCCS 1992*, par. 17.

Fin du document

Club Resorts Ltd. v. Van Breda

Supreme Court Reports

Supreme Court of Canada

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

Heard: March 21, 2011;

Judgment: April 18, ***2012***.

[page573]

File Nos.: 33692, 33606.

[*2012*] 1 S.C.R. 572 | *[2012] 1 R.C.S. 572* | *[2012] S.C.J. No. 17* | *[2012] A.C.S. no 17* | ***2012*** *SCC 17*

Club Resorts Ltd., Appellant; v. Morgan Van Breda, Viktor Berg, Joan Van Breda, Tony Van Breda, Adam Van Breda and Tonnille Van Breda, Respondents, and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association, Interveners. And Club Resorts Ltd., Appellant; v. Anna Charron, Estate Trustee of the Estate of Claude Charron, deceased, the said Anna Charron, personally, Jennifer Candace Charron, Stephanie Michelle Charron, Christopher Michael Charron, Bel Air Travel Group Ltd. and Hola Sun Holidays Limited, Respondents, and Tourism Industry Association of Ontario, Amnesty International, Canadian Centre for International Justice, Canadian Lawyers for International Human Rights and Ontario Trial Lawyers Association, Interveners.

(125 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Prior History:

* Binnie and Charron JJ. took no part in the judgment.

Catchwords:

Private international law — Choice of forum — Court having jurisdiction — Forum non conveniens — Respondents injured while vacationing in Cuba — Actions for damages brought in Ontario — Defendants bringing motion to stay actions on grounds that Ontario court lacks jurisdiction, or alternatively, should decline to exercise jurisdiction on basis of forum non conveniens — Whether Ontario court can assume jurisdiction over actions — If so, whether Ontario court should decline to exercise its jurisdiction on ground that court of another jurisdiction is clearly a more appropriate forum for hearing of actions.

Summary:

In separate cases, two individuals were injured while on vacation outside of Canada. Morgan Van Breda suffered catastrophic injuries on a beach in Cuba. Claude Charron died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant, Club Resorts Ltd., a company incorporated

in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. In both cases, the motion judges found that the Ontario courts had jurisdiction with respect to the actions against Club Resorts. In considering *forum non conveniens*, it was also held that the Ontario court was clearly a more appropriate forum. The two cases were heard together in the Court of Appeal. The appeals were both dismissed.

Held: The appeals should be dismissed.

This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. In determining whether a court can assume jurisdiction over a certain claim, the preferred approach in Canada has been to rely on a set of specific factors which are [page574] given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion. Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up on the fly on a case-by-case basis -- however laudable the objective of individual fairness may be. There must be order in the system, and it must permit the development of a just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensure security and predictability in the law governing the assumption of jurisdiction by a court. The identification of a set of relevant presumptive connecting factors and the determination of their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law. From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and analytical tools, such as the values of fairness and efficiency or the principle of comity.

To meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. Jurisdiction must be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts. In a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

[page575]

Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors. When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

The presumption of jurisdiction that arises where a recognized connecting factor -- whether listed or new -- applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must negate the presumptive effect of the listed or new factor and convince the court that the proposed assumption of jurisdiction would be inappropriate. This could be accomplished by establishing facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors -- whether listed or new -- apply or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum [page576] of necessity doctrine. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*.

A clear distinction must be drawn between the existence and the exercise of jurisdiction. Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim. If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must show that the alternative forum is clearly more appropriate and that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to choose an alternative forum and to deny the plaintiff the benefits of his or her decision to select a forum. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court however, should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. On the other hand, a court must refrain from leaning too instinctively in favour of its own jurisdiction. The doctrine focuses on the contexts of individual cases and the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context. Such factors might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties. Ultimately, the decision falls within the reasoned discretion of the trial court. This exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts [page577] which takes place at an interlocutory or preliminary stage.

In *Van Breda*, a contract was entered into in Ontario. The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. Therefore, there was a sufficient connection between the Ontario court and the subject matter of the litigation. Club Resorts has not discharged its burden of showing that a Cuban court would clearly be a more appropriate forum. While a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there, issues related to the fairness to the parties and to the efficient disposition of the claim must

be considered. A trial held in Cuba would present serious challenges to the parties. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba.

In *Charron*, the facts supported the conclusion that Club Resorts was carrying on a business in Ontario, which is a presumptive connecting factor. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis and it benefitted from the physical presence of an office in Ontario. It therefore follows that it has been established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction. Club Resorts has not rebutted the presumption of jurisdiction that arises from this connecting factor and therefore the Ontario court has jurisdiction on the basis of the real and substantial connection test. Furthermore, Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in favour of the plaintiffs.

Cases Cited

Explained: *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; **referred to:** *Breeden v. Black*, **2012** SCC 19, [**2012**] 1 S.C.R. 666; *Éditions Écosociété Inc. v. Banro Corp.*, **2012** SCC 18, [**2012**] 1 S.C.R. 636; *British Columbia v. Imperial Tobacco Canada Ltd.*, [page578] 2005 SCC 49, [2005] 2 S.C.R. 473; *Castillo v. Castillo*, 2005 SCC 83, [2005] 3 S.C.R. 870; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63; *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *McLean v. Pettigrew*, [1945] S.C.R. 62; *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, 2002 SCC 78, [2002] 4 S.C.R. 205; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *Lemmex v. Bernard* (2002), 60 O.R. (3d) 54; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68; *Sinclair v. Cracker Barrel Old Country Store, Inc.* (2002), 60 O.R. (3d) 76; *Leufkens v. Alba Tours International Inc.* (2002), 60 O.R. (3d) 84; *Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460; *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321; *Oppenheim forfait GMBH v. Lexus maritime inc.*, 1998 CanLII 13001.

Statutes and Regulations Cited

Civil Code of Québec, S.Q. 1991, c. 64, arts. 3076 to 3168, 3135, 3148.

Constitution Act, 1867, s. 92.

Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 11.

Court Jurisdiction and Proceedings Transfer Act, S.N.S. 2003 (2 Sess.), c. 2.

Court Jurisdiction and Proceedings Transfer Act, S.S. 1997, c. C-41.1.

Court Jurisdiction and Proceedings Transfer Act, *S.Y. 2000, c. 7* [not yet in force].

Family Law Act, R.S.O. 1990, c. F.3.

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194, r. 17.02*.

Authors Cited

Blom, Joost, and Elizabeth Edinger. "The Chimera of the Real and Substantial Connection Test" *(2005), 38 U.B.C. L. Rev. 373*.

Briggs, Adrian. *The Conflict of Laws*, 2 ed. Oxford: Oxford University Press, 2008.

Brun, Henri, Guy Tremblay et Eugénie Brouillet. *Droit constitutionnel*, 5e éd. Cowansville, Qué.: Yvon Blais, 2008.

Castel, Jean-Gabriel. "The Uncertainty Factor in Canadian Private International Law" *(2007), 52 McGill L.J. 555*.

[page579]

Emanuelli, Claude. *Droit international privé québécois*, 3e éd. Montréal: Wilson & Lafleur, 2011.

Goldstein, Gérald, et Ethel Groffier. *Droit international privé*, t. I, *Théorie générale*. Cowansville, Qué.: Yvon Blais, 1998.

Hogg, Peter W. *Constitutional Law of Canada*, vol. 1, 5 ed. Scarborough, Ont.: Thomson/Carswell, 2007.

Manitoba. Law Reform Commission. *Private International Law*, Report #119. Winnipeg: The Commission, 2009.

Monestier, Tanya. "A 'Real and Substantial' Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario", in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation, 2010*. Toronto: Carswell, 2010, 185.

Perell, Paul M., and John W. Morden. *The Law of Civil Procedure in Ontario*. Markham, Ont.: LexisNexis Canada, 2010.

Pitel, Stephen G. A., and Nicholas S. Rafferty. *Conflict of Laws*. Toronto: Irwin Law, 2010.

Talpis, Jeffrey A., with the collaboration of Shelley L. Kath. *"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation*. Montréal: Thémis, 2001.

Uniform Law Conference of Canada. *Uniform Court Jurisdiction and Proceedings Transfer Act* (online: http: //www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_T ransfer_Act_En.pdf).

Walker, Janet. "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", Consultation Paper, Law Commission of Ontario, March 2009 (online: http: //www.ontla.on.ca/library/repository/mon/23003/290663.pdf).

Yntema, Hessel E. "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721.

History and Disposition:

APPEALS from a judgment of the Ontario Court of Appeal (O'Connor A.C.J.O. and Weiler, MacPherson, Sharpe and Rouleau JJ.A.), *2010 ONCA 84*, *98 O.R. (3d) 721*, *264 O.A.C. 1*, 316 D.L.R. (4) 201, *71 C.C.L.T. (3d) 161*, 77 R.F.L. (6) 1, 81 C.P.C. (6) 219, *[2010] O.J. No. 402* (QL), *2010 CarswellOnt 549* (*sub nom. Van Breda v. Village Resorts Ltd.* and *Charron Estate v. Village Resorts Ltd.*), affirming a decision of Pattillo J., 60 C.P.C. (6) 186, 2008 CanLII 32309, *[2008] O.J. No. 2624* (QL), *2008 CarswellOnt 3867* (*sub nom. Van Breda v. Village Resorts Ltd.*), and affirming a decision of Mulligan J., *92 O.R. (3d) 608*, 2008 CanLII 53834, *[2008] O.J. No. 4078* (QL), [page580] 2008 CarswellOnt 6165 (*sub nom. Charron Estate v. Bel Air Travel Group Ltd.*). Appeals dismissed.

Counsel

John A. Olah, for the appellant (33692).

Chris G. Paliare, *Robert A. Centa* and *Tina H. Lie*, for the respondents Morgan Van Breda et al. (33692).

Peter J. Pliszka and *Robin P. Roddey*, for the appellant (33606).

Jerome R. Morse, *Lori Stoltz* and *John J. Adair*, for the respondents Anna Charron et al. (33606).

Howard B. Borlack, *Lisa La Horey* and *Sabine Kharabian*, for the respondent Bel Air Travel Group Ltd. (33606).

Catherine M. Buie, for the respondent Hola Sun Holidays Limited (33606).

John Terry and *Jana Stettner*, for the intervener the Tourism Industry Association of Ontario (33606 and 33692).

François Larocque, *Michael Sobkin*, *Mark C. Power* and *Lauren J. Wihak*, for the interveners Amnesty International, the Canadian Centre for International Justice and the Canadian Lawyers for International Human Rights (33606 and 33692).

Allan Rouben, for the intervener the Ontario Trial Lawyers Association (33606 and 33692).

The judgment of the Court was delivered by

LeBEL J.

I. Introduction

1 Tourism has grown into one of the most personal forms of globalization in the modern world. Canadians look elsewhere for the sun, or to see new sights or seek new experiences. Trips are planned and taken with great expectations. But personal [page581] tragedies do happen. Happiness gives way to grief, as in the situations that resulted in these appeals. A young woman, Morgan Van Breda, suffered catastrophic injuries on a beach in Cuba. A family doctor and father, Dr. Claude Charron, died while scuba diving, also in Cuba. Actions were brought in Ontario against a number of parties, including the appellant Club Resorts Ltd. ("Club Resorts"), a company incorporated in the Cayman Islands that managed the two hotels where the accidents occurred. Club Resorts sought to block those proceedings, arguing that the Ontario courts lacked jurisdiction and, in the alternative, that a Cuban court would be a more appropriate forum on the basis of the doctrine of *forum non conveniens*. The same issues have now been raised in this Court. I will begin by summarizing the events that led to the litigation, the conduct of the litigation and the judgments of the courts below. I will then consider the principles that should apply to the assumption of jurisdiction and the doctrine of *forum non conveniens* under the common law conflicts rules of Canadian private international law. Finally, I will apply those principles to determine whether the Ontario courts have jurisdiction and, if so, whether they should decline to exercise it.

II. Background and Facts

A. *Van Breda*

2 In June 2003, the respondent Viktor Berg and his spouse, Ms. Van Breda, went on a trip to Cuba, where they stayed at the SuperClubs Breezes Jibacoa resort managed by Club Resorts. Mr. Berg, a professional squash

player, had made arrangements for a one-week stay for two people at this hotel through René Denis, an Ottawa-based travel agent operating a business known as Sport au Soleil.

3 Mr. Denis's business involved arranging for racquet sport professionals for, among others, Club Resorts, in exchange for undisclosed compensation. [page582] Mr. Denis also received a fee from each professional. Once the arrangements for Mr. Berg were finalized, Mr. Denis sent him a letter on letterhead bearing the words "SuperClubs Cuba - Tennis", which confirmed the details of the agreement with Club Resorts: Mr. Berg was to provide two hours of tennis lessons a day in exchange for bed and board and other services for two people at the hotel.

4 The accident happened on the first day of their stay. Ms. Van Breda tried to do some exercises on a metal structure on the beach, but the structure collapsed. She suffered catastrophic injuries and, as a result, became paraplegic. After spending a few days in a hospital in Cuba, she returned to Canada, going to Calgary where her family lived. She is now living in British Columbia with Mr. Berg. They never returned to Ontario, which they had planned to do after their holiday.

5 In May 2006, Ms. Van Breda, her relatives and Mr. Berg sued several defendants, including Mr. Denis, Club Resorts, and some companies associated with Club Resorts in the SuperClubs group, in the Ontario Superior Court of Justice. Their claim was framed in contract and in tort. They sought damages for personal injury, damages for loss of support, care, guidance and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, and punitive damages.

6 Some of the parties, including those who were served outside Ontario under rule 17.02 of the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194*, moved to dismiss the action for want of jurisdiction. In the alternative, they asked the Superior Court of Justice to decline jurisdiction on the basis of *forum non conveniens*.

B. *Charron*

7 In January 2002, Dr. Charron and his wife booked a vacation package through a travel agent, [page583] Bel Air Travel Group Ltd. ("Bel Air"). This package was offered by Hola Sun Holidays Ltd. ("Hola Sun"), which sold packages offered by, among others, SuperClubs. It was an all-inclusive package - at the Breezes Costa Verde hotel in Cuba - that featured scuba diving. The hotel was owned by Gaviota SA (Ltd.) ("Gaviota"), a Cuban corporation, but was managed by the appellant, Club Resorts. Dr. and Mrs. Charron reached the Breezes Costa Verde on February 8, 2002. Four days later, Dr. Charron drowned during his second scuba dive.

8 Mrs. Charron and her children sued for breach of contract and negligence. Dr. Charron's estate sought damages for loss of future income, and the individual plaintiffs also sought damages for loss of love, care, guidance and companionship pursuant to the *Family Law Act*. The statement of claim was served on the Ontario defendants, Bel Air and Hola Sun. It was also served outside Ontario on several foreign defendants, including Club Resorts, under rule 17.02 of the *Rules of Civil Procedure*. The parties served outside Ontario included the diving instructor and the captain of the boat. Club Resorts and an associated company, Village Resorts International Ltd., which owned the SuperClubs trademark, moved to dismiss the action on the ground that the Ontario courts lacked jurisdiction or, in the alternative, to stay the action on the grounds that Ontario was not the most appropriate forum.

C. *Judicial History*

(1) *Van Breda* - Ontario Superior Court of Justice *(2008), 60 C.P.C. (6th) 186*

9 In *Van Breda*, Pattillo J. held that Club Resorts' motion turned on whether there was a real and substantial connection in accordance with the test laid out by the Ontario Court of Appeal in *Muscutt v. Courcelles* *(2002), 60 O.R. (3d) 20*. [page584] He found that there was a connection between Ontario and Club Resorts by virtue of the activities the company engaged in in Ontario through Mr. Denis. He also found on a *prima facie* basis that the

agreement between Mr. Berg and Club Resorts had actually been concluded in Ontario. After reviewing the other factors from *Muscutt*, including unfairness to the defendants in assuming jurisdiction, unfairness to the plaintiffs in not doing so and the involvement of other parties to the suit, he held that there was a sufficient connection between Ontario and the subject matter of the litigation. Pattillo J. then considered the issue of *forum non conveniens*. Although he accepted that Cuba also had jurisdiction, he concluded that it had not been established that a Cuban court would clearly be a more appropriate forum. For these reasons, he held that the Ontario Superior Court of Justice should entertain the action as against Club Resorts.

(2) *Charron* - Ontario Superior Court of Justice *(2008), 92 O.R. (3d) 608*

10 In *Charron*, Mulligan J. held against Club Resorts. In his opinion, a contract had been entered into between Dr. Charron and Bel Air. The travel agency had booked an all-inclusive package at the Cuban hotel through Hola Sun, which had an agreement with Club Resorts. These facts weighed in favour of assuming jurisdiction. Mulligan J. also found that there was a connection between Ontario and the defendants. In his view, the resort relied heavily on international travellers to ensure its profitability. Club Resorts marketed the resort in Ontario by way of an agreement with Hola Sun. I note that the record indicated that Club Resorts or one of its associated companies had an office in Richmond Hill, Ontario. After reviewing the other factors from *Muscutt*, Mulligan J. held that the Ontario courts had jurisdiction with respect to Club Resorts. In considering *forum non conveniens*, Mulligan J. weighed several factors. He took into account the fact that more parties and witnesses were located in Ontario than in Cuba, that the damage had been sustained in Ontario [page585] and that a liability insurance policy was available to the foreign defendants in Ontario. In addition, Mrs. Charron and her children would lose the benefit of statutory family law remedies if the case were to proceed in Cuba. For these reasons, Mulligan J. held that the Ontario court was clearly a more appropriate forum than a Cuban court.

(3) Ontario Court of Appeal, *2010 ONCA 84*, *98 O.R. (3d) 721*

11 The two cases were heard together in the Court of Appeal. After ordering a rehearing, the Court of Appeal, in reasons written by Sharpe J.A., took the opportunity to review and reframe the *Muscutt* test. I will discuss this new framework below in reviewing the evolution of the common law policy relating to conflicts of jurisdiction and conflicts of laws.

12 Suffice it to say at this stage that, after recasting the *Muscutt* test, the Court of Appeal unanimously held, in both cases, that the Ontario courts had jurisdiction over the claims and the parties. It then decided that the Ontario courts should not decline jurisdiction on the basis of *forum non conveniens* principles, because a Cuban court would not clearly be a more appropriate forum.

13 The appeals in *Van Breda* and *Charron* were also heard together in this Court. They were heard during the same session as two other appeals involving the issues of jurisdiction and *forum non conveniens*, which concerned actions in damages for defamation (*Breeden v. Black*, ***2012*** *SCC 19*, *[**2012**] 1 S.C.R. 666*, and *Éditions Écosociété Inc. v. Banro Corp.*, ***2012*** *SCC 18*, *[**2012**] 1 S.C.R. 636*).

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III. Analysis

Issues

(1) Nature and Scope of Private International Law

14 These appeals raise broad issues about the fundamental principles of the conflict of laws, as this branch of the law has traditionally been known in the common law, or "private international law" as it is often called now (A.

Briggs, *The Conflict of Laws* (2nd ed. 2008), at pp. 2-3; Manitoba Law Reform Commission, *Private International Law*, Report #119 (2009), at p. 2; J.-G. Castel, "The Uncertainty Factor in Canadian Private International Law" *(2007), 52 McGill L.J. 555*).

15 Although both appeals raise issues concerning both the determination of whether a court has jurisdiction (the test of jurisdiction *simpliciter*) and the principles governing a court's decision to decline to exercise its jurisdiction (the doctrine of *forum non conveniens*), those issues may have an impact on the development of other areas of private international law. Private international law is in essence domestic law, and it is designed to resolve conflicts between different jurisdictions, the legal systems or rules of different jurisdictions and decisions of courts of different jurisdictions. It consists of legal principles that apply in situations in which more than one court might claim jurisdiction, to which the law of more than one jurisdiction might apply or in which a court must determine whether it will recognize and enforce a foreign judgment or, in Canada, a judgment from another province (S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 1).

16 Three categories of issues - jurisdiction, *forum non conveniens* and the recognition of foreign judgments - are intertwined in this branch of the law. Thus, the framework established for the purpose of determining whether a court has jurisdiction may have an impact on the choice of law and on the recognition of judgments, and vice versa. [page587] Judicial decisions on choice of law and the recognition of judgments have played a central role in the evolution of the rules related to jurisdiction. None of the divisions of private international law can be safely analysed and applied in isolation from the others. This said, the central focus of these appeals is on jurisdiction and the appropriate forum.

(2) Issues Related to Jurisdiction: Assumption and Exercise of Jurisdiction

17 Two issues arise in these appeals. First, were the Ontario courts right to assume jurisdiction over the claims of the respondents Van Breda and Charron and over the appellant, Club Resorts? Second, were they right to exercise that jurisdiction and dismiss an application for a stay based on *forum non conveniens*?

18 To be able to resolve these issues, I must first discuss the evolution of the rules of jurisdiction *simpliciter* in Canadian private international law. It will be necessary to review the approach the Ontario Court of Appeal adopted in respect of the questions of assumption of jurisdiction and *forum non conveniens* in its judgments in the cases at bar and, in particular, its reconsideration of the principles that it had previously set out in *Muscutt*.

19 I will then propose an analytical framework and legal principles for assuming jurisdiction (jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). On that basis, I will review the facts of the cases at bar to determine whether the Ontario courts made any reviewable errors when they decided to retain jurisdiction over them.

20 Before turning to these issues, however, it is important to consider the constitutional [page588] underpinnings of private international law in Canada. This part of the analysis is necessary in order to explain the origins of the "real and substantial connection test" as it is now known, its nature, and its impact on the development of the principles of private international law.

(3) Constitutional Underpinnings of Private International Law

21 Conflicts rules must fit within Canada's constitutional structure. Given the nature of private international law, its application inevitably raises constitutional issues. This branch of the law is concerned with the jurisdiction of courts of the Canadian provinces, with whether that jurisdiction should be exercised, with what law should apply to a dispute, and with whether a court should recognize and enforce a judgment rendered by a court of another province or country. The rules of private international law can be found, in the common law provinces, in the common law and in statute law and, in Quebec, in the *Civil Code of Québec*, S.Q. 1991, c. 64, which contains a well-developed set of rules and principles in this area (see *Civil Code of Québec*, Book Ten, arts. 3076 to 3168). The interplay

between provincial jurisdiction and external legal situations takes place within a constitutional framework which limits the external reach of provincial laws and of a province's courts. The Constitution assigns powers to the provinces. But these powers are subject to the restriction that they be exercised within the province in question (see P. W. Hogg, *Constitutional Law of Canada* (5th ed. 2007), vol. 1, at pp. 364-65 and 376-77; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 569; *British Columbia v. Imperial Tobacco Canada Ltd.*, *2005 SCC 49*, *[2005] 2 S.C.R. 473*, at paras. 26-28, *per* Major J.), and they must be exercised in a manner consistent with the territorial restrictions created by the Constitution (see *Castillo v. Castillo*, *2005 SCC 83*, *[2005] 3 S.C.R. 870*, at para. 5, *per* Major J.; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, *2003 SCC 40*, *[2003] 2 S.C.R. 63*, at para. 51, *per* Binnie J.).

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(4) Origins of the Real and Substantial Connection Test

22 The real and substantial connection test arose out of decisions of this Court that were aimed at establishing broad and flexible principles to govern the exercise of provincial powers and the actions of a province's courts. It was focussed on two issues: (1) the risk of jurisdictional overreach by provinces and (2) the recognition of decisions rendered in other jurisdictions within the Canadian federation and in other countries. In developing the real and substantial connection test, the Court crafted a constitutional principle rather than a simple conflicts rule (see G. Goldstein and E. Groffier, *Droit international privé*, vol. I, *Théorie générale* (1998), at p. 47). However, the test was born as a general organizing principle of the conflict of laws. Its constitutional dimension appeared only later. Courts have used the expression "real and substantial connection" to describe the test in both senses, and often in the same judgment. This has produced confusion about both the nature of the test and the constitutional status of the rules and principles of private international law. A clearer distinction needs to be drawn between the private international law and constitutional dimensions of this test.

23 From a constitutional standpoint, the Court has, by developing tests such as the real and substantial connection test, sought to limit the reach of provincial conflicts rules or the assumption of jurisdiction by a province's courts. However, this test does not dictate the content of conflicts rules, which may vary from province to province. Nor does it transform the whole field of private international law into an area of constitutional law. In its constitutional sense, it places limits on the reach of the jurisdiction of a province's courts and on the application of provincial laws to interprovincial or international situations. It also requires that all Canadian courts recognize and enforce decisions rendered by courts of the other Canadian provinces on the basis of a proper assumption of jurisdiction. But it does not establish the actual content of rules and principles of private international law, nor does [page590] it require that those rules and principles be uniform.

24 The first mention of a "real and substantial connection test" in the Court's modern jurisprudence can be found in the reasons of Dickson J. in *Moran v. Pyle National (Canada) Ltd.*, *[1975] 1 S.C.R. 393*. That case concerned a tort action with respect to manufacturer's liability. The main issue was whether the courts of Saskatchewan had jurisdiction over the claim and, if so, what substantive law governed it. Dickson J. suggested that the English courts seemed to be moving towards some form of "real and substantial connection test" (pp. 407-8) to resolve issues related to the assumption of jurisdiction by a province's courts and the appropriate choice of the law applicable to a tort. The test was formally adopted in *Morguard Investments Ltd. v. De Savoye*, *[1990] 3 S.C.R. 1077*. As had been the case in *Moran*, the Court's intention in *Morguard* was to develop an organizing principle of Canadian private international law, albeit with constitutional overtones. The test's constitutional role in the Canadian federation was confirmed a few years later in *Hunt v. T&N plc*, *[1993] 4 S.C.R. 289*. Its Janus-like nature - with a private international law face on the one hand and a constitutional face on the other - crystallized in *Hunt* and remained a permanent feature of the subsequent jurisprudence.

25 In retrospect, it can be seen that in *Morguard*, the Court initiated a major shift in the framework governing the conflict of laws in Canada by accepting the validity of the real and substantial connection test as a principle governing the rules applicable to conflicts. In view of its importance, the case merits closer consideration. At issue

in *Morguard* was an application to enforce, in British Columbia, a judgment rendered in Alberta against a resident of British Columbia. The claim related to a debt secured by a mortgage on property in Alberta. The parties were resident in Alberta at the time the [page591] loan was made. La Forest J., writing for a unanimous Court, called for a re-evaluation of relationships between the courts of the provinces within the Canadian federation. The creation of the Canadian federation established an internal space within which exchanges should occur more freely than between independent states. The principle of comity and the principles of fairness and order applicable within a federal space required that the rules of private international law be adjusted (*Morguard*, at pp. 1095-96).

26 In *Morguard*, the Court held that the courts of a province must recognize and enforce a judgment of a court of another province if a real and substantial connection exists between that court and the subject matter of the litigation. Another purpose of the test was to prevent improper assumptions of jurisdiction by the courts of a province. Thus, the test was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and it requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced. La Forest J. did not seek to determine the precise content of this real and substantial connection test (*Morguard*, at p. 1108), nor did he elaborate on the strength of the connection. Rather, he held that the connections between the matters or the parties, on the one hand, and the court, on the other, must be of some significance in order to promote order and fairness. They must not be "tenuous" (p. 1110). La Forest J. added that the requirement of a real and substantial connection was consistent with the constitutional imperative that provincial power be exercised "in the province" (p. 1109). Because the appeal had not been argued on constitutional grounds, however, he refrained from determining whether the real and substantial connection test should be considered a constitutional test.

27 The Court's subsequent judgment in *Hunt* confirmed the constitutional nature of the real and substantial connection test. That case concerned [page592] the application of a "blocking" statute enacted by the Quebec legislature that prohibited the transfer to other jurisdictions of certain documents kept by corporations in Quebec, even in the context of court litigation. The Court found that the statute was not applicable to litigation conducted in British Columbia. It held that assumptions of jurisdiction by a province and its courts must be grounded in the principles of order and fairness in the judicial system. The real and substantial connection test from *Morguard* reflected the need for limits on assumptions of jurisdiction by a province's courts (*Hunt*, at p. 325). Any improper assumption of jurisdiction would be negated by the requirement that there be a "real and substantial connection" (p. 328; see C. Emanuelli, *Droit international privé québécois* (3rd ed. 2011), at p. 38).

28 Since *Hunt*, the real and substantial connection test has been recognized as a constitutional imperative in the application of the conflicts rules. It reflects the limits of provincial legislative and judicial powers and has thus become more than a conflicts rule. Its application was extended to the recognition and enforcement of foreign judgments in *Beals v. Saldanha*, *2003 SCC 72*, *[2003] 3 S.C.R. 416*.

29 But, in the common law, the nature of the conflicts rules that would accord with the constitutional imperative has remained largely undeveloped in this Court's jurisprudence. Although the real and substantial connection test has been consistently applied both as a constitutional test and as a principle of private international law, since *Hunt*, the Court has generally declined to articulate the content of the private international law rules that would satisfy the test's constitutional requirements or to develop a framework for them. The Court has continued to affirm the relevance and importance of the test and has even extended it to foreign judgments, but without attempting to elaborate upon the rules it requires (see *Beals*, at paras. 23 and 28, *per* Major J.).

[page593]

30 So the test does exist. But what does it mean? What rules would satisfy its status as a constitutional imperative? Two approaches are possible. One approach is to view the test not only as a constitutional principle, but also as a conflicts rule in itself. If it is viewed as a conflicts rule, its content would fall to be determined on a case-by-case basis by the courts in decisions in which they would attempt to implement the objectives of order and fairness in the legal system. The other approach is to accept that the test imposes constitutional limits on provincial powers, but to seek to develop a system of connecting factors and principles designed to make the resolution of

conflict of laws issues more predictable in order to reduce the scope of judicial discretion exercised in the context of each case. Some academic commentators view the second approach as critical in order to maintain order, efficiency and predictability in this area of the law. Indeed, the real and substantial connection test itself has been criticized as being much too loose and unpredictable to facilitate an orderly resolution of conflicts issues (see J.-G. Castel; J. Blom and E. Edinger, "The Chimera of the Real and Substantial Connection Test" *(2005), 38 U.B.C. L. Rev. 373*).

31 Thus, in the course of this review, we should remain mindful of the distinction between the real and substantial connection test as a constitutional principle and the same test as the organizing principle of the law of conflicts. With respect to the constitutional principle, the territorial limits on provincial legislative competence and on the authority of the courts of the provinces derive from the text of s. 92 of the *Constitution Act, 1867*. These limits are, in essence, concerned with the legitimate exercise of state power, be it legislative or adjudicative. The legitimate exercise of power rests, *inter alia*, upon the existence of an appropriate relationship or connection between the state and the persons who are brought under its authority. The purpose of constitutionally imposed territorial limits is to ensure the existence [page594] of the relationship or connection needed to confer legitimacy.

32 As can be observed from the jurisprudence, in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication. This test suggests that the connection between a state and a dispute cannot be weak or hypothetical. A weak or hypothetical connection would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute.

33 The constitutionally imposed territorial limits on adjudicative jurisdiction are related to, but distinct from, the real and substantial connection test as expressed in conflicts rules. Conflicts rules include the rules that have been chosen for deciding when jurisdiction can be assumed over a given dispute, what law will govern a dispute or how an adjudicative decision from another jurisdiction will be recognized and enforced. The constitutional territorial limits, on the other hand, are concerned with setting the outer boundaries within which a variety of appropriate conflicts rules can be elaborated and applied. The purpose of the constitutional principle is to ensure that specific conflicts rules remain within these boundaries and, as a result, that they authorize the assumption of jurisdiction only in circumstances representing a legitimate exercise of the state's power of adjudication.

34 This case concerns the elaboration of the "real and substantial connection" test as an appropriate common law conflicts rule for the assumption of jurisdiction. I leave further elaboration of the content of the constitutional test for adjudicative jurisdiction for a case in which a conflicts rule is challenged on the basis of inconsistency with constitutionally imposed territorial limits. To be clear, however, the existence of a constitutional test aimed at maintaining the constitutional limits on [page595] the powers of a province's legislature and courts does not mean that the rules of private international law must be uniform across Canada. Legislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system. Nor does this test's existence mean that the connections with the province must be the strongest ones possible or that they must all point in the same direction.

35 Turning to the search for appropriate conflicts rules, the trend is towards retaining or establishing a system of connecting factors informed by principles for applying them, as opposed to relying on almost pure judicial discretion to achieve order and fairness. This trend is apparent in the laws passed by certain provincial legislatures and is reflected in a number of judicial decisions. These decisions include the important jurisprudential current that the Ontario Court of Appeal has been developing since *Muscutt*, which is in issue in the cases at bar. The real and substantial connection test should be viewed not in isolation, but rather in the context of its historical roots, contemporary legislative developments, the academic literature and initiatives aimed at developing and modernizing Canada's conflicts rules. The test was not born *ex nihilo*, without any awareness of the methods and techniques that evolved in the field of private international law. In this respect, both the common law and the civil law have relied largely on the selection and use of a number of specific objective factual connections.

36 In *Hunt*, La Forest J. cautioned against casting aside all the traditional connections. In commenting on the

difficulties of framing an appropriate test for a reasonable assumption of jurisdiction and on the development of the real and substantial connection test, he wrote:

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> The exact limits of what constitutes a reasonable assumption of jurisdiction were not defined, and I add that no test can perhaps ever be rigidly applied; no court has ever been able to anticipate all of these. However, though some of these may well require reconsideration in light of *Morguard*, the connections relied on under the traditional rules are a good place to start. [p. 325]

37 Not long after *Hunt*, the Court rendered its judgment in *Tolofson v. Jensen*, *[1994] 3 S.C.R. 1022*, a case concerned mainly with determining what law should apply to a tort. In it, too, the Court's concern was to assure predictability in the application of the law of conflicts to tort claims. The Court established a new conflicts rule in respect of torts, abandoning the rule it had adopted in *McLean v. Pettigrew*, *[1945] S.C.R. 62*, that favoured the law of the forum (*lex fori*) and holding that, in principle, the law governing the tort should be that of the place where the tort occurred (*lex loci delicti*). The *situs* of the tort would also justify the assumption of jurisdiction by the courts of a province. The Court did not at that time rely solely on the real and substantial connection test as a conflicts rule. In a sense, it held that in this context, the objectives of fairness and efficiency in the conflicts system would be better served by relying on factual connections with the place where the tort occurred.

38 In La Forest J.'s opinion, *Morguard* prevented courts from overreaching by entering into matters in which they had little or no interest (*Tolofson*, at p. 1049). But he also cautioned against building a system of private international law based solely on the expectations of the parties and concerns of fairness in a specific case, as such a system could hardly be considered rational. A degree of predictability or reliability must be assured:

> The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of [page597] the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. [pp. 1046-47]

To La Forest J. in *Tolofson*, order was needed in the conflicts system, and was even a precondition to justice (p. 1058). Certainty was one of the key purposes being pursued in framing a conflicts rule (p. 1061). With this in mind, the Court crafted what it hoped would be a clear conflicts rule for torts that would bring a degree of certainty to this part of tort law and private international law (pp. 1062-64). Subject to the constitutional requirement established in *Morguard*, this rule would make it possible to identify some connecting factors linking the court or the law to the matter and to the parties. The presence of such factors would not necessarily resolve everything. Specific torts might raise particular difficulties that could require crafting carefully defined exceptions (p. 1050). Such difficulties indeed arise in the companion cases of *Breeden* and *Éditions Écosociété Inc.* Nevertheless, a conflicts rule based on specific connections seemed likely to introduce greater certainty into the interpretation and application of private international law principles in Canada.

39 Legislative action since *Morguard* and *Hunt* points in the same direction. Without entering into the details of the complex, often flexible and nuanced, system of conflicts rules that became part of the *Civil Code of Québec* in 1994, it is worth mentioning that the *Civil Code* sets out a number of specific conflicts rules that identify connecting factors to be applied in various international or interprovincial situations. This Court has discussed the *Civil Code*'s scheme on a number of occasions. In particular, in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, *2002 SCC 78*, *[2002] 4 S.C.R. 205*, it reviewed the scheme applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual or [page598] quasi-delictual liability in an international or interprovincial context.

40 Across Canada, various initiatives have been undertaken to flesh out the real and substantial connection test. For example, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to

jurisdiction and to the doctrine of *forum non conveniens* (see *Uniform Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") (online)).

41 The *CJPTA* focusses mainly on issues related to the assumption of jurisdiction. Section 3(e) provides that a court may assume jurisdiction if "there is a real and substantial connection between [enacting province or territory] and the facts on which the proceeding against that person is based" (text in brackets in original). Section 10 enumerates a variety of circumstances in which such a connection would be presumed to exist. For example, it lists a number of factors that might apply where the purpose of the proceeding is the determination of property rights or rights related to a contract. In the case of tort claims, s. 10(g) provides that the commission of a tort in a province would be a proper basis for the assumption of jurisdiction by that province's courts. Section 10 states that the list of connecting factors would not be closed and that other circumstances might be proven in order to establish a real and substantial connection. The *CJPTA* also includes specific provisions regarding forum of necessity (s. 6) and *forum non conveniens* (s. 11). A number of subsequent provincial statutes are clearly based on the *CJPTA* (see, e.g., *Court Jurisdiction and Proceedings Transfer Act*, *S.B.C. 2003, c. 28*; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2; *Court Jurisdiction and Proceedings Transfer Act*, *S.Y. 2000, c. 7* (not yet in force)).

42 In these statutes, the legislative scheme proposed in the *CJPTA* has been adopted, with some differences in wording, as they include [page599] non-exhaustive lists of prescriptive connecting factors which are presumed to establish a real and substantial connection. Unlike with Book Ten of the *Civil Code of Québec*, the legislatures that enacted them did not attempt to codify the entire field of private international law, but attached particular importance to issues related to the assumption and exercise of jurisdiction.

43 Unlike in these other provinces, the Ontario legislature has not enacted a statute based on the *CJPTA*. However, the province has established its own set of connecting factors for the purposes of service outside Ontario, which are set out in the Ontario *Rules of Civil Procedure*. These factors, which are found in rule 17.02, are similar, in part, to those of the *CJPTA* and of the statutes based on the *CJPTA*. It has been observed, though, that rule 17.02 is purely procedural in nature and does not by itself establish jurisdiction in a case (P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2010), at p. 121).

(5) Understanding the Real and Substantial Connection Test - The Ontario Court of Appeal in *Muscutt*

44 Given the absence of statutory rules, the Ontario Court of Appeal endeavoured to establish a common law framework for the application of the real and substantial connection test in its important judgment in *Muscutt*. At issue in that case was a claim in tort. An Ontario resident had been injured in a car crash in Alberta. The four defendants lived in Alberta at the time. One of them moved to Ontario after the accident. The plaintiff returned to Ontario and sued all the defendants in Ontario. Two of the Alberta defendants moved to stay the action for want of jurisdiction and, in the alternative, on the basis of *forum non conveniens*. They argued that the action should be stayed for want of jurisdiction. They also challenged the constitutional validity of the provisions of the Ontario rules on service outside the province. In their opinion, those provisions were *ultra vires* the province of Ontario because they had an extraterritorial effect. The Ontario Superior Court of Justice dismissed the constitutional challenge and assumed [page600] jurisdiction. The matter was then appealed to the Court of Appeal, which took the opportunity to consider the constitutional issues, although the main focus of its decision was on the content and the application of the real and substantial connection test.

45 The Court of Appeal quickly disposed of the argument that rule 17.02(h) was unconstitutional. It acknowledged that the real and substantial connection test imposed constitutional limits on the assumption of jurisdiction by a province's courts. But in its opinion, rule 17.02(h) was purely procedural and did not by itself determine the issue of the jurisdiction of the Ontario courts. The rule applied within the limits of the real and substantial connection test and did not resolve the issue of the assumption of jurisdiction (*Muscutt*, at paras. 50-52).

46 The Court of Appeal then turned to the central issue in the case: whether it was open to the Superior Court of

Justice to assume jurisdiction. Sharpe J.A. first sought to draw a clear distinction between the assumption of jurisdiction itself and *forum non conveniens*, which concerns the court's discretion to decline to exercise its jurisdiction. He cautioned against conflating what he viewed as different analytical stages in a situation in which the assumption of jurisdiction is in issue. A court must determine whether it has jurisdiction by applying the appropriate principles governing the assumption of jurisdiction. If it does have jurisdiction, it might then have to consider whether it should decline to exercise that jurisdiction in favour of a more appropriate forum (*Muscutt*, at paras. 40-42). The critical step in this process consists in determining when a court can properly assume jurisdiction in light of the constitutional limits imposed by the real and substantial connection test.

47 Sharpe J.A. emphasized the importance of this Court's decisions - from *Morguard* to *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, *[1993] 1 S.C.R. 897* - in the re-crafting of the traditional approaches to the [page601] resolution of conflicts in private international law. The adoption of the real and substantial connection test mandated a flexible approach to the assumption of jurisdiction informed by the underlying requirements of order and fairness. This approach required a concrete analysis of a number of factors that would allow a court to decide whether a sufficient connection existed between the forum and the subject matter of the litigation rather than with the parties. The court was to look not for the strongest possible connection with the forum, but for a minimum connection sufficient to meet the constitutional requirement that the matter be linked to the forum (para. 44). The Court of Appeal held that a court should consider a variety of factors to determine whether it has jurisdiction. Sharpe J.A. recommended taking a broad approach to jurisdiction. The defendant's relationship with the forum might be an "important" connecting factor, but not a "necessary" one (para. 74 (emphasis deleted)).

48 Although the Court of Appeal acknowledged the importance of flexibility, it stressed that clarity and certainty are also necessary characteristics of the conflicts system. It accordingly developed a list of eight factors to be considered when deciding whether an assumption of jurisdiction is justified:

(1) the connection between the forum and the plaintiff's claim;

(2) the connection between the forum and the defendant;

(3) unfairness to the defendant in assuming jurisdiction;

(4) unfairness to the plaintiff in not assuming jurisdiction;

(5) the involvement of other parties to the suit;

(6) the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;

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(7) whether the case is interprovincial or international in nature; and

(8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

49 In the Court of Appeal's opinion, no single factor should be determinative. In Sharpe J.A.'s words, "all relevant factors should be considered and weighed together" (*Muscutt*, at para. 76). The Court of Appeal held that the Superior Court of Justice could assume jurisdiction in the case before it. It turned briefly to the issue of *forum non conveniens*, but found that an Alberta court would not be a more appropriate forum (para. 115).

50 At the same time as its decision in *Muscutt*, the Court of Appeal applied this new template to four other cases in which the assumption of jurisdiction and *forum non conveniens* were in issue. In those appeals, it held that the Ontario courts should not assume jurisdiction, because the connections with Ontario were too insignificant to satisfy the real and substantial connection test. All four cases involved Ontario residents who had suffered injuries in accidents outside Canada and filed suits in Ontario courts (*Lemmex v. Bernard (2002), 60 O.R. (3d) 54*; *Gajraj v. DeBernardo (2002), 60 O.R. (3d) 68*; *Sinclair v. Cracker Barrel Old Country Store, Inc. (2002), 60 O.R. (3d) 76*;

Leufkens v. Alba Tours International Inc. (2002), 60 O.R. (3d) 84). All the actions were dismissed in respect of the foreign defendants. The Court of Appeal found that the facts that the plaintiffs resided in Ontario and had sustained damage in the province did not create a real and substantial connection between the litigation and the Ontario courts. Since the courts lacked jurisdiction, there was no need for the Court of Appeal to consider the *forum non conveniens* arguments.

(6) Reconsideration of *Muscutt* by the Ontario Court of Appeal

51 A few years after *Muscutt*, the Court of Appeal decided that, in the cases now before this [page603] Court, a review of the existing framework for the assumption of jurisdiction by Ontario courts and of issues related to *forum non conveniens* had become necessary. Since *Muscutt*, Ontario courts had consistently been applying the framework adopted in that case. Outside Ontario, *Muscutt* was considered an influential authority, and its framework was often accepted as an appropriate one for resolving issues related to the assumption of jurisdiction. But as I mentioned above, a number of common law provinces preferred to adopt the framework proposed in the *CJPTA*. On occasion, courts outside Ontario expressed reservations about certain aspects of the *Muscutt* framework (*Coutu v. Gauthier Estate*, 2006 NBCA 16, 296 N.B.R. (2d) 34, at paras. 67-68; *Fewer v. Ellis*, 2011 NLCA 17, 305 Nfld. & P.E.I.R. 39). It was suggested that the *Muscutt* test gave judges too much latitude in exercising their discretion on a case-by-case basis and was thus incompatible with the objectives of order and predictability in the assumption of jurisdiction. The wide parameters of this broad jurisdiction might also lead a court to conflate the jurisdictional analysis and the application of the doctrine of *forum non conveniens* in a search for the better or more appropriate forum in any given case. The analysis under the *Muscutt* test could also generate an instinctive bias in favour of the forum chosen by the plaintiff.

(7) The New *Van Breda-Charron* Approach of the Ontario Court of Appeal

52 As the Court of Appeal noted, it had heard a variety of opinions and conflicting suggestions regarding the need to reframe the *Muscutt* test and how this should be done. Some of the litigants wanted to retain *Muscutt* as it was; others proposed the adoption of a test based on a list of presumptive connecting factors similar to that of the *CJPTA* (*Van Breda-Charron*, paras. 56-57). The Court of Appeal declined to craft a common law rule that would in substance reproduce the content of the [page604] *CJPTA*. Sharpe J.A. expressed the view that the unpredictability of the *Muscutt* test had been exaggerated, as had the degree of certainty and predictability that would result if the *CJPTA* scheme were adopted (para. 68). He proposed what he saw as a middle way. The Court of Appeal would retain the *Muscutt* test, but would modify it by simplifying it and bringing it closer to the *CJPTA* model. Sharpe J.A. stated: "In refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction ... and, in so doing, bring Ontario law into line with the emerging national consensus on appropriate jurisdictional standards" (para. 69).

53 On that basis, the Court of Appeal reframed the *Muscutt* test in part. The first change, as Sharpe J.A. stated, moved the existing framework closer to that of the *CJPTA*. It was the creation of a category-based presumption of jurisdiction modelled on s. 10 of the *CJPTA*. In the absence of statutory connecting factors, the court decided to rely for this purpose on the factors governing service outside Ontario set out in rule 17.02 of the Ontario *Rules of Civil Procedure* (para. 71). Sharpe J.A. asserted that most of the connecting factors enumerated in rule 17.02, such as the fact that a contract was made in Ontario (rule 17.02(f)) or a tort was committed in the province (rule 17.02(g)), would presumptively confirm the jurisdiction of the Ontario court (para. 72). In other words, whenever one of these factors was established, a real and substantial connection justifying the assumption of jurisdiction by an Ontario court would be presumed to exist.

54 Sharpe J.A. added that where the presumption applied, it would be rebuttable. It would be open to a party to argue that, even though a presumptive connection existed, the real and substantial connection test had not been met (para. 72). Sharpe J.A. stated that these changes would be consistent with the incremental approach to the development [page605] of common law rules. In addition, almost all the post-*Muscutt* cases that he had reviewed seemed to have been resolved by one or another of the factors listed in rule 17.02 (paras. 74-75).

55 According to this view, the appropriate factors generally operate as reliable markers of jurisdiction at common law. The adoption of these markers would mitigate the complexity and unpredictability of the *Muscutt* test. Sharpe J.A. noted that the jurisprudence on service *ex juris* provides support for the use of these factors as indicators of a real and substantial connection. For example, in *Hunt*, La Forest J. had observed that, even if some of the traditional rules of jurisdiction might have to be recast in light of *Morguard*, the established factors could nevertheless be viewed as "a good place to start" (p. 325; see also *Spar Aerospace*, at paras. 55-56, on the provisions of the *Civil Code of Québec* applicable to the assumption by Quebec courts of jurisdiction over situations involving delictual and quasi-delictual liability). But Sharpe J.A. declined to give presumptive effect to the factors set out in rules 17.02(h) (damage sustained in Ontario) and 17.02(o) (necessary or proper party). Neither of these factors is included in the *CJPTA*. Nor have they gained broad acceptance as reliable indicators of jurisdiction. Indeed, the Court of Appeal found in *Muscutt* and its companion cases that the factor of "damage sustained in Ontario" was often not reliable and significant enough to justify an assumption of jurisdiction by an Ontario court.

56 Sharpe J.A. reaffirmed the need to draw a clear distinction between assuming jurisdiction and deciding whether to decline to exercise it on the basis of the *forum non conveniens* doctrine. He cautioned against confusing these two different steps in the resolution of a conflicts issue and emphasized that the factors that would justify a stay in the *forum non conveniens* analysis should not be worked into the jurisdiction *simpliciter* analysis (paras. 81-82 and 101). The conflation of the two analyses may have been the result of an [page606] unduly broad interpretation of the fairness factors of the *Muscutt* analysis (para. 81).

57 Building on this first principle that recognized the list of presumptive connecting factors, Sharpe J.A. re-crafted the *Muscutt* test. He retained part of the *Muscutt* analysis, merged some of its factors and reviewed the roles of other principles governing the assumption of jurisdiction. The defendants' connection with the court seized of the action continued to be a valid and important consideration. However, the connection between the plaintiffs' claim and the forum was maintained as a core element of the real and substantial connection test (paras. 87-88). A test based solely on the defendant's contacts with the jurisdiction would be "unduly restrictive" (para. 86).

58 The Court of Appeal merged the two factors related to fairness to the parties of assuming or declining jurisdiction into a single one. At the same time, it recommended that judges avoid treating the consideration of fairness as a separate inquiry distinct from the core of the test, since fairness cannot compensate for weak connections. Sharpe J.A. understood, however, the need to retain fairness to the plaintiff and to the defendant as an analytical tool in assessing the relevance, quality and strength of the connections with the forum in order to determine whether assuming jurisdiction would accord with the principles of order and fairness (paras. 93, 95-96 and 98).

59 Sharpe J.A. went on to observe that considerations of fairness would support the view that the forum of necessity doctrine is an exceptional basis for assuming jurisdiction (para. 100). I add that the forum of necessity issue is not before this Court in these appeals, and I will not need to address it here.

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60 According to Sharpe J.A., the involvement of other parties would remain a relevant factor, but its importance would be downgraded. It should not be routinely considered but would become relevant only if a party raised it as a connecting factor (para. 102).

61 He accepted that acts or conduct short of residence that take place in the jurisdiction will often support a finding that a real and substantial connection has been established (para. 92).

62 In the future, Sharpe J.A. stated, whether the courts would be willing to recognize and enforce a foreign judgment should not be treated as a separate factor to be weighed against the other connecting factors in determining jurisdiction. Rather, it is a general and overarching principle that constrains, or "disciplines", as he wrote, the assumption of jurisdiction against extraprovincial defendants. A court should not assume jurisdiction if it

would not be prepared to recognize and enforce a foreign judgment rendered on the same jurisdictional basis (para. 103). Whether the case is international or interprovincial was also removed from the list of factors. This would be treated as a question of law liable to be considered in the real and substantial connection analysis (para. 106). The court adopted the same approach in respect of comity and the standards of jurisdiction and of recognition and enforcement of judgments prevailing elsewhere. These considerations, while remaining relevant to the real and substantial connection analysis, would no longer serve as specific factors (paras. 107-8).

63 Finally, the Court of Appeal held that considerations related to foreign law remain relevant to the issue of the assumption of jurisdiction. In Sharpe J.A.'s view, evidence on how foreign courts would treat such cases might be helpful (para. 107). I note in passing, however, that undue emphasis on juridical disadvantage as a factor in the jurisdictional analysis appears to be hardly consonant with the principle of comity that should govern legal relationships between modern democratic states, [page608] as this Court held in *Beals*. In particular, such an emphasis would seem hard to reconcile with the principle of comity that should govern relationships between the courts of different provinces within the same federal state, as this Court held in *Morguard* and *Hunt*.

64 In summary, the *Van Breda-Charron* approach offers a simplified test in which the roles of a number of the factors of the *Muscutt* test have been modified. In short, when one of the presumptive connecting factors applies, the court will assume jurisdiction unless the defendant can demonstrate the absence of a real and substantial connection. If, on the other hand, none of the presumptive connecting factors are found to apply to the claim, the onus rests on the plaintiff to prove that a sufficient relationship exists between the litigation and the forum. In addition to the list of presumptive and non-presumptive factors, parties can rely on other connecting factors informed by the principles that govern the analysis.

65 I will now turn to the issue of whether the Court of Appeal was right to hold that it was open to the Ontario courts to assume jurisdiction in the two cases now before us. If I conclude that it was open to them to do so, I will then discuss whether they should have declined to exercise their jurisdiction under the principles of *forum non conveniens*.

(8) Framework for the Assumption of Jurisdiction

66 In this Court, as in the Court of Appeal, the parties and the interveners have expressed sharply different views about whether and how the law of conflicts should be changed in respect of the assumption of jurisdiction. As might be expected, the disagreements extend to the impact of possible changes on the outcome of these appeals. The conflicting approaches articulated in this Court reflect the tension between a search for flexibility, which is closely connected with concerns about fairness to individuals engaged in litigation, and a desire to [page609] ensure greater predictability and consistency in the institutional process for the resolution of conflict of laws issues related to the assumption and exercise of jurisdiction. Indeed, striking a proper balance between flexibility and predictability, or between fairness and order, has been a constant theme in the Canadian jurisprudence and academic literature since this Court's judgments in *Morguard*, *Hunt*, *Amchem* and *Tolofson*.

67 The real and substantial connection test is now well established. However, it is clear that dissatisfaction with it and uncertainty about its meaning and conditions of application have been growing, and that there is now a perceived need for greater direction on how it applies. I adverted above to the need to draw a distinction between the constitutional test and the rules of private international law - two aspects of the law of conflicts that have sometimes been conflated in previous cases. At this point, it is necessary to clarify the rules of the conflict of laws in a way that is consistent with the constitutional constraints on the provinces' courts but does not turn every private international law issue into a constitutional one.

68 The legislatures of several provinces, as well as the Ontario Court of Appeal in *Muscutt* and *Van Breda-Charron*, have responded to these concerns and attempted to provide guidance for the application of the real and substantial connection test. We can build upon these legislative developments and judgments. Indeed, Sharpe J.A. referred in *Van Breda-Charron* to what he described, perhaps with some optimism, as an emerging consensus in Canadian law on how to resolve these issues. On the basis of this perhaps fragile consensus and these

developments and judgments, this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province. I will also consider how jurisdiction should be exercised or declined under [page610] the doctrine of *forum non conveniens*. This said, I remain mindful that the Court is not of course tasked with drafting a complete code of private international law. Principles will be developed as problems arise before the courts. Moreover, all my comments about the development of the common law principles of the law of conflicts are subject to provisions of specific statutes and rules of procedure.

69 When a court considers issues related to jurisdiction, its analysis must deal first with those concerning the assumption of jurisdiction itself. That analysis must be grounded in a proper understanding of the real and substantial connection test, which has evolved into an important constitutional test or principle that imposes limits on the reach of a province's laws and courts. As I mentioned above, this constitutional test reflects the limited territorial scope of provincial authority under the *Constitution Act, 1867*. At the same time, the Constitution acknowledges that international or interprovincial situations may have effects within a province. Provinces may address such effects in order to resolve issues related to conflicts with their own internal legal systems without overstepping the limits of their constitutional authority (see *Castillo*).

70 The real and substantial connection test does not mean that problems of assumption of jurisdiction or other matters, such as the choice of the proper law applicable to a situation or the recognition of extraprovincial judgments, must be dealt with on a case-by-case basis by discretionary decisions of courts, which would determine, on the facts of each case, whether a sufficient connection with the forum has been established. Judicial discretion has an honourable history, and the proper operation of our legal system often depends on its being exercised wisely. Nevertheless, to rely completely on it to flesh out the real and substantial connection test in such a way that the test itself becomes a conflicts [page611] rule would be incompatible with certain key objectives of a private international law system.

71 The development of an appropriate framework for the assumption of jurisdiction requires a clear understanding of the general objectives of private international law. But the existence of these objectives does not mean that the framework for achieving them must be uniform across Canada. Because the provinces have been assigned constitutional jurisdiction over such matters, they are free to develop different solutions and approaches, provided that they abide by the territorial limits of the authority of their legislatures and their courts.

72 What would be an appropriate framework? How should it be developed in the case of the assumption and exercise of jurisdiction by a court? A particular challenge in this respect lies in the fact that court decisions dealing with the assumption and the exercise of jurisdiction are usually interlocutory decisions made at the preliminary stages of litigation. These issues are typically raised before the trial begins. As a result, even though such decisions can often be of critical importance to the parties and to the further conduct of the litigation, they must be made on the basis of the pleadings, the affidavits of the parties and the documents in the record before the judge, which might include expert reports or opinions about the state of foreign law and the organization of and procedure in foreign courts. Issues of fact relevant to jurisdiction must be settled in this context, often on a *prima facie* basis. These constraints underline the delicate role of the motion judges who must consider these issues.

73 Given the nature of the relationships governed by private international law, the framework for the assumption of jurisdiction cannot be an unstable, *ad hoc* system made up "on the fly" on a case-by-case basis - however laudable the objective of individual fairness may be. As La Forest J. wrote in *Morguard*, there must be order in the system, and it must permit the development of a [page612] just and fair approach to resolving conflicts. Justice and fairness are undoubtedly essential purposes of a sound system of private international law. But they cannot be attained without a system of principles and rules that ensures security and predictability in the law governing the assumption of jurisdiction by a court. Parties must be able to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect. The need for certainty and predictability may conflict with the objective of fairness. An unfair set of rules could hardly be considered an efficient and just legal

regime. The challenge is to reconcile fairness with the need for security, stability and efficiency in the design and implementation of a conflict of laws system.

74 The goal of the modern conflicts system is to facilitate exchanges and communications between people in different jurisdictions that have different legal systems. In this sense, it rests on the principle of comity. But comity itself is a very flexible concept. It cannot be understood as a set of well-defined rules, but rather as an attitude of respect for and deference to other states and, in the Canadian context, respect for and deference to other provinces and their courts (*Morguard*, at p. 1095; *R. v. Hape*, *2007 SCC 26*, *[2007] 2 S.C.R. 292*, at para. 47). Comity cannot subsist in private international law without order, which requires a degree of stability and predictability in the development and application of the rules governing international or interprovincial relationships. Fairness and justice are necessary characteristics of a legal system, but they cannot be divorced from the requirements of predictability and stability which assure order in the conflicts system. In the words of La Forest J. in *Morguard*, "what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice" (p. 1097; see also H. E. Yntema, "The Objectives of Private International Law" (1957), 35 *Can. Bar Rev.* 721, at p. 741).

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75 The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it. At the same time, the need for fairness and justice to all parties engaged in litigation must be borne in mind in selecting these presumptive connecting factors. But in recent years, the preferred approach in Canada has been to rely on a set of specific factors, which are given presumptive effect, as opposed to a regime based on an exercise of almost pure and individualized judicial discretion.

76 For example, the statutes based on the *CJPTA* and Book Ten of the *Civil Code of Québec* rely on specific facts linking the subject matter of the litigation to the jurisdiction. These factors are considered in order to determine whether a real and substantial connection exists for the purposes of the conflicts rules.

77 In the *CJPTA*, in the case of tort claims, s. 10(g) refers to the *situs* of a tort as a specific factor connecting the act with the jurisdiction. The identification of the *situs* of a tort may well lead to further questions, to which the *CJPTA* does not offer immediate answers, such as: Where did the acts that gave rise to the injury occur? Did they happen in more than one place? Where was the damage suffered or where did it become apparent? Other connecting factors might also become relevant, such as the existence of a contractual relationship (s. 10(e)) or a business carried on in the province (s. 10(h)). Jurisdiction can also be presence-based, when the defendant resides in the province (s. 3(d)). Likewise, the *Civil Code of Québec* contains a list of factors that must be considered in order to determine whether a Quebec authority has jurisdiction over a delictual or quasi-delictual action (art. 3148).

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78 Some authors take the view that the true core of the revised *Van Breda-Charron* test consists of a set of objective factual connections. Likewise, the Court of Appeal stated in *Van Breda-Charron* that the issue was essentially about connections: "The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum respectively" (para. 84; T. Monestier, "A 'Real and Substantial' Improvement? *Van Breda* Reformulates the Law of Jurisdiction in Ontario", in T. L. Archibald and R. S. Echlin, eds., *Annual Review of Civil Litigation, 2010* (2010) 185, at pp. 204-7). In my view, identifying a set of relevant presumptive connecting factors and determining their legal nature and effect will bring greater clarity and predictability to the analysis of the problems of assumption of jurisdiction, while at the same time ensuring consistency with the objectives of fairness and efficiency that underlie this branch of the law.

79 From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the

principles and analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction.

80 Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list. It will not be exhaustive. Rather, it will, first of all, be illustrative of the factual situations in which it will typically be open to a court to assume jurisdiction over a matter. These factors therefore warrant presumptive effect, [page615] as the Court of Appeal held in *Van Breda-Charron* (para. 109). The plaintiff must establish that one or more of the listed factors exists. If the plaintiff succeeds in establishing this, the court might presume, absent indications to the contrary, that the claim is properly before it under the conflicts rules and that it is acting within the limits of its constitutional jurisdiction (J. Walker, "Reforming the Law of Crossborder Litigation: Judicial Jurisdiction", consultation paper for the Law Commission of Ontario (March 2009), at pp. 19-20 (online)). Although the factors set out in the list are considered presumptive, this does not mean that the list of recognized factors is complete, as it may be reviewed over time and updated by adding new presumptive connecting factors.

81 The presumption with respect to a factor will not be irrebuttable, however. The defendant might argue that a given connection is inappropriate in the circumstances of the case. In such a case, the defendant will bear the burden of negating the presumptive effect of the listed or new factor and convincing the court that the proposed assumption of jurisdiction would be inappropriate. If no presumptive connecting factor, either listed or new, applies in the circumstances of a case or if the presumption of jurisdiction resulting from such a factor is properly rebutted, the court will lack jurisdiction on the basis of the common law real and substantial connection test. I will elaborate on each of these points below.

(a) *List of Presumptive Connecting Factors*

82 Jurisdiction must - irrespective of the question of forum of necessity, which I will not discuss here - be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first [page616] from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

83 At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law.

84 I would not include general principles or objectives of the conflicts system, such as fairness, efficiency or comity, in this list of presumptive connecting factors. These systemic values may influence the selection of factors or the application of the method of resolution of conflicts. Concerns for the objectives of the conflicts system might rule out reliance on some particular facts as connecting factors. But they should not themselves be confused with the factual connections that will govern the assumption of jurisdiction.

85 The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the [page617] conditions for the assumption of jurisdiction over all claims known to the law.

86 The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor. (I will not discuss its relevance or importance in the context of the forum of necessity doctrine, which is not at issue in these appeals.) Absent other considerations, the presence of the plaintiff in the jurisdiction will not create a presumptive relationship between the forum and either the subject matter of the litigation or the defendant. On the other hand, a defendant may always be sued in a court of the jurisdiction in which he or she is domiciled or resident (in the case of a legal person, the location of its head office).

87 Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

88 The *situs* of the tort is clearly an appropriate connecting factor, as can be seen from rule 17.02(g), and from the *CJPTA*, the *Civil Code of Québec* and the jurisprudence of this Court since [page618] *Tolofson*. The difficulty lies in locating the *situs*, not in acknowledging the validity of this factor once the *situs* has been identified. Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i)).

89 The use of damage sustained as a connecting factor may raise difficult issues. For torts like defamation, sustaining damage completes the commission of the tort and often tends to locate the tort in the jurisdiction where the damage is sustained. In other cases, the situation is less clear. The problem with accepting unreservedly that if damage is sustained at a particular place, the claim presumptively falls within the jurisdiction of the courts of the place, is that this risks sweeping into that jurisdiction claims that have only a limited relationship with the forum. An injury may happen in one place, but the pain and inconvenience resulting from it might be felt in another country and later in a third one. As a result, presumptive effect cannot be accorded to this connecting factor.

90 To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie*, entitle a court to assume jurisdiction over a dispute:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

(e) *Identifying New Presumptive Connecting Factors*

91 As I mentioned above, the list of presumptive connecting factors is not closed. Over time, courts may identify new factors which also presumptively [page619] entitle a court to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors. Relevant considerations include:

(a) Similarity of the connecting factor with the recognized presumptive connecting factors;

(b) Treatment of the connecting factor in the case law;

(c) Treatment of the connecting factor in statute law; and

(d) Treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.

92 When a court considers whether a new connecting factor should be given presumptive effect, the values of order, fairness and comity can serve as useful analytical tools for assessing the strength of the relationship with a forum to which the factor in question points. These values underlie all presumptive connecting factors, whether listed or new. All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum. Where such a relationship exists, one would generally expect Canadian courts to recognize and enforce a foreign judgment on the basis of the presumptive connecting factor in question, and foreign courts could be expected to do the same with respect to Canadian judgments. The assumption of jurisdiction would thus appear to be consistent with the principles of comity, order and fairness.

93 If, however, no recognized presumptive connecting factor - whether listed or new - applies, the effect of the common law real and substantial [page620] connection test is that the court should not assume jurisdiction. In particular, a court should not assume jurisdiction on the basis of the combined effect of a number of non-presumptive connecting factors. That would open the door to assumptions of jurisdiction based largely on the case-by-case exercise of discretion and would undermine the objectives of order, certainty and predictability that lie at the heart of a fair and principled private international law system.

94 Where, on the other hand, a recognized presumptive connecting factor does apply, the court should assume that it is properly seized of the subject matter of the litigation and that the defendant has been properly brought before it. In such circumstances, the court need not exercise its discretion in order to assume jurisdiction. It will have jurisdiction unless the party challenging the assumption of jurisdiction rebuts the presumption resulting from the connecting factor. I will now turn to this issue.

(c) *Rebutting the Presumption of Jurisdiction*

95 The presumption of jurisdiction that arises where a recognized connecting factor - whether listed or new - applies is not irrebuttable. The burden of rebutting the presumption of jurisdiction rests, of course, on the party challenging the assumption of jurisdiction. That party must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them.

96 Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the [page621] litigation. And where the presumptive connecting factor is the fact that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province. On the other hand, where the presumptive connecting factor is the commission of a tort in the province, rebutting the presumption of jurisdiction would appear to be difficult, although it may be possible to do so in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province.

97 In each of the above examples, it is arguable that the presumptive connecting factor points to a weak relationship between the forum and the subject matter of the litigation and that it would accordingly not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction. In such circumstances, the real and substantial connection test would not be satisfied and the court would lack jurisdiction to hear the dispute.

98 However, where the party resisting jurisdiction has failed to rebut the presumption that results from a presumptive connecting factor - listed or new - the court must acknowledge that it has jurisdiction and hold that the action is properly before it. At this point, it does not exercise its discretion to determine whether it has jurisdiction,

but only to decide whether to decline to exercise its jurisdiction should *forum non conveniens* be raised by one of the parties.

99 I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules is to establish whether a real and substantial connection exists [page622] between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

100 To recap, to meet the common law real and substantial connection test, the party arguing that the court should assume jurisdiction has the burden of identifying a presumptive connecting factor that links the subject matter of the litigation to the forum. In these reasons, I have listed some presumptive connecting factors for tort claims. This list is not exhaustive, however, and courts may, over time, identify additional presumptive factors. The presumption of jurisdiction that arises where a recognized presumptive connecting factor - whether listed or new - exists is not irrebuttable. The burden of rebutting it rests on the party challenging the assumption of jurisdiction. If the court concludes that it lacks jurisdiction because none of the presumptive connecting factors exist or because the presumption of jurisdiction that flows from one of those factors has been rebutted, it must dismiss or stay the action, subject to the possible application of the forum of necessity doctrine, which I need not address in these reasons. If jurisdiction is established, the claim may proceed, subject to the court's discretion to stay the proceedings on the basis of the doctrine of *forum non conveniens*. I will now turn to that issue.

(9) Doctrine of *Forum Non Conveniens* and the Exercise of Jurisdiction

101 As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is [page623] established. It has no relevance to the jurisdictional analysis itself.

102 Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.

103 If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for a stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.

104 This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem*. It built on the existing jurisprudence, and in particular on the judgment of the House of Lords in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] 1 A.C. 460. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based [page624] on a recognition that a common law court retains a residual power

to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.

105 A party applying for a stay on the basis of *forum non conveniens* may raise diverse facts, considerations and concerns. Despite some legislative attempts to draw up exhaustive lists, I doubt that it will ever be possible to do so. In essence, the doctrine focusses on the contexts of individual cases, and its purpose is to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient. For example, s. 11(1) of the *CJPTA* provides that a court may decline to exercise its jurisdiction if, "[a]fter considering the interests of the parties to a proceeding and the ends of justice", it finds that a court of another state is a more appropriate forum to hear the case. Section 11(2) then provides that the court must consider the "circumstances relevant to the proceeding". To illustrate those circumstances, it contains a non-exhaustive list of factors:

> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
>
> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole. [s. 11(2)]

106 British Columbia's *Court Jurisdiction and Proceedings Transfer Act*, which is based on the *CJPTA*, contains an identical provision - s. 11 - on [page625] *forum non conveniens*. In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, *2009 SCC 11*, *[2009] 1 S.C.R. 321*, at para. 22, this Court stated that s. 11 of the British Columbia statute was intended to "codify" *forum non conveniens*. Article 3135 of the *Civil Code of Québec* provides that *forum non conveniens* forms part of the private international law of Quebec, but it does not contain a description of the factors that are to govern the application of the doctrine in Quebec law. The courts are left with the tasks of developing an approach to applying it and of identifying the relevant considerations.

107 Quebec's courts have adopted an approach that, although basically identical to that of the common law courts, is subject to the indication in art. 3135 that *forum non conveniens* is an exceptional recourse. A good example of this can be found in the judgment of the Quebec Court of Appeal in *Oppenheim forfait GMBH v. Lexus maritime inc.*, *1998 CanLII 13001*, in which an action brought in Quebec was stayed in favour of a German court on the basis of *forum non conveniens*. Pidgeon J.A. emphasized the wide-ranging and contextual nature of a *forum non conveniens* analysis. The judge might consider such factors as the domicile of the parties, the locations of witnesses and of pieces of evidence, parallel proceedings, juridical advantage, the interests of both parties and the interests of justice (pp. 7-8; see also *Spar Aerospace*, at para. 71; J. A. Talpis with the collaboration of S. L. Kath, *"If I am from Grand-Mère, Why Am I Being Sued in Texas?" Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001), at pp. 44-45).

108 Regarding the burden imposed on a party asking for a stay on the basis of *forum non conveniens*, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*. On the other hand, it has not always been used consistently and does not appear in the *CJPTA* or any of the statutes based on the *CJPTA*, [page626] which simply require that the party moving for a stay establish that there is a "more appropriate forum" elsewhere. Nor is this expression found in art. 3135 of the *Civil Code of Québec*, which refers instead to the exceptional nature of the power conferred on a Quebec authority to decline jurisdiction: "... it may exceptionally and on an application by a party, decline jurisdiction ...".

109 The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the

normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. *Forum non conveniens* may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

110 As I mentioned above, the factors that a court may consider in deciding whether to apply *forum non conveniens* may vary depending on the context and might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation [page627] or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties.

111 Loss of juridical advantage is a difficulty that could arise should the action be stayed in favour of a court of another province or country. This difficulty is aggravated by the possible conflation of two different issues: the impact of the procedural rules governing the conduct of the trial, and the proper substantive law for the legal situation, that is, in the context of these two appeals, the proper law of the tort. In considering the question of juridical advantage, a court may be too quick to assume that the proper law naturally flows from the assumption of jurisdiction. However, the governing law of the tort is not necessarily the domestic law of the forum. This may be so in many cases, but not always. In any event, if parties plead the foreign law, the court may well need to consider the issue and determine whether it should apply that law once it is proved. Even if the jurisdictional analysis leads to the conclusion that courts in different states might properly entertain an action, the same substantive law may apply, at least in theory, wherever the case is heard.

112 A further issue that does not arise in these appeals is whether it is legitimate to use this factor of loss of juridical advantage within the Canadian federation. To use it too extensively in the *forum non conveniens* analysis might be inconsistent with the spirit and intent of *Morguard* and *Hunt*, as the Court sought in those cases to establish comity and a strong attitude of respect in relations between the different provinces, courts and legal systems of Canada. Differences should not be viewed instinctively as signs of disadvantage or inferiority. This factor obviously becomes more relevant where foreign countries are involved, but even then, comity and an attitude of respect for the courts and legal systems of other countries, many of which have the [page628] same basic values as us, may be in order. In the end, the court must engage in a contextual analysis, but refrain from leaning too instinctively in favour of its own jurisdiction. At this point, the decision falls within the reasoned discretion of the trial court. The exercise of discretion will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts, which, as I emphasized above, takes place at an interlocutory or preliminary stage. I will now consider whether the Ontario courts properly assumed jurisdiction in these cases and, if so, whether they should have declined to exercise it on the basis of *forum non conveniens*.

(10) Application

113 Before discussing the outcomes in the two appeals, I must note that the evidence was not the same in *Van Breda* and *Charron*, although they did raise similar legal issues and their factual matrices were the same in important aspects. The Court of Appeal rightly observed that the evidence about Club Resorts' activities in Ontario was not identical in the two cases. In particular, the plaintiffs in *Charron*, unlike the plaintiffs in *Van Breda*, asserted that the SuperClubs group of companies, to which the appellant Club Resorts belonged, maintained an office near Toronto and that Club Resorts had availed itself of that office's services. They also relied on the fact that representatives of Club Resorts had travelled to Ontario to promote their business. Moreover, it is important to note

that in considering the decisions of the courts below, this Court must show deference to the findings of fact of the judges of the Superior Court of Justice.

(a) *Van Breda*

114 In *Van Breda*, there is little evidence about the existence of sufficient factual connections. [page629] Ms. Van Breda's accident and physical injuries happened in Cuba. Mr. Berg and Ms. Van Breda were living in Ontario at the time of their trip. After the accident, however, they did not return to Ontario, as they moved first to Calgary and later to British Columbia, where they were living when they brought their action. Ms. Van Breda's damage, pain and suffering have happened mostly in British Columbia, like most of the treatments she has received. In addition, the evidence is essentially silent about Club Resorts' activities in Ontario, except on one point which I will address below. Moreover, I do not accept that evidence of advertising in Ontario would be enough to establish a connection. Advertising is often international, if not global. It is ubiquitous, crossing borders with ease. It does not, on its own, establish a connection between the claim and the forum. If advertising sufficed to create a connection with a forum, commercial organizations of a certain size could be sued in courts everywhere and anywhere in the world. The courts of a victim's place of residence would possess an almost universal jurisdiction over diverse and vast classes of consumer claims.

115 The motion judge and the Court of Appeal concluded, however, that a sufficient connection between the claim and the province arose out of the contractual relationship created between Mr. Berg and Club Resorts through the defendant Denis. Mr. Denis, who operated a specialized travel agency known as Sport au Soleil, had an agreement with Club Resorts under which he found tennis and squash professionals and sent them to Club Resorts hotels. In exchange for bed and board at a resort, each professional would give a few hours of instruction to guests of the hotel during his or her stay. It appears that Mr. Denis received some form of compensation from Club Resorts.

116 I find no reviewable error in the findings that Mr. Denis had the authority to represent Club Resorts and that a contract existed under which Mr. Berg was to provide services to Club Resorts. [page630] The benefit of this contract, accommodation at the resort, was extended to Ms. Van Breda, who was injured while there in the context of Mr. Berg's performance of his contractual obligation. Deference is owed to the motion judge's findings. No palpable and overriding error has been established. A contract was entered into in Ontario and a relationship was thus created in Ontario between Mr. Berg, Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

117 The existence of a contract made in Ontario that is connected with the litigation is a presumptive connecting factor that, on its face, entitles the courts of Ontario to assume jurisdiction in this case. The events that gave rise to the claim flowed from the relationship created by the contract. Club Resorts has failed to rebut the presumption of jurisdiction that arises where this factor applies. On this basis, I would uphold the Court of Appeal's conclusion that there was a sufficient connection between the Ontario court and the subject matter of the litigation.

118 Whether the Superior Court of Justice should have declined jurisdiction on the basis of the doctrine of *forum non conveniens* remains to be determined. Club Resorts had the burden of showing that a Cuban court would clearly be a more appropriate forum. I recognize that a sufficient connection exists between Cuba and the subject matter of the litigation to support an action there. The accident happened on a Cuban beach, at a hotel managed by Club Resorts. The initial injury was suffered there. Some of the potential defendants reside in Cuba. However, other issues related to fairness to the parties and to the efficient disposition of the claim must be considered. A trial held in Cuba would present serious challenges to the parties. There may be problems with witnesses, concerns about the application of local procedures, and expenses linked to litigating there. All things considered, the burden on the plaintiffs clearly would be far heavier if they were required to bring their action in Cuba. They would face substantial additional expenses and would be at a clear disadvantage relative to the defendants. They might [page631] also suffer a loss of juridical advantage. But on this point the evidence is far from clear and satisfactory. In the end, the appellant has not shown that a Cuban court would clearly be a more appropriate forum. I agree that the motion judge made no reviewable error in deciding not to decline to exercise his jurisdiction, and I would affirm the Court of

Appeal's judgment dismissing the appeal from that decision.

(b) *Charron*

119 In *Charron*, the existence of a sufficient connection with the Ontario court was hotly disputed. As in *Van Breda*, the accident itself happened in Cuba. On the other hand, Mrs. Charron returned to Ontario after her husband's death and continued to reside in that province. The damage claimed by the respondents was sustained largely in Ontario. But these facts do not constitute presumptive connecting factors and do not support the assumption of jurisdiction on the basis of the real and substantial connection test.

120 However, the evidence does support the presumptive connecting factor of carrying on business in the jurisdiction. The Superior Court of Justice assumed jurisdiction, and the Court of Appeal upheld its decision, mainly on the basis of an active commercial presence in Ontario that was not limited to advertising campaigns targeting the Ontario market. In the opinion of the courts below, Club Resorts had an active presence in Ontario even though its corporate head office was not in that province. Its presence was not limited to advertising activities or to contacts with travel package wholesalers or travel agents. The courts below concluded that the appellant had engaged in significant commercial activities in Ontario, especially through the office of the SuperClubs group, before the Charrons booked their holiday. The booking resulted at least in part from those activities in Ontario. After reviewing the evidence, Sharpe J.A. wrote the following for the Court of Appeal in respect of this factor:

[page632]

> The record reveals that CRL [Club Resorts Ltd.] was directly involved in activity in Ontario to solicit business for the resort. Unlike the defendants in *Leufkens*, *Lemmex* and *Sinclair*, CRL did not confine its activities to its home jurisdiction:
>
> - pursuant to its contract with the Cuban hotel owner, CRL was required to and did promote and advertise the resort using the "SuperClubs" brand in Canada;
> - CRL relies on maintaining a high profile for the SuperClubs brand in Ontario as residents of Canada and Ontario represent a high proportion of CRL's target market;
> - CRL was licenced to use the "SuperClubs" label and itself "created" the "SuperClubs Cuba" label and used these labels to market the resort in Ontario;
> - CRL's witness Abe Moore agreed on cross-examination:
>
> - "that CRL was in the business of carrying out activities in countries such as Canada to generate paying guests of the resort";
>
> - that to do so CRL had to "either directly or engage others to undertake the activity of solicitation, promotion and advertising" in Canada;
>
> - that CRL ensured that it had relationships with others to do so in Ontario to satisfy its contractual obligation to promote the resort;
>
> - CRL representatives regularly travel to Ontario to further CRL's promotional activity;
> - CRL arranged for the preparation and distribution of promotional materials in Ontario; and
> - as outlined in the following paragraph, CRL benefited from an office in Ontario that provided information and engaged in the promotion of the SuperClubs brand.
>
> ...
>
> In my view, one can fairly infer from this body of evidence that although CRL itself maintained no office [page633] in Ontario, CRL is implicated in and benefits from the physical presence in Ontario of an office

and contact person held out to the public as representing the same "SuperClubs" brand CRL uses to carry on its business of promoting and operating the resort. [paras. 117 and 119]

121 The Superior Court of Justice considered this evidence at a preliminary stage on the basis of the parties' pleadings. The nature and weight of this evidence has been challenged in this Court. But the courts below made findings about its content and about what it meant. The appellant has not demonstrated that the motion judge made any reviewable errors, and deference must be shown to his findings of fact.

122 Although whether this factor applies was a very hard fought issue in these appeals, the motion judge's findings of fact lead to the conclusion that Club Resorts was carrying on business in Ontario. Club Resorts' commercial activities in Ontario went well beyond promoting a brand and advertising. Its representatives were in the province on a regular basis. It benefited from the physical presence of an office in Ontario. Most significantly, on cross-examination Club Resorts' witness admitted that it was in the business of carrying out activities in Canada. Together, these facts support the conclusion that Club Resorts was carrying on business in Ontario. It follows that the respondents have established that a presumptive connecting factor applies and that the Ontario court is *prima facie* entitled to assume jurisdiction.

123 Club Resorts has not rebutted the presumption of jurisdiction that arises from this presumptive connecting factor. Its business activities in Ontario were specifically directed at attracting residents of the province, including the Charron family, to stay as paying guests at the resort in Cuba where the accident occurred. It cannot be said that the claim here is unrelated to Club Resorts' business activities in the province. Accordingly, I find that the [page634] Ontario court has jurisdiction on the basis of the real and substantial connection test.

124 I also find that the motion judge made no error in declining to stay the proceedings on the basis of *forum non conveniens*. Club Resorts failed to discharge its burden of showing that a Cuban court would clearly be a more appropriate forum in the circumstances of this case. Considerations of fairness to the parties weigh heavily in the respondents' favour. The inconvenience to the individual plaintiffs of transferring the litigation is greater than the inconvenience to the corporate defendant of not doing so. On the question of juridical advantage, I refer to my comments about *Van Breda*. I would add that keeping the case in the Ontario courts will probably avert a situation in which the proceedings against the various defendants are split.

IV. Conclusion

125 For these reasons, I would dismiss Club Resorts' appeals with costs to the respondents other than Bel Air Travel Group Ltd. and Hola Sun Holidays Limited.

Appeals dismissed with costs.

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Solicitors for the respondents Morgan Van Breda et al. (33692): Paliare, Roland, Rosenberg, Rothstein, Toronto.

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Solicitors for the respondent Bel Air Travel Group Ltd. (33606): McCague Borlack, Toronto.

Solicitors for the respondent Hola Sun Holidays Limited (33606): Buie Cohen, Toronto.

[page635]

Solicitors for the intervener the Tourism Industry Association of Ontario (33606 and 33692): Torys, Toronto.

Solicitors for the interveners Amnesty International, the Canadian Centre for International Justice and Canadian Lawyers for International Human Rights (33606 and 33692): Heenan Blaikie, Ottawa.

Solicitor for the intervener the Ontario Trial Lawyers Association (33606 and 33692): Allan Rouben, Toronto.

Morguard Investments Ltd. v. De Savoye

Supreme Court Reports

Supreme Court of Canada

Present: Dickson C.J.* and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

1990: April 23 / 1990: December 20.

File No.: 21116.

[1990] 3 S.C.R. 1077 | [1990] 3 R.C.S. 1077 | [1990] S.C.J. No. 135 | [1990] A.C.S. no 135

Douglas De Savoye, appellant; v. Morguard Investments Limited; respondent, and Credit Foncier Trust Company, respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (57 paras.)

* Chief Justice at the time of hearing.

Case Summary

Conflict of laws — Civil procedure — Judgments and orders — Recognition and enforcement of extraprovincial judgments — Respondents obtaining judgments in Alberta court against British Columbia resident for foreclosure and for deficiencies between value of property and amounts owing on mortgages — Whether or not Alberta judgments should be enforced by British Columbia court.

The respondents were mortgagees of lands in Alberta. The appellant was the mortgagor and then resided in Alberta. He moved to British Columbia and has not resided or carried on business in Alberta since then. The mortgages fell into default and the respondents brought action in Alberta. Service was effected in accordance with the rules for service ex juris of the Alberta Court. The appellant took no steps to appear or to defend the actions. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court and he did not attorn to its jurisdiction.

The respondents obtained judgments nisi in the foreclosure actions. At the expiry of the redemption period, they obtained orders for a judicial sale of the mortgaged properties to themselves and judgments were entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a [page1078] separate action in the British Columbia Supreme Court to enforce the Alberta judgments for the deficiencies. Judgment was granted to the respondents by the Supreme Court in a decision which was upheld on appeal to the Court of Appeal. At issue here was the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there.

Held: The appeal should be dismissed.

The common law regarding the recognition and enforcement of foreign judgments is anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century. This principle reflects one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Because jurisdiction is territorial, a state's law has no binding effect outside its jurisdiction.

Modern states cannot live in splendid isolation and do give effect to judgments given in other countries in certain

circumstances, such as judgments in rem and personal judgments. This was thought to be in conformity with the requirements of comity, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. But comity is based not simply on respect for a foreign sovereign, but on convenience and even necessity. Modern times require that the flow of wealth, skills and people across boundaries be facilitated in a fair and orderly manner. Principles of order and fairness which ensure security of transactions with justice must underlie a modern system of private international law. The content of comity therefore must be adjusted in the light of a changing world order.

No real comparison exists between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. The courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state.

[page1079]

The 19th century English rules fly in the face of the obvious intention of the Constitution to create a single country with a common market and a common citizenship. The constitutional arrangements made to effect this goal, such as the removal of barriers to interprovincial trade and mobility guarantees, speak to the strong need for the enforcement throughout the country of judgments given in one province.

The Canadian judicial structure is so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. All are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Further, Canadian counsel are all subject to the same code of ethics.

The courts in one province should give "full faith and credit" to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. Both order and justice militate in favour of the security of transactions. It is anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province.

These concerns, however, must be weighed against fairness to the defendant. The taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit. If the courts of one province are to be expected to give effect to judgments given in another province, there must be some limit to the exercise of [page1080] jurisdiction against persons outside the province. If it is reasonable to support the exercise of jurisdiction in one province, it is reasonable that the judgment be recognized in other provinces.

The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.

Here, the actions for the deficiencies properly took place in Alberta. The properties are situate there, and the contracts were entered into there by parties then resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiencies cries out for consolidation with the foreclosure proceedings. There was a real and substantial connection between the damages suffered and the jurisdiction. Thus, the Alberta court properly had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

The Reciprocal Enforcement of Judgments Acts in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than by bringing an action to enforce a judgment given in another province. There is nothing to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time.

Cases Cited

Referred to: Comber v. Leyland, [1898] A.C. 524; Travers v. Holley, [1953] 2 All E.R. 794; Emanuel v. Symon, [1908] 1 K.B. 302 (C.A.), rev'g [1907] 1 K.B. 235; Aetna Financial Services v. Feigelman, *[1985] 1 S.C.R. 2*; Marcotte v. Megson *(1987), 19 B.C.L.R. (2d) 300*; Singh v. Rajah of Faridkote, [1894] A.C. 670; Becquet v. Mac Carthy (1831), 2 B. & Ad. 951, 109 E.R. 1396; Schibsby v. Westenholz (1870), L.R. 6 Q.B. 155; Re Dulles' Settlement Trusts, [1951] 2 All E.R. 69; Harris v. Taylor, [1915] 2 K.B. 580; In re Trepca Mines Ltd., [1960] 1 W.L.R. 1273; Schemmer v. Property Resources Ltd., [1975] 1 Ch. 273; Indyka v. Indyka, [1969] 1 A.C. 33; New York v. Fitzgerald, *[1983] 5 W.W.R. 458*; Lung v. Lee *(1928), 63 O.L.R. 194*; Walsh v. Herman *(1908), 13 B.C.R. 314*; Marshall v. Houghton, *[1923] 2 W.W.R. 553*; Mattar v. Public Trustee *(1952), 5 W.W.R. (N.S.) 29*; Wedlay v. Quist *(1953), 10 W.W.R. (N.S.) 21*; Bank of Bermuda Ltd. v. Stutz, *[1965] 2 O.R. 121*; [page1081] Traders Group Ltd. v. Hopkins *(1968), 69 D.L.R. (2d) 250*; Batavia Times Publishing Co. v. Davis *(1977), 82 D.L.R. (3d) 247* (Ont. H.C.), aff'd *(1979), 105 D.L.R. (3d) 192* (Ont. C.A.); Eggleton v. Broadway Agencies Ltd. *(1981), 32 A.R. 61*; Weiner v. Singh *(1981), 22 C.P.C. 230*; Re Whalen and Neal *(1982), 31 C.P.C. 1*; North American Specialty Pipe Ltd. v. Magnum Sales Ltd. *(1985), 31 A.C.W.S. (2d) 320*; Archambault v. Solloway, B.C.S.C., April 18, 1956, unreported; Edward v. Edward Estate, *[1987] 5 W.W.R. 289*; Libman v. The Queen, *[1985] 2 S.C.R. 178*; Hilton v. Guyot, 159 U.S. 113 (1895); Spencer v. The Queen, *[1985] 2 S.C.R. 278*; Zingre v. The Queen, *[1981] 2 S.C.R. 392*; The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); The Atlantic Star, [1973] 2 All E.R. 175; Re Wismer and Javelin International Ltd. *(1982), 136 D.L.R. (3d) 647*; Re Mulroney and Coates *(1986), 27 D.L.R. (4th) 118*; Touche Ross Ltd. v. Sorrel Resources Ltd. *(1987), 11 B.C.L.R. (2d) 184*; Roglass Consultants Inc. v. Kennedy, Lock *(1984), 65 B.C.L.R. 393*; Black v. Law Society of Alberta, *[1989] 1 S.C.R. 591*; Interprovincial Co-Operatives Ltd. v. The Queen, *[1976] 1 S.C.R. 477*; R. v. Crown Zellerbach Canada Ltd., *[1988] 1 S.C.R. 401*; Multiple Access Ltd. v. McCutcheon, *[1982] 2 S.C.R. 161*; Moran v. Pyle National (Canada) Ltd., *[1975] 1 S.C.R. 393*; Central Trust Co. v. Rafuse, *[1986] 2 S.C.R. 147*; Dupont v. Taronga Holdings Ltd. (1986), 49 D.L.R. (4th) 335; International Shoe Co. v. Washington, 326 U.S. 310 (1945); First City Capital Ltd. v. Winchester Computer Corp., *[1987] 6 W.W.R. 212*.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 6, 7. Constitution Act, 1867, ss. 91(2), 91(29), 92(10), 121. Court Order Enforcement Act, R.S.B.C. 1979, c. 75, ss. 31(6), 40.

Authors Cited

Black, Vaughan. "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 Oxford J. Legal Stud. 547. Blom, Joost. "Conflict of Laws -- Enforcement of Extraprovincial Default Judgment -- Reciprocity of Jurisdiction: Morguard Investments Ltd. v. De Savoye" (1989), 68 Can. Bar Rev. 359. Castel, J.-G. "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 McGill L.J. 11. Edinger, Elizabeth. "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 U.B.C. L. Rev. 1.

Hogg, Peter W. Constitutional Law of Canada, 2nd ed. Toronto: Carswells, 1985. Kennedy, Gilbert D. "'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 Can. Bar Rev. 359. Kennedy, Gilbert D. "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. Bar Rev. 123. Sharpe, Robert J. Interprovincial Product Liability Litigation. Toronto: Butterworths, 1982. Sharpe, Robert J. "The Enforcement of Foreign Judgments". In M. A. Springman and Eric Gertner, eds., Debtor-Creditor Law: Practice and Doctrine. Toronto: Butterworths, 1985. Swan, John. "Recognition and Enforcement of Foreign Judgments: A Statement of Principle". In M. A. Springman and Eric Gertner, eds., Debtor-Creditor Law: Practice and Doctrine. Toronto: Butterworths, 1985. Swan, John. "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271. Von Mehren, Arthur T. and Donald T. Trautman. "Recognition of Foreign Adjudications: A Survey and a Suggested Approach" (1968), 81 Harv. L. Rev. 1601. Yntema, Hessel E. "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721.

APPEAL from a judgment of the British Columbia Court of Appeal *(1988), 27 B.C.L.R. (2d) 155*, *29 C.P.C. (2d) 52*, *[1988] 5 W.W.R. 650*, dismissing an appeal from a judgment of Boyd L.J.S.C. *(1987), 18 B.C.L.R. (2d) 262*, *[1988] 1 W.W.R. 87*. Appeal dismissed.

Donald J. Livingstone, for the appellant. Peter Reardon, for the respondents.

Solicitors for the appellant: Croft & Bjurman, North Vancouver. Solicitors for the respondents: Lawrence & Shaw, Vancouver.

The judgment of the Court was delivered by

LA FOREST J.

1 This appeal concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals with judgments granted in foreclosure proceedings for deficiencies on sale of mortgaged property.

[page1083]

Facts

2 The respondents, Morguard Investments Limited and Credit Foncier Trust Company, became mortgagees of lands in Alberta in 1978. The appellant, Douglas De Savoye, who then resided in Alberta, was originally guarantor but later took title to the lands and assumed the obligations of mortgagor. Shortly afterwards, he moved to British Columbia and has not resided or carried on business in Alberta since. The mortgages fell into default and the respondents brought action in Alberta. The appellant was served with process in the actions by double registered mail addressed to his home in British Columbia pursuant to orders for service by the Alberta court in accordance with its rules for service outside its jurisdiction. There are rules to the same effect in British Columbia.

3 The appellant took no steps to appear or to defend the action. There was no clause in the mortgages by which he agreed to submit to the jurisdiction of the Alberta court, and he did not attorn to its jurisdiction.

4 The respondents obtained judgments nisi in the foreclosure actions. At the expiry of the redemption period, they obtained "Rice Orders" against the appellant. Under these orders, a judicial sale of the mortgaged properties to the respondents took place and judgments were entered against the appellant for the deficiencies between the value of the property and the amount owing on the mortgages. The respondents then each commenced a separate action in the British Columbia Supreme Court to enforce the Alberta judgments for the deficiencies. Judgment was granted to

the respondents by the Supreme Court in a decision which was upheld on appeal to the British Columbia Court of Appeal. The appellant then sought and was granted leave to appeal to this Court, [1989] 1 S.C.R. viii.

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The Judgments Below

Supreme Court of British Columbia

5 The appellant argued that the respondents were not entitled to enforce the Alberta judgments because he had never attorned to the jurisdiction of the Alberta court. The chambers judge, Boyd L.J.S.C., noted that the Alberta court clearly had jurisdiction over the subject properties and the foreclosure proceedings. Nothing in the material, she noted, indicated that in granting orders for substitutional service upon the appellant, the Alberta court improperly exercised its discretion to assume jurisdiction, or that any other court would have been a more convenient forum in which to adjudicate the matter. She, therefore, concluded that the Alberta court had jurisdiction to make the orders in question. The judge then reviewed the substance of the orders and ordered that the respondents were entitled to judgment for the deficiencies: *(1987), 18 B.C.L.R. (2d) 262*, *[1988] 1 W.W.R. 87*.

Court of Appeal

6 The Court of Appeal, in reasons given by Seaton J.A., dismissed the appeal: *(1988), 27 B.C.L.R. (2d) 155*, *[1988] 5 W.W.R. 650*, *29 C.P.C. (2d) 52*. In its view, the Alberta default judgments could be enforced on the basis of reciprocity, more specifically reciprocity of jurisdictional practice in the two provinces. A British Columbia court, it held, should recognize an Alberta judgment if the Alberta court took jurisdiction in circumstances in which, if the facts were transposed to British Columbia, the courts of British Columbia would have taken jurisdiction as well.

7 In reviewing the question of the jurisdiction of the Alberta court, Seaton J.A. concluded that the Alberta judgments for the deficiency on the mortgage loans were enforceable by action in British Columbia because British Columbia's own courts, faced with a similar case, would have exercised jurisdiction under the British Columbia Rules of Court authorizing service ex juris without leave. He noted that such grounds for exercising jurisdiction [page1085] over a defendant resident outside the province were long established in English and Canadian law. He referred to Comber v. Leyland, [1898] A.C. 524 (H.L.), which held, at p. 527, that:

> ... where the parties have agreed that something is to be done in this country, some part of the subject-matter of the contract is to be executed within this country, it is a sort of consent of the parties that wherever they may be living, or wherever the contract may have been made, that question may be litigated in this country.

8 In Seaton J.A.'s view, this reasoning led logically to the assumption of jurisdiction, and reciprocally to the recognition by other courts. In this context, he cited Travers v. Holley, [1953] 2 All E.R. 794, where the English Court of Appeal had recognized a divorce decree granted in New South Wales on the ground that the English courts would in similar circumstances have exercised jurisdiction in the same way. If that reasoning were to be applied to courts of other provinces, judgments of other provinces should be enforced if the British Columbia courts exercise similar jurisdiction.

9 Seaton J.A. acknowledged, however, that this view has not prevailed in judgments in personam in which class the judgments concerned here fell. However, he noted that the leading case on the point, Emanuel v. Symon, [1908] 1 K.B. 302 (C.A.), had been decided at the beginning of the century when travel from one country to another was impractical (in that case between Western Australia and England). As well, he observed, there was then an unstated assumption that the administration of justice in other countries was inferior.

10 Considerations such as these, Seaton J.A. stated, had no application to the situation here. He favoured acknowledging a difference between foreign judgments and judgments in other provinces, and he observed that

such a difference had been accepted for certain purposes, such as in determining [page1086] the factors to be taken into account in deciding whether to grant a Mareva injunction prohibiting the transfer of goods to a place outside the court's jurisdiction; see Aetna Financial Services Ltd. v. Feigelman, *[1985] 1 S.C.R. 2*, at p. 35. He also drew support from the fact that all superior court judges are appointed, paid and removed by the same government, and that the Canadian Charter of Rights and Freedoms applies throughout Canada. He further referred to the Australian Constitution which provides for recognition by each state of judgments of other states in the Commonwealth.

11 He then reviewed the British Columbia decisions which had followed the English position, but found none that was binding and preferred the view of "reciprocal" recognition of judgments proposed in certain periodical writings (see Gilbert D. Kennedy, "'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley" (1954), 32 Can. Bar Rev. 359; Gilbert D. Kennedy, "Recognition of Judgments in Personam: The Meaning of Reciprocity" (1957), 35 Can. Bar Rev. 123; J.-G. Castel, "Recognition and Enforcement of Foreign Judgments in Personam and in Rem in the Common Law Provinces of Canada" (1971), 17 McGill L.J. 11). He then referred to and followed the judgment of Gow Co. Ct. J. (as he then was) in Marcotte v. Megson *(1987), 19 B.C.L.R. (2d) 300*, which had accepted the jurisdictional reciprocity approach for judgments in personam.

The Issue

12 No one denies the Alberta court's jurisdiction to entertain the actions and enforce them there if it can. It would be surprising if they did. They concern transactions entered into in Alberta by individuals who were resident in Alberta at the time of the transactions and involve land situate in that province. Though the defendant appellant was outside Alberta at the time the actions were brought and judgment given, the Alberta rules for service outside the jurisdiction permitted him to be served in British Columbia. These rules are similar to those in other provinces, and specifically British Columbia. The validity of such rules does not [page1087] appear to have been subjected to much questioning, a matter to which I shall, however, return.

13 The issue, then, as already mentioned, is simply whether a personal judgment validly given in Alberta against an absent defendant may be enforced in British Columbia where he now resides.

The English Background

14 The law on the matter has remained remarkably constant for many years. It originated in England during the 19th century and, while it has been subjected to considerable refinement, its general structure has not substantially changed. The two cases most commonly relied on, Singh v. Rajah of Faridkote, [1894] A.C. 670 (P.C.), and Emanuel v. Symon, supra, date from the turn of the century. I shall confine myself to a discussion of the latter because it is the more frequently cited.

15 In Symon, the defendant, while residing and carrying on business in Western Australia, entered into a partnership in 1895 for the working of a gold mine situated in the colony and owned by the partnership. He later ceased to carry on business there and moved permanently to England in 1899. Two years later, other members of the partnership brought an action in the colony for the dissolution of the partnership, sale of the mine, and an accounting. The writ was served on the defendant in England, but he took no step to defend the action. The colonial court decreed a dissolution of the partnership and sale of the mine, and in taking the accounts found a sum due from the partnership. The plaintiffs paid the sum and brought action in England to recover the portion which they alleged was owed by the defendant. Channell J. gave judgment for the plaintiffs, [1907] 1 K.B. 235, but a unanimous Court of Appeal reversed the judgment.

16 Buckley L.J.'s summary of the law in that case bears a remarkable resemblance to a Code and has [page1088] been cited repeatedly ever since. He stated, at p. 309:

> In actions in personam there are five cases in which the Courts of this country will enforce a foreign judgment: (1.) Where the defendant is a subject of the foreign country in which the judgment has been

> obtained; (2.) where he was resident in the foreign country when the action began; (3.) where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; (4.) where he has voluntarily appeared; and (5.) where he has contracted to submit himself to the forum in which the judgment was obtained.

Though the first of these propositions may now be open to doubt (see Robert J. Sharpe, "The Enforcement of Foreign Judgments", in M. A. Springman and E. Gertner, eds., Debtor-Creditor Law: Practice and Doctrine (1985), 641, at p. 645), Buckley L.J.'s statement of the law, with one qualification to be noted, otherwise accurately represents the common law in England to this day.

17 There had been some earlier attempts to extend the law to a situation relevant to this appeal. Thus from Becquet v. Mac Carthy (1831), 2 B. & Ad. 951, 109 E.R. 1396, it might have appeared that a sixth class might have been added to Buckley L.J.'s list, namely, "where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction". But that case was ultimately explained on the basis that the defendant there was the holder of a public office in the place where the judgment was obtained and so "constructively present" there at the time of the judgment; see Symon, supra, at pp. 310-11. One might also have been permitted to speculate that one who enters into a contract while residing in a given jurisdiction consents to the jurisdiction of the courts there as Blackburn J. seemed prepared to do in Schibsby v. Westenholz (1870), L.R. 6 Q.B. 155, at p. 161, but this possibility too was scotched in Symon; see per Lord Alverstone C.J., at p. 308.

[page1089]

18 Until the 1950s, then, the various circumstances identified by Buckley L.J. in Symon exhausted the possible cases in which a foreign judgment would be recognized in England. A change came, however, with the case of Travers v. Holley, supra, in 1953. There the English Court of Appeal had to consider whether they should recognize a divorce granted to a wife in New South Wales pursuant to a statute giving the New South Wales court jurisdiction to grant a divorce to a wife who was domiciled there at the time she was deserted by her husband, even though her husband had later acquired another domicile. A similar statute existed in England, and on this ground of reciprocal jurisdiction the Court of Appeal held that it should grant jurisdiction. As Hodson L.J. put it, at p. 800:

> ... where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves.

See also Somervell L.J., at p. 797.

19 It should be noted that England also has a rule of court (R.S.C. Ord. 11) that, like the rule under which Alberta exercised jurisdiction over the defendant here, permits the courts to assume jurisdiction over non-residents by service where he or she resides. This gives rise to the question whether, on the ground of jurisdictional reciprocity set forth in Travers v. Holley, the courts should recognize judgments of a foreign court which has exercised jurisdiction under a similar rule. Encouragement for this approach could be found in dicta by Denning L.J. in the earlier case of Re Dulles' Settlement Trusts, [1951] 2 All E.R. 69 (C.A.). At issue there was whether the English courts had jurisdiction to order a father, an American living outside the jurisdiction, to pay maintenance to a child. In discussing the case of [page1090] Harris v. Taylor, [1915] 2 K.B. 580 (C.A.), Denning L.J. had this to say, at pp. 72-73:

> The defendant was not in the island, but the Manx court gave leave to serve him out of the jurisdiction of the Manx court on the ground that the cause of action was founded on a tort committed within their jurisdiction. The defendant entered a conditional appearance in the Manx court and took the point that the cause of action had not arisen within the Manx jurisdiction. That point depended on the facts of the case,

> and it was decided against him, whence it followed that he was properly served out of the Manx jurisdiction in accordance with the rules of the Manx court. Those rules correspond with the English rules for service out of the jurisdiction contained in R.S.C., Ord. 11, and I do not doubt that our courts would recognise a judgment properly obtained in the Manx courts for a tort committed there whether the defendant voluntarily submitted to the jurisdiction or not, just as we would expect the Manx courts in a converse case to recognise a judgment obtained in our courts against a resident in the Isle of Man on his being properly served out of our jurisdiction for a tort committed here. [Emphasis added.]

20 This possibility of further extending the categories in the Symon case was, however, firmly rejected in In re Trepca Mines Ltd., [1960] 1 W.L.R. 1273 (C.A.), where the court stated that Travers v. Holley was limited to a judgment in rem in a matter affecting marital status, and that it was unwilling to take the step suggested by Denning L.J. in the Dulles case. In short, the English authorities afford no basis for extending the approach in Travers v. Holley to a personal obligation such as that existing in the present case; see also Schemmer v. Property Resources Ltd., [1975] 1 Ch. 273.

21 Before concluding this review of the English background, I should make reference to Indyka v. Indyka, [1969] 1 A.C. 33, in which the House of Lords found another technique for going beyond the strict categories in Symon. In that case, their Lordships held that the English courts would recognize a divorce decree granted in a foreign [page1091] country to a wife resident there though her husband was then domiciled in England. In the course of his remarks, Lord Wilberforce had this to say, at p. 105:

> In my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation -- mainly our own but also that of other countries with similar social systems -- to recognize divorces given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country, or territory, exercising jurisdiction.

It should be observed, however, that this case, too, involved matrimonial status and did not extend to an action in personam; see New York v. Fitzgerald, *[1983] 5 W.W.R. 458* (B.C.S.C.), per Sheppard L.J.S.C.

The Canadian Background

22 In Canada, the courts have until recent years unanimously accepted the authority of Emanuel v. Symon, supra, in dealing with the recognition of foreign judgments; see, for example, New York v. Fitzgerald. This was, of course, inevitable so far as foreign judgments were concerned until 1949 when appeals to the Privy Council were abolished. But, the approach was not confined to foreign judgments. It was extended to judgments of other provinces, which for the purposes of the rules of private international law are considered "foreign" countries; see, for example, Lung v. Lee *(1928), 63 O.L.R. 194* (C.A.). There is thus a plethora of cases throughout Canada where two persons have entered into a contract in one province, frequently when both were resident there at the time, but the plaintiff has found it impossible to enforce a judgment given in that province because the defendant had moved to another province when the action was brought. These cases include: Walsh v. Herman *(1908), 13 B.C.R. 314* (B.C.S.C. (Full Court)); Marshall v. Houghton, *[1923] 2 W.W.R. 553* (Man. C.A.); Mattar v. Public Trustee *(1952), 5 W.W.R. (N.S.) 29* (Alta. S.C., App. Div.); Wedlay v. Quist *(1953), 10 W.W.R. (N.S.) 21* (Alta. S.C., App. Div.); Bank of Bermuda Ltd. v. Stutz, *[1965] 2 O.R. 121* (H.C.); Traders Group Ltd. v. Hopkins *(1968), 69 D.L.R. (2d) 250* (N.W.T. Terr. C.); [page1092] Batavia Times Publishing Co. v. Davis *(1977), 82 D.L.R. (3d) 247* (Ont. H.C.), aff'd *(1979), 105 D.L.R. (3d) 192* (Ont. C.A.); Eggleton v. Broadway Agencies Ltd. *(1981), 32 A.R. 61* (Alta. Q.B.); Weiner v. Singh *(1981), 22 C.P.C. 230* (B.C. Co. Ct.); Re Whalen and Neal *(1982), 31 C.P.C. 1* (N.B.Q.B.); North American Specialty Pipe Ltd. v. Magnum Sales Ltd., B.C.S.C., No. C841410, February 11, 1985 (summarized in *(1985), 31 A.C.W.S. (2d) 320*). Essentially, then, recognition by the courts of one province of a personal judgment against a defendant given in another province is dependant on the defendant's presence at the time of the action in the province where the judgment was given, unless the defendant in some way submits to the jurisdiction of the court giving the judgment.

23 Soon after the decision in Travers v. Holley, supra, however, Professor Kennedy began to argue for the

extension of the "reciprocity" approach adopted in that case to personal actions, at least in the case of judgments given in other provinces; see "'Reciprocity' in the Recognition of Foreign Judgments: The Implications of Travers v. Holley", op. cit. An unreported British Columbia case, Archambault v. Solloway, B.C.S.C., April 18, 1956, prompted a further article from his pen: "Recognition of Judgments in Personam: The Meaning of Reciprocity", op. cit. In Archambault, Wilson J. of the British Columbia Supreme Court had found the jurisdictional reciprocity approach "highly persuasive" and failed to apply it solely because Quebec (where the judgment sought to be enforced had been given) only gave effect to a foreign judgment after an enquiry on its merits. It was, therefore, not comparable to the effect given to foreign judgments in cases where these are recognized in common law provinces. Subsequently, Professor Castel joined Kennedy in arguing for the adoption of the reciprocity approach; see Castel, op. cit. "There does not", he stated, "seem [page1093] to be any compelling reason against recognizing a jurisdiction which the forum itself claims" (p. 47).

24 Until 1987, however, no case appears to have adopted that position. But in that year, Gow Co. Ct. J. in a forceful judgment applied the reciprocity approach to an in personam action in Marcotte v. Megson, supra. The headnote summarizes the case as follows:

> The plaintiff, an Alberta resident, sued the defendant in the court of Queen's Bench of Alberta pursuant to s. 114(1) of the Business Corporations Act of that province which renders directors of a corporation liable to employees of the corporation for all debts not exceeding six months' wages. The plaintiff was granted leave to serve the defendant ex juris in British Columbia. The defendant was served but filed no defence. The plaintiff obtained default judgment against him for $6,307. The plaintiff later sued on that judgment in British Columbia. The defendant defended the action on the grounds that he had done nothing to submit to the jurisdiction of the Alberta court and that the Alberta court was without jurisdiction in the sense that it acted without jurisdiction under the conflict of laws (private international law) rules of the courts of British Columbia.
>
> Held -- Judgment for plaintiff.
>
> Reason would suggest that inside the Confederation of Canada the principle of reciprocity of jurisdiction should apply. The action was concerned, and only concerned, with a judgment of a next-door province, not a foreign state but a partner in Confederation, which could not be registered as a domestic judgment because the defendant never submitted to the jurisdiction of the Alberta court. Because the judgment was a default judgment, it could have been opened up on the merits had the defendant chosen to do so, but he deliberately chose not to do so, preferring to rest his defence on the grounds of "no presence" and "no submission". In those circumstances, there being as between Alberta and British Columbia reciprocity of jurisdiction, it was appropriate to apply the principle that our courts should recognize a jurisdiction which they themselves claim.

[page1094]

The British Columbia Court of Appeal in the present case has now added its support to the call that reason dictates the evolution of the common law to permit the enforcement of in personam judgments given in sister-provinces.

25 The appellant in this case, of course, relies on the law as stated in Symon, supra. The respondents naturally rely on the Court of Appeal's judgment and particularly the "reciprocity" approach.

26 Before going on, I should observe that academic writers have now engaged the issue on a broader plane than reciprocity; see Robert J. Sharpe, Interprovincial Product Liability Litigation (1982); John Swan, "Recognition and Enforcement of Foreign Judgments: A Statement of Principle", in Springman and Gertner, op. cit., at pp. 691 et seq.; John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271; Vaughan Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 Oxford J. Legal Stud. 547. Their approaches are not identical but in a broad sense it may be said that their thesis is that the conditions governing the taking of jurisdiction by the courts of one province and those under which they are enforced by the courts of another province should be viewed as correlative. If it is fair and reasonable for the courts of one province

to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment. For a number of these writers, there are constitutional overtones to this approach; see also Peter W. Hogg, Constitutional Law of Canada (2nd ed. 1985), at pp. 278-80. It is fair to say that I have found the work of these writers very helpful in my own analysis of the issues.

27 I should also note that the Indyka case, supra, has been followed in Canada; see Edward v. Edward Estate, *[1987] 5 W.W.R. 289* (Sask. C.A.).

[page1095]

Analysis

28 The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see Rajah of Faridkote, supra. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction. Great Britain, and specifically its courts, applied that doctrine more rigourously than other states; see Libman v. The Queen, *[1985] 2 S.C.R. 178*, which deals with the question in its criminal aspect. The English approach, we saw, was unthinkingly adopted by the courts of this country, even in relation to judgments given in sister-provinces.

29 Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. Thus a judgment in rem, such as a decree of divorce granted by the courts of one state to persons domiciled there, will be recognized by the courts of other states. In certain circumstances, as well, our courts will enforce personal judgments given in other states. Thus, we saw, our courts will enforce an action for breach of contract given by the courts of another country if the defendant was present there at the time of the action or has agreed to the foreign court's exercise of jurisdiction. This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory. Since the state where the judgment was given had power over the litigants, the judgments of its courts should be respected.

[page1096]

30 But a state was under no obligation to enforce judgments it deemed to fall outside the jurisdiction of the foreign court. In particular, the English courts refused to enforce judgments on contracts, wherever made, unless the defendant was within the jurisdiction of the foreign court at the time of the action or had submitted to its jurisdiction. And this was so, we saw, even of actions that could most appropriately be tried in the foreign jurisdiction, such as a case like the present where the personal obligation undertaken in the foreign country was in respect of property located there. Even in the 19th century, this approach gave difficulty, a difficulty in my view resulting from a misapprehension of the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

31 For my part, I much prefer the more complete formulation of the idea of comity adopted by the Supreme Court of the Unites States in Hilton v. Guyot, 159 U.S. 113 (1895), at pp. 163-64, in a passage cited by Estey J. in Spencer v. The Queen, *[1985] 2 S.C.R. 278*, at p. 283, as follows:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws ...

As Dickson J. in Zingre v. The Queen, *[1981] 2 S.C.R. 392*, at p. 400, citing Marshall C.J. in The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812), stated, "common interest impels sovereigns to mutual intercourse" between sovereign states. In a word, the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner. Von Mehren and Trautman have [page1097] observed in "Recognition of Foreign Adjudications: A Survey and A Suggested Approach" (1968), 81 Harv. L. Rev. 1601, at p. 1603: "The ultimate justification for according some degree of recognition is that if in our highly complex and interrelated world each community exhausted every possibility of insisting on its parochial interests, injustice would result and the normal patterns of life would be disrupted."

32 Yntema (though speaking more specifically there about choice of law) caught the spirit in which private international law, or conflict of laws, should be approached when he stated: "In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws"; see Hessel E. Yntema, "The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721, at p. 741. As is evident throughout his article, what must underlie a modern system of private international law are principles of order and fairness, principles that ensure security of transactions with justice.

33 This formulation suggests that the content of comity must be adjusted in the light of a changing world order. The approach adopted by the English courts in the 19th century may well have seemed suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England would find himself in defending an action initiated in a far corner of the world in the then state of travel and communications. The Symon case, supra, where the action arose in Western Australia against a defendant in England, affords a good illustration. The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against a defendant who has moved to a distant [page1098] land. However, this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly Englishmen who carried on enterprises in far away lands. As well, there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad; see Lord Reid in The Atlantic Star, [1973] 2 All E.R. 175 (H.L.), at p. 181.

34 The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.

35 However that may be, there is really no comparison between the interprovincial relationships of today and those obtaining between foreign countries in the 19th century. Indeed, in my view, there never was and the courts made a serious error in transposing the rules developed for the enforcement of foreign judgments to the enforcement of judgments from sister-provinces. The considerations underlying the rules of comity apply with much greater force between the units of a federal state, and I do not think it much matters whether one calls these rules of comity or simply relies directly on the reasons of justice, necessity and convenience to which I have already adverted. Whatever nomenclature is used, our courts have not hesitated to cooperate with courts of other [page1099] provinces where necessary to meet the ends of justice; see Re Wismer and Javelin International Ltd. *(1982), 136 D.L.R. (3d) 647* (Ont. H.C.), at pp. 654-55; Re Mulroney and Coates *(1986), 27 D.L.R. (4th) 118* (Ont. H.C.), at pp. 128-29; Touche Ross Ltd. v. Sorrel Resources Ltd. *(1987), 11 B.C.L.R. (2d) 184* (S.C.), at p. 189; Roglass Consultants Inc. v. Kennedy, Lock *(1984), 65 B.C.L.R. 393* (C.A.), at p. 394.

36 In any event, the English rules seem to me to fly in the face of the obvious intention of the Constitution to create

a single country. This presupposes a basic goal of stability and unity where many aspects of life are not confined to one jurisdiction. A common citizenship ensured the mobility of Canadians across provincial lines, a position reinforced today by s. 6 of the Charter; see Black v. Law Society of Alberta, *[1989] 1 S.C.R. 591*. In particular, significant steps were taken to foster economic integration. One of the central features of the constitutional arrangements incorporated in the Constitution Act, 1867 was the creation of a common market. Barriers to interprovincial trade were removed by s. 121. Generally trade and commerce between the provinces was seen to be a matter of concern to the country as a whole; see Constitution Act, 1867, s. 91(2). The Peace, Order and Good Government clause gives the federal Parliament powers to deal with interprovincial activities (see Interprovincial Co-Operatives Ltd. v. The Queen, *[1976] 1 S.C.R. 477*; as well as my reasons in R. v. Crown Zellerbach Canada Ltd., *[1988] 1 S.C.R. 401* (dissenting but not on this point); see also Multiple Access Ltd. v. McCutcheon, *[1982] 2 S.C.R. 161*). And the combined effect of s. 91(29) and s. 92(10) does the same for interprovincial works and undertakings.

37 These arrangements themselves speak to the strong need for the enforcement throughout the country of judgments given in one province. But that is not all. The Canadian judicial structure is [page1100] so arranged that any concerns about differential quality of justice among the provinces can have no real foundation. All superior court judges -- who also have superintending control over other provincial courts and tribunals -- are appointed and paid by the federal authorities. And all are subject to final review by the Supreme Court of Canada, which can determine when the courts of one province have appropriately exercised jurisdiction in an action and the circumstances under which the courts of another province should recognize such judgments. Any danger resulting from unfair procedure is further avoided by sub-constitutional factors, such as for example the fact that Canadian lawyers adhere to the same code of ethics throughout Canada. In fact, since Black v. Law Society of Alberta, supra, we have seen a proliferation of interprovincial law firms.

38 These various constitutional and sub-constitutional arrangements and practices make unnecessary a "full faith and credit" clause such as exists in other federations, such as the United States and Australia. The existence of these clauses, however, does indicate that a regime of mutual recognition of judgments across the country is inherent in a federation. Indeed, the European Economic Community has determined that such a feature flows naturally from a common market, even without political integration. To that end its members have entered into the 1968 Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

39 The integrating character of our constitutional arrangements as they apply to interprovincial mobility is such that some writers have suggested that a "full faith and credit" clause must be read into the Constitution and that the federal Parliament is, under the "Peace, Order and Good Government" clause, empowered to legislate respecting the recognition and enforcement of judgments throughout Canada; see, for example, Black, op. cit., and Hogg, op. cit. The present case was not, however, argued on that basis, and I need not go [page1101] that far. For present purposes, it is sufficient to say that, in my view, the application of the underlying principles of comity and private international law must be adapted to the situations where they are applied, and that in a federation this implies a fuller and more generous acceptance of the judgments of the courts of other constituent units of the federation. In short, the rules of comity or private international law as they apply between the provinces must be shaped to conform to the federal structure of the Constitution.

40 This Court has, in other areas of the law having extraterritorial implications, recognized the need for adapting the law to the exigencies of a federation. Thus in Aetna Financial Services Ltd. v. Feigelman, supra, the Court set aside a court order, a Mareva injunction, issued against a federally incorporated company with its head office in Montréal and offices in Toronto, enjoining it from transferring certain assets in Manitoba to one of its offices outside the province. There this Court clearly expressed the different considerations that distinguished that case from the English situations where it was sought to prevent the transfer of assets to other countries. Estey J. had this to say, at pp. 34-35:

> All the foregoing considerations, while important to an understanding of the operation of this type of injunction, leave untouched the underlying and basic question: do the principles, as developed in the United Kingdom courts, survive intact a transplantation from that unitary state to the federal state of Canada? The

> question in its simplest form arises in the principles enunciated in the earliest Mareva cases where the wrong to be prevented was the removal from "the jurisdiction" of assets of the respondent with a view to defeating the claim of a creditor. It has been found by the courts below that there was no such wrongdoing here. An initial question, therefore, must be answered, namely, what is meant by "jurisdiction" in a federal context? It at least means the jurisdiction of the Manitoba court. But is the bare removal of assets from the Province of Manitoba sufficient? The appellant is a federally incorporated company with authority to carry on business throughout Canada. In the course of so doing, it moves assets in and out of the provinces of Manitoba, Quebec and Ontario. No breach of law is asserted by the respondent. No [page1102] improper purpose has been exposed. It is simply a clash of rights: the respondents' right to protect their position under any judgment which might hereafter be obtained, and the appellant's right to exercise its undoubted corporate capacity, federally confirmed (and the constitutionality of which is not challenged), to carry on business throughout Canada. The appellant does not seek to remove the assets in question from the national jurisdiction in which its corporate existence is maintained. The writ of the Manitoba court runs through judgment, founded on service of initiating process on the appellant within Manitoba, into Ontario under reciprocal provincial legislation, and into Quebec by reason of the laws of that province, supra. None of these vital considerations was present in the United Kingdom where Mareva was conceived to fend off the depredations of shady mariners operating out of far-away havens, usually on the fringe of legally organized commerce. In the Canadian federal system, the appellant is not a foreigner, nor even a non-resident in the ordinary sense of the word. It is capable of 'residing' throughout Canada and did so in Manitoba. It is subject to execution under any Manitoba judgment in every part of Canada. There was no clandestine transfer of assets designed to defraud the legal process of the courts of Manitoba. There is no evidence that this federal entity has arranged its affairs so as to defraud Manitoba creditors. The terminology and trappings of Mareva must be examined in the federal setting. In some ways, 'jurisdiction' extends to the national boundaries, or, in any case, beyond the provincial boundary of Manitoba. For other purposes, jurisdiction no doubt can be confined to the reach of the writ of the Manitoba courts. [Emphasis added.]

41 A similar approach should, in my view, be adopted in relation to the recognition and enforcement of judgments within Canada. As I see it, the courts in one province should give full faith and credit, to use the language of the United States Constitution, to the judgments given by a court in another province or a territory, so long as that court has properly, or appropriately, exercised jurisdiction in the action. I referred earlier to the principles of order and fairness that should obtain in this area of the law. Both order and justice militate in favour of the security of transactions. It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province [page1103] simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?

42 These concerns, however, must be weighed against fairness to the defendant. I noted earlier that the taking of jurisdiction by a court in one province and its recognition in another must be viewed as correlatives, and I added that recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject-matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject-matter of the suit; see Joost Blom, "Conflict of Laws -- Enforcement of Extraprovincial Default Judgment -- Reciprocity of Jurisdiction: Morguard Investments Ltd. v. De Savoye" (1989), 68 Can. Bar Rev. 359, at p. 360. Thus, fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction.

43 As discussed, fair process is not an issue within the Canadian federation. The question that remains, then, is when has a court exercised its jurisdiction appropriately for the purposes of recognition by a court in another province? This poses no difficulty where the court has acted on the basis of some ground traditionally accepted by courts as permitting the recognition and enforcement of foreign judgments -- in the case of judgments [page1104] in

personam where the defendant was within the jurisdiction at the time of the action or when he submitted to its judgment whether by agreement or attornment. In the first case, the court had jurisdiction over the person, and in the second case by virtue of the agreement. No injustice results.

44 The difficulty, of course, arises where, as here, the defendant was outside the jurisdiction of that court and he was served ex juris. To what extent may a court of a province properly exercise jurisdiction over a defendant in another province? The rules for service ex juris in all the provinces are broad, in some provinces, Nova Scotia and Prince Edward Island, very broad indeed. It is clear, however, that if the courts of one province are to be expected to give effect to judgments given in another province, there must be some limits to the exercise of jurisdiction against persons outside the province.

45 It will be obvious from the manner in which I approach the problem that I do not see the "reciprocity approach" as providing an answer to the difficulty regarding in personam judgments given in other provinces, whatever utility it may have on the international plane. Even there, I am more comfortable with the approach taken by the House of Lords in Indyka v. Indyka, supra, where the question posed in a matrimonial case was whether there was a real and substantial connection between the petitioner and the country or territory exercising jurisdiction. I should observe, however, that in a case involving matrimonial status, the subject-matter of the action and the petitioner are obviously at the same place. That is not necessarily so of a personal action where a nexus may have to be sought between the subject-matter of the action and the territory where the action is brought.

[page1105]

46 A case in this Court, Moran v. Pyle National (Canada) Ltd., *[1975] 1 S.C.R. 393*, though a tort action, is instructive as to the manner in which a court may properly exercise jurisdiction in actions in contracts as well. In that case, an electrician was fatally injured in Saskatchewan while removing a spent light bulb manufactured in Ontario by a company that neither carried on business nor held any property in Saskatchewan. The company sold all its products to distributors and none to consumers. It had no salesmen or agents in Saskatchewan. The electrician's wife and children brought action against the company under The Fatal Accidents Act of Saskatchewan claiming the company had been negligent in the manufacture of the light bulb and in failing to provide an adequate safety system to prevent unsafe bulbs from leaving the plant and being sold or used. On a chambers motion, the trial judge held that any negligence would have occurred in Ontario and so the tort was committed out of Saskatchewan. He, however, granted special leave under a provision of The Queen's Bench Act to commence an action in Saskatchewan, and made an order allowing service of the statement of claim and a writ of summons in Ontario. The company successfully appealed to the Saskatchewan Court of Appeal, but the Court of Appeal's judgment was reversed by this Court.

47 Dickson J. gave the reasons of the Court. The location of a tort, he noted, was a matter of some difficulty. Normally, he observed, an action for a tort would be brought where the defendant happened to be, on the theory that the court had physical power over the defendant. But, he added, that suit could also be brought where the tort had been committed. Where the situs of the tort was, however, was not an easy question. One theory was that it was situated where the wrongful action took place (there Ontario). Another would have it that [page1106] it is the place where the damage occurred. But as Dickson J. noted, at p. 398:

> Logically, it would seem that if a tort is to be divided and one part occurs in state A and another in state B, the tort could reasonably for jurisdictional purposes be said to have occurred in both states or, on a more restrictive approach, in neither state. It is difficult to understand how it can properly be said to have occurred only in state A.

At the end of the day, he rejected any rigid or mechanical theory for determining the situs of the tort. Rather, he adopted "a more flexible, qualitative and quantitative test", posing the question, as had some English cases there cited, in terms of whether it was "inherently reasonable" for the action to be brought in a particular jurisdiction, or whether, to adopt another expression, there was a "real and substantial connection" between the jurisdiction and

the wrongdoing. Dickson J. thus summarized his view, at pp. 408-9:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the Distillers' case and again in the Cordova case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. This rule recognizes the important interest a state has in injuries suffered by persons within its territory. It recognizes that the purpose of negligence as a tort is to protect against carelessly inflicted injury and thus that the predominating element is damage suffered. By tendering his products in the [page1107] market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods. This is particularly true of dangerously defective goods placed in the interprovincial flow of commerce. [Emphasis added.]

48 Before going on, I should observe that if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment. This is obvious from the fact that in Moran Dickson J. derived the reasonableness of his approach from the "normal distributive channels" of products and, in particular, the "interprovincial flow of commerce". If, as I stated, it is reasonable to support the exercise of jurisdiction in one province, it would seem equally reasonable that the judgment be recognized in other provinces. This is supported by the statement of Dickson J. in Zingre, cited supra, that comity is based on the common interest of both the jurisdiction giving judgment and the recognizing jurisdiction. Indeed, it is in the interest of the whole country, an interest recognized in the Constitution itself.

49 The above rationale is not, as I see it, limited to torts. It is interesting to observe the close parallel in the reasoning in Moran with that adopted by this Court in dealing with jurisdiction for the purposes of the criminal law; see Libman, supra. In particular, barring express or implied agreement, the reasoning in Moran is obviously relevant to contracts; indeed, the same activity can often give rise to an action for breach of contract and one in negligence; see Central Trust Co. v. Rafuse, *[1986] 2 S.C.R. 147*. As Professor Sharpe observes [page1108] in Interprovincial Product Liability Litigation, op. cit., at pp. 19-20:

> It is inconsistent to permit jurisdiction in tort claims on the basis that the defendant should reasonably have foreseen that his goods would reach the plaintiff and cause damage within the jurisdiction and, on the other hand, to refuse service out of the jurisdiction in contractual actions where the defendant clearly knows that his goods are going to the foreign jurisdiction.

50 Turning to the present case, it is difficult to imagine a more reasonable place for the action for the deficiencies to take place than Alberta. As noted earlier, the properties were situate in Alberta, and the contracts were entered into there by parties then both resident in the province. Moreover, deficiency actions follow upon foreclosure proceedings, which should obviously take place in Alberta, and the action for the deficiencies cries out for consolidation with the foreclosure proceedings in some manner similar to a Rice Order. A more "real and substantial" connection between the damages suffered and the jurisdiction can scarcely be imagined. In my view, the Alberta court had jurisdiction, and its judgment should be recognized and be enforceable in British Columbia.

51 I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions in rem now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred. It seems to me that the approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties. In a world where even the most familiar things we buy and sell originate or are manufactured elsewhere, and where people are constantly moving from [page1109] province to province, it is simply anachronistic to uphold a "power theory" or a single situs for torts or contracts for the proper exercise of jurisdiction.

52 The private international law rule requiring substantial connection with the jurisdiction where the action took place is supported by the constitutional restriction of legislative power "in the province". As Guérin J. observed in Dupont v. Taronga Holdings Ltd. (1986), 49 D.L.R. (4th) 335 (Que. Sup. Ct.), at p. 339, [TRANSLATION] "In the case of service outside of the issuing province, service ex juris must measure up to constitutional rules." The restriction to the province would certainly require at least minimal contact with the province, and there is authority for the view that the contact required by the Constitution for the purposes of territoriality is the same as required by the rule of private international law between sister-provinces. That was the view taken by Guérin J. in Taronga where, at p. 340, he cites Professor Hogg, op. cit., at p. 278, as follows:

> In Moran v. Pyle, Dickson J. emphasized that the "sole issue" was whether Saskatchewan's rules regarding jurisdiction based on service ex juris had been complied with. He did not consider whether there were constitutional limits on the jurisdiction which could be conferred by the Saskatchewan Legislature on the Saskatchewan courts. But the rule which he announced could serve satisfactorily as a statement of the constitutional limits of provincial-court jurisdiction over defendants outside the province, requiring as it does a substantial connection between the defendant and the forum province of a kind which makes it reasonable to infer that the defendant has voluntarily submitted himself to the risk of litigation in the courts of the forum province.

I must confess to finding this approach attractive, but as I noted earlier, the case was not argued in constitutional terms and it is unnecessary to pronounce definitively on the issue. In another passage cited by Guérin J. (at p. 341), Professor Hogg (at pp. 278-79) observes that this is similar to the position taken in the United States through the instrumentality of the Due Process clause of the [page1110] Constitution of the United States; see International Shoe Co. v. Washington, 326 U.S. 310 (1945). Whether the Canadian counterpart to the due process clause, s. 7 of the Charter, though not made expressly applicable to property, might, at least in certain circumstances, play a role is also unnecessary to determine.

53 There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of forum non conveniens and the power of a court to prevent an abuse of its process; for a recent discussion, see Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 U.B.C. L. Rev. 1.

54 There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the Charter. None of these questions, however, are relevant to the facts of the present case and I have not given them consideration.

Relevance of Reciprocal Enforcement Legislation

55 I turn finally to an argument faintly pressed by the appellant, namely that the Legislature of British Columbia, like

that of other provinces, appears to have recognized the judicial rules as adopted in Symon, supra, in the Court Order Enforcement Act, R.S.B.C. 1979, c. 75, and no addition can, therefore, properly be made to the grounds there stated. In particular, counsel drew attention to s. 31(6) and especially para. (b) thereof. Section 31(6) reads as follows:

[page1111]

> 31. ...
>
> (6) No order for registration shall be made if the court to which application for registration is made is satisfied that
>
> (a) the original court acted either
>
> (i) without jurisdiction under the conflict of laws rules of the court to which application is made; or
>
> ...
>
> (b) the judgment debtor, being a person who was neither carrying on business nor ordinarily resident in the state of the original court, did not voluntarily appear or otherwise submit during the proceedings to the jurisdiction of that court;

56 There is a short answer to this argument. The Reciprocal Enforcement of Judgments Acts in the various provinces were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available, i.e. by bringing an action to enforce a judgment given in another province; see First City Capital Ltd. v. Winchester Computer Corp., *[1987] 6 W.W.R. 212* (Sask. C.A.). This is in fact made clear by s. 40 of the British Columbia Act which provides that nothing in the Act deprives a judgment creditor from bringing an action for enforcement of a judgment. There is nothing, then, to prevent a plaintiff from bringing such an action and thereby taking advantage of the rules of private international law as they may evolve over time.

Disposition

57 I would dismiss the appeal with costs.

Chevron Corp. v. Yaiguaje

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Karakatsanis, Wagner and Gascon JJ.

Heard: December 11, 2014;

Judgment: September 4, 2015.

File No.: 35682.

[2015] 3 S.C.R. 69 | *[2015] 3 R.C.S. 69* | *[2015] S.C.J. No. 42* | *[2015] A.C.S. no 42* | *2015 SCC 42*

Chevron Corporation and Chevron Canada Limited, Appellants; v. Daniel Carlos Lusitande Yaiguaje, Benancio Fredy Chimbo Grefa, Miguel Mario Payaguaje Payaguaje, Teodoro Gonzalo Piaguaje Payaguaje, Simon Lusitande Yaiguaje, Armando Wilmer Piaguaje Payaguaje, Angel Justino Piaguaje Lucitante, Javier Piaguaje Payaguaje, Fermin Piaguaje, Luis Agustin Payaguaje Piaguaje, Emilio Martin Lusitande Yaiguaje, Reinaldo Lusitande Yaiguaje, Maria Victoria Aguinda Salazar, Carlos Grefa Huatatoca, Catalina Antonia Aguinda Salazar, Lidia Alexandria Aguinda Aguinda, Clide Ramiro Aguinda Aguinda, Luis Armando Chimbo Yumbo, Beatriz Mercedes Grefa Tanguila, Lucio Enrique Grefa Tanguila, Patricio Wilson Aguinda Aguinda, Patricio Alberto Chimbo Yumbo, Segundo Angel Amanta Milan, Francisco Matias Alvarado Yumbo, Olga Gloria Grefa Cerda, Narcisa Aida Tanguila Narvaez, Bertha Antonia Yumbo Tanguila, Gloria Lucrecia Tanguila Grefa, Francisco Victor Tanguila Grefa, Rosa Teresa Chimbo Tanguila, Maria Clelia Reascos Revelo, Heleodoro Pataron Guaraca, Celia Irene Viveros Cusangua, Lorenzo Jose Alvarado Yumbo, Francisco Alvarado Yumbo, Jose Gabriel Revelo Llore, Luisa Delia Tanguila Narvaez, Jose Miguel Ipiales Chicaiza, Hugo Gerardo Camacho Naranjo, Maria Magdalena Rodriguez Barcenes, Elias Roberto Piyahuaje Payahuaje, Lourdes Beatriz Chimbo Tanguila, Octavio Ismael Cordova Huanca, Maria Hortencia [page70] Viveros Cusangua, Guillermo Vincente Payaguaje Lusitante, Alfredo Donaldo Payaguaje Payaguaje and Delfin Leonidas Payaguaje Payaguaje, Respondents, and International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada, Canadian Centre for International Justice and Justice and Corporate Accountability Project, Interveners.

(96 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Private international law — Foreign judgments — Recognition — Enforcement — Foreign judgment creditor sought recognition and enforcement of foreign judgment in Ontario against U.S. foreign judgment debtor's and Canadian seventh-level indirect subsidiary — Foreign judgment debtor served ex juris at U.S. head office — Subsidiary served in juris at place of business in Ontario — Whether a real and substantial connection must exist between defendant or dispute and Ontario for jurisdiction to be established — Whether Ontario courts have jurisdiction over foreign judgment debtor's subsidiary when subsidiary is a third party to the judgment for which recognition and enforcement is sought.

Summary:

The oil-rich Lago Agrio region of Ecuador has long attracted the exploration and extraction activities of global oil companies, including Texaco. As a result of those activities, the region is said to have suffered extensive environmental pollution that has disrupted the lives and jeopardized the futures of its residents. For over 20 years, the 47 respondents/plaintiffs, who represent [page71] approximately 30,000 indigenous Ecuadorian villagers, have been seeking legal accountability and financial and environmental reparation for harms they allegedly suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron, a U.S. corporation. The Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed an Ecuadorian trial judge's award of US$8.6 billion in environmental damages and US$8.6 billion in punitive damages against Chevron. Ecuador's Court of Cassation upheld the judgment except on the issue of punitive damages. In the end, the total amount owed was reduced to US$9.51 billion.

Since the initial judgment, Chevron has fought the plaintiffs in the U.S. courts and has refused to acknowledge or pay the debt. As Chevron does not hold any Ecuadorian assets, the plaintiffs commenced an action for recognition and enforcement of the Ecuadorian judgment in the Ontario Superior Court of Justice. It served Chevron at its head office in California, and served Chevron Canada, a seventh-level indirect subsidiary of Chevron, first at an extra-provincially registered office in British Columbia, and then at its place of business in Ontario. *Inter alia*, the plaintiffs sought the Canadian equivalent of the award resulting from the judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos. Chevron and Chevron Canada each sought orders setting aside service *ex juris* of the amended statement of claim, declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying the action.

The motion judge ruled in the plaintiffs' favour with respect to jurisdiction. However, he exercised the court's power to stay the proceeding on its own initiative pursuant to s. 106 of the Ontario *Courts of Justice Act*. The Court of Appeal held this was not an appropriate case in which to impose a discretionary stay under s. 106. On the jurisdictional issue, it held that, as the foreign court had a real and substantial connection with the subject matter of the dispute or with the defendant, an Ontario court has jurisdiction to determine whether the foreign judgment should be recognized and enforced in Ontario against Chevron. With respect to Chevron Canada, in view of its bricks-and-mortar business in Ontario and its significant [page72] relationship with Chevron, the Court of Appeal found that an Ontario court has jurisdiction to adjudicate a recognition and enforcement action that also named it as a defendant.

Held: The appeal should be dismissed.

Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. There is no need to demonstrate a real and substantial connection between the dispute or the defendant and the enforcing forum. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules, and would be inconsistent with this Court's statement that the doctrine of comity must be permitted to evolve concomitantly with international business relations, cross-border transactions, and mobility.

This Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings. An unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a fixed, clear and predictable rule, allowing parties to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect and will help to avert needless and wasteful jurisdictional inquiries.

Two considerations of principle support the view that the real and substantial connection test should not be

extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. As the enforcing court is not creating a new substantive obligation, there can be no concern that the parties are situated elsewhere, or that the facts underlying the dispute [page73] are properly addressed in another court. The only important element is the foreign judgment and the legal obligation it has created. Furthermore, enforcement is limited to measures that can be taken only within the confines of the jurisdiction and in accordance with its rules, and the enforcing court's judgment has no coercive force outside its jurisdiction. Similarly, enforcement is limited to seizable assets found within its territory. As a result, any potential constitutional concerns relating to conflict of laws simply do not arise in recognition and enforcement cases: since the obligation created by a foreign judgment is universal, each jurisdiction has an equal interest in the obligation resulting from the foreign judgment, and no concern about territorial overreach could emerge.

Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. The need to acknowledge and show respect for the legal action of other states has consistently remained one of comity's core components, and militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The goal of modern conflicts systems rests on the principle of comity, which calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity. This is true of all areas of private international law, including the recognition and enforcement of foreign judgments. In recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. No unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings - through their own behaviour and legal noncompliance, they have made themselves the subject of outstanding obligations, so they may be called upon to answer for their debts in various jurisdictions. They are also provided with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted. Requiring a defendant to be present or to have assets in the enforcing jurisdiction would only undermine order and fairness: presence will frequently be absent given the very nature of the proceeding at issue, and requiring assets in the enforcing jurisdiction when recognition and [page74] enforcement proceedings are instituted would risk depriving creditors of access to funds that might eventually enter the jurisdiction. In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality.

Finding that there is no requirement of a real and substantial connection between the defendant or the action and the enforcing court in an action for recognition and enforcement is also supported by the choices made by the Ontario legislature, all other common law provinces and territories, Quebec, other international common law jurisdictions and most Canadian conflict of laws scholars.

In this case, jurisdiction is established with respect to Chevron. It attorned to the jurisdiction of the Ecuadorian courts, it was served *ex juris* at its head office, and the amended statement of claim alleged that it was a foreign debtor pursuant to a judgment of an Ecuadorian court. While this judgment has since been varied by a higher court, this occurred after the amended statement of claim had been filed; even if the total amount owed was reduced, the judgment remains largely intact. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

The question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction. Where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists. To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. This is a question of fact: the court must inquire into whether the company has some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time. Here, the motion judge's factual findings have not been contested. They are sufficient

to establish presence-based jurisdiction. Chevron Canada has a physical office in Ontario, where it was served. Its business activities at this office are sustained; it has representatives who provide [page75] services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances. The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction.

The establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron and Chevron Canada can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal. Further, the conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada or whether Chevron Canada's shares or assets will be available to satisfy Chevron's debt.

Cases Cited

Applied: *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077; *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416; **distinguished:***Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572; **referred to:***Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2002); *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (2011); *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2012); *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (2014); *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *BNP Paribas (Canada) v. Mécs* (2002), 60 O.R. (3d) 205; *Tasarruf Mevduati Sigorta Fonu v. Demirel*, [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508; *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115; *Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (2001); *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (2014); *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F.Supp.2d 905 (2002); *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004); *Base Metal [page76] Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (2002), cert. denied, 537 U.S. 822 (2002); *CSA8-Garden Village LLC v. Dewar*, 2013 ONSC 6229, 369 D.L.R. (4th) 125; *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549; *Salomon v. Salomon & Co.*, [1897] A.C. 22; *Ontario v. Rothman's Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561; *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20; *Wilson v. Hull* (1995), 174 A.R. 81; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330; *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, aff'd 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, aff'd 2012 ONCA 211, 110 O.R. (3d) 256; *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849; *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560.

Statutes and Regulations Cited

Canada Business Corporations Act, R.S.C. 1985, c. C-44.

Civil Code of Québec, art. 3155.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 106.

International Commercial Arbitration Act, R.S.O. 1990, c. I.9, Sch., arts. 35(1), 36(1).

Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5.

Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R.6.

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*, rr. 16.02(1)(c), 17.02, 20, 21.

Authors Cited

Black, Vaughan. "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 *Oxford J. Legal Stud.* 547.

Black, Vaughan, Stephen G. A. Pitel and Michael Sobkin. *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act*. Toronto: Carswell, 2012.

Blom, Joost. "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 *Can. Bus. L.J.* 1.

Brand, Ronald A. "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2013), 74 U. Pitt. L. Rev. 491.

[page77]

Briggs, Adrian. *The Conflict of Laws*, 3rd ed. Oxford: Oxford University Press, 2013.

Castel, J.-G. *Introduction to Conflict of Laws*, 4th ed. Markham, Ont.: Butterworths, 2002.

Dicey and Morris on the Conflict of Laws, vol. 1, 13th ed. Under the general editorship of Lawrence Collins. London: Sweet & Maxwell, 2000.

Monestier, Tanya J. "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2007), 33 Queen's L.J. 179.

Monestier, Tanya J. "Jurisdiction and the Enforcement of Foreign Judgments" (2013), 42 *Advocates' Q.* 107.

Monestier, Tanya J. "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 Fordham Int'l L.J. 396.

Perell, Paul M., and John W. Morden. *The Law of Civil Procedure in Ontario*, 2nd ed. Markham, Ont.: LexisNexis, 2014.

Pitel, Stephen G. A., and Cheryl D. Dusten. "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006), 85 *Can. Bar Rev.* 61.

Pitel, Stephen G. A., and Nicholas S. Rafferty. *Conflict of Laws*. Toronto: Irwin Law, 2010.

Uniform Law Conference of Canada. *Court Jurisdiction and Proceedings Transfer Act* (online: http: //www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/7 39-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-pro ceedings-transfer-act).

Walker, Janet. *Castel & Walker: Canadian Conflict of Laws*, 6th ed. Markham, Ont.: LexisNexis, 2005 (loose-leaf updated June 2015, release 50).

Watson, Garry D., and Frank Au. "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Advocates' Q.* 167.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Gillese and Hourigan JJ.A.), *2013 ONCA 758*, *118 O.R. (3d) 1*, *313 O.A.C. 285*, *370 D.L.R. (4th) 132*, *52 C.P.C. (7th) 229*, *15 B.L.R. (5th) 285*, *[2013] O.J. No. 5719* (QL), *2013 CarswellOnt 17574* (WL Can.), setting aside a decision of Brown J., *2013 ONSC 2527*, *361 D.L.R. (4th) 489*, *15 B.L.R. (5th) 226*, *[2013] O.J. No. 1955* (QL), *2013 CarswellOnt 5729* (WL Can.). Appeal dismissed.

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Clarke Hunter, *Q.C.*, *Anne Kirker*, *Q.C.*, and *Robert Frank*, for the appellant Chevron Corporation.

Benjamin Zarnett, *Suzy Kauffman* and *Peter Kolla*, for the appellant Chevron Canada Limited.

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Murray Klippenstein, *Renu Mandhane* and *W. Cory Wanless*, for the interveners the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice.

A. Dimitri Lascaris and *James Yap*, for the intervener the Justice and Corporate Accountability Project.

The judgment of the Court was delivered by

GASCON J.

I. Overview

1 In a world in which businesses, assets, and people cross borders with ease, courts are increasingly called upon to recognize and enforce judgments from other jurisdictions. Sometimes, successful recognition and enforcement in another forum is the only means by which a foreign judgment creditor can obtain its due. Normally, a judgment creditor will choose to commence recognition and enforcement proceedings in a forum where the judgment debtor has assets. In this case, however, the Court is asked to determine whether the Ontario courts have jurisdiction to recognize and enforce an Ecuadorian judgment where the foreign judgment debtor, Chevron Corporation ("Chevron"), claims to have no connection with the province, whether through assets or otherwise. The Court is also asked to determine whether the Ontario courts have jurisdiction over a Canadian subsidiary of Chevron, Chevron Canada Limited ("Chevron Canada"), a stranger to the foreign judgment for which recognition and enforcement is being sought.

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2 The courts below found that jurisdiction existed over Chevron. They held that the only connection that must be proven for recognition and enforcement to proceed is one between the foreign court and the original action on the merits; there is no preliminary need to prove a connection with Ontario for jurisdiction to exist in recognition and enforcement proceedings. They also found there to be an independent jurisdictional basis for proceeding against Chevron Canada due to the place of business it operates in the province, and at which it had been duly served.

3 I agree with the outcomes reached by the courts below with respect to both Chevron and Chevron Canada and I would dismiss the appeal. In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute. It makes little sense to compel such a connection when, owing to the nature of the action itself, it will frequently be lacking. Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum. Jurisdiction to recognize and enforce a foreign judgment within Ontario exists by virtue of the debtor being served on the basis of the outstanding debt resulting from the judgment. This is the case for Chevron. Jurisdiction also exists here with respect to Chevron Canada because it was validly served at a place of business it operates in the province. On the traditional jurisdictional grounds, this is sufficient to find jurisdiction.

II. Backgrounds and Facts

4 The dispute underlying the appeal originated in the Lago Agrio region of Ecuador. The oil-rich area has long attracted the exploration and extraction activities of global oil companies, including [page80] Texaco, Inc. ("Texaco"). As a result of those activities, the region is said to have suffered extensive environmental pollution that has, in turn, disrupted the lives and jeopardized the futures of its residents. The 47 respondents ("plaintiffs") represent approximately 30,000 indigenous Ecuadorian villagers. For over 20 years, they have been seeking legal accountability as well as financial and environmental reparation for harms they allegedly have suffered due to Texaco's former operations in the region. Texaco has since merged with Chevron.

5 In 1993, the plaintiffs filed suit against Texaco in the United States District Court for the Southern District of New York. In 2001, after lengthy interim proceedings, the District Court dismissed their suit on the grounds of international comity and *forum non conveniens*. The following year, the United States Court of Appeals for the Second Circuit upheld that judgment, relying in part on a commitment by Texaco to submit to the jurisdiction of the Ecuadorian courts should its motion to dismiss succeed: *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002).

6 In 2003, the plaintiffs filed suit against Chevron in the Provincial Court of Justice of Sucumbíos. Several years of litigation ensued. In 2011, Judge Zambrano ruled in the plaintiffs' favour, and ordered Chevron to pay US$8.6 billion in environmental damages, as well as US$8.6 billion in punitive damages that were to be awarded unless Chevron apologized within 14 days of the judgment. As Chevron did not apologize, the punitive damages award remained intact. In January 2012, the Appellate Division of the Provincial Court of Justice of Sucumbíos affirmed the trial judgment. In November 2013, Ecuador's Court of Cassation upheld the Appellate Division's judgment, except on the issue of punitive damages. In the end, the total amount owed was reduced to US$9.51 billion.

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7 Meanwhile, Chevron instituted further U.S. proceedings against the plaintiffs' American lawyer, Steven Donziger, and two of his Ecuadorian clients, seeking equitable relief. Chevron alleged that Mr. Donziger and his team had corrupted the Ecuadorian proceedings by, among other things, ghost-writing the trial judgment and paying Judge Zambrano US$500,000 to release it as his own. In 2011, Judge Kaplan of the United States District Court for the Southern District of New York granted preliminary relief in the form of a global anti-enforcement injunction with respect to the Ecuadorian judgment: *Chevron Corp. v. Donziger*, 768 F.Supp.2d 581 (S.D.N.Y. 2011). The United States Court of Appeals for the Second Circuit overturned this injunction in 2012, stressing that "[t]he [plaintiffs] hold a judgment from an Ecuadorian court. They may seek to enforce that judgment in any country in the world where

Chevron has assets": *Chevron Corp. v. Naranjo*, 667 F.3d 232 (2d Cir. 2012), at pp. 245-46. In 2014, Judge Kaplan of the District Court held that the Ecuadorian judgment had resulted from fraud committed by Mr. Donziger and others on the Ecuadorian courts: *Chevron Corp. v. Donziger*, 974 F.Supp.2d 362 (S.D.N.Y. 2014). That decision and the underlying allegations of fraud are not before this Court.

8 Since the initial judgment, Chevron has refused to acknowledge or pay the debt that the trial court said it owed, and it does not hold any Ecuadorian assets. Faced with this situation, the plaintiffs have turned to the Canadian courts for assistance in enforcing the Ecuadorian judgment, and obtaining their financial due. On May 30, 2012, after the Appellate Division's decision but prior to the release of the 2013 judgment of the Court of Cassation, they commenced an action for recognition and enforcement of the Ecuadorian judgment against Chevron, Chevron Canada and Chevron Canada Finance Limited in the Ontario Superior Court of Justice. The action against the latter has since been discontinued.

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9 Chevron, a U.S. corporation incorporated in Delaware, was served at its head office in San Ramon, California. Chevron Canada, a Canadian corporation governed by the *Canada Business Corporations Act*, *R.S.C. 1985, c. C-44*, with its head office in Alberta, is a seventh-level indirect subsidiary of Chevron, which has 100 percent ownership of every company in the chain between itself and Chevron Canada. The plaintiffs initially served Chevron Canada with their amended statement of claim at an extra-provincially registered office in British Columbia. Later, they served the company at a place of business it operates in Mississauga, Ontario.

10 In serving Chevron in San Ramon, the plaintiffs relied upon rule 17.02(m) of Ontario's *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194* ("Rules"), which provides that service may be effected outside of Ontario without leave where the proceeding consists of a claim "on a judgment of a court outside Ontario". In serving Chevron Canada at its Mississauga office, the plaintiffs relied upon rule 16.02(1)(c), which requires that personal service be made on a corporation "by leaving a copy of the document ... with a person at any place of business of the corporation who appears to be in control or management of the place of business".

11 In their amended statement of claim, the plaintiffs sought: (a) the Canadian equivalent of the award of US$18,256,718,000 resulting from the 2012 judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos; (b) the Canadian equivalent of costs to be determined by the Ecuadorian court; (c) a declaration that the shares of Chevron Canada are available to satisfy the judgment of the Ontario court; (d) the appointment of an equitable receiver over the shares and assets of Chevron Canada; (e) prejudgment interest from January 3, 2012; and (f) all costs of the proceedings on a substantial indemnity basis, plus all applicable taxes. In response, the appellants each brought a motion in which they sought substantially the same relief: (1) [page83] an order setting aside service *ex juris* of the amended statement of claim; and (2) an order declaring that the court had no jurisdiction to hear the action, and dismissing or permanently staying it.

III. Judicial History

A. *Ontario Superior Court of Justice (Commercial List) (Brown J.), 2013 ONSC 2527, 361 D.L.R. (4th) 489*

(1) Order Setting Aside Service *Ex Juris*

12 The motion judge was asked to determine the prerequisites for establishing that an Ontario court has jurisdiction in an action to recognize and enforce a foreign judgment. Chevron contended that the "real and substantial connection" test for establishing jurisdiction articulated by this Court in *Club Resorts Ltd. v. Van Breda*, *2012 SCC 17*, *[2012] 1 S.C.R. 572*, applies not only to the question whether a court can assume jurisdiction over a dispute in order to decide its merits, but also to whether an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment. The plaintiffs replied that the "real and substantial connection" test for jurisdiction does not apply to the enforcing court. Rather, in an action for recognition and enforcement, it need only be established that the foreign court had a real and substantial connection with the dispute's parties or with its subject matter. The motion judge ruled in the plaintiffs' favour, dismissing Chevron's motion. He offered five reasons for his conclusion.

13 First, in his view, this Court's leading cases on recognition and enforcement -- *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Beals v. Saldanha*, 2003 SCC 72, [2003] 3 S.C.R. 416 -- contain no suggestion that a real and [page84] substantial connection between the foreign judgment debtor and Ontario is needed. Second, he found that there is nothing in *Van Breda* to suggest that it altered the principles laid down in *Morguard* and *Beals*. Third, requiring that rule 17.02(m) be read "within the (un-stated) context of the Ontario court otherwise enjoying some real and substantial connection to the defendant would render the sub-rule meaningless" because the Ontario court will, of course, have no connection with the subject matter of the judgment, given that "it is a foreign judgment which by its very nature has no connection with Ontario": para. 80. Nor will there be an *in personam* connection between the defendant and Ontario, as "the sub-rule specifically contemplates that a non-Ontario resident will be the defendant in the action": *ibid*. Fourth, the judge held that there may be legitimate reasons (for instance, the practical reality that assets can exit a jurisdiction quickly) for seeking the recognition and enforcement of a foreign judgment against a non-resident debtor who has no assets in Ontario. To insist that the debtor have assets in the jurisdiction before a judgment creditor can seek recognition and enforcement could harm the creditor's ability to recover the debt. Fifth, the motion judge considered two analogous Ontario statutes -- the *Reciprocal Enforcement of Judgments (U.K.) Act*, R.S.O. 1990, c. R.6, and the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 -- and found that neither of these legislative schemes establishes a requirement that the defendant be located or possess assets in Ontario before a creditor can register a foreign judgment or arbitral award. In "an age of global commerce", he added, it would be misguided to have a more restrictive common law approach than a statutory one: para. 82.

14 The motion judge also found that jurisdiction existed over Chevron Canada, which had initially contended that because it was not a judgment debtor, there was no basis upon which to serve it *ex juris* in British Columbia. The judge observed, however, that the situation had changed since Chevron [page85] Canada had brought its motion: the plaintiffs had served the corporation at a "bricks and mortar" office it operates in Mississauga, Ontario (para. 87). This constituted a "place of business" within the meaning of rule 16.02(1)(c), and service at that location was sufficient to establish jurisdiction.

(2) Order of a Stay Under Section 106 of the *Courts of Justice Act*

15 In spite of these conclusions, the motion judge found that this was an appropriate case in which to exercise the court's power to stay a proceeding "on its own initiative" pursuant to s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. He so held for several reasons. First, Chevron does not own, has never owned, and has no intention of owning assets in Ontario. Second, Chevron conducts no business in Ontario. Third, there is no basis for asserting that Chevron Canada's assets are Chevron's assets for the purposes of satisfying the Ecuadorian judgment. Chevron does not own Chevron Canada's shares. Nor is there a legal basis for piercing Chevron Canada's corporate veil. In the judge's view, even though "[i]mportant considerations of international comity accompany any request for the recognition of a judgment rendered by a foreign court ... [t]he evidence [in this case] disclosed that there is nothing in Ontario to fight over", and thus no reason to allow the claim to proceed any further: para. 111.

B. *Ontario Court of Appeal (MacPherson, Gillese and Hourigan JJ.A.), 2013 ONCA 758, 118 O.R. (3d) 1*

16 The plaintiffs appealed the stay entered by the motion judge. Chevron and Chevron Canada cross-appealed his conclusion that the Ontario courts have jurisdiction.

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(1) Entering of the Stay

17 To maintain consistency with their jurisdictional challenge, Chevron and Chevron Canada made no submissions

before the Ontario Court of Appeal in support of the stay that had been granted. They made no submissions on this point before this Court either. This issue is therefore not before us.

18 In this regard, I would simply note that the Court of Appeal rejected the view that this was an appropriate case in which to impose a discretionary stay under s. 106 of the *Courts of Justice Act*. MacPherson J.A., writing for the court, emphasized that Chevron and Chevron Canada -- both "sophisticated parties with excellent legal representation" -- had decided not to attorn to the jurisdiction of the Ontario courts: para. 45. They referenced s. 106 in their submissions only insofar as it potentially supported a stay on the basis of lack of jurisdiction, not on the basis on which it had ultimately been granted. The stay was entirely the initiative of the motion judge. According to the Court of Appeal, a s. 106 stay should only be granted in rare circumstances, and the bar to granting it should be raised even higher when it is not requested by the parties. In fact, the s. 106 stay in this case constituted a "disguised, unrequested and premature Rule 20 and/or Rule 21 motion": para. 57. In MacPherson J.A.'s view, the motion judge had effectively imported a *forum non conveniens* motion into his reasoning on the stay, even though no such motion had been before him. The issues that the motion judge had addressed deserved to be fully canvassed on the basis of a complete record and full legal argument.

19 I note as well that the Court of Appeal found that although the motion judge's analysis with respect to jurisdiction relied on the notion of comity, he underplayed comity's importance in the reasons he gave in support of the stay. The Court of Appeal disagreed that allowing the case to be heard on the [page87] merits would constitute a mere "academic exercise": para. 70. In its view, in light of Chevron's considerable efforts to stall proceedings up to that point, the plaintiffs "[did] not deserve to have their entire case fail on the basis of an argument against their position that was not even made, and to which they did not have an opportunity to respond": *ibid*. It found that while the plaintiffs may not ultimately succeed on the merits, or in collecting from the judgment debtor, this was not relevant to a determination of whether to grant a discretionary stay at this stage of the proceedings. For the Court of Appeal, "[t]his case crie[d] out for assistance, not unsolicited and premature barriers": para. 72.

(2) Jurisdiction to Determine Whether the Ecuadorian Judgment Should Be Recognized and Enforced

20 On the jurisdictional issue, the Court of Appeal agreed with the motion judge's analysis. It found this Court's judgment in *Beals* to be "crystal clear" about how the real and substantial connection test is to be applied in an action for recognition and enforcement of a foreign judgment: para. 29. The sole question is whether the foreign court properly assumed jurisdiction, in the sense that it had a real and substantial connection with the subject matter of the dispute or with the defendant. In other words, there need not be an inquiry into the relationship between "the legal dispute in the foreign country and the domestic Canadian court being asked to recognize and enforce the foreign judgment": para. 30.

21 MacPherson J.A. found that this Court's decision in *Van Breda* did not alter this analysis. In his view, *Van Breda* applies to actions at first instance, not to actions for recognition and enforcement. In a first instance case, "an Ontario court exceeds its constitutional authority when it assumes jurisdiction of a case where there is no real and substantial connection to Ontario": para. 32. Assuming jurisdiction in such a case "offends the principle of comity because [page88] one or more other jurisdictions have a real and substantial connection to the subject matter of the litigation and Ontario does not": *ibid*. No constitutional issues or comity concerns arise when merely recognizing and enforcing a foreign judgment, "because the Ontario court does not purport to intrude on matters that are properly within the jurisdiction of the foreign court": para. 33. In the result, MacPherson J.A. held that "it is clear that the Ecuadorian judgment for US$9.51 billion against Chevron satisfied the requirement of rule 17.02(m)": para. 35. Thus, "an Ontario court has jurisdiction to determine whether the Ecuadorian judgment against Chevron may be recognized and enforced in Ontario": *ibid*.

22 With respect to Chevron Canada, the Court of Appeal held that the motion judge had been "correct to note Chevron Canada's bricks-and-mortar business in Ontario": para. 38. In addition, the court found that "Chevron Canada's significant relationship with Chevron" was also relevant to whether jurisdiction was legitimately found: *ibid*. An Ontario court thus has jurisdiction to adjudicate a recognition and enforcement action against Chevron that

also names Chevron Canada as a defendant.

IV. Issues

23 The appeal raises two issues:

(a) In an action to recognize and enforce a foreign judgment, must there be a real and substantial connection between the defendant or the dispute and Ontario for jurisdiction to be established?

(b) Do the Ontario courts have jurisdiction over Chevron Canada, a third party to the judgment for which recognition and enforcement is sought?

[page89]

V. Analysis

A. *Establishing Jurisdiction Over Foreign Debtors in Actions to Recognize and Enforce Foreign Judgments*

24 Chevron submits that before proceeding with an action to recognize and enforce a foreign judgment, an Ontario enforcing court must follow a two-step process. First, it must determine its own jurisdiction by applying the real and substantial connection test articulated by this Court in *Van Breda*. For Chevron, this test applies to actions to recognize and enforce foreign judgments just as it does to actions at first instance. Chevron suggests that one way -- and in many cases the only way -- in which this first component can be satisfied is if the defendant has assets in Ontario, or if there is a reasonable prospect of his or her having assets in Ontario in the future. Second, if jurisdiction is found, then the enforcing court should proceed to assess whether the foreign court appropriately assumed jurisdiction. Chevron does not dispute that this second component is satisfied here: a real and substantial connection undoubtedly existed between the subject matter of the litigation, Chevron and the Ecuadorian court that rendered the foreign judgment.

25 In support of its position, Chevron relies on a passage from this Court's decision in *Pro Swing Inc. v. Elta Golf Inc.*, *2006 SCC 52*, *[2006] 2 S.C.R. 612*, at para. 28: "Under the traditional rule [that only monetary judgments were enforceable], once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced" (Chevron's factum, at para. 52 (emphasis added by Chevron)). It contends that the requirement of a preliminary finding of jurisdiction did not need to be addressed in the Court's previous leading cases on recognition and enforcement -- *Morguard* and *Beals* -- as in each of those cases, the judgment debtor was resident in the province.

[page90]

26 Chevron further argues that this position is consistent with *Van Breda*. There, the Court emphasized that pursuant to the Constitution, Canadian courts can only adjudicate disputes where doing so constitutes a legitimate exercise of state power: para. 31. Chevron suggests that in actions to recognize and enforce foreign judgments, this constitutional legitimacy must still exist. Ontario courts risk jurisdictional overreach if they assume jurisdiction in cases like this one, in which the province has no interest. Moreover, assuming jurisdiction in such a case risks undermining, not furthering, the notion of comity. The rules for service *ex juris* create mere presumptions of jurisdiction that are "rebuttable if there is no real and substantial connection with the province": Chevron's factum, at para. 57.

27 I agree with the Ontario Court of Appeal and the motion judge that the approach favoured by Chevron is sound neither in law nor in policy. Canadian courts, like many others, have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. To recognize and enforce such a judgment, the only prerequisite is that the foreign court had a real and substantial connection with the litigants or with the subject matter of the dispute, or that the traditional bases of jurisdiction were satisfied. It is true that in any case in which a Canadian

court exercises authority over a party, some basis must exist for its doing so. It does not follow, however, that jurisdiction is and can only be established using the real and substantial connection test, whether that test is satisfied by the existence of assets alone or on another basis. In actions to recognize and enforce foreign judgments within the limits of the province, it is the act of service on the basis of a foreign judgment that grants an Ontario court jurisdiction over the defendant. I arrive at this conclusion for several reasons. First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance [page91] support this position. Third, the experiences of other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission.

(1) Jurisprudential Guidance Prior to *Van Breda*

28 Contrary to Chevron's contention, this Court has never required there to be a real and substantial connection between the defendant or the action and the enforcing court for jurisdiction to exist in recognition and enforcement proceedings.

29 This Court's modern judgments on recognition and enforcement begin with the 1990 decision in *Morguard*. There, the Court expanded the traditionally limited bases upon which foreign judgments could be recognized and enforced. Before *Morguard*, a foreign judgment would be recognized and enforced only if the defendant in the original action had been present in the foreign jurisdiction, or had consented to the court's jurisdiction: S. G. A. Pitel and N. S. Rafferty, *Conflict of Laws* (2010), at p. 53; *Morguard*, at p. 1092. These traditional bases for recognition and enforcement attracted criticism as being unduly restrictive, particularly as between sister provinces: see, e.g., V. Black, "Enforcement of Judgments and Judicial Jurisdiction in Canada" (1989), 9 *Oxford J. Legal Stud.* 547.

30 In *Morguard*, La Forest J., writing for the Court, held that the judgments of another province could and should also be recognized and enforced [page92] where the other province's court assumed jurisdiction on the basis of a real and substantial connection between the action and that province: pp. 1102 and 1108. In his view, the traditional grounds for recognition and enforcement had been retained based on a misguided notion of comity, unsuited to "the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner": p. 1096. Moreover, the traditional recognition and enforcement rules were tailored to circumstances that had existed at a time when it would have been difficult for the defendant to defend "an action initiated in a far corner of the world in the then state of travel and communications": p. 1097. The need to revisit the traditional rules was particularly acute in a federal state like Canada, to which "considerations underlying the rules of comity apply with much greater force": p. 1098.

31 In arriving at his conclusions, La Forest J.'s analysis focused entirely on whether the court of the other province or territory had "properly, or appropriately, exercised jurisdiction in the action": p. 1102. He intimated no need to interrogate the enforcing court's jurisdiction, either in his discussion of the law or in its application to the facts of the case. Instead, once a real and substantial connection between the original court and the action is demonstrated, and it is clear that the original court had jurisdiction, the resulting judgment "should be recognized and be enforceable" in the other provinces: p. 1108.

32 This Court revisited the prerequisites to recognition and enforcement in 2003 in *Beals*. It held that the real and substantial connection test should also apply to the money judgments of other countries' courts. In reasons written by Major J., the majority of the Court found that the principles of order, fairness, and comity that underlay the decision in *Morguard*, while originally cast in the interprovincial context, were equally compelling internationally: paras. 25-27. According to Major J., [page93] "[i]nternational comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law": para. 28. Where a real and substantial connection existed between the foreign court and the action's subject matter or its defendants, the foreign judgment should be recognized and enforced: para. 29.

33 Here again, the Court did not articulate or imply a need to inquire into the enforcing court's jurisdiction; the focus remained squarely on the foreign jurisdiction. In Major J.'s view, the following conditions must be met before a domestic court will enforce a judgment from a foreign jurisdiction:

> The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, *supra*. A real and substantial connection is the overriding factor in the determination of jurisdiction... .
>
> If a foreign court did not properly take jurisdiction, its judgment will not be enforced... .
>
> ...
>
> Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

(*Beals*, at paras. 37-39)

34 Thus, in the recognition and enforcement context, the real and substantial connection test operates simply to ensure that the foreign court from which the judgment originated properly assumed jurisdiction over the dispute. Once this is demonstrated, the defendant has an opportunity to prove that one of the defences to recognition and enforcement should apply. No mention is made of any need [page94] to prove a connection between the enforcing jurisdiction and the action. In the end, the test articulated for recognition and enforcement in *Morguard* and *Beals* is "seemingly straightforward": T. J. Monestier, "Jurisdiction and the Enforcement of Foreign Judgments" (2013), 42 *Advocates' Q.* 107, at p. 110.

35 Three years later, in *Pro Swing*, the Court once more extended the scope of Canadian recognition and enforcement law, this time in relation to non-monetary foreign judgments. Traditionally, to be recognizable and enforceable, a foreign judgment had to be "(a) for a debt, or definite sum of money" and "(b) final and conclusive": para. 10, quoting *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75. In *Pro Swing*, the Court held that non-monetary foreign judgments should also be capable of being recognized and enforced in Canada. In its view, "the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce": para. 31. Chevron contends that it was in the course of this judgment that the Court clearly expressed what had been implicit in *Morguard* and *Beals*: the need to assess the Canadian forum's jurisdiction before recognizing and enforcing the foreign judgment. In this regard, Chevron points to para. 28 of the majority's reasons, where Deschamps J. wrote: "Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced."

36 I cannot accede to Chevron's submission that this phrase was intended to alter this Court's clear guidance in *Morguard* and *Beals* for two reasons. First, this Court's insistence in *Pro Swing* that jurisdiction must be established prior to determining whether the foreign judgment should be recognized and enforced is hardly controversial: jurisdiction must, of course, always be established regardless of the type of action being brought. Otherwise, the court will lack the power to hear and determine [page95] the case. Where Chevron's submission fails, however, is in assuming that the only way to establish jurisdiction is by proving the existence of a real and substantial connection between the foreign judgment debtor and the Canadian forum. In my view, jurisdiction in an action limited to recognition and enforcement of a foreign judgment within the province of Ontario is established when service is effected on a defendant against whom a foreign judgment debt is alleged to exist. There is no requirement, nor need, to resort to the real and substantial connection test.

37 Second, Deschamps J. clearly stated the prerequisites to recognition and enforcement elsewhere in her

reasons, and did not insist or expand upon such a requirement. She wrote:

> The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms.

(*Pro Swing*, at para. 11)

This statement is consistent with *Morguard* and *Beals*: there is no need to probe the relationship between the enforcing forum and the action or the defendant. Deschamps J.'s one prior, passing reference to the need for the enforcing court to have jurisdiction cannot serve as a basis for inferring the existence of a significant, and previously unstated, hurdle to recognition and enforcement that simply does not exist. As is evident from her reasons, she retained the focus on jurisdiction in the original foreign proceeding.

(2) Effect of *Van Breda*

38 Chevron also places considerable reliance upon this Court's decision in *Van Breda*. In my view, [page96] this reliance is misplaced. While there is no denying that the *Van Breda* decision carries great importance in many areas of Canadian conflict of laws, its intended scope should not be overstated. Nothing in *Van Breda* altered the jurisdictional inquiry in actions to recognize and enforce foreign judgments as established by this Court in *Morguard*, *Beals* and *Pro Swing*.

39 In *Van Breda*, LeBel J. clearly specified the limited areas of private international law to which the decision was intended to apply. First, he noted at para. 16 that three categories of issues are "intertwined" in private international law: jurisdiction, *forum non conveniens* and the recognition of foreign judgments. Although he acknowledged that "[n]one of the divisions of private international law can be safely analysed and applied in isolation from the others", LeBel J. nonetheless cautioned that "the central focus of these appeals is on jurisdiction and the appropriate forum", that is, only two of the three categories of issues at play in private international law: para. 16. He went on to propose an analytical framework and legal principles applicable to the assumption of jurisdiction (one way of establishing jurisdiction *simpliciter*) and for deciding whether to decline to exercise it (*forum non conveniens*). Nowhere did he purport to analyze or modify the principles applicable to the recognition and enforcement of foreign judgments, the area of private international law that is the central focus of this appeal.

40 Second, LeBel J. further -- and repeatedly -- confined the principles he developed in *Van Breda* to the assumption of jurisdiction in tort actions. For example, he said: "... this Court must craft more precisely the rules and principles governing the assumption of jurisdiction by the courts of a province over tort cases in which claimants sue in Ontario, but at least some of the events that gave rise to the claims occurred outside Canada or outside the province" (para. 68). He later added the following: [page97] "Before I go on to consider a list of presumptive connecting factors for tort cases, I must define the legal nature of the list" (para. 80). Perhaps most tellingly, LeBel J. stated, at para. 85: "The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law."

41 To accept Chevron's argument would be to extend *Van Breda* into an area in which it was not intended to apply, and in which it has no principled reason to meddle. In fact, and more compellingly, the principles that animate recognition and enforcement indicate that *Van Breda*'s pronouncements should not apply to recognition and enforcement cases. It is to these principles that I will now turn.

(3) Principles Underlying Actions for Recognition and Enforcement

42 Two considerations of principle support the view that the real and substantial connection test should not be

extended to an enforcing court in an action for recognition and enforcement. First, the crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. Second, the notion of comity, which has consistently underlain actions for recognition and enforcement, militates in favour of generous enforcement rules.

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(a) *Purpose of Recognition and Enforcement Proceedings*

43 Canadian law recognizes that the purpose of an action to recognize and enforce a foreign judgment is to allow a pre-existing obligation to be fulfilled; that is, to ensure that a debt already owed by the defendant is paid. As Pitel and Rafferty explain, such an action "is based not on the original claim the plaintiff had pursued against the defendant but rather on the obligation created by the foreign judgment": p. 159; see also P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (2nd ed. 2014), at para 11.177. The following comment made by McLachlin C.J. in *Pro Swing* (although in dissent) also reflects this logic: "Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself" (para. 77).

44 Important consequences flow from this observation. First, the purpose of an action for recognition and enforcement is not to evaluate the underlying claim that gave rise to the original dispute, but rather to assist in enforcing an already-adjudicated obligation. In other words, the enforcing court's role is not one of substance, but is instead one of facilitation: *Pro Swing*, at para. 11. The court merely offers an enforcement mechanism to facilitate the collection of a debt within the jurisdiction. This entails that the enforcing court does not exercise jurisdiction in the same way as it does in actions at first instance. In a first instance case like *Van Breda*, the focus is on whether the court has jurisdiction to determine the merits of a substantive legal claim; in a recognition and enforcement case, the court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one.

45 It follows that there can be no concern that the parties are located elsewhere, or that the facts [page99] underlying the dispute are properly addressed in another court, factors that might serve to undermine the existence of a real and substantial connection with the forum in first instance adjudication. The defendant will, of course, not have a significant connection with the forum, otherwise an independent jurisdictional basis would already exist for proceeding against him or her. Moreover, the facts underlying the original judgment are irrelevant, except insofar as they relate to potential defences to enforcement. The only important element is the foreign judgment itself, and the legal obligation it has created. Simply put, the logic for mandating a connection with the enforcing jurisdiction finds no place.

46 Second, enforcement is limited to measures -- like seizure, garnishment, or execution -- that can be taken only within the confines of the jurisdiction, and in accordance with its rules: *Pro Swing*, at para. 11; J. Walker, *Castel & Walker: Canadian Conflict of Laws* (6th ed. (loose-leaf)), at p. 11-52. The recognition and enforcement of a judgment therefore has a limited impact: as Walker states, "[a]n order enforcing a foreign judgment applies only to local assets" (p. 14-11). The enforcing court's judgment has no coercive force outside its jurisdiction. Whether recognition and enforcement should proceed depends entirely on the enforcing forum's laws. The dispute does not contain a foreign element that would make resort to the real and substantial connection test necessary. Walker adds that, as a result, since enforcement concerns only local assets, "there is no basis for staying the proceedings on the grounds that the forum is inappropriate or that the judgment debtor's principal assets are elsewhere": *ibid*.

47 Third, and flowing from this reality, any potential constitutional concerns that might sometimes emerge in conflict of laws cases simply do not arise in recognition and enforcement proceedings. In *Morguard*, the Court elaborated a conflict of laws rule and also hinted, without deciding, that the test might have constitutional foundations: pp. 1109-10. [page100] In *Hunt v. T&N plc*, [*[1993] 4 S.C.R. 289*], the Court confirmed that *Morguard* had created a constitutional principle that was applicable to the assumption of jurisdiction. LeBel J. later reaffirmed and clarified

this in *Van Breda*, where he noted that the real and substantial connection test has a dual nature: first, it serves as a constitutional principle; second, it constitutes a conflict of laws rule (paras. 22-24). He stated that "in Canadian constitutional law, the real and substantial connection test has given expression to the constitutionally imposed territorial limits that underlie the requirement of legitimacy in the exercise of the state's power of adjudication"; he added that the test "suggests that the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": para. 32.

48 No concern about the legitimacy of the exercise of state power exists in actions to recognize and enforce foreign judgments against judgment debtors. As I have explained, when such an action comes before a Canadian court, the court is not assuming jurisdiction over the parties in the same way as would occur in a first instance case. The enforcing court has no interest in adjudicating the original rights of the parties. Rather, the court merely seeks to assist in the enforcement of what has already been decided in another forum. As Deschamps J. aptly stated in *Pro Swing*, "[t]he enforcing court ... lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms": para. 11. The manner in which the court exercises control over the parties is thus different -- and far less invasive -- than in an action at first instance.

49 In most recognition and enforcement proceedings, the only factor that draws a foreign judgment creditor to the province is the potential for assets upon which to ultimately enforce the judgment. Enforcement is limited to the seizable assets [page101] found within the province. No constitutional concern about the legitimacy of this exercise of jurisdiction emerges. I acknowledge that, under provincial legislation, a recognition and enforcement judgment issued in one province may be capable of being "registered" in another province, thus offering some advantage to plaintiffs who have already successfully obtained a recognition and enforcement judgment. Nevertheless, the existence of such legislation does not alter the basic fact that absent some obligation to enforce another forum's judgments, the judicial system of each province controls access to its jurisdiction's enforcement mechanisms, whenever a foreign judgment creditor seeks to seize assets within its territory in satisfaction of a foreign judgment debt.

50 In addition, the obligation created by a foreign judgment is universal; there is no competing claim to jurisdiction with respect to it. If each jurisdiction has an equal interest in the obligation resulting from a foreign judgment, it is hard to see how any concern about territorial overreach could emerge. Simply put, there can be no concern about jurisdictional overreach if no jurisdiction can reach further into the matter than any other. The purposes that underlie recognition and enforcement proceedings simply do not require proof of a real and substantial connection between the dispute and Ontario, whether for constitutional reasons or otherwise.

(b) *The Notion of Comity in Recognition and Enforcement Proceedings*

51 Beyond this, it must be remembered that the notion of comity has consistently been found to underlie Canadian recognition and enforcement law. In *Morguard*, this Court stated that comity refers to "the deference and respect due by other states to the actions of a state legitimately taken within its territory", as well as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and [page102] to the rights of its own citizens or of other persons who are under the protection of its laws": pp. 1095-96, quoting with approval the U.S. Supreme Court's foundational articulation of the concept of comity in *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64; see also *Spencer v. The Queen*, *[1985] 2 S.C.R. 278*, at p. 283, per Estey J., concurring.

52 The Court's formulation of the notion of comity in *Morguard* was quoted with approval in *Beals*: para. 20. In *Hunt*, the Court observed that "ideas of 'comity' are not an end in themselves, but are grounded in notions of order and fairness to participants in litigation with connections to multiple jurisdictions": p. 325. In *Tolofson v. Jensen*, *[1994] 3 S.C.R. 1022*, the Court again referred to the notion of comity, stating that it entails respect for the authority of each state "to make and apply law within its territorial limit", and that "to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, [states] will in great measure recognize the

determination of legal issues in other states": p. 1047. In *Pro Swing*, the Court described comity as a "balancing exercise" between "respect for a nation's acts, international duty, convenience and protection of a nation's citizens": para. 27. Finally, in *Van Breda*, LeBel J. emphasized that the goal of modern conflicts systems rests on the principle of comity, which, although a flexible concept, calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity: para. 74. This is true of all areas of private international law, including that of the recognition and enforcement of foreign judgments.

53 As this review of the Court's statements on comity shows, the need to acknowledge and show [page103] respect for the legal acts of other states has consistently remained one of the principle's core components. Comity, in this regard, militates in favour of recognition and enforcement. Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The concepts of order and fairness in which comity is grounded are not affronted by rejecting Chevron's proposed extension of the real and substantial connection test. This is so for several reasons.

54 First, in recognition and enforcement proceedings, order and fairness are protected by ensuring that a real and substantial connection existed between the foreign court and the underlying dispute. If such a connection did not exist, or if the defendant was not present in or did not attorn to the foreign jurisdiction, the resulting judgment will not be recognized and enforced in Canada. The judgment debtor is free to make this argument in the recognition and enforcement proceedings, and indeed will have already had the opportunity to contest the jurisdiction of the foreign court in the foreign proceedings. Here, for instance, it is accepted that Chevron attorned to the jurisdiction of the Ecuadorian courts. As Walker writes, "[t]he jurisdictional requirements of order and fairness considered in the context of *direct* jurisdiction operate to promote the international acceptance of the adjudication of a matter by a Canadian court": p. 14-1 (emphasis in original). There is no similar requirement of international acceptance in the context of the recognition and enforcement of a foreign judgment.

55 Second, no unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings. In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions. Of course, the principles of order and fairness are also protected by providing [page104] a foreign judgment debtor with the opportunity to convince the enforcing court that there is another reason why recognition and enforcement should not be granted: see *Beals*, at paras. 39 *et seq*.

56 Third, contrary to Chevron's argument, a requirement that the defendant have a real and substantial connection with the enforcing court in the sense of being present or having assets in the province would only undermine order and fairness. In recognition and enforcement proceedings, besides an unlikely attornment by the defendant, the only way a real and substantial connection with the enforcing forum could be achieved, in the end, is through presence or assets in the jurisdiction. However, presence will frequently be absent given the very nature of the proceeding at issue. Indeed, rule 17.02(m) is implicitly based on an expectation that the defendant in a claim on a judgment of a court outside Ontario will not be present in the province. Requiring assets to be present in the jurisdiction when recognition and enforcement proceedings are instituted is also not conducive to order or fairness. For one thing, assets such as receivables or bank deposits may be in one jurisdiction one day, and in another the next. If jurisdiction over recognition and enforcement proceedings were dependent upon the presence of assets at the time of the proceedings, this may ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction.

57 In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. The motion judge rightly opined as follows on this subject:

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> In an age of electronic international banking, funds once in the hands of a judgment debtor can quickly leave a jurisdiction. While it is highly unlikely that a judgment debtor would move assets into a jurisdiction in the face of a pending recognition action, in some circumstances judgment debtors may not control the timing or location of the receipt of an asset due to them; control may rest in the hands of a third party as a result of contract or otherwise. Where a judgment creditor under a foreign judgment learns that its judgment debtor may come into possession of an asset in the foreseeable future, it might want the recognition of its foreign judgment in advance of that event so that it could invoke some of the enforcement mechanisms of the receiving jurisdiction, such as garnishment. To insist that the judgment creditor under a foreign judgment await the arrival of the judgment debtor's asset in the jurisdiction before seeking recognition and enforcement could well prejudice the ability of the judgment creditor to recover on its judgment. Given the wide variety of circumstances - including timing - in which a judgment debtor might come into possession of an asset, I do not think it prudent to lay down a hard and fast rule that assets of the judgment debtor must exist in the receiving jurisdiction as a pre-condition to the receiving jurisdiction entertaining a recognition and enforcement action. [para. 81]

I note that in one Ontario lower court decision, albeit in the context of *forum non conveniens*, the existence of assets has been held to be irrelevant to the jurisdictional inquiry: see *BNP Paribas (Canada) v. Mécs* *(2002), 60 O.R. (3d) 205* (S.C.J.).

58 In this regard, I find persuasive value in the fact that other common law jurisdictions -- presumably equally concerned about order and fairness as our own -- have also found that the presence of assets in the enforcing jurisdiction is not a prerequisite to the recognition and enforcement of a foreign judgment.

59 In *Tasarruf Mevduati Sigorta Fonu v. Demirel* [2007] EWCA Civ 799, [2007] 1 W.L.R. 2508, for example, the England and Wales Court of Appeal [page106] (Civil Division) held that "a claimant seeking to enforce a foreign judgment by action does not have to show that there are assets in the jurisdiction. To require him to do so would be tantamount to construing the rule as if it were limited in that way": para. 29. The court also held that to be granted permission to serve *ex juris* (permission that is needed under the applicable English procedural rules), the claimant is required to show "that he has a good arguable case in the action, that is that he has a good arguable case that judgment should be given based upon the foreign judgment": *ibid*. The court continued, holding that the claimant must "ordinarily show further that he can reasonably expect a benefit from such a judgment": *ibid*. However, on the facts of the case, it held that service *ex juris* should be permitted where the defendant did not possess assets in England at the time, but had a "reasonable possibility" of having assets in London "one of these days": para. 40.

60 The High Court of Ireland followed a similar approach in *Yukos Capital S.A.R.L. v. OAO Tomskneft VNK*, [2014] IEHC 115, in an arbitration context, holding that "the presence of assets within the jurisdiction is not a pre-requisite for the granting of leave to serve out of the jurisdiction on an application to enforce a Convention Award": para. 112 (BAILII). Although the court quoted with approval the passages from *Tasarruf* to the effect that the applicant must demonstrate that some potential benefit would accrue should the recognition and enforcement action succeed, it nevertheless accepted, with no hesitation, that "the seeking of recognition and enforcement of an award in a country where the losing party may have no assets in order to obtain the imprimatur of a respected court upon the award is acceptable": para. 128.

61 The U.S. courts appear to be divided on the prerequisites to recognition and enforcement: see R. A. Brand, "Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments" (2013), 74 *U. Pitt. L. Rev*. 491. Some, as exemplified by the decision in *Lenchyshyn [page107] v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (App. Div. 2001), take a broad approach. In *Lenchyshyn*, the Supreme Court of New York, Appellate Division, held that personal jurisdiction need not be established over judgment debtors for recognition and enforcement to proceed. In the court's view, "[r]equiring that the judgment debtor have a 'presence' in or some other jurisdictional nexus to the state of enforcement would unduly protect a judgment debtor and enable him easily to

escape his just obligations under a foreign country money judgment" (p. 292); moreover, no constitutional obligation exists to satisfy such a requirement (p. 289). The court concluded that "even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment ... and thereby should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York": p. 291. The same court recently reiterated the *Lenchyshyn* approach in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 986 N.Y.S.2d 454 (App. Div. 2014). Other state and district courts have also adopted its reasoning: *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476 (Tex. App. 2008); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F.Supp.2d 905 (N.D. Iowa 2002).

62 As the motion judge below correctly pointed out, some U.S. courts have taken a different approach. For instance, the Michigan Court of Appeals stated the following in *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874 (2004):

> We hold that where plaintiff failed to identify any property owned by defendants in Michigan, the trial court erred in holding that it was unnecessary for plaintiff to demonstrate that the Michigan court had personal jurisdiction over defendants in this common-law enforcement action.
>
> [page108]
>
> ...
>
> We have not found any authorities indicating that the foundational requirement of demonstrating a trial court's jurisdiction over a person or property is inapplicable in enforcement proceedings. [pp. 880 and 884]

Other U.S. courts have adopted an even more extreme position, holding that "attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary": Brand, at p. 506, citing *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), cert. denied, 537 U.S. 822 (2002).

63 As this review of the case law indicates, many courts in common law jurisdictions have been hesitant to make the presence of assets a prerequisite to jurisdiction in recognition and enforcement proceedings. While it is true that some have nonetheless seen fit to limit the existence of jurisdiction in other ways (notably, by requiring that judgment creditors prove that a benefit will result from successful recognition and enforcement proceedings), they have done so in the context of different procedural rules and distinct constitutional considerations.

64 Turning to the works of Canadian conflict of laws scholars, most support the view that requiring a real and substantial connection through the defendant being present or having assets in the province is not necessary for the purposes of a recognition and enforcement action. Walker, for instance, writes:

> The security of crossborder transactions rests on the confidence that the law will enable the prompt and effective determination of the effect of judgments from other legal systems. For this reason, there are no separate or additional jurisdictional requirements, such as the residence of the defendant or the presence of the defendant's assets in the jurisdiction, for a court to determine [page109] whether a foreign judgment may be recognized or enforced. [Emphasis added; p. 14-1.]

65 Perell and Morden express a similar view:

> Subject to the defences, a Canadian court will enforce a foreign judgment if the foreign court or foreign jurisdiction had a "real and substantial connection" to the dispute. However, it is not necessary for the plaintiffs to establish that Ontario has a real and substantial connection with the litigation; it is sufficient to show that the foreign court that gave the judgment had a real and substantial connection with the matter. [Footnotes omitted; para 11.181.]

66 Pitel and Rafferty take a somewhat different position in the following passage:

> Because an action on the foreign judgment is a new legal proceeding, issues of jurisdiction ... must be considered at the outset. If the defendant is resident in the country in which recognition and enforcement is sought, it will be easy to establish jurisdiction. But in many cases the defendant will not be resident there: he or she will only have assets there, which the plaintiff is going after to enforce the judgment. Typically the presence of assets in a province is an insufficient basis for taking jurisdiction over a foreign defendant. But most provinces have made specific provision to allow for service *ex juris* in such cases. For example, in Ontario service outside the province can be made as of right where the claim is "on a judgment of a court outside Ontario." ... [T]he plaintiff would still need to show a real and substantial connection to the province in which enforcement was sought. Under this test, the presence of assets may be insufficient to ground substantive proceedings but they should virtually always be sufficient to ground proceedings for recognition and enforcement. [Footnote omitted; pp. 159-60.]

67 This statement, however, has been criticized by at least one lower court judge who "decline[d] to follow that theory for the following reasons: (1) they cite no authority for the theory that they advance (neither case law nor academic commentary); and (2) the preponderance of precedent is to the contrary": *CSA8-Garden Village LLC v. Dewar*, [page110] *2013 ONSC 6229*, *369 D.L.R. (4th) 125*, at para. 43. I am inclined to agree with this criticism. Pitel and Rafferty's statement does not accord with the principles discussed above that underlie actions for the recognition and enforcement of foreign judgments.

68 In my view, there is nothing improper in allowing foreign judgment creditors to choose where they wish to enforce their judgments and to assess where, in all likelihood, their debtors' assets could be found or may end up being located one day. In this regard, it is the existence of clear, liberal and simple rules for the recognition and enforcement of foreign judgments that facilitates the flow of wealth, skills and people across borders in a fair and orderly manner: Walker, at p. 14-1. Requiring a real and substantial connection through the presence of assets in the enforcing jurisdiction would serve only to hinder these considerations, which are important for commercial dealings in an increasingly globalized economy. It is true that the absence of assets upon which to enforce a foreign judgment may, in some situations, have an impact on the legitimate use of the judicial resources of an enforcing court, and in turn on the court's exercise of its discretionary power to stay the proceeding. The absence of assets may also influence the appropriateness of the choice of a given forum for the enforcement proceedings. These issues do not relate, however, to the existence of jurisdiction, but to its exercise; as this Court emphasized in *Van Breda*, "a clear distinction must be drawn between the existence and the exercise of jurisdiction": para. 101.

69 Facilitating comity and reciprocity, two of the backbones of private international law, calls for assistance, not barriers. Neither this Court's jurisprudence nor the principles underlying recognition and enforcement actions requires imposing additional jurisdictional restrictions on the determination of whether a foreign judgment is binding and enforceable in Ontario. The principle of comity does not require that Chevron's submissions be [page111] adopted. On the contrary, an unambiguous statement by this Court that a real and substantial connection is not necessary will have the benefit of providing a "fixed, clear and predictable" rule, which some say is necessary in this area: T. J. Monestier, "A 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" *(2007), 33 Queen's L.J. 179*, at p. 192. Such a rule will clearly be consistent with the dictates of order and fairness; it will also allow parties "to predict with reasonable confidence whether a court will assume jurisdiction in a case with an international or interprovincial aspect", as LeBel J. in *Van Breda* insisted they should be able to do: para. 73. Moreover, a clear rule will help to avert needless and wasteful jurisdictional inquiries that merely thwart the proceedings from their eventual resumption. As some have noted, our courts "should exercise care in interpreting rules and developing legal principles so as not to encourage unnecessary motions", since "[i]n many cases, the defendant's challenge to service *ex juris* is just another dilatory tactic that provincial rules of civil procedure have sought to avoid": G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Advocates' Q.* 167, at p. 205. To accept Chevron's submissions would be to ignore this wise counsel.

(4) Relevant Legislation

70 Finally, the choices made by the Ontario legislature provide an additional useful perspective, one that reinforces the validity of the approach favoured by this Court's jurisprudence and the principles discussed above. Two points are of note. First, the Rules do not require that the court probe the relationship between the dispute and the province, whether by inquiring into the existence of assets or otherwise. Rule 17.02 establishes the bases upon which a party can serve an adversary with an originating process or notice of a reference outside Ontario without needing to seek leave of the court [page112] to do so. Rule 17.02(m) provides that one basis for service exists where the claim is "on a judgment of a court outside Ontario", which, naturally, contemplates recognition and enforcement proceedings. While the Rules do not in and of themselves confer jurisdiction (see Perell and Morden, at para 2.306), they nevertheless "represent an expression of wisdom and experience drawn from the life of the law" (*Van Breda*, at para. 83) and offer useful guidance with respect to the intentions of the Ontario legislators. That the legislators have not seen fit to craft specific jurisdictional rules respecting foreign judgments is indicative of their intention to have the Rules alone govern, and therefore to maintain the existence of broad jurisdictional bases in actions for recognition and enforcement.

71 Second, analogous provisions found in other Ontario statutes do not impose an obligation on the plaintiff to establish that the defendant has assets in the province or some other conceivable connection with the forum. For example, the Ontario *International Commercial Arbitration Act*, which permits registration of foreign arbitral awards, does not require that the debtor be present or have assets in Ontario. Article 35(1) of the Schedule to that Act provides that "[a]n arbitral award ... shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36." Article 36(1) lists various grounds for refusing recognition or enforcement of such awards. None of those grounds is based upon the absence of a real and substantial connection between either the underlying dispute or the defendant and Ontario, or upon an absence of assets. Similarly, the *Reciprocal Enforcement of Judgments (U.K.) Act*, which facilitates the recognition and enforcement of judgments from the United Kingdom, does not permit a debtor to escape enforcement by demonstrating that no real and substantial connection exists between the debtor or the dispute and the forum. Finally, the *Reciprocal Enforcement of Judgments Act*, R.S.O. 1990, c. R.5, which supplies an expedited mechanism for registering and enforcing the judgments of [page113] the other Canadian provinces and territories, contains no such requirement either.

72 I note that all the common law provinces and territories have statutes providing for the recognition and enforcement of foreign arbitral awards or of judgments from the United Kingdom. They also have similar statutes providing for the expedited registration or recognition of judgments from specified jurisdictions. In Quebec, it is art. 3155 of the *Civil Code of Québec* that provides for the recognition and enforcement of foreign decisions. It notably does not require a connection between the foreign debtor and the province. In *Canada Post Corp. v. Lépine*, 2009 SCC 16, [2009] 1 S.C.R. 549, this Court found that "the basic principle laid down in art. 3155 ... is that any decision rendered by a foreign authority must be recognized unless an exception applies": para. 22. The Court acknowledged that the enumerated exceptions are "limited": *ibid*. I note that none of them concerns a jurisdictional hurdle in the enforcing state. This shows that the Quebec legislature did not intend a connection between the foreign debtor and the province to be a prerequisite to recognition and enforcement.

73 I acknowledge that the Uniform Law Conference of Canada took a different approach in drafting the *Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") (online) in the 1990s. The CJPTA has been passed, with some variations, in five jurisdictions (Saskatchewan, Prince Edward Island, Yukon, British Columbia, and Nova Scotia), though it has only come into force in three of them. Section 3(e) of the CJPTA provides that one circumstance in which a court has territorial competence in a proceeding is if "there is a real and substantial connection between [*enacting province or territory*] and the facts on which the proceeding against that person is based" (emphasis in original; text in brackets in original). Section 10 states that a real and substantial connection "is presumed to exist if the proceeding ... (k) is for enforcement of a judgment of a court made in or outside [*enacting province or territory*] or an arbitral award made in or [page114] outside [*enacting province or territory*]" (emphasis in original; text in brackets in original). Thus, the foreign judgment creates a rebuttable presumption of jurisdiction, which the judgment debtor can contest. Yet, in spite of this possibility, V. Black, S. G. A. Pitel and M. Sobkin point

out that, as of 2012, "no defendant [had] succeeded in rebutting a s. 10 presumption" in the provinces in which the CJPTA was in force at that time: *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012), at pp. 146-47. As this Court observed in *Van Breda*, "[l]egislatures and courts may adopt various solutions to meet the constitutional requirements and the objectives of efficiency and fairness that underlie our private international law system": para. 34. The legislatures are therefore free to adopt legislation like the CJPTA that departs from the common law, so long as they do so within constitutional limits. Ontario, however, has not done so.

74 As a result, to find in this case that there is no requirement of a real and substantial connection between the forum and the dispute in an action for recognition and enforcement would neither pervert the Ontario legislators' intentions, nor risk some other unforeseen outcome. Instead, such a finding would be respectful of the legislative choices already made by the province, while leaving open legal space in which it is free to develop its own conflict of laws rules, if it so chooses. This decision is limited to common law recognition and enforcement principles.

(5) Summary

75 Case law, principle, relevant statutes and practicality all support a rejection of Chevron's contention. Jurisdiction in an action for recognition and enforcement stems from service being effected on the basis of a foreign judgment rendered in the [page115] plaintiff's favour, and against the named defendant. There is no need to demonstrate a real and substantial connection between the dispute and the enforcing forum. To conclude otherwise would undermine the important values of order and fairness that underlie all conflicts rules: *Van Breda*, at para. 74, quoting *Morguard*, at p. 1097. Moreover, such a conclusion would be inconsistent with this Court's statement in *Beals* that the doctrine of comity (to which the principles of order and fairness attach) "must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility": para. 27. Cross-border transactions and interactions continue to multiply. As they do, comity requires an increasing willingness on the part of courts to recognize the acts of other states. This is essential to allow individuals and companies to conduct international business without worrying that their participation in such relationships will jeopardize or negate their legal rights.

76 In this case, jurisdiction is established with respect to Chevron, which was served *ex juris* pursuant to rule 17.02(m) of the Rules. The plaintiffs alleged in their amended statement of claim that Chevron was a foreign debtor as a result of "the final Judgment of the Appellate Division of the Provincial Court of Justice of Sucumbíos of Ecuador of January 3, 2012": A.R., vol. I, at p. 102. While this judgment has since been varied by the Court of Cassation, this occurred after the amended statement of claim had been filed. The original judgment remains largely intact, although, as noted, the Court of Cassation reduced the total amount owed. The plaintiffs have sufficiently pleaded the Ontario courts' jurisdiction over Chevron.

77 In closing on this first issue, I wish to emphasize that when jurisdiction is found to exist, it does not necessarily follow that it will or should be exercised: A. Briggs, *The Conflict of Laws* (3rd ed. [page116] 2013), at pp. 52-53; see also *Van Breda*, at para. 101. Establishing jurisdiction merely means that the alleged debt merits the assistance and attention of the Ontario courts. Once the parties move past the jurisdictional phase, it may still be open to the defendant to argue any or all of the following, whether by way of preliminary motions or at trial: that the proper use of Ontario judicial resources justifies a stay under the circumstances; that the Ontario courts should decline to exercise jurisdiction on the basis of *forum non conveniens*; that any one of the available defences to recognition and enforcement (i.e. fraud, denial of natural justice, or public policy) should be accepted in the circumstances; or that a motion under either Rule 20 (summary judgment) or Rule 21 (determination of an issue before trial) of the Rules should be granted. The availability of these potential arguments, however, does not oust the jurisdiction of the Ontario courts over the plaintiffs' action for recognition and enforcement.

B. *Jurisdiction With Respect to Chevron Canada*

78 For its part, Chevron Canada contends that -- whatever might be the case for Chevron -- jurisdiction cannot be

established over it, a stranger to the original foreign judgment. It advances two primary submissions. First, in its view, the Court of Appeal erroneously found jurisdiction over Chevron without inquiring into the nature of the relationship between that defendant or the subject matter of the action and Ontario. This error allegedly had important consequences on the issue of whether jurisdiction exists over Chevron Canada. Given that I have found that jurisdiction properly exists over Chevron, this submission is now moot.

79 Chevron Canada's second submission is that the other factors relied upon by the Court of Appeal to find jurisdiction (C.A. reasons, at para. 38) -- [page117] namely, Chevron Canada's "bricks-and-mortar business in Ontario" and its "economically significant relationship" with Chevron -- do not in fact establish jurisdiction. Chevron Canada argues that while corporations domiciled in Ontario can be brought before the province's courts even in the absence of a relationship between the claim and that province, the same cannot be said for corporations that merely carry on business in Ontario. Relying on *Van Breda*, it argues that in such cases, Ontario courts only have jurisdiction if there is a connection between the subject matter of the claim and the business conducted in the province. According to Chevron Canada, while the Court in *Van Breda* maintained the traditional jurisdictional grounds of presence and consent, it also limited the instances in which presence-based jurisdiction can be said to exist. For corporations, the Court recognized that the existence of an office other than the head office is not an independent jurisdictional ground, but is properly considered part of carrying on business in the province. In Chevron Canada's view, carrying on business from an office is only a presumptive connecting factor that can be rebutted by showing that there is no connection between the claim and the business the corporation conducts in the province. This flows from the constitutional limits on the state's exercise of power and applies regardless of whether service is effected *ex juris* or *in juris*.

80 Chevron Canada further submits that the existence of its "economically significant relationship" with Chevron is insufficient to find jurisdiction: A.F., at para. 65. Such a finding would disregard the concept of separate corporate personality, "a bedrock principle of law" since *Salomon v. Salomon & Co.*, [*[1897] A.C. 22*]. This case is not one of the limited instances in which piercing the corporate veil is permissible. Chevron Canada adds that in every action, there must be a "good arguable case" that [page118] a sufficient connection with Ontario exists before the province's courts can exercise jurisdiction: A.F., at para. 86, citing *Ontario v. Rothman's Inc.*, *2013 ONCA 353*, *115 O.R. (3d) 561*, at para. 54. In its submission, there is none here.

81 I do not accept Chevron Canada's submissions. *Van Breda* specifically preserved the traditional jurisdictional grounds of presence and consent. Chevron Canada erroneously seeks to conflate the rules on presence-based jurisdiction and those on assumed jurisdiction, even though they have always developed in their respective spheres. Here, presence-based jurisdiction is made out on the basis of Chevron Canada's office in Mississauga, Ontario, where it was served *in juris*. Carrying on a business in Ontario at which the defendant is served is sufficient to find presence-based jurisdiction. Several Ontario courts have found this to be the case. The reference in *Van Breda* to constitutional conflict of laws principles does not change the fact that a sufficient jurisdictional basis exists to allow the plaintiffs' case to proceed against Chevron Canada. In any event, even in the context of the rules on assumed jurisdiction, which I do not need to consider in this case, it would be inappropriate to import the connecting factors for tort claims identified in *Van Breda* into the recognition and enforcement context without further analysis.

(1) *Van Breda* and the Traditional Jurisdictional Grounds

82 *Van Breda* was a case about assumed jurisdiction, one of three bases for asserting jurisdiction *in personam* over an out-of-province defendant. The other two bases, known as the "traditional" jurisdictional grounds, are presence-based jurisdiction and consent-based jurisdiction: *Muscutt [page119] v. Courcelles* *(2002), 60 O.R. (3d) 20* (C.A.), at para. 19.

83 Chevron Canada's appeal concerns the traditional ground of presence. Presence-based jurisdiction has existed at common law for several decades; its historical roots "cannot be over-emphasized": S. G. A. Pitel and C. D. Dusten, "Lost in Transition: Answering the Questions Raised by the Supreme Court of Canada's New Approach to Jurisdiction" (2006), 85 *Can. Bar Rev.* 61, at p. 69. It "is based upon the requirement and sufficiency of personal

service of the originating process within the province or territory of the forum (service *in juris*)": J.-G. Castel, *Introduction to Conflict of Laws* (4th ed. 2002), at p. 83. If service is properly effected on a person who is in the forum at the time of the action, the court has jurisdiction regardless of the nature of the cause of action: T. J. Monestier, "(Still) a 'Real and Substantial' Mess: The Law of Jurisdiction in Canada" (2013), 36 Fordham Int'l L.J. 396, at p. 449. Assumed jurisdiction, for its part, emerged much later and developed through the adoption of rules for service *ex juris*: Pitel and Rafferty, at p. 53. When a court finds that it has jurisdiction on this basis, that jurisdiction is limited to the specific action at issue before it.

84 While *Van Breda* simplified, justified, and explained many critical aspects of Canadian private international law, it did not purport to displace the traditional jurisdictional grounds. LeBel J. explicitly stated that, in addition to the connecting factors he established for assumed jurisdiction, "jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established": para. 79. In other words, "[t]he real and substantial connection test does not oust the traditional private international law bases for court jurisdiction": *ibid*.

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85 To establish traditional, presence-based jurisdiction over an out-of-province corporate defendant, it must be shown that the defendant was carrying on business in the forum at the time of the action. Whether a corporation is "carrying on business" in the province is a question of fact: *Wilson v. Hull* (1995), 174 A.R. 81 (C.A.), at para. 52; *Ingersoll Packing Co. v. New York Central and Hudson River R.R. Co.* (1918), 42 O.L.R. 330 (S.C. (in chambers)), at p. 337. In *Wilson*, in the context of statutory registration of a foreign judgment, the Alberta Court of Appeal was asked to assess whether a company was carrying on business in the jurisdiction. It held that to make this determination, the court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time": para. 13. These factors are and always have been compelling indicia of corporate presence; as the cases cited in *Adams v. Cape Industries Plc.*, [1990] 1 Ch. 433, at pp. 467-68, per Scott J., demonstrate, the common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor. LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there": para. 87.

86 The motion judge in this case made the following factual findings concerning Chevron Canada's Mississauga office:

> Chevron Canada operates a business establishment in Mississauga, Ontario. It is not a mere "virtual" business. It runs a bricks and mortar office from which it carries out a non-transitory business with human means and its Ontario staff provides services to and solicits sales from its customers in this province. [para. 87]

These findings have not been contested. They are sufficient to establish presence-based jurisdiction. [page121] Chevron Canada has a physical office in Mississauga, Ontario, where it was served pursuant to rule 16.02(1)(c), which provides that valid service can be made at a place of business in Ontario. Chevron Canada's business activities at this office are sustained; it has representatives who provide services to customers in the province. Canadian courts have found that jurisdiction exists in such circumstances: *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.), at para. 36; *Prince v. ACE Aviation Holdings Inc.*, 2013 ONSC 2906, 115 O.R. (3d) 721, appeal dismissed and cross-appeal allowed 2014 ONCA 285, 120 O.R. (3d) 140; *Abdula v. Canadian Solar Inc.*, 2011 ONSC 5105, 92 B.L.R. (4th) 324, aff'd 2012 ONCA 211, 110 O.R. (3d) 256; *Wilson*; *Charron v. Banque provinciale du Canada*, [1936] O.W.N. 315 (H.C.J.).

87 The motion judge's analysis was correct, and the Ontario Court of Appeal had no need to go beyond these considerations to find jurisdiction. As several lower courts have noted both prior to and since *Van Breda*, where jurisdiction stems from the defendant's presence in the jurisdiction, there is no need to consider whether a real and substantial connection exists: *Incorporated Broadcasters Ltd.*, at para. 29, cited with approval in *Prince* (C.A.), at

para. 48; *Patterson v. EM Technologies, Inc.*, 2013 ONSC 5849, at paras. 13-16 (CanLII). In other words, the question of whether jurisdiction exists over Chevron Canada should begin and end with traditional, presence-based jurisdiction in this case.

(2) Effect of the Constitutional Principles Developed in *Van Breda*

88 Nonetheless, Chevron Canada adds constitutional flavour to its submissions, contending that LeBel J.'s comments in *Van Breda* on the prerequisites for assuming jurisdiction over corporate defendants should apply to all types of jurisdiction -- presence-based, consent-based, and assumed -- by [page122] virtue of the real and substantial connection test as a constitutional principle: A.F., at paras. 42-50. As noted in my discussion of Chevron, LeBel J. articulated this constitutional principle as suggesting that "the connection between a state and a dispute cannot be weak or hypothetical", as such a connection "would cast doubt upon the legitimacy of the exercise of state power over the persons affected by the dispute": *Van Breda*, at para. 32.

89 In my view, the real and substantial connection test as a constitutional principle does not dictate that it is "illegitimate" to find jurisdiction over Chevron Canada in this case. Chevron Canada has elected to establish and continue to operate a place of business in Mississauga, Ontario, at which it was served. It should therefore have expected that it might one day be called upon to answer to an Ontario court's request that it defend against an action. If a defendant maintains a place of business in Ontario, it is reasonable to say that the Ontario courts have an interest in the defendant and the disputes in which it becomes involved. As the Ontario Court of Appeal put it in *Incorporated Broadcasters Ltd.*, at para. 33, "[t]here is no constitutional impediment to a court asserting jurisdiction over a person having a presence in the province", at least as presence is established in this case. To accept Chevron Canada's submission to the contrary would be to endorse an unduly "narrow" view of jurisdiction, one towards which this Court has shown no prior inclination: J. Blom, "New Ground Rules for Jurisdictional Disputes: The *Van Breda* Quartet" (2012), 53 *Can. Bus. L.J.* 1, at p. 12. For Ontario courts to have jurisdiction over Chevron Canada in this case, mere presence through the carrying on of business in the province, combined with service therein, suffices to find jurisdiction on the traditional grounds. There is no need to resort to the *Van Breda* criteria for assumed jurisdiction in tort claims in such a situation. To accept Chevron Canada's submissions would be to permit a total conflation of presence-based and assumed jurisdiction. As Briggs has noted, "[c]ommon law jurisdiction draws a fundamental distinction between cases [page123] where the defendant is and is not within the territorial jurisdiction of the court when the proceedings are commenced": p. 112.

90 Because jurisdiction over Chevron Canada exists on the basis of the traditional grounds, I need not consider how jurisdiction might be found over a third party who is not present in and does not attorn to the jurisdiction of the Ontario courts, but who is alleged to be capable of satisfying a foreign judgment debt. I offer only two comments in this regard.

91 First, it should be remembered that the specific connecting factors that LeBel J. established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions. His comments with respect to carrying on business in the jurisdiction, at paras. 85 and 87, were tailored to that context. The same is true of the examples he gave to show how the presumption of jurisdiction can be rebutted in respect of the connecting factors he identified. LeBel J.'s statement that the presumptive connecting factor of "carrying on business in the province ... can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province" must be confined accordingly: para. 96. The connecting factors that he identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue.

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92 In the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute. The subject matter of recognition and enforcement proceedings is the collection of a debt. A debt is enforceable against any and all assets of a given

debtor, not merely those that may have a relationship to the claim. For instance, suppose a foreign judgment is validly rendered against Corporation A in a foreign country as a result of a liability of its Division I, which operates solely in that country. If Corporation A operates a place of business for its separate and unrelated Division II in Ontario, where all its available and recoverable assets happen to be located, it could not be argued that the foreign judgment creditor cannot execute and enforce it in Ontario against Corporation A because the business activities of the latter in the province are not related to the liability created by the foreign judgment.

93 Second, one aspect of the plaintiffs' claim in this case is for enforcement of Chevron's obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation's debt obligation. In this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment to which Chevron Canada is a stranger, but rather, at least arguably, the collection of a debt using shares and assets that are alleged to be available for enforcement purposes. In an enforcement process like this for the collection of a debt against a third party, assets in the jurisdiction through the carrying on of business activities are undoubtedly tied to the subject matter of the claim. From that standpoint, seizable assets are not merely the subject matter of the dispute, they are its core. In this regard, the third party is the direct object of the proceedings. When a plaintiff seeks enforcement against a third party to satisfy a foreign judgment debt, the existence of assets in the province may therefore well be a highly relevant connecting factor of the sort needed for such an action to proceed. Indeed, it is hard to identify who, besides the province, would have jurisdiction over [page125] a company for enforcement processes against that company's assets in the province.

(3) Conclusion

94 Chevron Canada was served *in juris*, in accordance with rule 16.02(1)(c), at a place of business it operates in Mississauga, Ontario. Traditional, presence-based jurisdiction is satisfied. Jurisdiction is thus established with respect to it. As indicated for Chevron, the establishment of jurisdiction does not mean that the plaintiffs will necessarily succeed in having the Ecuadorian judgment recognized and enforced against Chevron Canada. A finding of jurisdiction does nothing more than afford the plaintiffs the opportunity to seek recognition and enforcement of the Ecuadorian judgment. Once past the jurisdictional stage, Chevron Canada, like Chevron, can use the available procedural tools to try to dispose of the plaintiffs' allegations. This possibility is foreign to and remote from the questions that must be resolved on this appeal.

95 Further, my conclusion that the Ontario courts have jurisdiction in this case should not be understood to prejudice future arguments with respect to the distinct corporate personalities of Chevron and Chevron Canada. I take no position on whether Chevron Canada can properly be considered a judgment-debtor to the Ecuadorian judgment. Similarly, should the judgment be recognized and enforced against Chevron, it does not automatically follow that Chevron Canada's shares or assets will be available to satisfy Chevron's debt. For instance, shares in a subsidiary belong to the shareholder, not to the subsidiary itself. Only those shares whose ownership is ultimately attributable to the judgment debtor could be the valid target of a recognition and enforcement action. It is not at the early stage of [page126] assessing jurisdiction that courts should determine whether the shares or assets of Chevron Canada are available to satisfy Chevron's debt. As such, contrary to the appellants' submissions, this is not a case in which the Court is called upon to alter the fundamental principle of corporate separateness as reiterated in *BCE Inc. v. 1976 Debentureholders*, *2008 SCC 69*, *[2008] 3 S.C.R. 560*, at least not at this juncture. In that regard, the deference allegedly owed to the motion judge's findings concerning the separate corporate personalities of the appellants and the absence of a valid foundation for the Ontario courts' exercise of jurisdiction is misplaced. These findings were reached in the context of the s. 106 stay. As I stated above, the Court of Appeal reversed that stay, and this issue is not on appeal before us.

VI. Disposition

96 For these reasons, I would dismiss the appeal, with costs.

Appeal dismissed with costs.

Solicitors:

Solicitors for the appellant Chevron Corporation: Norton Rose Fulbright Canada, Calgary and Toronto.

Solicitors for the appellant Chevron Canada Limited: Goodmans, Toronto.

Solicitors for the respondents: Lenczner Slaght Royce Smith Griffin, Toronto; Conway Baxter Wilson, Ottawa.

Solicitors for the interveners the International Human Rights Program at the University of Toronto Faculty of Law, MiningWatch Canada and the Canadian Centre for International Justice: Klippensteins, Toronto; University of Toronto, Toronto.

Solicitors for the intervener the Justice and Corporate Accountability Project: Siskinds, London.

Tolofson v. Jensen; Lucas (Litigation Guardian of) v. Gagnon

Supreme Court Reports

Supreme Court of Canada

Present: La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

1994: February 21 / 1994: December 15.

File Nos.: 22980, 23445.

[1994] 3 S.C.R. 1022 | [1994] 3 R.C.S. 1022 | [1994] S.C.J. No. 110 | [1994] A.C.S. no 110

Leroy Jensen and Roger Tolofson, appellants; v. Kim Tolofson, respondent, and Réjean Gagnon, appellant; v. Tina Lucas and Justin Gagnon by their litigation guardian Heather Gagnon, Heather Gagnon personally, and Cyrille Lavoie, respondents, and Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey, Aditha Le Blanc, Clarence S. Marshall, La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée and Allstate Insurance Co. of Canada, interveners.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Conflict of laws — Torts — Traffic accident — Injured parties not resident in province where accident occurred — Actions instituted in home provinces of injured parties — Whether lex fori or lex loci delicti should apply — If substantive law that of jurisdiction where accident occurred, whether limitation period substantive law and therefore applicable in forum or procedural law and therefore not binding on court hearing case — Automobile Insurance Act, L.Q. 1977, c. 68, ss. 3, 4 — Code civil du Bas Canada, art. 6 — Limitation of Actions Act, R.S.S. 1978, c. L-15 — Vehicles Act, R.S.S. 1978, c. V-3, s. 180(1).

These appeals deal with the "choice of law rule": which law should govern in cases involving the interests of more than one jurisdiction specifically as it concerns automobile accidents involving residents of different provinces. The first case also raises the subsidiary issue of whether, assuming the applicable substantive law is that of the place where the tort arises, the limitation period established under that law is inapplicable as being procedural law and so not binding on the court hearing the case, or substantive law. The second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Tolofson v. Jensen

The plaintiff, Kim Tolofson, a 12-year-old passenger in a car driven by his father Roger, was seriously injured in a car accident with Leroy Jensen. The accident occurred in Saskatchewan. The Tolofsons were residents of and their car was registered in British Columbia; Mr. Jensen was a resident of and his car was registered in Saskatchewan. Plaintiff brought an action eight years later in British Columbia on the assumption that the action was statute-barred under Saskatchewan law. Further, Saskatchewan law, unlike British Columbia law, did not permit a gratuitous passenger to recover, absent wilful or wanton misconduct of the driver of the car in which he or she was travelling. Neither defendant admitted liability. The defendants brought an application by consent to seek a determination as to whether the court was forum non conveniens or alternatively as to whether Saskatchewan law applied. The motions judge dismissed the application and ruled that choice of law was inextricably entwined with issues of jurisdiction and forum conveniens, and that choice of law followed these determinations. The Court of Appeal found that the law of the forum should apply.

Lucas (Litigation Guardian of) v. Gagnon

Mrs. Gagnon brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in a Quebec traffic accident involving her husband and Mr. Lavoie. The Gagnons were residents of Ontario; Mr. Lavoie was a resident of Quebec. Mrs. Gagnon discontinued her action against Mr. Lavoie following an Ontario Court of Appeal judgment that a Quebec resident's liability was governed by Quebec law. Mr. Gagnon, however, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued. Mrs. Gagnon obtained all of the no-fault benefits allowable under the Quebec scheme from Mr. Gagnon's Ontario insurer which was in turn reimbursed by the Régie de l'assurance automobile du Québec. The only legal avenue open to Mrs. Gagnon in seeking damages was to sue in Ontario because she was barred from bringing an action for damages in Quebec by operation of Quebec's Automobile Insurance Act.

The Ontario Court (General Division), on a motion brought by Mr. and Mrs. Gagnon (without notice to Mr. Lavoie) to determine specific points of law, decided that the Ontario court had jurisdiction, that the Ontario court should accept that jurisdiction, that Ontario law applied, and that Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. Mr. Gagnon and Mr. Lavoie appealed on the questions of whether Ontario law applied and whether Mr. Gagnon could maintain his cross-claim against Mr. Lavoie. The Ontario Court of Appeal held that Ontario law applied in the action against Mr. Gagnon but that the law of Quebec applied with respect to any claim made against Mr. Lavoie since he was not a resident of Ontario and the accident occurred in Quebec.

Held (Tolofson v. Jensen, File No. 22980): The appeal should be allowed.

Held (Lucas (Litigation Guardian of) v. Gagnon, File No. 23445): The appeal should be allowed.

Per La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ.: The rule of private international law that should generally be applied in torts is the law of the place where the activity occurred -- the lex loci delicti. This approach responds to the territorial principle under the international legal order and the federal regime. It also responds to a number of sound practical considerations. It is certain, easy to apply and predictable and meets normal expectations in that ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs.

The former British rule, adopted in McLean v. Pettigrew, that a court should apply its law (lex fori) when adjudicating on wrongs committed in another country, subject to the wrong's being "unjustifiable" in that country, cannot be accepted. This would involve a court's defining the nature and consequences of an act done in another country, which, barring some principled justification, flies against the territoriality principle. In practice, the courts of different countries would follow different rules in respect of the same wrong and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would make forum shopping even easier.

No compelling reason exists for following the lex fori. The problem of proof of foreign law has been considerably attenuated given advances in transportation and communication. McLean v. Pettigrew, which applied the lex fori even though the action complained of was not actionable under the law of the place of the wrong, should be overruled. Its application in the federal context raises serious constitutional difficulties.

The nature of Canada's constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- supports a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces and the essentially unitary nature of Canada's court system, an invariable rule that the matter also be actionable in the province of the forum is not necessary. This factor should be considered in determining whether

there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could be resolved by a sensitive application of the doctrine of forum non conveniens.

Strict application of lex loci delicti also has the advantage of unquestionable conformity with the Constitution. This advantage is not to be ignored given the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may, when explored, not conform to constitutional imperatives.

One of the main goals of any conflicts rule is to create certainty in the law. Any exception adds an element of uncertainty. However, since a rigid rule on the international level could give rise to injustice, the courts should retain a discretion to apply their own law to deal with such circumstances, although such cases would be rare. Indeed, if not strictly narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice.

The underlying principles of private international law are order and fairness, but order comes first for it is a precondition to justice. Considerations of public policy in actions that take place wholly within Canada should play a limited role, if at all. Arguments for an exception based on public policy are simply rooted in the fact that the court does not approve of the law that the legislature chose to adopt. The law of the land, however, is not usually ignored in favour of those who visit. The perception that the parties intend the law of their residence to apply is not valid.

On the international level, the rule that the wrong must be actionable under Canadian law is not really necessary, since the jurisdiction of Canadian courts is confined to matters where a real and substantial connection with the forum jurisdiction exists. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or whether entertaining the action would violate the public policy of the forum jurisdiction.

Saskatchewan's substantive law applies in Tolofson v. Jensen. This includes its limitation rule. In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial because the substantive rights of the parties to an action may be governed by a foreign law, but all matters of procedure are governed exclusively by the law of the forum. The forum court cannot be expected to apply the procedural rules of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them.

The bases of the old common law rule, which held that statutes of limitation are always procedural, are out of place in the modern context. The limitation period in this case was substantive because it created an accrued right in the defendant to plead a time bar. The limitation defence was properly pleaded here and all parties proceeded on the assumption that, if Saskatchewan law applied, it was a valid defence. It should not be rejected by a British Columbia court as contrary to public policy. The extent to which limitation statutes should go in protecting individuals against stale claims involves policy considerations unrelated to the manner in which a court must carry out its functions and the particular balance may vary from place to place.

In Lucas (Litigation Guardian of) v. Gagnon, Quebec law applies, both by virtue of Quebec's no-fault insurance scheme and through the operation of lex loci delicti. Barring other considerations, the legislature clearly intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence. This policy is clearly within the province's constitutional competence. The new Civil Code, which was not in effect at the time of the accident, did not change the situation of the parties. Even had it been operative, the language of the Automobile Insurance Act clearly overrode the general law. Section 4 removes not only rights of action but also "all rights . . . of any one".

Per Sopinka J. Concurrence with the reasons of La Forest J. was subject to the observations expressed by Major J.

Per Major J.: The question of which province's law should govern the litigation should be determined by reference to the lex loci delicti rule. An absolute rule admitting of no exceptions needed not be established. Parties have the ability to choose, by agreement, to be governed by the lex fori and a discretion exists to depart from the absolute

rule in international litigation where the lex loci delicti rule would work an injustice. Recognition of a similar exception should not be foreclosed in interprovincial litigation.

Cases Cited

By La Forest J.

Overruled: McLean v. Pettigrew, *[1945] S.C.R. 62*; not followed: Chaplin v. Boys, [1969] 2 All E.R. 1085 (H.L.), aff'd [1968] 1 All E.R. 283 (C.A.); considered: Phillips v. Eyre (1870), L.R. 6 Q.B. 1; Machado v. Fontes, [1897] 2 Q.B. 231; Going v. Reid Brothers Motor Sales Ltd. *(1982), 35 O.R. (2d) 201*; Ang v. Trach *(1986), 57 O.R. (2d) 300*; Breavington v. Godleman (1988), 80 A.L.R. 362; Block Bros. Realty Ltd. v. Mollard *(1981), 122 D.L.R. (3d) 323*; Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553; Clark v. Naqvi *(1990), 99 N.B.R. (2d) 271*; referred to: Morguard Investments Ltd. v. De Savoye, *[1990] 3 S.C.R. 1077*; Hunt v. T & N plc, *[1993] 4 S.C.R. 289*; Amchem Products Inc. v. British Columbia (Workers' Compensation Board), *[1993] 1 S.C.R. 897*; Grimes v. Cloutier *(1989), 61 D.L.R. (4th) 505*; Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521; Canadian Pacific Railway Co. v. Parent, *[1917] A.C. 195*; Red Sea Insurance Co. v. Bouygues, [1994] J.C.J. No. 29; Walpole v. Canadian Northern Railway Co., [1923] A.C. 113; Prefontaine Estate v. Frizzle *(1990), 71 O.R. (2d) 385*; Moran v. Pyle National (Canada) Ltd., *[1975] 1 S.C.R. 393*; Babcock v. Jackson (1963), 12 N.Y.2d 473; Richards v. United States, 369 U.S. 1 (1962); Dym v. Gordon, 209 N.E.2d 792 (1965); Neumeier v. Kuehner, 286 N.E.2d 454 (1972); LaVan v. Danyluk (1970), 75 W.W.R. 500; Poyser v. Minors (1881), 7 Q.B.D. 329; Huber v. Steiner (1835), 2 Bing. N.C. 202, 132 E.R. 80; Leroux v. Brown (1852), 12 C.B. 801, 138 E.R. 1119; Nash v. Tupper, 1 Caines 402 (1803); Martin v. Perrie, *[1986] 1 S.C.R. 41*; Szeto c. Fédération (La), Cie d'assurances du Canada, *[1986] R.J.Q. 218*.

Statutes and Regulations Cited

Automobile Insurance Act, L.Q. 1977, c. 68, ss. 3, 4. British Columbia Supreme Court Rules, Rule 34. Civil Code of Lower Canada, art. 6. Civil Code of Quebec, art. 3126. Constitution Act, 1867, s. 92(13). Foreign Limitation Periods Act, 1984, (U.K.) 1984, c. 16. Highway Traffic Act, R.S.O. 1937, c. 288, s. 47. Highway Traffic Code, R.S.Q. 1977, c. C-24. Insurance Act, R.S.O. 1970, c. 224, Schedule E. Limitation of Actions Act, *R.S.S. 1978, c. L-15*. Negligence Act, *R.S.O. 1990, c. N.1, s. 2*. Real Estate Act, R.S.B.C. 1979, c. 356, s. 37. Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 22. Vehicles Act, R.S.S. 1978, c. V-3, s. 180(1).

Authors Cited

Ailes, Edgar H. "Limitation of Actions and the Conflict of Laws" (1933), 31 Mich. L. Rev. 474. Cheshire, Geoffrey Chevalier and Peter Machin North. Cheshire and North's Private International Law, 12th ed. By Peter Machin North and J. J. Fawcett. London: Butterworths, 1992. Conférence de La Haye de droit international privé. Actes et documents de la Onzième session, 7 au 26 octobre 1968. t. III, Accidents de la circulation routière. Travaux préliminaires. Mémorandum relatif aux actes illicites en droit international privé, établi par Bernard M. Dutoit, Secrétaire au Bureau Permanent. Document préliminaire no 1 de janvier 1967. La Haye: Imprimerie Nationale, 1970. Cook, Walter Wheeler. The Logical and Legal Bases of the Conflict of Laws. Cambridge, Mass.: Harvard University Press, 1942. Dicey, Albert Venn and J. H. C. Morris. Dicey and Morris on the Conflict of Laws, vol. 2, 11th ed. London: Stevens & Sons, 1987. Hancock, Moffatt. Case and Comment on McLean v. Pettigrew (1945), 23 Can. Bar Rev. 348. Lorenzen, Ernest G. "Huber's De Conflictu Legum" (1919), 13 Ill. L. Rev. 375, reprinted in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws. New Haven: Yale University Press, 1947, p. 136. Lorenzen, Ernest G. "Story's Commentaries on the Conflict of Laws -- One Hundred Years After" (1934), 48 Harv. L. Rev. 15, reprinted in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws. New Haven: Yale University Press, 1947, p. 181. Memorandum of Agreement between the Régie de l'assurance automobile du Québec and the

Minister of Consumer and Commercial Relations for Ontario (December 27, 1978). Michel, M. Jean. La Prescription Libératoire en Droit International Privé, Thesis, University of Paris, 1911, cited in Edgar H. Ailes, "Limitation of Actions and the Conflict of Laws" (1933), 31 Mich. L. Rev. 474, p. 494. Swan, John. "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271. Walsh, Catherine. "'A Stranger in the Promised Land?': The Non-Resident Accident Victim and the Quebec No-Fault Plan" (1988), 37 U.N.B.L.J. 173.

APPEAL (Tolofson v. Jensen, File No. 22980) from a judgment of the British Columbia Court of Appeal *(1992), 65 B.C.L.R. (2d) 114*, *89 D.L.R. (4th) 129*, *11 B.C.A.C. 94*, 22 W.A.C. 94, *[1992] 3 W.W.R. 743*, *9 C.C.L.T. (2d) 289*, *4 C.P.C. (3d) 113*, dismissing an appeal from a judgment of Macdonald J. *(1989), 40 B.C.L.R. (2d) 90*, Appeal allowed.

APPEAL (Lucas (Litigation Guardian of) v. Gagnon, File No. 23445) from a judgment of the Ontario Court of Appeal *(1992), 11 O.R. (3d) 422*, *99 D.L.R. (4th) 125*, *59 O.A.C. 174*, *15 C.C.L.T. (2d) 41*, *15 C.C.L.I. (2d) 100*, *42 M.V.R. (2d) 67*, allowing an appeal, to the extent it held that a cross-claim for contribution and indemnity could not be maintained, from a judgment of Hurley J. *(1991), 3 O.R. (3d) 38*, *4 C.C.L.I. (2d) 194*, *28 M.V.R. (2d) 155*, determining that Ontario law applied to the cause of action and that a cross-claim could be maintained against appellant Lavoie. Appeal allowed.

Avon M. Mersey, Elizabeth B. Lyall and Brian F. Schreiber, for the appellants Leroy Jensen and Roger Tolofson. Noreen M. Collins, for the respondent Kim Tolofson. Allan Lutfy, Q.C., and Odette Jobin-Laberge, for the appellant Réjean Gagnon. Robert J. Reynolds, for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon. Graeme Mew and Adelina Wong, for the respondent Cyrille Lavoie. Written submission only by Brian J. E. Brock and Lesli Bisgould, for the intervener Clarence S. Marshall. Written submission only by Peter A. Daley, for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc. Written submission only by W. T. McGrenere, for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada.

Solicitors for the appellant Leroy Jensen: McQuarrie, Hunter, New Westminster. Solicitors for the appellant Roger Tolofson: Russell & DuMoulin, Vancouver. Solicitors for the respondent Kim Tolofson: Simpson & Company, Vancouver. Solicitors for the appellant Réjean Gagnon: Lavery, de Billy, Ottawa. Solicitors for the respondent Cyrille Lavoie: Smith, Lyons, Torrance, Stevenson & Mayer, Toronto. Solicitors for the respondents Tina Lucas, Justin Gagnon and Heather Gagnon: Reynolds, Kline, Selick, Belleville. Solicitors for the intervener Clarence S. Marshall: Dutton, Brock, MacIntyre & Collier, Toronto. Solicitors for the interveners Sybil Marshall, Victor Marshall, Dianne Margaret Marshall, Rosemarie Anne Marshall, Carmen Selina Frey and Aditha Le Blanc: Soloway, Wright, Ottawa. Solicitors for the interveners La Société d'experts-conseils Pellemon Inc., Le Groupe Pellemon Inc., Simcoe and Erie General Insurance Co., Les Services de béton universels Ltée, and Allstate Insurance Co. of Canada: Fraser & Beatty, North York.

The judgment of La Forest, Gonthier, Cory, McLachlin and Iacobucci JJ. was delivered by

LA FOREST J.

1 This Court has in recent years been called upon to review a number of the structural rules of conflict of laws or private international law. In Morguard Investments Ltd. v. De Savoye, *[1990] 3 S.C.R. 1077*, and Hunt v. T & N plc, *[1993] 4 S.C.R. 289*, the Court had occasion to revisit the law governing the jurisdiction of courts to deal with multi-jurisdictional problems and the recognition to be accorded by the courts of one jurisdiction to a judgment made in another jurisdiction. In Amchem Products Inc. v. British Columbia (Workers' Compensation Board), *[1993] 1 S.C.R.*

897, the Court also examined the rules governing when a court may refuse jurisdiction on the basis of forum non conveniens.

2 In the two appeals before us we are called upon to reconsider the "choice of law rule", i.e., which law should govern in cases involving the interests of more than one jurisdiction, specifically as it concerns automobile accidents involving residents of different provinces.

3 The precise issue may be distilled from the facts of the two cases under appeal. The plaintiffs, residents of Province A, were passengers in an automobile registered and insured in that province. The driver of the automobile in which they were travelling was a resident of Province A. The passengers were injured in a collision with another automobile in Province B. The driver of that automobile was a resident of Province B, and his automobile was registered in that province. In one of the cases, liability from the operation of the automobile was covered by an insurance contract made in Province B; in the other, it was covered under the terms of Province B's "no-fault" insurance scheme. The plaintiffs instituted an action for the resulting personal injuries in Province A against both drivers. The issue that arises is what law should be applied in determining the liability of the defendant drivers.

4 The first of these cases also raises the following subsidiary issue. Assuming the applicable substantive law is that of the place where the tort arises, is the limitation period established under that law inapplicable as being procedural law and so not binding on the court hearing the case, or is it substantive law? For its part, the second case raises the issue whether the Quebec no-fault insurance scheme applies to situations where some or all the parties are non-residents.

Background

Tolofson v. Jensen

Facts

5 On July 28, 1979, the plaintiff (respondent) Kim Tolofson was a passenger in a car owned and driven by his father, the defendant (appellant) Roger Tolofson. He was seriously injured when the car was involved in an accident with a vehicle driven by the other defendant (appellant) Leroy Jensen. The accident occurred in Saskatchewan. The Tolofsons were and remain residents of British Columbia and the car in which they drove was registered and insured in that province. Jensen was and remains a resident of Saskatchewan, and his car was registered and insured in that province.

6 The plaintiff Tolofson alleges that he suffered head injuries in the collision which affected his learning capacity and his physical capabilities. He began an action in British Columbia against both defendants seeking damages for these injuries on December 17, 1987, more than eight years after the collision occurred. He was only 12 years old at the time of the accident. The parties both operated on the assumption that the plaintiff's action is barred under Saskatchewan law because it must be brought within 12 months of the accident. Such a suit is not barred in British Columbia. As well, under Saskatchewan law a gratuitous passenger cannot recover unless "wilful or wanton misconduct" can be established against the driver of the car in which he or she was a passenger. This is not the case in British Columbia. Neither defendant admits liability.

7 The defendants then brought an application by consent pursuant to Rule 34 of the Supreme Court Rules of British Columbia before Macdonald J. seeking determination of a point of law, namely, that the court was forum non conveniens or, in the alternative, that the law of Saskatchewan applied with respect to the limitation period and the standard of care for gratuitous passengers. That is the proceeding from which the first of these appeals arises.

Judicial History

British Columbia Supreme Court *(1989), 40 B.C.L.R. (2d) 90*

8 On October 17, 1989, Macdonald J. dismissed the application. He concluded that while he was impressed with the logic of applying the "proper law of the tort", he was bound by McLean v. Pettigrew, *[1945] S.C.R. 62*, where this Court upheld an action in respect of a single car accident in Ontario which was successfully brought in Quebec under Quebec law by a passenger, a resident of Quebec, against the owner and operator of the car, also a resident of Quebec. Having considered the authorities, he concluded that choice of law was inextricably entwined with issues of jurisdiction and forum conveniens, and that choice of law followed these determinations.

British Columbia Court of Appeal *(1992), 65 B.C.L.R. (2d) 114*

9 On the appeal to the British Columbia Court of Appeal, the defendants no longer contended that the British Columbia courts are without jurisdiction or should decline jurisdiction as being forum non conveniens. They argued, however, that Macdonald J. had erred in failing to separate issues of jurisdiction and forum non conveniens from choice of law. In addition, they submitted that the applicable law was that of Saskatchewan. Cumming J.A., who gave reasons for the Court of Appeal, agreed, at p. 120, that "even when the court finds jurisdiction and refuses to stay an action based on forum non conveniens because a juridical advantage is found in the forum, it is still necessary to examine choice of law independently".

10 After an extensive review of the history of choice of law rules and their application in recent Canadian cases, Cumming J.A. reviewed the facts of Lucas v. Gagnon (then at the Ontario Divisional Court level). He concluded that it made no difference that in that case Lucas was a defendant on a cross-claim whereas in the present case Jensen was a co-defendant. He adopted the reasoning of Hurley J. in Gagnon that, not only was he bound by McLean v. Pettigrew even on the facts of the case at bar, but even if he were not so bound, he would hold that the law of the forum should apply since it had the most significant relationship with the parties. In obiter, Cumming J.A. stated that this decision was justified in that it met with the reasonable expectations of all the parties in that the Saskatchewan defendant would have reasonably expected to be subject to a lawsuit initially, and that both the limitation period and the gratuitous passenger laws of Saskatchewan had since been repealed.

Lucas (Litigation Guardian of) v. Gagnon

Facts

11 The Gagnon case is similar to the Tolofson case, except that in the Gagnon case the appellant does not seek to avoid a limitation period and a higher standard of care in the jurisdiction where the accident occurred; he seeks rather to avoid the limits on liability provided in the no-fault regime in effect in Quebec where the accident occurred. While the amount that can be recovered under that regime is greater than can be recovered under the unsatisfied judgment funds in other provinces, it is much less than can be recovered in a tort action against the party at fault. I note that Ontario has entered into an agreement regarding the application of the Quebec no-fault regime to Ontario residents who have an accident in Quebec which, it was argued, has an impact on the result of this case. This was not directly discussed in the courts below, and I shall only make reference to it later.

12 The essential facts, for present purposes, are these. The plaintiff, Mrs. Gagnon, brought action on her own behalf and as litigation guardian of two children against her husband, Mr. Gagnon, for personal injuries suffered in an accident that occurred in the Province of Quebec when there was a collision between an automobile driven by her husband, in which she was a passenger, and an automobile owned and operated by Mr. Lavoie. The Gagnons are all residents of Ontario; Mr. Lavoie is a resident of Quebec.

13 Mrs. Gagnon originally included Mr. Lavoie as a defendant, but after the Ontario Court of Appeal released its decision in Grimes v. Cloutier *(1989), 61 D.L.R. (4th) 505*, which distinguished McLean v. Pettigrew, supra, and held that a Quebec resident's liability in circumstances like the present case was governed by Quebec law, Mrs. Gagnon discontinued her action against Mr. Lavoie. However, the defendant, Mr. Gagnon, had cross-claimed against Mr. Lavoie and that cross-claim was not discontinued.

14 Mrs. Gagnon obtained 100% of the no-fault benefits (on the Quebec scale) to which she was entitled under the Quebec scheme from Mr. Gagnon's Ontario insurer. The Ontario insurer was reimbursed by the Régie de l'assurance automobile du Quebec ("La Régie"), pursuant to a 1978 agreement between the Régie and Ontario's Minister of Consumer and Commercial Relations. Mrs. Gagnon could not bring an action for damages in Quebec because of the prohibition in s. 4 of the Quebec Automobile Insurance Act, L.Q. 1977, c. 68. Her only option in seeking an award of damages was to sue in Ontario.

15 Mr. and Mrs. Gagnon then brought a motion on an agreed statement of facts for an order under Rule 22 of the Ontario Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*, to determine the following questions: whether the Ontario court had jurisdiction; whether it should accept that jurisdiction; whether Ontario law applied; and whether Mr. Gagnon was entitled to maintain his action against Mr. Lavoie. It is from this proceeding that the appeal to this Court emanates. Mr. Lavoie was not notified of the motion at first instance, did not concur with the questions stated and did not attend.

Judicial History

Ontario Court (General Division) *(1991), 3 O.R. (3d) 38*

16 The motion was heard by Hurley J. He replied in the affirmative to all the questions set forth in the motion. He began his analysis with Phillips v. Eyre (1870), L.R. 6 Q.B. 1 (Ex. Ch.), which is the starting point for the law in this area. He cited the general rule stated therein to the effect that to found a suit in England for a wrong committed abroad, two conditions had to be met: (1) the wrong would have been actionable if committed in England and (2) was not justifiable by the law of the place where the act was committed. That case, he noted, had been followed by this Court in McLean v. Pettigrew, supra, where the second condition was held to be satisfied by the fact that the wrong was subject to a penal prohibition in the place where the act was committed even though it was not actionable there. McLean involved an action where the plaintiff and defendant were residents of the same province and the action was brought there. The situation was similar here as it related to the Gagnons. Assuming evidence of the second condition in Phillips v. Eyre was established by evidence at trial, he concluded that an action would lie.

17 Though he had made reference to Grimes v. Cloutier, supra, and other Ontario jurisprudence as it affected Quebec residents in relation to accidents that take place in Quebec, Hurley J. still thought the defendant's claim against Mr. Lavoie could be pursued. In his view, the fact that the defendant in the cross-claim was originally a defendant in the action was irrelevant, since he was no longer so. Hurley J. stated, at p. 43:

> If I am not bound to apply McLean then, in my opinion, the reasonable expectations of the plaintiffs and the defendant are that this sort of litigation would take place in Ontario according to the law of Ontario, and I conclude that the defendant's assertion in the action of a claim over against a Quebec driver/owner does not alter those expectations. Rather, in my opinion it would be unfair to allow the addition of that claim over to alter the law applicable from that of Ontario, which has the most significant relationship with the parties, to that of Quebec.

Ontario Court of Appeal *(1992), 11 O.R. (3d) 422*

18 Mr. Lavoie and Mr. Gagnon then appealed to the Ontario Court of Appeal, but only on the questions of whether Ontario law applied and whether Gagnon was entitled to maintain his cross-claim against Lavoie. The late Tarnopolsky J.A. stated the main question as whether Ontario or Quebec law governed both the main action and the cross-claim. He examined whether the decision of McLean v. Pettigrew, supra, should be distinguished on the basis that the defendant to the cross-claim, who was not a party to the main action, was a resident of Quebec and that the accident occurred in Quebec. He also considered, if McLean v. Pettigrew applied to the main action, whether the choice of law with respect to the cross-claim was different having regard to the Court of Appeal's decision in Grimes v. Cloutier, supra.

19 After reviewing the case law, Tarnopolsky J.A. emphasized that McLean v. Pettigrew ought not to be applied rigidly to factual circumstances not closely similar to those in that case. He held that McLean applied to the main action. As for the cross-claim, he found the following, at p. 438:

> In my opinion, given the facts of the case at bar it [would] be unjust if the action against Lavoie were not bound by Grimes v. Cloutier. After all, Lavoie was a Quebec resident driving his car in his own province. Therefore, when an Ontario resident is involved in an accident in Quebec with a Quebec resident, although both the passenger and his or her driver are residents of Ontario, a claim against the Quebec driver must be barred by the Quebec non-actionability law.

20 As a result, Ontario law, including conflict rules developed according to Phillips v. Eyre, supra, was held to apply in the action of the respondents against the appellant Gagnon. Since Lavoie was not a resident of Ontario and the accident occurred in Quebec, the facts and law of Grimes v. Cloutier applied to any claim against him. The action was remitted for trial on that basis.

21 Carthy J.A. agreed with Tarnopolsky J.A. but arrived at the conclusion that the cross-claim should not proceed by a different route. He reviewed s. 2 of the Negligence Act, *R.S.O. 1990, c. N.1*, and concluded, at p. 440, that, because Lavoie could not, on the authority of Grimes v. Cloutier, have been sued alone, he was not a person who was or "would if sued have been, liable" in respect of the damage suffered by the respondent.

22 Blair J.A., who found the views of his colleagues complementary rather than inconsistent, agreed with both of them.

Historical Highlights of Choice of Law Rule in Tort

23 The genesis of the existing Canadian rule for the determination of choice of law for torts arising outside a court's territorial jurisdiction is the seminal case of Phillips v. Eyre, supra. There the plaintiff brought an action in England for assault and false imprisonment against the defendant who at the time of the torts was governor of Jamaica. The acts of which the plaintiff complained were part of a course of action taken by Jamaican authorities to suppress a rebellion. Later the governor caused an act of indemnity to be passed absolving all persons of liability for any unlawful act committed in putting down the rebellion. Much of the judgment given by Willes J. is devoted to questions concerning whether a colony like Jamaica could constitutionally enact such a statute; these the court answered in the affirmative. But the major import of the case relates to the final objection of the plaintiff that, assuming the colonial statute was valid in Jamaica, it could not have the effect of taking away a right of action in an English court. Willes J. replied that the objection rested on a misconception of a civil obligation and the corresponding right of action, which later he stated is only an accessory to the obligation and subordinate to it. As in the case of contract, the general rule was that "the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law" (emphasis added) (p. 28). The substantive law, he affirmed, is governed by the law of the place where the wrong has been committed. That, of course, would be Jamaica because the torts were wholly committed there.

24 Willes J. then went on to say that English courts are said to be more open to admit actions founded on foreign transactions than those of other European countries, but he added, at p. 28, that there are restrictions (e.g., trespass to land) that exclude certain actions altogether, and "even with respect to those not falling within that description our courts do not undertake universal jurisdiction" (emphasis added). He then immediately continued with the following frequently cited passage, at pp. 28-29:

> As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done.

25 In this passage, Willes J. appears to commingle the law dealing with what we would today call jurisdiction and choice of law. The first rule is strictly related to jurisdiction as is evident from its context, which I have just related. The second rule we would normally think of as dealing with choice of law, which it is apparent from his earlier remarks was the place of the wrong, the lex loci delicti. It was not, however, necessary for Willes J. to engage in this type of modern analysis. All he was doing was expressing a rule of double actionability to permit suit in England; see Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co. (1883), 10 Q.B.D. 521, at pp. 536-37.

26 The law was not to remain in this form. In Machado v. Fontes, [1897] 2 Q.B. 231, (an interlocutory appeal heard in a summary way by two judges), Willes J.'s judgment was read in a rather wooden manner to mean something quite different from what he, in my view, had intended. In that case the plaintiff brought action in England for libel alleged to have been published in Portuguese in Brazil. Though the report leaves us to surmise, the names of the parties would indicate that they were Brazilian and, the language being Portuguese, the libel would seem to have taken place there. The court interpreted Willes J.'s language as meaning that an act committed abroad could be brought in England in the same way as if it had taken place in England, so long as it was not justified or excused under the law of the place where it was committed. It was, in other words, actionable under English law even if not actionable where it was committed if it was "unjustifiable" there, for example, if it constituted a criminal act there.

27 The approach taken in Machado v. Fontes was subjected to considerable judicial and academic criticism; see Professor Moffatt Hancock's biting Case and Comment on McLean v. Pettigrew, supra, (1945), 23 Can. Bar Rev. 348. In particular so far as Canadian cases are concerned, Viscount Haldane in Canadian Pacific Railway Co. v. Parent, *[1917] A.C. 195*, at p. 205, early expressed some reservations about it. For my part, I would have thought the question whether a wrong committed in Brazil by a Brazilian against another Brazilian gave rise to an action for damages should be within the purview of Brazil, and that its being made actionable under English law by an ex post facto decision of an English court would constitute an intrusion in Brazilian affairs which an English court, under basic principles of comity, should not engage in. I could understand the approach if the parties were both English nationals or domiciled in England and there is some support in English cases for that measure of intervention; see Chaplin v. Boys, [1969] 2 All E.R. 1085 (H.L.), per Lord Hodson, at p. 1094, and Lord Wilberforce, at p. 1104; see also Lord Denning in the same case in the Court of Appeal, [1968] 1 All E.R. 283, at pp. 289-90. I add parenthetically that it could well be argued (though the facts were not conducive to that possibility) that, unlike a motor vehicle accident, the tort of libel should be held to take place where its effects are felt, but the court simply assumed that the place of the tort was Brazil.

28 In England, Machado v. Fontes was ultimately overruled by the House of Lords in Chaplin v. Boys, supra. There the plaintiff, a passenger on a motorcycle, was injured through the negligence of the defendant whose car had hit the motorcycle. The plaintiff and defendant were British soldiers stationed in Malta. In upholding the action, their Lordships adopted a test of double actionability. Substantive British law would be applied if the conduct was actionable both in England and in the place where the conduct occurred, with a residual discretion to depart from the rule where justice warranted. Here the conduct was actionable both in England and in Malta, and there was no ground for a discretion to be exercised. The majority thus determined that the rule in Phillips v. Eyre was a double actionability test. While the ratio of the case is difficult to define with precision (see Red Sea Insurance Co. v. Bouygues, [1994] J.C.J. No. 29 (P.C.)), the summary of the result set forth in the well known text of Dicey and Morris, Dicey and Morris on the Conflict of Laws, vol. 2 (11th ed. 1987), at pp. 1365-66, has been generally accepted:

> Rule 205. -- (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both
>
> (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and
>
> (b) actionable according to the law of the foreign country where it was done.

> (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties.

29 Nonetheless it was on the insecure foundation of Phillips v. Eyre as interpreted in Machado v. Fontes that the existing Canadian law was erected by this Court's 1945 decision in McLean v. Pettigrew. There, it will be remembered, a driver and his gratuitous passenger, both domiciled in Quebec, had a car accident in Ontario, and the passenger sued the driver in Quebec. Under Ontario law, the claim would not have been actionable. It would, however, have been actionable in Quebec had it occurred there. Applying the prevalent English law, the Court found that since the tort was actionable in Quebec, and the driver's conduct, though not actionable in Ontario, was prohibited under the Highway Traffic Act, R.S.O. 1937, c. 288, s. 47, of that province, it was not "justifiable" in Ontario. It, therefore, upheld the plaintiff's action under Quebec law.

30 The law as enunciated in McLean v. Pettigrew has remained the basic rule in Canada ever since. However, its fundamental weaknesses began to be revealed in a series of Ontario cases beginning in the 1980s. The first requiring discussion is Going v. Reid Brothers Motor Sales Ltd. *(1982), 35 O.R. (2d) 201* (H.C.). There the plaintiffs were seriously injured in a collision with the defendant's vehicle in Quebec owing to the negligence of the defendant. All the parties resided in Ontario. In an action in Ontario, Henry J. held that the plaintiffs were entitled to recover damages in accordance with Ontario law despite the fact that the no-fault scheme in Quebec, where the accident took place, extinguished any action in respect of bodily injuries arising out of the accident. Had there been no breach of Quebec law of any kind the action would not have been maintainable in Ontario; see Walpole v. Canadian Northern Railway Co., [1923] A.C. 113 (P.C.). However, in Going, the defendant had been in breach of the Quebec Highway Traffic Code, R.S.Q. 1977, c. C-24. Thus the action was not "justifiable" in Quebec so, following the rule in McLean v. Pettigrew, the plaintiffs could recover under Ontario law. Henry J. noted that the effect was that the defendants, who had no relationship with the plaintiffs apart from the accident, were deprived of the protection of the law accorded them in Quebec where the action occurred; moreover, he added, the rule encouraged forum shopping. Had either the British rule in Chaplin v. Boys, supra, or the American rule (which applied the proper law of the tort), been in effect, that would not have been the case. I note in passing that in this and the cases that followed, reference is made to rules in other countries, but in none of these cases was the rule approached on the basis of Canadian constitutional imperatives.

31 Ang v. Trach *(1986), 57 O.R. (2d) 300* (H.C.), even more strongly underlines the deficiencies of the rule in McLean v. Pettigrew. There Ontario residents who were involved in a motor vehicle accident in Quebec with a Quebec resident were held entitled to sue the latter despite the fact that a Quebec resident must surely expect to be governed by Quebec law in such circumstances. As Henry J. observed, the rule, by applying the law of the forum as to liability and assessment, in essence constitutes an extraterritorial extension of the law of the forum. The situation in Going was at least supportable since the parties were all Ontario residents. In Henry J.'s view, the law of the place of the tort, or the proper law (i.e., the place having the most substantial connection with the tort) a concept which has been developed in the United States, would be more appropriate. He voiced the hope, since repeated in many cases including those before us, that the matter would be addressed by the appellate courts or by legislation.

32 Henry J.'s prayer was answered by the Ontario Court of Appeal, at least to the extent to which it could do so, in Grimes v. Cloutier, supra, and Prefontaine Estate v. Frizzle *(1990), 71 O.R. (2d) 385*. In effect what the court did in the latter two cases was to confine McLean v. Pettigrew to its particular facts. In other situations, it held, the rule of double actionability set forth in Dicey and Morris following Chaplin v. Boys, supra, should be followed. Accordingly, in Grimes v. Cloutier, it dismissed the action of an Ontario resident against a Quebec resident for personal injuries suffered in an automobile accident in Quebec. Since under the Quebec no-fault scheme no action existed in respect of the accident, no action could be brought in Ontario. The same rule was applied in Prefontaine Estate v. Frizzle where a Quebec resident sued an Ontario resident in respect of an accident in Quebec.

33 It was against this background that the present cases arose. In Tolofson, we saw, the British Columbia Court of Appeal followed the rule in McLean v. Pettigrew strictly, holding that the British Columbia plaintiff could sue both the British Columbia defendant and the Saskatchewan defendant in British Columbia under the laws of that province for damages resulting from an automobile accident that occurred in Saskatchewan. Following the principles enunciated

in its earlier decisions, the Ontario Court of Appeal in Gagnon held that the Ontario resident could sue the defendant who was also resident in Ontario, but further held that the latter could not cross-claim for contributory negligence against the Quebec defendant because that claim could not have been pursued in Quebec so the double actionability rule was not satisfied.

34 Under these circumstances it is incumbent on this Court to respond to the prayer originally appearing in the reasons of Henry J. in Ang v. Trach and repeatedly reiterated in subsequent cases.

Critique and Reformulation

35 What strikes me about the Anglo-Canadian choice of law rules as developed over the past century is that they appear to have been applied with insufficient reference to the underlying reality in which they operate and to general principles that should apply in responding to that reality. Often the rules are mechanistically applied. At other times, they seem to be based on the expectations of the parties, a somewhat fictional concept, or a sense of "fairness" about the specific case, a reaction that is not subjected to analysis, but which seems to be born of a disapproval of the rule adopted by a particular jurisdiction. The truth is that a system of law built on what a particular court considers to be the expectations of the parties or what it thinks is fair, without engaging in further probing about what it means by this, does not bear the hallmarks of a rational system of law. Indeed in the present context it wholly obscures the nature of the problem. In dealing with legal issues having an impact in more than one legal jurisdiction, we are not really engaged in that kind of interest balancing. We are engaged in a structural problem. While that structural problem arises here in a federal setting, it is instructive to consider the matter first from an international perspective since it is, of course, on the international level that private international law emerged.

36 On the international plane, the relevant underlying reality is the territorial limits of law under the international legal order. The underlying postulate of public international law is that generally each state has jurisdiction to make and apply law within its territorial limit. Absent a breach of some overriding norm, other states as a matter of "comity" will ordinarily respect such actions and are hesitant to interfere with what another state chooses to do within those limits. Moreover, to accommodate the movement of people, wealth and skills across state lines, a byproduct of modern civilization, they will in great measure recognize the determination of legal issues in other states. And to promote the same values, they will open their national forums for the resolution of specific legal disputes arising in other jurisdictions consistent with the interests and internal values of the forum state. These are the realities that must be reflected and accommodated in private international law.

37 The earlier 19th century English cases, such as Phillips v. Eyre, were alive to the fact that these are the realities and forces to which courts should respond in the development of principles in this area. By the turn of the century, however, the English courts adopted a positivistic rule-oriented approach that has since seriously inhibited the development of rational principles in this area; see Morguard, supra, for an illustration of this in a different context. It is to the underlying reality of the international legal order, then, that we must turn if we are to structure a rational and workable system of private international law. Much the same approach applies within a federal system with the caveat that these internal rules have their own constitutional imperatives and other structural elements. For example, in Canada this Court has a superintending role over the interpretation of all laws, federal and provincial, and can thus ensure the harmony that can only be achieved on the international level in the exercise of comity.

38 All of this is simply an application to "choice of law" of the principles enunciated in relation to recognition and enforcement of judgments in Morguard, supra. There this Court had this to say, at p. 1095:

> The common law regarding the recognition and enforcement of foreign judgments is firmly anchored in the principle of territoriality as interpreted and applied by the English courts in the 19th century; see Rajah v. Faridkote, supra. This principle reflects the fact, one of the basic tenets of international law, that sovereign states have exclusive jurisdiction in their own territory. As a concomitant to this, states are hesitant to exercise jurisdiction over matters that may take place in the territory of other states. Jurisdiction being territorial, it follows that a state's law has no binding effect outside its jurisdiction.

> Modern states, however, cannot live in splendid isolation and do give effect to judgments given in other countries in certain circumstances. . . . This, it was thought, was in conformity with the requirements of comity, the informing principle of private international law, which has been stated to be the deference and respect due by other states to the actions of a state legitimately taken within its territory.

39 As Morguard and Hunt also indicate, the courts in the various states will, in certain circumstances, exercise jurisdiction over matters that may have originated in other states. And that will be so as well where a particular transaction may not be limited to a single jurisdiction. Consequently, individuals need not in enforcing a legal right be tied to the courts of the jurisdiction where the right arose, but may choose one to meet their convenience. This fosters mobility and a world economy.

40 To prevent overreaching, however, courts have developed rules governing and restricting the exercise of jurisdiction over extraterritorial and transnational transactions. In Canada, a court may exercise jurisdiction only if it has a "real and substantial connection" (a term not yet fully defined) with the subject matter of the litigation; see Moran v. Pyle National (Canada) Ltd., *[1975] 1 S.C.R. 393*; Morguard, supra; and Hunt, supra. This test has the effect of preventing a court from unduly entering into matters in which the jurisdiction in which it is located has little interest. In addition, through the doctrine of forum non conveniens a court may refuse to exercise jurisdiction where, under the rule elaborated in Amchem, supra (see esp. at pp. 921, 922, 923), there is a more convenient or appropriate forum elsewhere.

41 The major issue that arises in this case is this: once a court has properly taken jurisdiction (and this was conceded in both the cases in these appeals), what law should it apply? Obviously the court must follow its own rules of procedure; it could not function otherwise; see Chaplin v. Boys, supra. What is procedural is usually clear enough though at times this can raise difficult issues. In the Tolofson case, for example, the parties have raised the much debated question of whether a statute of limitation is of a procedural or substantive character. I shall deal with that issue later. I will here turn to the more common "choice of law" problem, and the principal issue in these appeals, namely, what is the substantive law that should be applied in considering the present cases?

42 From the general principle that a state has exclusive jurisdiction within its own territories and that other states must under principles of comity respect the exercise of its jurisdiction within its own territory, it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the lex loci delicti. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. Difficulties may also arise where the wrong directly arises out of some transnational or interprovincial activity. There territorial considerations may become muted; they may conflict and other considerations may play a determining role. But that is not this case. Though the parties may, before and after the wrong was suffered, have travelled from one province to another, the defining activity that constitutes the wrong took place wholly within the territorial limits of one province, in one case, Quebec, in the other Saskatchewan, and the resulting injury occurred there as well. That being so it seems to me, barring some recognized exception, to which possibility I will turn later, that as Willes J. pointed out in Phillips v. Eyre, supra, at p. 28, "civil liability arising out of a wrong derives its birth from the law of the place [where it occurred], and its character is determined by that law". In short, the wrong is governed by that law. It is in that law that we must seek its defining character; it is that law, too, that defines its legal consequences.

43 I have thus far framed the arguments favouring the lex loci delicti in theoretical terms. But the approach responds to a number of sound practical considerations. The rule has the advantage of certainty, ease of application and predictability. Moreover, it would seem to meet normal expectations. Ordinarily people expect their activities to be governed by the law of the place where they happen to be and expect that concomitant legal benefits and responsibilities will be defined accordingly. The government of that place is the only one with power to deal with these activities. The same expectation is ordinarily shared by other states and by people outside the place where an activity occurs. If other states routinely applied their laws to activities taking place elsewhere, confusion would be the result. In our modern world of easy travel and with the emergence of a global economic order, chaotic situations would often result if the principle of territorial jurisdiction were not, at least generally, respected. Stability

of transactions and well grounded legal expectations must be respected. Many activities within one state necessarily have impact in another, but a multiplicity of competing exercises of state power in respect of such activities must be avoided.

44 Leaving aside the British practice, which itself is giving increasing deference to the lex loci delicti, the practice of most states until recently favoured exclusive reference to the lex loci. Thus the "mémorandum Dutoit" in Actes et documents de la Onzième session (at p. 20) of the Hague Convention on Traffic Accidents has this to say:

> [Translation] And in fact, courts in nearly all the member States have ruled in favour of recourse in principle to the lex loci actus in cases of automobile collisions occurring abroad. . . .

This statement is supported by an extensive footnote quoting the sources of this law in all the member states. Quebec law, following European tradition, did the same; see art. 6, Civil Code of Lower Canada. This was the case, as well, in the United States. This is attested to in Babcock v. Jackson (1963), 12 N.Y.2d 473, where Fuld J. stated, at p. 477: "The traditional choice of law rule, embodied in the original Restatement of Conflict of Laws ([sec.] 384), and until recently unquestioningly followed in this court . . . has been that the substantive rights and liabilities arising out of a tortious occurrence are determinable by the law of the place of the tort." Similarly Australia has bypassed British precedents by adopting the lex loci delicti as the rule governing the choice of law in litigation within Australia; see Breavington v. Godleman (1988), 80 A.L.R. 362 (H.C.).

45 There may be room for exceptions but they would need to be very carefully defined. It seems to me self evident, for example, that State A has no business in defining the legal rights and liabilities of citizens of State B in respect of acts in their own country, or for that matter the actions in State B of citizens of State C, and it would lead to unfair and unjust results if it did. The same considerations apply as between the Canadian provinces. What is really debatable is whether State A, or for that matter Province A, should be able to do so in respect of transactions in other states or provinces between its own citizens or residents.

46 It will be obvious from what I have just said that I do not accept the former British rule, adopted in McLean v. Pettigrew, that in adjudicating on wrongs committed in another country our courts should apply our own law, subject to the wrong being "unjustifiable" in the other country. As I see it, this involves a court's defining the nature and consequences of an act done in another country. This, barring some principled justification, seems to me to fly against the territoriality principle. As well, if this approach were generally adopted, it would, in practice, mean that the courts of different countries would follow different rules in respect of the same wrong, and invite forum shopping by litigants in search of the most beneficial place to litigate an issue. Applying the same approach to the units of a federal state like Canada would be even worse. Given the constant mobility between the provinces as well as similar legal regimes and other factors, forum shopping would be much easier.

47 There were in the 19th century context in which the British approach was established a number of forces that militated in favour of the English rule. To begin with Great Britain was the metropolitan state for many colonies and dependencies spread throughout the globe over which it had sovereign legislative power and superintending judicial authority through the Privy Council. Because of its dominant position in the world, it must have seemed natural to extend the same approach to foreign countries, especially when this dominance probably led to the temptation, not always resisted, that British laws were superior to those of other lands (see Chaplin v. Boys, supra, at p. 1100). There was, as well, the very practical consideration that proof of laws of far-off countries would not have been easy in those days, and the convenience of using the law with which the judges were familiar must have proved irresistible. All the social considerations enumerated above are gone now, and the problem of proof of foreign law has now been considerably attenuated in light of advances in transportation and communication, as Lord Wilberforce acknowledged in Chaplin v. Boys. And as he further indicated (at p. 1100), one of the ways in which this latter problem can be minimized in practice is by application of the rule that, in the absence of proof of foreign law, the lex fori will apply. Thus the parties may either tacitly or by agreement choose to be governed by the lex fori if they find it advisable to do so.

48 In sum, I can find no compelling reason for following the law of the forum either as enunciated in Chaplin v.

Boys or in McLean v. Pettigrew, supra. The latter case has, of course, the further disadvantage of applying the law of the forum when the action complained of was not even actionable under the law of the place of the wrong. As well, as will be seen, the application of that case in other contexts raises serious constitutional difficulties. I would overrule it.

49 What then can be said of the double actionability rule along the lines adopted in England in Chaplin v. Boys? I have already indicated, of course, that I view the lex loci delicti rule as the governing law. However, because a rigid rule on the international level could give rise to injustice, in certain circumstances, I am not averse to retaining a discretion in the court to apply our own law to deal with such circumstances. I can, however, imagine few cases where this would be necessary.

50 If one applies the lex loci delicti rule as the rule for defining the obligation and its consequences, the requirement under the English rule that the wrong must also be a tort when committed under English law seems to me to be related more to jurisdiction than choice of law. There appears to be some merit to the requirement, especially when coupled with a discretion not to enforce the requirement, but it may be wondered whether it is not excessive, particularly if this calls for a meticulous examination of the law. Some breathing room was allowed in Chaplin v. Boys, where the court there retained a discretion to deal with a case without complying with the double actionability rule and it is of interest that in the recent case of Red Sea Insurance Co. v. Bouygues, supra, the Privy Council used the discretion to deal with a contract under the law of the place where the contract was made rather than the law of the forum. However, given the fact that the jurisdiction of Canadian courts is confined to matters in respect of which there is a real and substantial connection with the forum jurisdiction, I seriously wonder whether the requirement that the wrong be actionable in that jurisdiction is really necessary. It may force or persuade litigants who are within the territorial jurisdiction of the court to sue elsewhere even though it may be more convenient for all or most of the parties to sue here. The fact that a wrong would not be actionable within the territorial jurisdiction of the forum if committed there might be a factor better weighed in considering the issue of forum non conveniens or, on the international plane, whether entertaining the action would violate the public policy of the forum jurisdiction. Certainly where the place of the wrong and the forum are both in Canada, I am convinced that the application of the forum non conveniens rule should be sufficient. I add that I see a limited role, if any, for considerations of public policy in actions that take place wholly within Canada. What I have to say about federal issues later strengthens my conviction that the appropriate rule is the lex loci delicti.

Should There Be an Exception Within Canada?

51 I turn then to consider whether there should be an exception to the lex loci delicti rule. As I mentioned earlier, the mere fact that another state (or province) has an interest in a wrong committed in a foreign state (or province) is not enough to warrant its exercising jurisdiction over that activity in the foreign state, for a wrong in one state will often have an impact in another. If we are to permit a court in a territorial jurisdiction to deal with a wrong committed in another jurisdiction solely in accordance with the law of that court's jurisdiction, then some rule must be devised to displace the lex loci delicti, and that rule must be capable of escaping the spectre that a multiplicity of jurisdictions may become capable of exercising jurisdiction over the same activity in accordance with their own laws. This would not only encourage forum shopping but have the underlying effect of inhibiting mobility.

52 A means of achieving this has been attempted in the United States through an approach often referred to as the proper law of the tort. This involves qualitatively weighing the relevant contacts with the competing jurisdictions to determine which has the most significant connections with the wrong. The approach was adopted by the majority in a strongly divided Court of Appeals of New York in Babcock v. Jackson, supra, a case whose facts were very similar to McLean v. Pettigrew, supra. The plaintiff, while a gratuitous passenger in the defendant's automobile, suffered injuries when the automobile was in an accident. Both plaintiff and defendant were residents of New York, but the accident occurred in Ontario where a statute absolved the owner and driver from liability for gratuitous passengers. In an action in New York, the defendant moved for dismissal on the ground that the law of Ontario applied. A majority denied the motion to dismiss. The court stated that while the jurisdiction where the wrongful conduct occurred will usually govern, justice, fairness and best practical results may better be achieved in tort cases with multi-state contacts by according controlling effect to the law of the jurisdiction which, because of its

relationship and contact with the occurrence and the parties, has the greatest concern with the issue raised in the litigation. There has been a tendency to adopt that approach in a number of the American states, although it would appear the vast majority still apply the law of the place of the injury; see Richards v. United States, 369 U.S. 1 (1962), at pp. 11-14.

53 I leave aside for the moment the assumptions that a flexible rule better meets the demands of justice, fairness and practical results and underline what seems to be the most obvious defect of this approach -- its extreme uncertainty. Lord Wilberforce in Chaplin v. Boys, supra, at p. 1103, after setting forth the complexities and uncertainties of the rule thus summarized his view:

> The criticism is easy to make that, more even than the doctrine of the proper law of the contract. . . where the search is often one of great perplexity, the task of tracing the relevant contacts, and of weighing them, qualitatively, against each other, complicates the task of the courts and leads to uncertainty and dissent (see particularly the powerful dissents in Griffith's case of Bell, Ch.J., and in Miller's case of Breitel, J.).

I agree with Lord Pearson too, at p. 1116, that the proposed rule is "lacking in certainty and likely to create or prolong litigation". As illustrating the uncertainty, he referred to Dym v. Gordon, 209 N.E.2d 792 (N.Y.C.A. 1965), in which four members of the court held that the law of Colorado applied while the three dissenters would have applied the law of New York. Even more difficult problems would arise where more than two states had interests in the litigation. I therefore agree with the views expressed by the majority in Chaplin v. Boys.

54 There might, I suppose, be room for an exception where the parties are nationals or residents of the forum. Objections to an absolute rule of lex loci delicti generally arise in such situations; see Babcock, supra; McLean v. Pettigrew, supra. There are several reasons why it is considered appropriate that the home state of the parties apply its own law to them. It is perceived by some commentators to be "within the reasonable expectations of the parties" to apply their home law to them (an assumption with which I disagree). It is considered to be more convenient for both litigants and judges and to accord with forum notions of "public policy" or justice. In Neumeier v. Kuehner, 286 N.E.2d 454 (N.Y.C.A. 1972), the underlying rationale of the "justice" theory was succinctly put by Fuld C.J., at p. 456: "It is clear that . . . New York has a deep interest in protecting its own residents, injured in a foreign state, against unfair or anachronistic statutes of that state." I shall consider the issue of "public policy" first.

55 The imputed injustice of applying the lex loci delicti in the seminal choice of law cases to which I have just referred arose from some aspect of the law of the locus delicti that the court considered contrary to the public policy of the forum, i.e., unfair. In McLean, supra, and Babcock, supra, it was Ontario's notorious gratuitous passenger law. In Chaplin, supra, it was the unavailability of general damages under Maltese law. In LaVan v. Danyluk (1970), 75 W.W.R. 500 (B.C.S.C.), it was the absence of a contributory negligence statute under Washington law. In Tolofson, as between father and son (residents of British Columbia), it is Saskatchewan's guest passenger law and the short limitation period for infants under Saskatchewan law.

56 I remain unconvinced by these arguments. These "public policy" arguments simply mean that the court does not approve of the law that the legislature having power to enact it within its territory has chosen to adopt. These laws are usually enacted on the basis of what are often perceived by those who make them as reasonable, though they may turn out to be unwise. The residents of the jurisdiction must put up with them until they are modified, and one does not ordinarily ignore the law of the land in favour of those who visit. True, it may be unfortunate for a plaintiff that he or she was the victim of a tort in one jurisdiction rather than another and so be unable to claim as much compensation as if it had occurred in another jurisdiction. But such differences are a concomitant of the territoriality principle. While, no doubt, as was observed in Morguard, the underlying principles of private international law are order and fairness, order comes first. Order is a precondition to justice. At all events, similar anomalies occur if we create an exception for domiciliaries. Thus why should we allow an exception for the lex fori to a driver and passenger who lose control of their car and go off the road into a ditch, but not for a similar driver and passenger who crash into a negligently planted telephone pole or a negligently erected road sign? Why should we allow an exception at all where two residents of the forum fortuitously happen to meet each other head-on on the road?

Should luck be on your side because you happen to crash into another Ontario resident while driving in Quebec, instead of crashing into a Quebecer?

57 I should add that the "public policy" problems, particularly between the provinces, tend to disappear over time. Even since the launching of the Tolofson case, Saskatchewan has repealed its guest passenger statute and has changed the rule regarding the limitation period of minors. The biggest difference between provinces now is in insurance schemes, and this only creates problems of quantum, not of liability.

58 There are as well more general arguments of convenience for allowing an exception to the lex loci delicti rule. These are summarized in Professor Catherine Walsh's article "'A Stranger in the Promised Land?': The Non-Resident Accident Victim and the Quebec No-Fault Plan" (1988), 37 U.N.B.L.J. 173, at p. 182. She states:

> In this situation [where the defendant is resident in another jurisdiction whose domestic law allows full tort recovery], it is argued, application of forum law neither prejudices the defendant nor impinges on the interests of the jurisdiction where the accident occurred. The litigation, after all, will take place outside Québec and the plaintiff's losses will be paid by the defendant's liability insurer, not the defendant personally. Indeed, from la Régie's perspective, it is likely preferable that non-residents should settle their rights and obligations inter se in their home courts.

59 These considerations are not without weight, but others are advanced that are more doubtful. When all parties are from the forum, so the argument goes, there are many factors, not the least of which are the involvement of the health care system of their home province and the defendant's forum insurer, which are considered justifications for allowing the plaintiffs and defendants to settle their affairs according to the lex fori. I observe, however, that such considerations would "come out in the wash". A province would probably gain in as many cases as it would lose in others; in any event, the national health plan tends to even this out.

60 Those who favour an exception refer to the fact that in the international context, the Hague Convention on Traffic Accidents allows for an exception where all parties involved in the accident are from the forum. Consequently, though Canada is not a signatory to that Convention, it becomes useful to examine the underlying reasons for the adoption of the exception.

61 On an examination of the travaux préparatoires, the reasons for the adoption of the rule seem similar to those expressed in Professor Walsh's article (see the mémorandum Dutoit, supra). There were other reasons as well. One relates to guarding sovereignty: it is considered appropriate that in an accident involving only residents of a single country, that country should apply its law to the resolution of disputes without regard to the place where the tort took place. Whatever relevance that may have in the international sphere, I fail to see its application within a single country.

62 Another reason, more germane here, had to do with judicial convenience. There appears to have been a desire that the Convention should, if possible, limit the number of occasions when judges of the forum would have to apply foreign law; difficulties of proof, the expense and inconvenience involved, and the possibility that the judge might misinterpret the foreign law were all concerns. With the general rule of lex loci delicti, in cases involving parties from two or more jurisdictions, chances are that the lawsuit will take place in the country in which the tort took place. But when all parties are from another state, the likelihood is that the lawsuit will take place in their home jurisdiction. There is some merit to allowing judges in this situation to apply their own law. This factor is, however, of less concern in matters arising within Canada. The laws of our common law provinces, at least, are not that different from each other that their application would give our judges and lawyers significant difficulty. Lord Wilberforce in Chaplin v. Boys (at p. 1100) conceded the same on the international plane and set forth means, already referred to, of accommodating the problems that might be posed, means that could be equally useful here. What is more, in Canada, case law from other provinces is readily available (and now available online), and lawyers called to the bar in several provinces are to be found in every major city in this country.

63 Another point in favour of a strict rule is that it may be difficult to determine the ambit of claims at the outset. The

problems this raises could be exacerbated by the fact that having an exception could encourage frivolous cross-claims and joinders of third parties. If it is known that the lex fori will apply, when residents of the forum are the only parties involved in an accident, but that the lex loci delicti will apply the moment any non-forum natural or legal person is joined to the action, are we not encouraging those who wish to be governed by the latter rule to dig up third parties from the locus delicti? Will there be attempts to join, say, the company that erected the road sign they crashed into, or again, a pedestrian who may have momentarily distracted them from their driving? More difficult still, will the defendant join another driver who was "involved" in the accident (like Mr. Lavoie), even though there is a high likelihood that the original defendant (as it is argued is the case with Mr. Gagnon) will be found 100% liable.

64 One of the main goals of any conflicts rule is to create certainty in the law. Any exception adds an element of uncertainty, and leaves the door open to a resourceful lawyer to attempt to change the application of the law. It is idealistic to say that, if there were no truth to the allegations of negligence against a defendant or a third party, such party would be able to have the case against it dismissed by way of summary judgment. The claim may be framed in such a way that there is some doubt as to liability, and that may indeed be the case. Motions judges are reluctant to grant summary judgments in any but the clearest cases. Most matters would have to proceed to trial on the basis that the lex loci delicti applied. If, at the end of the day, only parties from the forum were found liable, would the applicable law "jump" to that of the forum?

65 Problems of this kind extend well beyond the courtroom. Clear application of law promotes settlement. If one has to wait for litigation to see if complications of the kind I have just described arise, then settlement will be inhibited. There is need for the law to be clear. Indeed, if not strictly narrowed to situations that involve some timely and close relationship between the parties, an exception could lead to injustice. It is one thing for a passenger to sue his or her driver on a trip from one jurisdiction to another. It may be another thing to permit suit in a case where the parties have been away from their own jurisdiction for several years because the likelihood is that the owner of a vehicle would then insure it on the basis of the local situation. A discretion along the lines proposed by Lord Wilberforce in Chaplin v. Boys, supra, could, I suppose, be used, but this scarcely contributes to certainty in the law.

66 On the whole, I think there is little to gain and much to lose in creating an exception to the lex loci delicti in relation to domestic litigation. This is not to say that an exception to the lex loci delicti such as contained in the Hague Convention is indefensible on the international plane, particularly since it is enshrined in a convention that ensures reciprocity. A similar reciprocal scheme might well be arranged between the provinces. As I have noted, however, a rule along the lines of the Hague Convention is not without its problems and does not appear to afford this country most of the advantages that Europeans may gain from it. I note that Quebec has adopted a rule along the same lines in its new Civil Code, but the appropriateness of a judicially created rule seems questionable, especially given the additional matters that require consideration in a federation. To these federal issues I now turn.

Federal Problems

67 I begin by observing that in Breavington v. Godleman, supra, the High Court of Australia favoured the view that, while different approaches might be taken in the international arena, within Australia the choice of law rule should be the lex loci delicti. The judges of that court were, it is true, far from unanimous about the technical basis in support of this approach, many of which, centred as they are on the Australian Constitution, cannot be directly transported to our situation. Nonetheless, so much of the history and the social, practical and constitutional environment is of a nature akin to those with which we are faced in dealing with conflict of laws within this country that their observations must be accorded considerable weight. The niceties of the technical mechanisms by which judges arrive at decisions are far less important than the underlying policy considerations that give them life. Thus I think what Mason C.J. had to say, at p. 372, has clear application to Canada:

> When an Australian resident travels from one State or Territory to another State or Territory he does not enter a foreign jurisdiction. He is conscious that he is moving from one legal regime to another in the same country and that there may be differences between the two which will impinge in some way on his rights, duties and liabilities so that his rights, duties and liabilities will vary from place to place within Australia. It may come as no surprise to him to find that the local law governed his rights and liabilities in respect of any

> wrong he did or any wrong he suffered in a State or Territory. He might be surprised if it were otherwise. In these circumstances there may be a stronger case for looking to the law of the place of the tort as the governing law for the purpose of determining the substantive rights and liabilities of the parties in respect of a tort committed within Australia.

Also relevant is the following remark in the reasons of Wilson and Gaudron JJ., at p. 379:

> It is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought.

A similar sentiment is expressed by Deane J., at p. 404:

> What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.

68 As I mentioned, these statements are made in the light not only of different views about the common law but also of different theories concerning the constitutional arrangements in Australia. Nonetheless, the policies inhering therein are surely relevant in the development of common law rules for choice of law within our federation.

69 The nature of our constitutional arrangements -- a single country with different provinces exercising territorial legislative jurisdiction -- would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favour of the lex loci delicti rule. In this respect, given the mobility of Canadians and the many common features in the law of the various provinces as well as the essentially unitary nature of Canada's court system, I do not see the necessity of an invariable rule that the matter also be actionable in the province of the forum. That seems to me to be a factor to be considered in determining whether there is a real and substantial connection to the forum to warrant its exercise of jurisdiction. Any problems that might arise could, I should think, be resolved by a sensitive application of the doctrine of forum non conveniens. The doctrine of forum non conveniens would, of course, have far more occasions to be brought into play where a dispute involving the interrelation of Quebec's Civil Code is involved in a suit in some other province, or where a legal issue involving an essentially common law problem arises in Quebec. Even here, however, it must be remembered that many areas of law in Quebec and the other provinces are not so dissimilar as to give difficulties, and the convenience of the parties should not be overlooked.

70 The approach I have suggested also has the advantage of unquestionable conformity with the Constitution, an advantage not to be ignored having regard to the largely unexplored nature of the area and the consequent danger that a rule developed in a constitutional vacuum may when explored not conform to constitutional imperatives. I do not wish to enter largely into this or to come to any final, and indeed in many situations, tentative view. The constitutional problems were not adverted to in the courts below and were largely dealt with in this Court as a mere backdrop to other issues. Importantly, too, (though I am not suggesting their presence was required by law), the Attorneys General were not present.

71 It is useful, however, in understanding why one should not venture far from what is clearly constitutionally acceptable, to give some notion of the nature of these problems. Unless the courts' power to create law in this area exists independently of provincial power, subject or not to federal power to legislate under its residuary power -- ideas that have been put forth by some of the Australian judges in Breavington v. Godleman, supra, but never, so far as I know, in Canada -- then the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures; see John Swan, "The Canadian Constitution, Federalism and the Conflict of Laws" (1985), 63 Can. Bar Rev. 271, at p. 309. I note that provincial legislative power in this area would appear to rest on s. 92(13) -- "Property and Civil Rights in the Province". If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an attempt by one province

to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns. Such legislation applying solely to the forum province's residents would appear to have more promise. However, it is arguable that it is not constitutionally permissible for both the province where certain activities took place and the province of the residence of the parties to deal with civil liability arising out of the same activities. Assuming both provinces have legislative power in such circumstances, this would open the possibility of conflicting rules in respect of the same incident. I go no further regarding the possible resolution of these problems. What these considerations indicate, however, is that the wiser course would appear to be for the Court to avoid devising a rule that may possibly raise intractable constitutional problems.

72 I shall therefore turn to the specific issues in the two cases under appeal.

Specific Issues

Tolofson v. Jensen

73 On the application of the lex loci delicti principle, it is clear that the substantive law applicable in the Tolofson case is that of Saskatchewan. This immediately disposes of the plaintiff's (respondent's) argument respecting the different standard of care under British Columbia and Saskatchewan law: it is the law of Saskatchewan that applies.

74 The argument concerning the applicable statute of limitation, however, depends upon whether the limitation period prescribed by s. 180(1) of The Vehicles Act, R.S.S. 1978, c. V-3, should be characterized as substantive or procedural. The section reads as follows:

> 180. -- (1) Subject to subsections (2) and (3), no action shall be brought against a person for recovery of damages occasioned by a motor vehicle after the expiration of twelve months from the time when the damages were sustained. [Emphasis added.]

75 Both parties proceeded on the assumption that, if Saskatchewan law applies, this legislation, read in conjunction with The Limitation of Actions Act, *R.S.S. 1978, c. L-15*, would make the plaintiff's action statute-barred. Not surprisingly, then, the respondent would like the legislation characterized as procedural, in order that the British Columbia provision should apply; the appellant, of course, wishes it characterized as substantive.

76 In any action involving the application of a foreign law the characterization of rules of law as substantive or procedural is crucial for, as Cheshire and North, Cheshire and North's Private International Law (12th ed. 1992), at pp. 74-75, state:

> One of the eternal truths of every system of private international law is that a distinction must be made between substance and procedure, between right and remedy. The substantive rights of the parties to an action may be governed by a foreign law, but all matters appertaining to procedure are governed exclusively by the law of the forum.

77 The reason for the distinction is that the forum court cannot be expected to apply every procedural rule of the foreign state whose law it wishes to apply. The forum's procedural rules exist for the convenience of the court, and forum judges understand them. They aid the forum court to "administer [its] machinery as distinguished from its product" (Poyser v. Minors (1881), 7 Q.B.D. 329, at p. 333, per Lush L.J.). Although clearcut categorization has frequently been attempted, differentiating between what is a part of the court's machinery and what is irrevocably linked to the product is not always easy or straightforward. The legal realist Walter Cook has commented (The Logical and Legal Bases of the Conflict of Laws (1942), at p. 166):

> If we admit that the 'substantive' shades off by imperceptible degrees into the 'procedural', and that the 'line' between them does not 'exist', to be discovered merely by logic and analysis, but is rather to be drawn so as best to carry out our purpose, we see that our problem resolves itself substantially into this: How far can

> the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself?

78 This pragmatic approach is illustrated by Block Bros. Realty Ltd. v. Mollard *(1981), 122 D.L.R. (3d) 323* (B.C.C.A.). In that case the issue was whether the requirement of s. 37 of the Real Estate Act, R.S.B.C. 1979, c. 356, that a real estate agent be licensed in British Columbia, should be categorized as procedural or substantive. The parties had executed a real estate listing agreement in Alberta for land situated in British Columbia. The plaintiff, an agent licensed in Alberta, sold the land to Alberta residents. The defendant vendor failed or refused to pay the commission. The plaintiff sued in British Columbia. The lex causae was Alberta. The defendant pleaded that the British Columbia licensing requirement was procedural. The court, however, ruled that it was substantive, notwithstanding that the section read: "A person shall not maintain an action . . .", language traditionally relied on for a finding that a statute is procedural because it purported to extinguish the remedy, but not the right. The court expressly relied on policy reasons for its decision. It stated at pp. 327-28:

> If, however, the contract is governed by the law of Alberta and if the contract is valid under the law of Alberta, the characterization of s. 37 as procedural would deprive the plaintiff of the opportunity to enforce his legal rights in a British Columbia Court. The only purpose of s. 37 is to enforce the licensing sections, and it should be examined in this context. I think that legislation should be categorized as procedural only if the question is beyond any doubt. If there is any doubt, the doubt should be resolved by holding that the legislation is substantive.

79 This approach makes sense to me. It is right to say, however, that it is significantly different from the early common law position as it relates to statutes of limitation.

80 The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive. The common law doctrine is usually attributed to the seventeenth century Dutch theorist Ulrich Huber, whose celebrated essay De conflictu legum diversarum in diversis imperiis (1686), became known in England during the reign of William and Mary (see Edgar H. Ailes, "Limitation of Actions and the Conflict of Laws" (1933), 31 Mich. L. Rev. 474, at p. 487; and Ernest G. Lorenzen, "Huber's De Conflictu Legum" (1919), 13 Ill. L. Rev. 375, reprinted in Ernest G. Lorenzen, Selected Articles on the Conflict of Laws (1947), at p. 136). By the early nineteenth century, the doctrine was firmly established in England and in the United States. From the cases and academic commentary of the time (see, for example, Huber v. Steiner (1835), 2 Bing. N.C. 202, 132 E.R. 80; Leroux v. Brown (1852), 12 C.B. 801, 138 E.R. 1119; Nash v. Tupper, 1 Caines 402 (N.Y.S.C. 1803); Ernest G. Lorenzen, "Story's Commentaries on the Conflict of Laws -- One Hundred Years After" (1934), 48 Harv. L. Rev. 15, reprinted in Selected Articles, supra, at p. 181), one can glean the two main reasons for the ready acceptance of this doctrine in Anglo/American jurisprudence. The first was the view that foreign litigants should not be granted advantages that were not available to forum litigants. This relates to the English preference for the lex fori in conflict situations. The second reason was the rather mystical view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation merely removed the remedy in the courts of the jurisdiction that had enacted the statute.

81 Such reasoning mystified continental writers such as M. Jean Michel (La Prescription Libératoire en Droit International Privé, Thesis, University of Paris, 1911, paraphrased in Ailes, supra, at p. 494), who contended that "the distinction is a specious one, turning upon the language rather than upon the sense of limitation acts . . . ." In the continental view, all statutes of limitation destroy substantive rights.

82 I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context. The notion that foreign litigants should be denied advantages not available to forum litigants does not sit well with the proposition, which I have earlier accepted, that the law that defines the character and consequences of the tort is the lex loci delicti. The court takes jurisdiction not to administer local law, but for the convenience of litigants, with a view to responding to modern mobility and the needs of a world or national economic order.

83 Canadian courts have also begun to shatter the mystique of the second reason which rests on the notion that statutes of limitation are directed at the remedy and not the right. This Court has in another context taken cognizance of the right of the defendant to be free from stale claims in Martin v. Perrie, *[1986] 1 S.C.R. 41*. There the plaintiff sued the defendant doctor for having left an indissoluble suture inside her during surgery ten years earlier. At the time of the surgery, in 1969, the Ontario period of limitation on malpractice suits was 1 year from the time of the medical intervention. The discovery principle of limitation was adopted by statute in 1975. The plaintiff launched her lawsuit within a year of having discovered her problem in 1979. Her argument was that the statue of limitations, being procedural, was necessarily retrospective. Although not explicitly stated, the plaintiff's reasoning seems to have been as follows: if the previous statute of limitation did not bar the right but merely the remedy, then the new statute of limitations created a new remedy (or revived an old one) enabling her to enforce a right that had never been extinguished.

84 The Court circumvented the distinction between the plaintiff's right and her remedy by holding that the termination of a limitation period vests rights in the defendant. Chouinard J., at p. 49, quoted with approval Lord Brightman in Yew Bon Tew v. Kenderaan Bas Mara, [1983] 1 A.C. 553 (P.C.), at p. 563:

> In their Lordships' view, an accrued right to plead a time bar, which is acquired after the lapse of the statutory period, is in every sense a right, even though it arises under an act which is procedural. It is a right which is not to be taken away by conferring on the statute a retrospective operation, unless such a construction is unavoidable. [Emphasis added.]

While correctly considering that a statute of limitation vests a right in the defendant, the Privy Council in Yew Bon Tew continued to cling to the old English view that statutes of limitation are procedural. Nonetheless the case seems to me to demonstrate the lack of substance in the approach. The British Parliament obviously thought so. The following year the rule was swept away by legislation; the Foreign Limitation Periods Act, 1984, (U.K.) 1984, c. 16, declared that foreign limitation periods are substantive.

85 I do not think it is necessary to await legislation to do away with the rule in conflict of laws cases. The principle justification for the rule, preferring the lex fori over the lex loci delicti, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

86 Such a step has already been judicially attempted by Stratton C.J.N.B. in Clark v. Naqvi *(1990), 99 N.B.R. (2d) 271* (C.A.). In that case Clark, in 1978, received medical treatment from Dr. Naqvi in Nova Scotia. He commenced an action for injuries arising out of that treatment in New Brunswick in 1984. The limitation period in respect of such proceedings in Nova Scotia was one year. The majority of the New Brunswick Court of Appeal held that the action was statute barred (Ryan J.A. dissenting). Referring to both Yew Bon Tew v. Kenderaan Bas Mara and Martin v. Perrie, Stratton J.A. held, at p. 275, that the limitation period was substantive, notwithstanding that it was phrased "[t]he actions . . . shall be commenced within . . .", because it created an accrued right in the defendant to plead a time bar. Hoyt J.A., while concurring in the result, was reluctant to make such a categorical statement. Ryan J.A., dissenting, was unwilling to abandon the traditional common law rule that statutes of limitation are procedural, though he decided the case on different grounds.

87 In my view, the reasoning of Stratton C.J.N.B. is correct. He stated, at p. 276:

> When I read the words used in s. 2(1)(d)(i) of the Nova Scotia Limitation of Actions Act in their grammatical and ordinary sense, I conclude that the limitation period in respect of actions for negligence or malpractice against a registered medical practitioner is one year from the date of the termination of medical services. Moreover, in my view, the section was enacted by the Legislature with the purpose and intention of

> protecting the medical profession from stale claims when evidence may no longer be available to defending litigants who come within the protection of the section. . . .

88 This is not to say that procedural rules of the forum may not affect the operation of the statute of limitation of the lex loci delicti. Thus, whether or not a litigant must plead a statute of limitation if he or she wishes to rely on it is undoubtedly a matter of procedure for the forum; some rules of court or judicial interpretations of the rules require the pleading of all or certain statutes. Limitation periods included in the various rules of court, such as those for the filing of pleadings, are also undoubtedly matters of procedure. These may be waived with leave of the court or the agreement of the other parties, as often happens. Additionally, a substantive limitation defence such as the one in the case at bar may be waived either by failure to plead it, if this is required, or by agreement.

89 The limitation defence has been properly pleaded in the case at bar and all parties proceeded before us on the assumption that, if Saskatchewan law applies, it is a valid defence. I do not accept that this defence is so repugnant to public policy that a British Columbia court should not apply it. The extent to which limitation statutes should go in protecting individuals against stale claims obviously involves policy considerations unrelated to the manner in which a court must carry out its functions, and the particular balance may vary from place to place. To permit the court of the forum to impose its views over those of the legislature endowed with power to determine the consequences of wrongs that take place within its jurisdiction would invite the forum shopping that is to be avoided if we are to attain the consistency of result an effective system of conflict of laws should seek to foster.

90 For these reasons I conclude that the Saskatchewan limitation rule applies in these proceedings.

Lucas (Litigation Guardian of) v. Gagnon

91 In addition to his argument that the Quebec law governs on the ground that the lex loci delicti was applicable, the appellant maintained that, in any event, Quebec law was the applicable law by virtue of Quebec's no-fault scheme. Since I have already decided that the lex loci delicti should govern, it would be unnecessary to enter into a discussion of the second argument, were it not for the fact that counsel for the respondent took a different view of the effect of Quebec law, in particular having regard to Quebec's new Civil Code.

92 The relevant portions of Quebec's no-fault scheme appear in ss. 3 and 4 of the Quebec Automobile Insurance Act, which read:

> 3. The victim of bodily injury caused by an automobile shall be compensated by the Régie in accordance with this title, regardless of who is at fault.
>
> 4. The indemnities provided for in this title are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice.

Barring other considerations, it seems clear to me that the legislature intended that these provisions should apply to all persons who have an accident in Quebec regardless of their province of residence, a policy which I noted earlier is clearly within its constitutional competence.

93 This position is buttressed by the fact that, at the time of the accident, this was wholly consistent with art. 6 of the Civil Code of Lower Canada which was in effect at the time of the accident. That provision reads:

> 6 . . .
>
> The laws of Lower Canada relative to persons, apply to all persons being therein, even to those not domiciled there. . . .

In my view, then, the appellant is entitled to succeed on this ground as well.

94 The Quebec and Ontario governments certainly thought the Quebec no-fault scheme applied to all accidents in Quebec, whatever the domicile of the persons involved. The interprovincial Memorandum of Agreement between the Régie and the Ontario Minister of Consumer and Commercial Relations, signed in 1978, is predicated on the assumption that the Act covers all victims of accidents in Quebec, whether resident or not. In the agreement, the Minister undertook to amend Schedule E of the Ontario Insurance Act, R.S.O. 1970, c. 224, to require that Ontario residents be indemnified by their respective Ontario insurers for injuries sustained in automobile accidents occurring in Quebec in accordance with Régie benefits and regardless of fault. The agreement begins with recitals describing the application of Ontario and Quebec's respective laws, of which the first and last are the most pertinent:

> 1.1 WHEREAS by virtue of article 8 of the Automobile Insurance Act (L.Q. 1977 C. 68) the victim of an automobile accident that occurred in Québec who is not resident therein is compensated by the Régie to the extent that he is not responsible for the accident unless otherwise agreed between the Régie and the competent authority of the place of residence of such a victim.
>
> . . .
>
> 1.5 AND WHEREAS it is the desire of both parties that the resident of Ontario, other than the uninsured who is a victim of an automobile accident occurring in Québec, be entitled to compensation on the same basis as a resident of Québec and that his legal liability for such an accident be no greater than that of a Québec resident.
>
> Now therefore, in consideration of the mutual covenants hereinafter, the parties hereby agree as follows . . . .

95 The new Civil Code does not change the situation of the parties in the present action; as mentioned, it was not in effect at the time of the accident. In view of its implications for other cases, however, I think it wise to deal with the case on the assumption that the new Civil Code applies. The relevant provision reads as follows:

> Art. 3126. The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the latter country is applicable if the person who committed the injurious act should have foreseen that the damage would occur.
>
> In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies.

96 Even assuming this provision were the operative one at the time of the accident, I am convinced the language of the provisions of the Automobile Insurance Act is so clear that it must have been intended to override the general law. Section 3 provides without exception that all automobile accident victims (and one must read here in the province) shall be compensated by the Régie regardless of fault. Then s. 4 provides that these indemnities "are in the place and stead of all rights, recourses and rights of action of any one by reason of bodily injury caused by an automobile and no action in that respect shall be admitted before any court of justice". I observe that the provision removes not only rights of action but "all rights . . . of any one".

97 This method of approach receives support from the case of Szeto c. Fédération (La), Cie d'assurances du Canada, *[1986] R.J.Q. 218*, before the Quebec Court of Appeal where the court refused the claim of an accident victim against the Régie in respect of an automobile accident between two residents of Quebec in Ontario. That case, of course, arose out of quite different facts, but the manner in which the court dealt with the relation of the Automobile Insurance Act to the general law is of assistance. Paré J.A. (speaking for himself and L'Heureux-Dubé J.A.) (as she then was) had this to say, at p. 220:

> [Translation] It is true that the Automobile Insurance Act must be interpreted so as to override the general law only to the extent that this is clearly stated. The fact remains that the principle underlying it denies in a general way a right of action to all accident victims. The statute thus clearly departs from the general rules of our civil law. The remedies retained by the statute are thus retained only as exceptions and I wonder whether as a consequence the provisions of s. 7 of the Act should not be so treated.

98 I, therefore, conclude that nothing in the provisions cited to us overrides the general rule that the lex loci delicti applies to this case. Indeed I think these provisions buttress this position by providing that Quebec law applies.

Disposition

Tolofson v. Jensen

99 The appeal should be allowed with costs throughout. The appellants' application for a declaration that the proper choice of law to be applied is the law of Saskatchewan and that the Saskatchewan limitation period is substantive should be granted, and the action should be referred to the Supreme Court of British Columbia Chambers for determination.

Lucas (Litigation Guardian of) v. Gagnon

100 The appeal should be allowed and the action of the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally should be dismissed. Question 2 of the agreed statement of facts should be answered as follows:

> 2(a) Does Ontario tort law or Quebec law, as set out in the Automobile Insurance Act, apply to this action?
>
> Quebec law, as set out in the Automobile Insurance Act.
>
> 2(b) Is the appellant Réjean Gagnon entitled to maintain his cross-claim for contribution and indemnity against the respondent Cyrille Lavoie?
>
> No.

As agreed between these parties, there should be no order as to costs against the respondents Tina Lucas and Justin Gagnon, by their litigation guardian Heather Gagnon, and Heather Gagnon personally, in this Court and the courts below. The respondent Cyrille Lavoie should have his costs against the appellant unless the two agree otherwise.

The following are the reasons delivered by

SOPINKA J.

101 Subject to the observations of Justice Major with which I agree, I concur in the reasons of Justice La Forest.

The following are the reasons delivered by

MAJOR J.

102 I have had the opportunity to read the reasons of Justice La Forest, and I agree that, in general, the question of which province's law should govern the litigation should be determined by reference to the lex loci delicti (law of the place) rule. I also agree that, in the present appeals, this rule governs which provincial laws should apply.

103 However, I doubt the need in disposing of these appeals to establish an absolute rule admitting of no exceptions. La Forest J. has recognized the ability of the parties by agreement to choose to be governed by the lex

fori and a discretion to depart from the absolute rule in international litigation in circumstances in which the lex loci delicti rule would work an injustice. I would not foreclose the possibility of recognizing a similar exception in interprovincial litigation.

Partner Reinsurance Company Ltd. c. Optimum Réassurance inc.

Jugements du Québec

Cour d'appel du Québec

Greffe de Montréal

Les honorables Marie-France Bich J.C.A., Geneviève Marcotte J.C.A. et Marie-Josée Hogue J.C.A.

Entendu : le 14 janvier 2020.

Rendu : le 3 avril 2020.

No : 500-09-028535-193 (500-11-056724-194)

[2020] J.Q. no 2211 | 2020 QCCA 490 | EYB 2020-350825 | 2020EXP-966

Entre PARTNER REINSURANCE COMPANY LTD., Appelante -- défenderesse, et OPTIMUM RÉASSURANCE INC., Intimée -- demanderesse

(95 paragr.)

Résumé

Droit international privé — Conflits de juridictions — A caractère patrimonial — Action fondée sur un contrat d'assurance — Détermination de l'autorité compétente — Naissance du droit d'action — Inexécution d'une obligation — Préjudice — Partner se pourvoit contre un jugement qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois — Le juge de première instance n'a pas commis d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec — Les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. en fonction du lieu du préjudice subi — Le juge de première instance n'a pas commis d'erreur en rejetant la demande en rejet de l'appelante puisque les tribunaux québécois détiennent la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. — Appel rejeté.

Partner Reinsurance Company Ltd. (Partner) se pourvoit contre un jugement qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois. Partner est domiciliée aux Bermudes et n'a aucun établissement au Canada, bien qu'elle y exerce des activités par le biais de son agent principal, Reeve, à Toronto. L'intimée Optimum Réassurance inc. (Optimum) a son siège social à Montréal. Depuis 2000, les parties sont liées par des traités de rétrocession par lesquels Partner accepte de partager une partie du risque réassuré par Optimum, en contrepartie d'une portion des primes versées par ses assurés, en lien avec deux de ses portefeuilles. En 2014, les parties ont conclu une nouvelle entente intitulée General Agreement, qui comporte une clause de non-concurrence à l'égard du marché canadien de la réassurance. En 2017, Partner voulait entrer sur le marché canadien de la réassurance et les parties ont signé un amendement à leur entente qui comportait une clause de renonciation à l'obligation de non-concurrence assortie de conditions. Tant le General Agreement que l'amendement stipulent expressément que les parties sont régies par les lois du Québec. Optimum a demandé au Tribunal de déclarer qu'elle a validement exercé ses droits de reprise. Partner a répliqué par une demande en rejet fondée sur l'absence de compétence des tribunaux québécois. Le juge a rejeté la demande de rejet, concluant qu'il y avait suffisamment de motifs pour justifier la compétence des tribunaux québécois, sans qu'il lui soit nécessaire d'aborder tous les préjudices allégués.

DISPOSITIF: Appel rejeté. Tel que l'a conclu le juge de première instance, le General Agreement et l'Amendement forment un seul et même contrat. Un manquement à l'obligation de bonne foi et de diligence est susceptible d'entraîner la nullité de la renonciation à la clause de non-concurrence. Dès lors, Partner a tort de prétendre que l'obligation de non-concurrence est éteinte. Le fait de prétendre qu'une obligation serait éteinte lors de l'institution d'un recours n'empêche pas les tribunaux québécois de s'en saisir. Le juge de première instance n'a pas commis

d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec. La faute reprochée en l'espèce est une faute d'omission à l'égard d'une obligation qui devait avoir lieu au Québec. Le situs des obligations d'information de Partner correspond en l'espèce implicitement au lieu de son siège social. La conclusion du juge de première instance à cet égard s'avère fondée et ne donne pas prise à une intervention de la Cour. Optimum allègue expressément qu'une variété de préjudices ont été subis au Québec à la suite du refus injustifié de l'appelante de reconnaître l'exercice de ses droits de reprise et donc de la difficulté réelle soulevée à l'égard de l'interprétation de l'amendement. Par conséquent, la démonstration de la difficulté réelle et, par extension, du préjudice subi, fait partie du fardeau de preuve d'Optimum et le fait qu'aucune conclusion de nature pécuniaire ne soit recherchée, du moins pour le moment, ne la prive pas de soutenir l'existence d'un lien de rattachement avec le Québec. Les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. en fonction du lieu du préjudice subi.

Législation citée :

Code civil du Québec, C.C.Q.-1991, art. 3148(3), art. 3150

Code de procédure civile, *RLRQ, c. C-25, art. 68*

Avocats

Me Douglas Mitchell, Me Miriam Clouthier, IMK LLP, Pour l'appelante.

Me Éric Christian Lefebvre, Me Charles-Antoine M. Péladeau, NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., s.r.l., Pour l'intimée.

ARRÊT

1 L'appelante se pourvoit contre un jugement rendu le 26 juillet 2019 par la Cour supérieure, district de Montréal (l'honorable Michel A. Pinsonnault), qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois[1].

2 Pour les motifs de la juge Marcotte, auxquels souscrivent les juges Bich et Hogue, **LA COUR** :

3 **REJETTE** l'appel;

4 **LE TOUT** avec les frais de justice.

L'HONORABLE MARIE-FRANCE BICH J.C.A.
L'HONORABLE GENEVIÈVE MARCOTTE J.C.A.
L'HONORABLE MARIE-JOSÉE HOGUE J.C.A.

MOTIFS DE LA JUGE MARCOTTE

5 Le débat en appel porte essentiellement sur la compétence internationale des tribunaux québécois de se saisir d'un litige entourant l'interprétation d'un contrat en regard de l'article 3148(3) *C.c.Q.*

LES FAITS

6 Les parties oeuvrent dans le domaine de la réassurance.

7 L'appelante est domiciliée aux Bermudes et n'a aucun établissement au Canada, bien qu'elle y exerce des activités par le biais de son agent principal, Brian Reeve, à Toronto. L'intimée a son siège social à Montréal.

8 Depuis 2000, les parties sont liées par des traités de rétrocession par lesquels l'appelante accepte de partager une partie du risque réassuré par l'intimée, en contrepartie d'une portion des primes versées par ses assurés, en lien avec deux de ses portefeuilles.

9 En 2014, les parties concluent une nouvelle entente intitulée *General Agreement*, qui comporte une clause de non-concurrence à l'égard du marché canadien de la réassurance :

> B. NON COMPETE
>
> While this Agreement is in effect, PARTNER RE agrees to not compete directly or indirectly with OPTIMUM by assuming reinsurance or retrocession of business from clients where Optimum owns the contact to the client and PARTNER RE is taking a share as the retrocessionaire.
>
> Hence, PARTNER RE will not compete in cases subject to retrocession within the retrocession agreements between PARTNER RE and OPTIMUM listed below :
>
> * Individual Retrocession Pool (Pool SL-1996 and the Pools that will replace it);
> * Group Retrocession Pool (Pool 1997 and the Pools that will replace it);
> * Out of Country Agreements (OOC Pool, excess and quota-share and the Pools that will replace it);
> * All other existing retrocession agreements and others that will be agreed upon between the parties in the future.
>
> For the avoidance of doubt, the retrocession relation between PARTNER RE and Berkshire Hathaway (Sun Life I Clarica), Pacific Life (Manulife) and Swiss Re (Lincoln National) existing before January 1st, 1999 will continue.
>
> Additionally, at the beginning of each calendar year, possibly after an annual strategic meeting in the first quarter, Partner Re must inform Optimum if it has the intention to start entering the Canadian market as a reinsurer within the next 12 months subsequently following the annual strategic meeting.
>
> However, in the case where PARTNER RE acquires a Canadian life insurance company or a Canadian portfolio of life insurance or reinsurance, right after its public announcement, PARTNER RE and OPTIMUM would discuss what would be the best adjustments to this Agreement. If no adjustment to the satisfaction of both parties is agreed, PARTNER RE commits to continue to support OPTIMUM as a retrocessionaire with a minimum period of one year, unless OPTIMUM indicates a shorter period.
>
> [Soulignement ajouté]

10 En septembre 2016, l'appelante informe verbalement l'intimée de son intention d'entrer sur le marché canadien de la réassurance. Puis, le 20 octobre 2016, elle annonce l'acquisition de la société Aurigen Capital Limited, un réassureur actif sur le marché canadien qui fait concurrence à l'intimée.

11 En avril 2017, les parties négocient et conviennent d'un "*Amendment to the General Agreement*" (l'"Amendement"), lequel comporte une clause de renonciation à l'obligation de non-concurrence assortie de conditions :

> 1. NON COMPETE WAIVER

> OPTIMUM agrees to waive application and enforcement of the NON COMPETE provisions set forth in Section B of the GENERAL AGREEMENT in consideration of and to the extent and on the condition that PARTNER RE :
>
> * pays to OPTIMUM a retrocession reorganization fee of CA $1.5 million, payable within 45 days of the dale at which execution of this Amendment by all parties hereto is completed, and
>
> * provides OPTIMUM with recapture rights, the whole in accordance with the terms set forth in Appendix c.
>
> PARTNER RE recognizes and accepts that should such recaptures fail to occur, for lack of good faith or lack of reasonable diligence or effort by PARTNER RE, the foregoing waiver by OPTIMUM will be deemed null and void and PARTNER RE shall provide a full compensatory payment to OPTIMUM for the non-compliance to the GENERAL AGREEMENT and for the reimbursement of all of OPTIMUM'S incurred and reasonably expected fees and expenses.

12 En vertu de l'Amendement, l'intimée peut exercer des droits de reprise (*recapture rights*) de la totalité ou d'une partie des portefeuilles rétrocédés jusqu'au 15 mars 2019 suivant les modalités prévues dans l'Annexe C. Ces modalités incluent, notamment, le choix des hypothèses devant servir au calcul des valeurs de reprise des portefeuilles rétrocédés (*best estimate assumptions* ou "BEA"), qui doivent être négociées par les parties, ou à défaut d'entente, déterminées par un actuaire canadien indépendant.

13 Tant le *General Agreement* que l'Amendement stipulent expressément que les parties sont régies par les lois du Québec. Ils ne contiennent toutefois aucune clause d'élection de for.

14 En septembre 2017, les parties se rencontrent afin de discuter des BEA. À l'issue de leurs discussions qui se poursuivent jusqu'en mars 2019, l'intimée constate que les parties ne parviendront pas à s'entendre et retient les services d'une actuaire indépendante pour déterminer les BEA.

15 Le 14 mars 2019, l'intimée transmet à l'appelante des avis d'exercice de ses droits de reprise. L'appelante en accuse réception le lendemain, mais avise l'intimée qu'elle n'a pas exercé ses droits de reprise conformément aux modalités prévues dans l'Annexe C, en l'absence d'un engagement irrévocable de sa part.

16 Le 19 mars 2019, l'appelante avise l'intimée qu'elle considère que celle-ci a renoncé à exercer ses droits de reprise.

17 Le 22 mars 2019, l'intimée intente une action en jugement déclaratoire par laquelle elle demande à la Cour supérieure de déclarer que, le 14 mars 2019, elle a validement exercé ses droits de reprise à l'égard des deux portefeuilles, conformément aux modalités prévues dans l'Amendement et dans son Annexe C.

18 Le 26 avril 2019, l'appelante réplique par une demande en rejet fondée sur l'absence de compétence des tribunaux québécois.

19 Le 11 juillet 2019, l'intimée amende sa demande introductive d'instance afin d'y ajouter des allégations visant à asseoir la compétence des tribunaux du Québec. Elle y précise qu'elle a son siège social à Montréal, que les traités de rétrocession conclus avec l'appelante concernent des contrats d'assurances couvrant des assurés québécois, que l'engagement de l'appelante de ne pas lui faire concurrence au Canada inclut le Québec et que l'Amendement a été conclu à Montréal. L'intimée allègue également que le comportement de l'appelante et son refus de reconnaître l'exercice de ses droits de reprise lui causent un préjudice additionnel et continu au Québec dans la gestion de ses portefeuilles, en la privant de plusieurs millions de dollars qu'elle était en droit de recevoir, en l'obligeant à assumer seule le versement des indemnités aux assurés, de même qu'en la privant de l'opportunité de placer une partie du risque relatif à ces portefeuilles auprès d'autres rétrocessionnaires aux conditions prévalant en mars 2019. L'intimée allègue finalement que les agissements de l'appelante l'ont forcée à déployer des efforts et à débourser des sommes considérables au Québec, notamment pour retenir les services d'une actuaire canadienne indépendante.

20 Le 26 juillet 2019, la Cour supérieure rejette la demande de rejet fondée sur l'absence de compétence des tribunaux québécois.

21 Le 11 septembre 2019, l'appelante obtient la permission d'appeler du jugement et la suspension des procédures en première instance[2].

JUGEMENT ENTREPRIS

22 Après avoir énoncé les faits entourant la conclusion du *General Agreement* et de l'Amendement liant les parties et résumé les arguments soulevés par l'appelante au soutien de son moyen déclinatoire, le juge aborde plus précisément les critères du paragraphe 3 de l'article 3148 *C.c.Q.*, sur lequel se fonde l'intimée, pour soutenir que les tribunaux québécois ont compétence pour se saisir du litige.

23 Il précise à cet égard que l'appelante plaide que l'intimée n'allègue pas que la faute a eu lieu au Québec, ni qu'une obligation du contrat devait y être exécutée et soutient que, pour que les tribunaux québécois aient compétence à l'égard d'un litige mettant en jeu l'inexécution d'une obligation contractuelle aux termes de l'article 3148(3) *C.c.Q.*, le contrat doit prévoir expressément que l'obligation doit être exécutée au Québec et non seulement qu'elle pourrait y être exécutée. L'appelante plaide aussi que le seul fait d'alléguer des pertes financières ne permet pas d'asseoir la compétence des tribunaux québécois, surtout dans le contexte d'une demande de jugement déclaratoire où aucun montant ne lui est réclamé.

24 Avant même d'entamer l'analyse des prétentions de l'appelante, le juge rejette l'argument voulant que la nature déclaratoire du recours, qui n'est pas assorti de conclusions en dommages, puisse priver l'intimée du droit de prétendre qu'elle subit un préjudice économique. Il rappelle que le véritable enjeu de l'exercice des droits de reprise, qui est soulevé à titre de difficulté réelle, demeure le versement d'un montant net de 144,7 M de dollars.

25 Puis, dans le cadre de son analyse, il signale que les faits allégués dans la demande introductive d'instance doivent être tenus pour avérés, sauf dans la mesure où la partie adverse conteste ces faits dans sa demande de rejet. Or, puisque l'appelante n'a pas contesté les faits allégués ou les pièces déposées au soutien de la procédure, il estime que le débat lié au moyen déclinatoire ne doit porter que sur l'interprétation des dispositions de l'Annexe C de l'Amendement et des modalités d'exercice des droits de reprise.

26 Il rappelle que, pour bénéficier de l'application du paragraphe 3 de l'article 3148 *C.c.Q.*, l'intimée doit démontrer qu'au moins un des quatre critères qui y sont énoncés est présent et, qu'en l'espèce, il lui suffit de démontrer qu'un préjudice a été subi au Québec ou que l'une des obligations du contrat doit y être exécutée. Il conclut que c'est le cas.

27 Il rappelle que l'intimée allègue, entre autres, dans sa demande modifiée :

* Qu'elle a son siège social et sa place d'affaires à Montréal;
* Que les portefeuilles d'assurance visés par l'Amendement concernent des contrats d'assurance sur la vie de résidents du Québec;
* Que l'Amendement a été conclu à son siège social à Montréal où elle a reçu l'acceptation de sa proposition;
* Qu'au chapitre du préjudice subi, le refus de l'appelante de verser sa part des frais d'actuaires et les débours encourus, en vertu de l'article 1d) de l'Annexe C de l'Amendement, lui cause un préjudice important.

28 Puis, il reproduit intégralement les paragraphes 39, 39.1 et 40 de la demande modifiée dans lesquels l'intimée expose en détail le préjudice subi et la difficulté réelle soulevée.

29 Il aborde ensuite l'argument de l'appelante voulant que l'Amendement et le *General Agreement* forment deux contrats distincts. Il conclut qu'il s'agit plutôt d'un seul et même contrat[3].

30 S'appuyant sur l'approche prise par la Cour dans l'affaire *Poppy Industries Canada inc. c. Diva Delights Ltd.*[4], il détermine que le fait que des obligations contractuelles doivent être exécutées au Québec suffit à établir la compétence des tribunaux québécois, sans que l'intimée soit requise de démontrer que la cause d'action découle d'un manquement à de telles obligations.

31 Il juge que l'obligation de non-concurrence à laquelle s'est engagée l'appelante, qui vise le territoire canadien, s'étend nécessairement à la province de Québec et que l'obligation de l'appelante d'informer l'intimée à l'avance de son intention d'entrer sur le marché canadien, et donc de lui faire concurrence au Canada, doit également y être exécutée. Il retient sur ce point l'argument de l'intimée voulant que l'obligation soit considérée comme devant être exécutée à l'endroit où l'avis s'avère utile, soit au siège social de l'intimée, à Montréal, où elle mène ses opérations[5], s'appuyant à cet égard sur les propos de la Cour suprême dans *Air Canada c. McDonnell Douglas Corp.*[6].

32 Le juge signale que c'est précisément le défaut de l'appelante d'informer l'intimée de l'acquisition d'une entreprise concurrente au Canada qui est à l'origine de l'Amendement par lequel l'appelante a consenti à indemniser l'intimée, en échange de sa renonciation à invoquer la clause de non-concurrence, de même qu'à lui accorder l'option d'exercer des droits de reprise.

33 Il ajoute que l'exercice des droits de reprise nécessite une entente sur les BEA, qui implique nécessairement un échange d'information entre les parties, lui aussi assujetti aux règles énoncées par la Cour suprême dans l'arrêt *Air Canada* précité, laissant ainsi entendre que cette obligation, pour s'avérer utile, doit également être exécutée au Québec, au siège social de l'intimée.

34 Bien que l'existence d'obligations de non-concurrence et d'information devant être exécutées au Québec suffise à donner compétence aux tribunaux québécois en vertu de l'article 3148(3) *C.c.Q.*, le juge poursuit néanmoins son analyse sous l'angle du lieu du préjudice subi.

35 Il rappelle que l'un des buts de la règle d'attribution de compétence de l'article 3148(3) *C.c.Q.* est d'assurer la protection de la victime d'un préjudice en lui permettant d'agir en justice au Québec lorsqu'elle y subit le préjudice en question[7]. Puis, il souligne que l'intimée allègue avoir subi un préjudice au Québec sous trois volets : 1) le préjudice économique découlant du refus de l'appelante de reconnaître la valeur des droits de reprise réclamés par l'intimée; 2) le préjudice lié à la gestion des portefeuilles et des réclamations auxquelles elle doit faire face sans bénéficier du versement de la valeur des droits de reprise et 3) dans une moindre mesure, le préjudice découlant de l'absence de collaboration de l'appelante dans la poursuite de l'exercice des droits de reprise. Il réitère qu'il n'a pas à analyser ces réclamations en détail à ce stade préliminaire, alors qu'il doit tenir les faits allégués comme étant avérés et que ces allégations ne lui paraissent pas frivoles.

36 Il reproduit ensuite les propos de la Cour suprême dans l'affaire *Infineon Technologies AG c. Option Consommateurs*, qui confirment le raisonnement du juge Kasirer, alors qu'il siégeait en appel, et reconnaissent qu'il n'y a pas de raison d'exclure le préjudice purement économique de l'application de l'article 3148(3) *C.c.Q.*, si ce préjudice a été essentiellement subi au Québec, par opposition au préjudice simplement "comptabilisé" au Québec.

37 Le juge reprend également à son compte l'approche proposée par le juge Kasirer dans l'affaire *Infineon* précitée concernant la pertinence du lieu de conclusion du contrat à titre de "fait juridique" dans la détermination du site réel du préjudice et de la compétence des tribunaux québécois.

38 Il conclut ensuite que le refus de l'appelante de reconnaître l'exercice valable des droits de reprise par l'intimée, qui est au coeur du débat et découle des dispositions de l'Amendement, constitue un préjudice important subi par l'intimée au Québec, où les parties ont convenu de l'Amendement en fonction de la loi québécoise.

39 Au final, il détermine que l'ensemble de ses constats l'amène à conclure qu'il y a suffisamment de motifs pour justifier la compétence des tribunaux québécois, sans qu'il lui soit nécessaire d'aborder les autres préjudices allégués.

40 Avant de conclure, le juge aborde l'argument subsidiaire de l'intimée voulant que le contrat de rétrocession puisse être qualifié de contrat d'assurance au sens de l'article 3150 *C.c.Q.* de manière à conférer compétence aux tribunaux québécois lorsque l'assuré ou le bénéficiaire (en l'occurrence l'intimée) est domicilié au Québec. Bien qu'il semble disposé à reconnaître l'application de cet article aux faits de l'affaire, il estime qu'il n'y a pas matière à en décider puisqu'il a conclu à la compétence des tribunaux québécois en vertu de l'article 3148(3) *C.c.Q.* et ne tranche pas de manière définitive la question.

QUESTIONS EN APPEL

41 En appel, l'appelant soulève essentiellement trois questions :

1. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que des obligations contractuelles devaient être exécutées au Québec?
2. Le juge a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que l'intimée aurait subi un préjudice au Québec?
3. Si la réponse aux deux premières questions s'avère affirmative, les tribunaux québécois ont-ils compétence en vertu de l'article 3150 *C.c.Q.*?

ANALYSE

1. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que des obligations contractuelles devaient être exécutées au Québec?

42 L'appelante soulève à cet égard deux arguments.

43 D'une part, l'obligation de non-concurrence et les obligations afférentes d'informer l'intimée de son intention d'entrer sur le marché canadien et de lui faire concurrence n'existent plus : elles ont été éteintes par l'Amendement et ne peuvent donner ouverture à l'application de l'article 3148(3) *C.c.Q.*

44 D'autre part, le contrat ne prévoit pas expressément que les obligations d'informer l'intimée devaient être exécutées au Québec (qu'il s'agisse d'annoncer son intention d'entrer sur le marché canadien ou de communiquer sa position sur les BEA), de sorte que le critère de l'article 3148(3) *C.c.Q.* n'est pas davantage satisfait.

45 J'estime que ni l'un ni l'autre des arguments ne peuvent être retenus.

46 Il m'apparaît utile de reproduire la disposition pertinente :

> **3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :
>
> [...]
>
> 3. Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée;

* * *

> **3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases :
>
> [...]
>
> 3. a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

47 Les tribunaux interprètent généralement cette disposition de manière large et souple. Dans l'arrêt *Spar Aerospace ltée c. American Mobile Satellite Corp.*[8], la Cour suprême rappelle que "l'article 3148 *C.c.Q.* prévoit une large assise juridictionnelle"[9]. Elle souligne qu'il ressort des termes explicites de cet article que le but du système de droit international privé est d'assurer la présence d'un lien réel et substantiel entre l'action entreprise et le Québec[10]. Elle signale également que chacun des motifs énumérés par l'article 3148(3) *C.c.Q.*, soit la faute, le préjudice, le fait dommageable et l'obligation contractuelle, "semble être un exemple de situations qui constituent un lien réel et substantiel entre la province de Québec et l'action"[11], de sorte qu'ils doivent être considérés comme des critères alternatifs plutôt que cumulatifs[12].

48 Toutefois, pour conférer compétence aux tribunaux québécois en fonction du lieu d'exécution des obligations du contrat, il ne suffit pas à la partie demanderesse de démontrer que l'obligation a été, dans les faits, exécutée au Québec[13]. Elle doit démontrer que l'une des obligations découlant du contrat devait y être exécutée, sans pour autant exiger d'elle qu'elle démontre que la cause d'action est elle-même fondée sur la violation d'une obligation devant être exécutée au Québec, puisque ceci ferait double emploi avec le critère distinct de la faute prévu à l'article 3148(3) *C.c.Q.*[14].

49 En l'espèce, l'appelante ne remet pas en question la conclusion du juge voulant que l'obligation de non-concurrence ait été exécutée en partie au Québec. Elle se limite plutôt à soutenir que cette obligation, tout comme les obligations d'information liées à la non-concurrence et à l'entrée sur le marché canadien, n'existe plus parce qu'elle s'est éteinte lors de la conclusion de l'Amendement.

50 À mon avis, elle a tort.

51 Tel que l'a conclu le juge de première instance, le *General Agreement* et l'Amendement forment un seul et même contrat. La clause 6 de l'Amendement prévoit d'ailleurs expressément que les stipulations du *General Agreement* qui sont demeurées intactes continuent de s'appliquer. L'obligation de non-concurrence contenue dans le *General Agreement* a été en vigueur et sa violation, en raison de l'acquisition par l'appelante d'une société canadienne oeuvrant dans le domaine de l'assurance-vie, est à l'origine de la conclusion de l'Amendement, tel que le prévoyait d'ailleurs le *General Agreement*.

52 Toutefois, dans le cadre de l'Amendement, les parties ont convenu qu'en contrepartie du versement d'une indemnité (*retrocession reorganization fee*) et de l'octroi de droits de reprise (*recapture rights*), l'intimée renonçait à invoquer la clause de non-concurrence contenue dans le *General Agreement*, mais que cette renonciation était conditionnelle à ce que l'appelante fasse preuve de bonne foi et de diligence, et qu'elle mette les efforts requis pour permettre l'exercice des droits de reprise. Cette renonciation serait réputée nulle et sans effet et l'appelante serait tenue de verser à l'intimée une compensation :

> PARTNER RE recognizes and accepts that should such recaptures fail to occur, for lack of good faith or lack of reasonable diligence or effort by PARTNER RE, the foregoing waiver by OPTIMUM will be deemed null and void and PARTNER RE shall provide a full compensatory payment to OPTIMUM for the non-compliance to the GENERAL AGREEMENT and for the reimbursement of all of OPTIMUM'S incurred and reasonably expected fees and expenses.
>
> [Soulignement ajouté]

53 C'est précisément un manquement de la part de l'appelante à cette obligation de bonne foi et de diligence qui lui est reproché dans la procédure.

54 Dans les circonstances, un tel manquement est susceptible d'entraîner la nullité de la renonciation à la clause de non-concurrence. Dès lors, l'appelante a tort de prétendre que l'obligation de non-concurrence est éteinte. Ceci, d'autant que la formulation de la disposition contractuelle par laquelle l'intimée ne fait que renoncer à invoquer la clause de non-concurrence ("*OPTIMUM agrees to waive application and enforcement*") tend à indiquer que celle-ci est simplement suspendue jusqu'à ce que soient remplies les conditions convenues par les parties.

55 De toute manière, le fait de prétendre qu'une obligation serait éteinte lors de l'institution d'un recours n'empêche pas les tribunaux québécois de s'en saisir. La compétence des tribunaux québécois peut s'appuyer sur des obligations déjà exécutées, tel que l'énoncent les professeurs Goldstein et Groffier lorsqu'ils traitent de l'article 3148(3) *C.c.Q.*[15] :

> L'apport du nouvel article est donc que l'autorité québécoise est compétente dès lors qu'une seule obligation d'un contrat doit être exécutée au Québec. Par exemple, l'obligation de payer une somme d'argent au Québec fonde la compétence des autorités québécoises, même au cas où les autres obligations prévues au contrat doivent être exécutées à l'étranger et même si, en l'espèce, le prix a été payé.

56 Qu'en est-il du lieu d'exécution de l'obligation?

57 La clause de non-concurrence contenue dans le *General Agreement*[16] prévoit expressément que l'appelante doit l'informer si elle entre sur le marché canadien. Cette obligation de ne pas faire concurrence au Canada couvre la province de Québec[17] et, à mon avis, il en découle que l'obligation de non-concurrence devait y être exécutée.

58 Considérant ce qui précède, j'estime donc que le juge de première instance n'a pas commis d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec.

59 Il conclut également que les obligations d'information incombant à l'appelante devaient y être exécutées, conformément aux enseignements de la Cour suprême dans l'arrêt *Air Canada*[18]. Dans cette affaire, où la Cour suprême devait déterminer si toute la cause d'action des intimées avait pris naissance au Québec pour fonder la compétence des tribunaux québécois, conformément à l'article 68 a.*C.p.c.*, elle affirmait ceci au sujet du *situs* de la faute d'omission[19] :

> Puisque l'omission d'avertir est un acte qui n'a pas été accompli, il faut recourir à un autre critère que l'omission elle-même pour déterminer le lieu de l'omission aux fins d'établir la compétence conformément à l'al. 68(2) C.p.c. L'omission d'avertir ne constitue une faute que s'il y a une obligation préexistante d'informer de l'existence d'un danger. À mon avis, le lieu de l'omission d'avertir doit donc être déterminé en fonction de l'endroit où l'obligation préexistante aurait dû être remplie. L'obligation d'avertir l'utilisateur de ces biens ne peut être remplie qu'en donnant un avertissement là où il sera utile : de par sa nature même, un avertissement doit être reçu à l'endroit et au moment qui permettront à l'utilisateur des biens d'agir de façon à éviter le danger qui fait l'objet de cet avertissement. Le lieu de l'omission d'avertir est l'endroit où l'avertissement aurait dû être reçu, c'est-à-dire là où se trouve l'utilisateur, ou encore là où les biens sont utilisés.
>
> [Soulignement ajouté]

60 L'appelante prétend que l'affaire *Air Canada*, décidée dans le contexte d'un recours en responsabilité extracontractuelle, ne trouve pas application puisque l'intimée soulève une faute contractuelle. Or, il n'y a pas lieu, à mon avis, de faire une telle distinction. D'abord, puisque dans cette affaire la Cour suprême confirme l'existence du droit d'option, de sorte que la cause d'action aurait pu être tout autant contractuelle qu'extracontractuelle.

Ensuite, puisque la faute reprochée en l'espèce est une faute d'omission à l'égard d'une obligation qui devait avoir lieu au Québec. Le professeur Emanuelli précise d'ailleurs que le même raisonnement doit s'appliquer en matière de faute contractuelle et formule les remarques suivantes[20] :

> La faute en question [à l'article 3148 (3) C.c.Q.] peut être contractuelle ou extracontractuelle. S'il s'agit d'une faute d'omission, le raisonnement suivi par la Cour suprême dans *Air Canada c. McDonnell Douglas* pour déterminer si elle s'est produite au Québec peut être suivi : l'omission constitue une faute seulement si elle contrevient à une obligation préexistante. La faute d'omission a lieu au Québec si l'obligation préexistante devait y être remplie.
>
> [...]
>
> Cette jurisprudence demeure pertinente pour déterminer si la faute d'omission a été commise au Québec.
>
> [Références omises; italique dans l'original]

61 Si l'appelante a raison de prétendre que les modalités d'envoi des avis requis par le *General Agreement* ou l'Amendement n'ont pas été précisées par les parties dans leur contrat, j'estime que, même en l'absence de stipulations expresses, on peut inférer des circonstances que ces avis devaient être expédiés au siège social de l'intimée, à Montréal[21].

62 D'ailleurs, dans l'arrêt *E. Hofmann Plastics Inc. c. Tribec Metals Ltd.*, la Cour n'a pas hésité à conclure que l'obligation de donner un préavis de résiliation devait être exécutée au lieu du siège social de l'intimée, en l'absence d'une stipulation expresse, dans le contexte d'un contrat verbal[22] :

> [7] Furthermore, contrary to what the appellant argues, it is of no consequence that the alleged fault was not based on a written contract between the parties. Indeed, in the context of longstanding contractual relationships, as is the present case, good faith requires some form of notice before terminating, which the appellant did not provide.
>
> [8] This omission alone is sufficient to ground jurisdiction because the obligation to provide notice was to be performed at the respondent's head office in Montreal. In our view, the trial judge correctly applied the principle articulated by the Supreme Court in *Air Canada v McDonnell*.
>
> [Références omises]

63 En ce qui concerne la prétention de l'appelante voulant que son obligation d'informer puisse être accomplie dans n'importe quel lieu aléatoire, notamment en ce qui concerne la communication des BEA, en l'absence de toute stipulation dans le contrat, elle ne peut davantage être retenue. Une telle approche aurait pour conséquence de laisser à la partie qui s'oblige le choix du forum, en lui permettant de choisir le lieu d'exécution de son obligation, non sans par ailleurs susciter une certaine incertitude pour les parties à l'égard du forum compétent.

64 Je conviens donc avec l'intimée que le *situs* des obligations d'information de l'appelante correspond en l'espèce implicitement au lieu de son siège social. La conclusion du juge de première instance à cet égard s'avère fondée et ne donne pas prise à une intervention de la Cour.

> **2. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que l'intimée aurait subi un préjudice au Québec?**

65 L'appelante soutient d'abord que le juge a erré en concluant que son refus de payer l'intimée constitue un préjudice subi au Québec, au motif que le contrat y a été conclu. Elle plaide que ceci revient à rétablir la compétence des tribunaux québécois en fonction du lieu de la conclusion du contrat, alors que ce critère, qui prévalait sous l'ancien *Code de procédure civile*, a été écarté par le législateur et, qu'en l'espèce, la conclusion de l'Amendement n'a pas cristallisé le préjudice allégué par l'intimée.

66 Elle ajoute qu'un préjudice qui est seulement comptabilisé à l'endroit où se trouve le patrimoine du créancier n'est pas un préjudice subi au Québec aux fins de l'article 3148(3) *C.c.Q.* Ceci, d'autant plus que l'article 1566 al. 2 *C.c.Q.* prévoit qu'une dette est payable au lieu de la résidence du débiteur (en l'occurrence, aux Bermudes, où l'appelante est domiciliée).

67 L'appelante plaide finalement que le juge ne pouvait considérer le préjudice allégué par l'intimée aux fins de décider de la compétence des tribunaux québécois puisque, dans le contexte d'une demande en jugement déclaratoire où aucune conclusion en dommages-intérêts n'est recherchée, le préjudice potentiel n'est pas pertinent.

68 Les tribunaux reconnaissent qu'en l'absence d'indication contraire du législateur, le préjudice auquel réfère l'article 3148(3) *C.c.Q.* est bel et bien un critère pertinent tant en matière contractuelle qu'extracontractuelle[23]. Il n'est cependant pas nécessaire que le préjudice soit lié à l'endroit où la faute est commise, contrairement à ce qui est prévu à l'article 3148 *C.c.Q.*, qui régit la compétence des tribunaux étrangers[24].

69 Dans *Stormbreaker Marketing and Productions inc.*, la Cour signalait qu'en choisissant le préjudice subi au Québec comme facteur de rattachement, le législateur "a voulu protéger ses ressortissants et d'autres États ont sûrement jugé bon de faire de même. Il n'y a d'ailleurs rien de choquant à ce que la victime d'un préjudice soit "favorisée" aux dépens de la personne qui en est présumément responsable"[25].

70 Le fait que le préjudice est allégué dans le cadre d'une action en responsabilité contractuelle et qu'il est de nature économique ou financière empêche-t-il l'application de l'article 3148(3) *C.c.Q.* en l'espèce?

71 J'estime que non. Je m'explique.

72 Avant toute chose, un bref rappel de l'évolution de la jurisprudence sur la question paraît utile.

73 En 2001, dans l'arrêt *Quebecor Printing Memphis Inc. c. Regenair Inc.*[26] ("*Regenair*"), la Cour d'appel accueillait une demande en rejet fondée sur l'absence de compétence des tribunaux du Québec dans le cadre d'une action sur compte. Bien que le contrat ait été conclu à Montréal, la principale obligation de l'intimée, domiciliée au Québec, était de fournir et d'installer de la machinerie à Memphis, où se situait l'établissement de l'appelante, en contrepartie d'un prix payable par cette dernière. S'appuyant sur l'article 1566 *C.c.Q.*, l'appelante plaidait qu'aucun préjudice n'avait été subi au Québec, puisque le dommage était étroitement lié au lieu du défaut de paiement, soit Memphis.

74 Les juges majoritaires lui ont donné raison[27] :

> [9] D'autre part, le refus par Quebecor d'exécuter son obligation de payer à Memphis ne peut être tenu comme un fait dommageable survenu au Québec et le fait que Regenair, dont le siège social est au Québec, ne reçoit pas le paiement de sa créance, laquelle est payable à Memphis, ne fait pas qu'un préjudice a été subi au Québec.
>
> [10] Si Regenair avait raison, la compétence des tribunaux du Québec serait automatique dans le cas où le demandeur est un résident du Québec et les autres chefs de compétence visés à l'article 3148 C.c.Q. seraient inutiles.
>
> [11] Il n'y a pas lieu d'interpréter d'une façon large l'article 3148 du fait de l'existence de l'article 3135 C.c.Q. Ce dernier article trouve application une fois qu'on a constaté qu'interprété d'une façon raisonnable, l'article 3148 confère juridiction au tribunal québécois.

75 Le juge *ad hoc* Philippon, dissident, était plutôt d'avis que le préjudice économique subi par l'intimée permettait d'asseoir la compétence des tribunaux québécois[28] :

> [30] Selon le texte de l'article 3148 3. C.c.Q., les critères attributifs de compétence sont nombreux, distincts et autonomes les uns les autres. L'existence de l'un d'entre eux suffit.
>
> [31] La notion de préjudice s'attache intrinsèquement au patrimoine. En l'espèce, il s'agit du patrimoine de l'intimée affectée par le défaut de paiement auquel elle aurait droit. Cette atteinte est subie au lieu du domicile de l'intimée, à Ste-Rose, Ville de Laval.
>
> [32] Une telle application de la notion de préjudice peut entraîner la reconnaissance d'une compétence qui s'avère exorbitante. Si tel est le cas, c'est au stade de l'application de la doctrine du forum **non conveniens** que le problème doit être abordé, comme dans le cas où, par analogie, selon les auteurs Goldstein et Groffier, une obligation accessoire d'une valeur minime pourrait fonder la compétence.
>
> [Référence omise]

76 Or, l'année suivante, dans l'arrêt *Spar*, la Cour suprême, sous la plume du juge LeBel, reprenait l'interprétation moins restrictive proposée par le juge dissident dans *Regenair* à l'égard du paragraphe 3148(3) *C.c.Q.* et du caractère large de la notion de préjudice[29] en soulignant que "la doctrine du *forum non conveniens*, telle que codifiée à l'art. 3135, constitue un contrepoids important à la large assise juridictionnelle prévue à l'art. 3148"[30]. Ceci s'inscrivait toutefois dans le contexte d'une réclamation pour un préjudice découlant d'une atteinte à la réputation.

77 Subséquemment, dans *Banque de Montréal c Hydro Aluminum Wells Inc.*, la Cour d'appel reprenait le raisonnement des juges majoritaires dans *Regenair* voulant que le seul préjudice économique ne permette pas d'asseoir la compétence des tribunaux québécois, en distinguant l'arrêt *Spar*, au motif que la Cour suprême n'y aurait pas abordé la question de la nature du préjudice visé par l'article 3148(3) *C.c.Q.*[31] et que le recours visé par la demande d'exception déclinatoire était de nature extracontractuelle[32].

78 Puis, en 2011, dans *Infineon*[33], la Cour d'appel, sous la plume du juge Kasirer, affirmait qu'il n'y a pas lieu d'exclure le préjudice purement économique de l'application de l'article 3148(3) *C.c.Q.* s'il a été pour l'essentiel subi au Québec plutôt que d'y être simplement comptabilisé. Son raisonnement était par ailleurs repris par la Cour suprême en 2013, tout en remettant les propos des juges majoritaires de la Cour d'appel dans l'affaire *Regenair* dans leur contexte :

> [45] Le préjudice subi au Québec constitue un facteur indépendant prévu au par. 3148(3) : il n'est pas nécessaire que le préjudice soit lié à l'endroit où le fait dommageable a été subi ou la faute commise, contrairement par exemple à l'art. 3168. Chacun des quatre facteurs mentionnés au par. 3148(3) créerait un lien suffisant avec la province pour fonder la compétence (voir *Royal Bank of Canada c. Capital Factors Inc.*, *[2004] Q.J. No. 11841* (QL) (C.A.), par. 2; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, *2002 CSC 78* (CanLII), *[2002] 4 R.C.S. 205*, par. 56). S'agissant du type de préjudice visé par le par. 3148(3), il n'existe aucune raison de principe justifiant d'exclure le préjudice purement économique de l'application de la disposition. Le libellé clair du par. 3148(3) n'empêche pas le préjudice économique de servir de facteur de rattachement, et le droit civil québécois n'interdit pas non plus l'indemnisation de la perte purement économique (voir C. Emanuelli, *Droit international privé québécois* (3e éd. 2011), p. 116-118). Il ressort clairement de la jurisprudence québécoise que le préjudice économique peut servir de facteur de rattachement en vertu du par. 3148(3) (voir, p. ex., *Sterling Combustion inc. c. Roco Industrie inc.*, *2005 QCCA 662* (CanLII); *Option Consommateurs c. British Airways PLC*, *2010 QCCS 140* (CanLII)).
>
> [46] L'affaire *Quebecor Printing*, sur laquelle s'appuient les appelantes, ne devrait pas recevoir une interprétation si large qu'elle exclurait systématiquement la perte purement économique des formes de préjudice auxquelles s'applique le par. 3148(3). Cet arrêt indique plutôt que le fait de simplement comptabiliser au Québec le préjudice financier ne suffit pas pour fonder la compétence en vertu du par. 3148(3). Pour remplir l'exigence du par. 3148(3), le préjudice doit être subi au Québec. Comme l'explique le juge Kasirer dans la décision de la Cour d'appel dans la présente affaire, il importe de distinguer le préjudice subi pour l'essentiel au Québec de celui qui est simplement comptabilisé au Québec, sur le fondement du lieu où se trouve le patrimoine du demandeur :

> [traduction] Il faut établir une distinction entre [le préjudice] et le "dommage", qui représente la conséquence subjective du préjudice se rapportant à la mesure de réparation nécessaire pour compenser la perte. Par conséquent, en précisant qu'"un préjudice y a été subi" comme facteur de rattachement pertinent, le paragraphe 3148(3) vise à identifier le situs réel du "préjudice, qu'il soit corporel, moral ou matériel, que lui cause le défaut du débiteur et qui en est une suite immédiate et directe" (article 1607 C.c.Q.), et non le situs du patrimoine dans lequel la conséquence de ce préjudice est comptabilisée. [par. 65]
>
> [47] Cette application du *C.c.Q.* ne constitue pas, comme l'affirment les appelantes, un élargissement nouveau ou injustifié de la compétence des tribunaux du Québec. Au contraire, elle s'appuie sur le libellé du par. 3148(3) et sur la jurisprudence. Comme l'a affirmé notre Cour au par. 58 de l'arrêt *Spar Aerospace*, "[e]st amplement étayée la thèse selon laquelle l'art. 3148 prévoit une large assise juridictionnelle."
>
> [Soulignements ajoutés]

79 Dans son jugement, le juge de première instance a d'ailleurs jugé opportun de reproduire un extrait des propos de la Cour suprême[34]. Il a également repris à son compte les motifs du juge Kasirer[35] relativement à l'opportunité de considérer le lieu de conclusion du contrat, à l'origine des dommages réclamés, comme un fait juridique susceptible de déterminer le lieu du préjudice subi.

80 L'appelante plaide que, ce faisant, le juge se serait trompé, puisqu'il aurait fondé sa conclusion concernant le lieu du préjudice subi sur le seul fait que le contrat d'Amendement, dont il découle, a été conclu au Québec.

81 L'appelante a raison de soutenir que le législateur a exclu le lieu de la conclusion du contrat comme facteur de rattachement, puisqu'il établissait des liens trop ténus avec les autorités québécoises[36], de sorte qu'il ne peut s'agir d'un critère suffisant pour conférer à lui seul compétence aux tribunaux québécois.

82 Cela dit, l'appelante ne peut prétendre qu'il s'agit du seul facteur ou "fait juridique" qu'a considéré le juge de première instance pour conclure à l'application de l'article 3148(3) *C.c.Q.* J'estime qu'il s'agit plutôt d'un fait juridique retenu parmi d'autres.

83 Il est vrai que le juge ne s'est pas attardé longuement aux autres préjudices invoqués par l'intimée, autrement qu'en les résumant dans son analyse et en reproduisant les allégations de préjudice contenues dans la procédure, qu'il a déclaré tenir pour avérées en l'absence de contestation de l'appelante. Cependant, il n'était pas tenu d'en faire une analyse exhaustive à cette étape, d'autant que le préjudice dont il est question à l'article 3148(3) *C.c.Q.* n'est sujet à aucune restriction quant à son montant ou à sa nature, qu'il n'a pas à être direct et que l'analyse du moyen déclinatoire n'oblige pas le juge des requêtes à se prononcer prématurément sur le fond du litige, comme le signalait la Cour suprême dans *Spar*[37].

84 Cela dit, en l'espèce, le préjudice invoqué par l'intimée est lié non seulement au préjudice économique découlant du fait d'être privé de l'encaissement des valeurs de reprise, mais également au préjudice découlant des difficultés de gestion que lui occasionne le défaut de l'appelante de lui verser ces montants. Suivant les allégations de la procédure, le refus de l'appelante de reconnaître la validité de l'exercice des droits de reprise de l'intimée affecte sa gestion des portefeuilles au Québec, qui comprennent des contrats d'assurance sur la vie d'assurés québécois, et il entraîne une réduction de sa capacité à faire face aux réclamations des assurés au Québec et celle d'y placer de nouveaux risques. C'est également au Québec que l'intimée a dû débourser des honoraires pour l'embauche d'une actuaire aux fins de déterminer les BEA.

85 Il ne s'agit donc pas, dans l'un et l'autre de ces cas, d'un préjudice subi ailleurs et seulement comptabilisé au Québec[38]. Il y a donc ici un contexte bien différent de celui qui prévalait dans les causes invoquées par l'appelante. Qu'il s'agisse, par exemple, de l'affaire *Regenair*[39] mentionnée précédemment (où les obligations devaient être exécutées hors Québec, tout comme le paiement de la dette, bien que le contrat ait été conclu à Montréal) ou de l'affaire *Green Planet Technologies Ltd. c. Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*[40] (où l'intimée, une société québécoise, poursuivait l'appelante au Québec en remboursement d'un acompte versé

pour la livraison de pneus à l'étranger, en invoquant que le virement avait été fait à partir de la banque de l'intimée, située à Montréal, à la banque de l'appelante à Londres), la Cour y avait conclu que le préjudice n'avait pas été subi à Montréal[41], bien que l'intimée ait amendé sa demande introductive d'instance en appel afin de réclamer la perte de profits subie au Québec. La Cour distinguait à cet égard l'arrêt *Federal Corporation*[42] :

> [10] [...] That judgment is inapplicable, however, since in Triangle Tires, the failed transaction resulted in the inability of the Quebec party to sell the products it purchased in Quebec and other eastern Canadian provinces.
>
> [11] The loss of profit in this case arises from the inability of Blackstone to sell OTR tires to its customer operating a mine in Brazil. Therefore, the loss of profit occurred in Brazil, although it would undoubtedly be recorded in Quebec. The mere allegation in Blackstone's amended motion introductive of suit that the loss of profit it claims was suffered in Quebec is a legal characterization of facts that does not bind the Court, and moreover is inconsistent with the documents in the record.
>
> [Référence omise]

86 À noter que, dans l'arrêt *Federal Corporation c. Triangle Tires inc.*[43], la Cour avait conclu que la perte de profits causée à un distributeur québécois, par l'impossibilité de son cocontractant établi à Taïwan de livrer des biens au Québec, avait été subie au Québec, puisque la vente des pneus devait y avoir lieu et permettait de rattacher le préjudice financier au Québec, de manière à conférer compétence aux tribunaux québécois[44].

87 Les causes invoquées par l'appelante au soutien de ses prétentions doivent donc être distinguées en l'espèce.

88 Finalement, en ce qui concerne l'argument lié à la nature de la demande en jugement déclaratoire, laquelle empêcherait d'invoquer le préjudice pour justifier la compétence des tribunaux québécois, il m'apparaît également mal fondé.

89 L'appelante fonde en large partie son argument sur l'arrêt *SCFP*[45]. Or, cet arrêt n'a pas la portée qu'elle souhaiterait lui donner puisque, dans ce cas précis, contrairement au présent cas, les requérants n'alléguaient aucun préjudice : la difficulté réelle soulevée ne concernait que le droit de deux sections locales d'un syndicat de nommer un fiduciaire au sein d'un comité de retraite.

90 En l'espèce, l'intimée allègue expressément qu'une variété de préjudices ont été subis au Québec à la suite du refus injustifié de l'appelante de reconnaître l'exercice de ses droits de reprise et donc de la difficulté réelle soulevée à l'égard de l'interprétation de l'Amendement. Par conséquent, la démonstration de la difficulté réelle et, par extension, du préjudice subi, fait partie du fardeau de preuve de l'intimée et le fait qu'aucune conclusion de nature pécuniaire ne soit recherchée, du moins pour le moment, ne la prive pas de soutenir l'existence d'un lien de rattachement avec le Québec.

91 Tel que le souligne l'intimée, la situation n'est d'ailleurs pas ici très différente de celle d'une demande d'injonction qui, bien que ne comportant aucune conclusion en dommages-intérêts, peut comporter un facteur de rattachement lié à un préjudice subi au Québec, tel que l'a reconnu la Cour supérieure dans l'affaire *Transat Tours Canada Inc. c. Tescor, S.A. de C.V*[46] :

> [33] Ces trois défenderesses prétendent aussi qu'aucun préjudice afférent à la présente demande n'a été subi au Québec. Au soutien de cette prétention, elles plaident qu'il s'agit d'une action en injonction dans laquelle Transat ne réclame aucun dommage. [...]
>
> [34] Le tribunal partage l'opinion des trois défenderesses à l'exception de la question du préjudice.
>
> [...]
>
> [38] Il est vrai que pour l'instant, Transat ne réclame pas de dommages-intérêts. Toutefois, pour obtenir une injonction, même provisoire, elle doit démontrer un préjudice. Au stade d'une ordonnance de

> sauvegarde tout comme pour une injonction provisoire, la demanderesse doit même démontrer un préjudice irréparable si le lien de droit qu'elle invoque n'est pas clair.
>
> [...]
>
> [40] Considérant que la demanderesse allègue qu'elle a subi et continue de subir un préjudice sérieux justifiant l'émission d'une ordonnance de sauvegarde et que ce prétendu préjudice est subi à Montréal, lieu de son siège social, le tribunal en conclut qu'il a compétence en vertu de l'article 3148 (3) C.C.Q.

92 De la même façon ici, l'intimée allègue une difficulté réelle (et son intérêt juridique lié à celle-ci) qui lui cause préjudice au Québec, où elle a son siège social et d'où elle gère ses affaires québécoises, en raison d'une divergence dans l'interprétation des modalités d'exercice des droits de reprise stipulées dans le contrat. L'absence d'une conclusion d'ordre pécuniaire n'empêche pas l'intimée de soulever le préjudice comme assise à la compétence des tribunaux québécois.

93 J'en conclus que les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) *C.c.Q.* en fonction du lieu du préjudice subi.

> **3. Si la réponse aux deux premières questions s'avère affirmative, les tribunaux québécois ont-ils compétence en vertu de l'article 3150 *C.c.Q.*?**

94 Considérant mes réponses aux deux premières questions et la conclusion à laquelle j'en viens sur l'application de l'article 3148(3) *C.c.Q.*, il ne m'apparaît pas utile d'aborder la question subsidiaire.

95 Aussi, pour l'ensemble des motifs précédemment énoncés, j'estime que le juge de première instance n'a pas commis d'erreur en rejetant la demande en rejet de l'appelante puisque les tribunaux québécois détiennent la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) *C.c.Q.* Je propose donc de rejeter l'appel avec les frais de justice.

L'HONORABLE GENEVIÈVE MARCOTTE J.C.A.

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1 *Optimum Réassurance inc. c. Partner Reinsurance Company Ltd.*, 2019 QCCS 3184 [Jugement entrepris].

2 *Partner Reinsurance Company Ltd. c. Optimum Réassurance inc.*, 2019 QCCA 1487 (J. Schrager).

3 Jugement entrepris, *supra*, note 1, paragr. 50-51.

4 *Poppy Industries Canada Inc. c. Diva Delights Ltd.*, 2018 QCCA 163 [*Poppy*].

5 Jugement entrepris, *supra*, note 1, paragr. 53-54.

6 *Air Canada* c. *McDonnell Douglas Corp.*, [1989] 1 R.C.S. 1554 [*Air Canada*].

7 *Stormbreaker Marketing and Productions inc. v. Weinstock*, 2013 QCCA 269, paragr. 90 [*Stormbreaker*].

8 *Spar Aerospace ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205 [*Spar*]. Cet énoncé sera repris plus tard dans *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600 [*Infineon*].

9 *Id.*, paragr. 58.

10 *Id.*, au paragr. 55 : Les dispositions [du Livre dixième du C.c.Q.] doivent s'interpréter comme un tout cohérent et en fonction des principes de courtoisie, d'ordre et d'équité. Selon moi, il ressort des termes explicites de l'art. 3148 et des autres dispositions du Livre dixième que ce système de droit international privé vise à assurer la présence d'un "lien réel et substantiel" entre l'action et la province de Québec, et à empêcher l'exercice inapproprié de la compétence du for québécois.

11 *Spar, supra*, note 8, paragr. 56.

12 *Infineon, supra*, note 8, paragr. 45; *Poppy, supra*, note 4, paragr. 25; *Hoteles Decameron Jamaica Ltd. c. D'Amours*, *2007 QCCA 418*, paragr. 22; *Sterling Combustion inc. c. Roco Industrie inc.*, *2005 QCCA 662*, paragr. 8; *Capital Factors Inc. c. Royal Bank of Canada*, *J.E. 2004-2164*, AZ-04019213, paragr. 2 (C.A.); *Bombardier Inc. c. Honeywell International Inc.*, *2019 QCCS 481*, paragr. 26, demande de permission d'appeler rejetée dans *Honeywell International inc. c. Bombardier inc.*, *2019 QCCA 582*.

13 *Poppy, supra*, note 4, paragr. 28; *Green Planet Technologies Ltd. c. Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*, *2013 QCCA 56*, paragr. 7 [*Green Planet*]; *Banque canadienne impériale de commerce c. Conseils taxes inc.*, *2005 QCCA 888*, paragr. 14; *DDH Aviation Inc. v. Fox*, *J.E. 2002-1293*, *2002 CanLII 41085*, paragr. 27-28 (C.A.); Gérald Goldstein, *Droit international privé*, vol. 2, Commentaires sur le Code civil du Québec (DCQ), Cowansville, Yvon Blais, 2011, p. 216.

14 *Poppy, supra*, note 4, paragr. 30; Claude Emanuelli, *Droit international privé québécois*, 3e éd., Montréal, Wilson & Lafleur, 2011, p. 119, paragr. 194; Gérald Goldstein et Ethel Groffier, *Traité de droit civil - Droit international privé*, t. 1 "Théorie générale", Cowansville, Yvon Blais, 1998, p. 358-359, paragr. 146; H.P. Glenn, "Droit international privé", *La réforme du Code civil*, Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, t. 3, Sainte-Foy, P.U.L., 1993, p. 754.

15 Gérald Goldstein et Ethel Groffier, *Traité de droit civil - Droit international privé*, t. 1 "Théorie générale", Cowansville, Yvon Blais, 1998, p. 359, paragr. 146. Voir par exemple : *NAD Suppléments inc. c. Spartan Nutritional & Fitness Centres inc.*, *2016 QCCQ 7883*, paragr. 14-17.

16 Voir la clause reproduite précédemment au paragr. 9 du présent arrêt.

17 Il y a lieu à cet égard de distinguer l'affaire *Nour c. Natchev*, *2019 QCCS 708*, en raison de son contexte particulier, puisque, dans ce cas, aucune violation de la clause de non-sollicitation au Québec n'était alléguée et, au surplus, la clause ne comportait aucune limite territoriale et visait uniquement les clients du "book of business" du demandeur, ainsi que ses employés et d'autres personnes affiliées à ses succursales.

18 *Air Canada, supra*, note 6.

19 *Id.*, p. 1569.

20 Claude Emanuelli, *Droit international privé québécois*, 3e éd., Montréal, Wilson & Lafleur, 2011, p. 115-116, paragr. 194. La Cour suprême réfère à cet extrait dans l'affaire *Infineon Technologies AG c. Option consommateurs, supra*, note 8, paragr. 45.

21 *Voir par exemple : Bombardier Inc. c. General Directorate for Defense, Armaments And Investments Of The Hellenic Ministry Of National Defense (HMOD)*, *2018 QCCS 2127*, paragr. 116 [*Bombardier*]; *Republic Bank Ltd. c. Firecash Ltd.*, AZ-5022867, *2004 CanLII 8560*, paragr. 23-26 (C.A.).

22 *E. Hofmann Plastics Inc. c. Tribec Metals Ltd.*, *2013 QCCA 2112*, paragr. 7-8. Voir aussi : *Bombardier, supra*, note 21, paragr. 116.

23 *Federal Corporation c. Triangle Tires Inc.*, *2012 QCCA 434*, paragr. 37 [*Federal Corporation*]; *Gentec inc. c. Eecol Electric Inc.*, *2006 QCCS 2134*, paragr. 15; *Société des technologies de l'aluminium du Saguenay ltée c. Cooper Grainger Technical Bearing Sales Ltd.*, *J.E. 2004-1825*, AZ-50265709, paragr. 18 (C.S.); *Air Saguenay (1980) inc. c. Aero Recip (Canada) Ltd.*, (2003) AZ-50161374, *[2003] J.Q. no 461* paragr. 21 (C.S.). Certains ont remis en question l'applicabilité des critères de préjudice et de faute en matière contractuelle : *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052*, paragr. 32 (C.A.); Sylvette Guillemard, "Commentaire sur la décision Stormbreaker Marketing and Productions Inc. c. World Class Events Ltd. (Sports Legends Challenge) -- Variations sur des questions connues de compétence internationale des tribunaux québécois", dans *Repères*, mars 2013, La référence, EYB2013REP1321.

24 *Infineon, supra*, note 8, paragr. 45.

25 *Stormbreaker supra*, note 7, paragr. 90.

26 *Quebecor Printing Memphis Inc. c. Regenair Inc.*, *[2001] R.J.Q. 966*, *J.E. 2001-958* (C.A.) [*Quebecor*].

27 *Quebecor, supra*, note 26, paragr. 9-11. Ce raisonnement a été réaffirmé par la Cour d'appel dans les arrêts suivants : *Richelieu Projects Inc. c. Western Rail Inc.*, *2006 QCCA 840*, paragr. 7; *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052* (C.A.); *Foster c. Kaycan Ltd.*, *J.E. 2002-163*, *2001 CanLII 38391*, paragr. 7 (C.A.).

28 *Quebecor, supra*, note 26, paragr. 30-32.

29 *Spar, supra*, note 8, paragr. 61. À noter cependant que dans le texte du professeur Catherine Walsh, "*The International Jurisdiction of Québec Authorities in Personal Actions : An Overview*", (2012) 71 *R. du B.* 249, p. 271, cette dernière suggère que ce volet du raisonnement de la Cour a été implicitement mis de côté dans l'arrêt *Club Resorts Ltd. c. Van Breda*, *2012 CSC 17*, *[2012] 1 R.C.S. 572*, paragr. 101, également rendu sous la plume du juge LeBel. Dans cet arrêt, le juge LeBel établit une distinction entre l'établissement de la compétence, pour lequel la présence d'un lien réel et substantiel constitue un impératif constitutionnel, et l'exercice de la compétence, lors de laquelle intervient la doctrine du *forum non conveniens*. Selon la professeure Walsh, une interprétation trop large de l'article 3148(3) *C.c.Q.*, qui se justifierait uniquement par la possibilité de décliner compétence après coup, ne saurait rencontrer les exigences constitutionnelles. Quoique la décision *Van Breda* concerne un litige en provenance de l'Ontario, ses aspects constitutionnels demeurent pertinents en droit québécois.

30 *Spar, supra*, note 8, paragr. 57.

31 *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052*, paragr. 55 (C.A.).

32 *Id.*, paragr. 47.

33 *Infineon Technologies AG c. Option consommateurs*, *2011 QCCA 2116*.

34 Soit le paragraphe 46 du jugement *Infineon* reproduit dans le Jugement entrepris au paragraphe 67.

35 *Infineon, supra*, note 33, *2011 QCCA 2116*, paragr. 49.

36 Ministère de la Justice, *Commentaires* du *ministre de la Justice ? Le Code civil du Québec*, t. 2, Québec, Les Publications du Québec, 1993, p. 2010.

37 *Spar, supra*, note 8, paragr. 32 et 36.

38 Par analogie, dans *7296126 Canada inc. c. YQR Ventures Hotel and Resorts Inc.*, *2017 QCCS 5174*, [*7296126 Canada*], le juge Gaudet, j.c.s., conclut que l'appauvrissement de la demanderesse constitue un préjudice subi au Québec, là où elle mène ses opérations et où se trouve son patrimoine :

> [21] En l'espèce, il ne s'agit pas du cas où le préjudice est subi ailleurs qu'au Québec, mais est ensuite simplement comptabilisé au Québec dans les livres du créancier. Il s'agit plutôt d'un cas où la demanderesse, une compagnie qui est établie au Québec d'où elle mène ses opérations, dit s'être appauvrie au profit du défendeur en payant pour lui des achats *à partir de ses propres fonds*. C'est au Québec que l'appauvrissement de la demanderesse s'est matérialisé lorsqu'elle a avancé des fonds pour l'achat de biens au bénéfice de YQR, même si ces biens ont été livrés en Saskatchewan.

39 *Quebecor Printing Memphis Inc. c. Regenair Inc.*, *[2001] R.J.Q. 966*, *J.E. 2001-958* (C.A.). Voir aussi : *7296126 Canada, supra*, note 38, paragr. 6.

40 *Green Planet, supra*, note 13.

41 *Id.*, paragr. 9 :

> [9] The motion's judge nevertheless arrived at the correct conclusion on the issue of whether damages had been suffered in Quebec. The loss of the deposit undoubtedly was recorded on the books of [the Respondent] in Quebec, but the situs of the loss is where the money is for the purchase -- in the United Kingdom, or, according to the purchase order, where it is deemed to be located -- in Tianjin, China, where the goods were to be shipped FOB by [the Appellant's] supplier. In any event the payment would be deemed as a matter of Quebec civil law to be made at the place of delivery in the case of a sale -- article 1734 C.C.Q. -- and not the place of payment in the domicile of the debtor as if there were no sale -- article 1566 C.C.Q. [Références omises]

42 *Green Planet, supra*, note 13, paragr. 10-11.

43 *Federal Corporation, supra*, note 23.

44 *Id.*, paragr. 43.

45 *Syndicat canadien de la fonction publique c. Syndicat canadien des communications, de l'énergie et du papier, section locale 2013 (SCEP)*, *2015 QCCA 1392*.

46 *Transat Tours Canada Inc. c. Tescor, S.A. de C.V.*, *2005 CanLII 32136*, paragr. 33-34, 37-38 et 40 (C.S.), cette conclusion a été confirmée en appel, bien que l'appel ait été accueilli pour d'autres motifs, *Transat Tours Canada inc. c. Impulsora Turistica de Occidente, s.a. de c.v.*, *2006 QCCA 413*, paragr. 38, appel à la Cour suprême rejeté, *Impulsora Turistica de Occidente, S.A. de C.V. c. Transat Tours Canada Inc.*, *2007 CSC 20*, *[2007] 1 R.C.S. 867*.

Fin du document

Partner Reinsurance Company Ltd. c. Optimum Réassurance inc.

Jugements du Québec

Cour d'appel du Québec

Greffe de Montréal

Les honorables Marie-France Bich J.C.A., Geneviève Marcotte J.C.A. et Marie-Josée Hogue J.C.A.

Entendu : le 14 janvier 2020.

Rendu : le 3 avril 2020.

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Entre PARTNER REINSURANCE COMPANY LTD., Appelante -- défenderesse, et OPTIMUM RÉASSURANCE INC., Intimée -- demanderesse

(95 paragr.)

Résumé

Droit international privé — Conflits de juridictions — A caractère patrimonial — Action fondée sur un contrat d'assurance — Détermination de l'autorité compétente — Naissance du droit d'action — Inexécution d'une obligation — Préjudice — Partner se pourvoit contre un jugement qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois — Le juge de première instance n'a pas commis d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec — Les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. en fonction du lieu du préjudice subi — Le juge de première instance n'a pas commis d'erreur en rejetant la demande en rejet de l'appelante puisque les tribunaux québécois détiennent la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. — Appel rejeté.

Partner Reinsurance Company Ltd. (Partner) se pourvoit contre un jugement qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois. Partner est domiciliée aux Bermudes et n'a aucun établissement au Canada, bien qu'elle y exerce des activités par le biais de son agent principal, Reeve, à Toronto. L'intimée Optimum Réassurance inc. (Optimum) a son siège social à Montréal. Depuis 2000, les parties sont liées par des traités de rétrocession par lesquels Partner accepte de partager une partie du risque réassuré par Optimum, en contrepartie d'une portion des primes versées par ses assurés, en lien avec deux de ses portefeuilles. En 2014, les parties ont conclu une nouvelle entente intitulée General Agreement, qui comporte une clause de non-concurrence à l'égard du marché canadien de la réassurance. En 2017, Partner voulait entrer sur le marché canadien de la réassurance et les parties ont signé un amendement à leur entente qui comportait une clause de renonciation à l'obligation de non-concurrence assortie de conditions. Tant le General Agreement que l'amendement stipulent expressément que les parties sont régies par les lois du Québec. Optimum a demandé au Tribunal de déclarer qu'elle a validement exercé ses droits de reprise. Partner a répliqué par une demande en rejet fondée sur l'absence de compétence des tribunaux québécois. Le juge a rejeté la demande de rejet, concluant qu'il y avait suffisamment de motifs pour justifier la compétence des tribunaux québécois, sans qu'il lui soit nécessaire d'aborder tous les préjudices allégués.

DISPOSITIF: Appel rejeté. Tel que l'a conclu le juge de première instance, le General Agreement et l'Amendement forment un seul et même contrat. Un manquement à l'obligation de bonne foi et de diligence est susceptible d'entraîner la nullité de la renonciation à la clause de non-concurrence. Dès lors, Partner a tort de prétendre que l'obligation de non-concurrence est éteinte. Le fait de prétendre qu'une obligation serait éteinte lors de l'institution d'un recours n'empêche pas les tribunaux québécois de s'en saisir. Le juge de première instance n'a pas commis

d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec. La faute reprochée en l'espèce est une faute d'omission à l'égard d'une obligation qui devait avoir lieu au Québec. Le situs des obligations d'information de Partner correspond en l'espèce implicitement au lieu de son siège social. La conclusion du juge de première instance à cet égard s'avère fondée et ne donne pas prise à une intervention de la Cour. Optimum allègue expressément qu'une variété de préjudices ont été subis au Québec à la suite du refus injustifié de l'appelante de reconnaître l'exercice de ses droits de reprise et donc de la difficulté réelle soulevée à l'égard de l'interprétation de l'amendement. Par conséquent, la démonstration de la difficulté réelle et, par extension, du préjudice subi, fait partie du fardeau de preuve d'Optimum et le fait qu'aucune conclusion de nature pécuniaire ne soit recherchée, du moins pour le moment, ne la prive pas de soutenir l'existence d'un lien de rattachement avec le Québec. Les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) C.c.Q. en fonction du lieu du préjudice subi.

Législation citée :

Code civil du Québec, C.C.Q.-1991, art. 3148(3), art. 3150

Code de procédure civile, *RLRQ, c. C-25, art. 68*

Avocats

Me Douglas Mitchell, Me Miriam Clouthier, IMK LLP, Pour l'appelante.

Me Éric Christian Lefebvre, Me Charles-Antoine M. Péladeau, NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., s.r.l., Pour l'intimée.

ARRÊT

1 L'appelante se pourvoit contre un jugement rendu le 26 juillet 2019 par la Cour supérieure, district de Montréal (l'honorable Michel A. Pinsonnault), qui rejette sa demande en rejet fondée sur l'absence de compétence des tribunaux québécois[1].

2 Pour les motifs de la juge Marcotte, auxquels souscrivent les juges Bich et Hogue, **LA COUR** :

3 **REJETTE** l'appel;

4 **LE TOUT** avec les frais de justice.

L'HONORABLE MARIE-FRANCE BICH J.C.A.
L'HONORABLE GENEVIÈVE MARCOTTE J.C.A.
L'HONORABLE MARIE-JOSÉE HOGUE J.C.A.

MOTIFS DE LA JUGE MARCOTTE

5 Le débat en appel porte essentiellement sur la compétence internationale des tribunaux québécois de se saisir d'un litige entourant l'interprétation d'un contrat en regard de l'article 3148(3) *C.c.Q.*

LES FAITS

6 Les parties oeuvrent dans le domaine de la réassurance.

7 L'appelante est domiciliée aux Bermudes et n'a aucun établissement au Canada, bien qu'elle y exerce des activités par le biais de son agent principal, Brian Reeve, à Toronto. L'intimée a son siège social à Montréal.

8 Depuis 2000, les parties sont liées par des traités de rétrocession par lesquels l'appelante accepte de partager une partie du risque réassuré par l'intimée, en contrepartie d'une portion des primes versées par ses assurés, en lien avec deux de ses portefeuilles.

9 En 2014, les parties concluent une nouvelle entente intitulée *General Agreement*, qui comporte une clause de non-concurrence à l'égard du marché canadien de la réassurance :

> B. NON COMPETE
>
> While this Agreement is in effect, PARTNER RE agrees to not compete directly or indirectly with OPTIMUM by assuming reinsurance or retrocession of business from clients where Optimum owns the contact to the client and PARTNER RE is taking a share as the retrocessionaire.
>
> Hence, PARTNER RE will not compete in cases subject to retrocession within the retrocession agreements between PARTNER RE and OPTIMUM listed below :
>
> * Individual Retrocession Pool (Pool SL-1996 and the Pools that will replace it);
> * Group Retrocession Pool (Pool 1997 and the Pools that will replace it);
> * Out of Country Agreements (OOC Pool, excess and quota-share and the Pools that will replace it);
> * All other existing retrocession agreements and others that will be agreed upon between the parties in the future.
>
> For the avoidance of doubt, the retrocession relation between PARTNER RE and Berkshire Hathaway (Sun Life I Clarica), Pacific Life (Manulife) and Swiss Re (Lincoln National) existing before January 1st, 1999 will continue.
>
> Additionally, at the beginning of each calendar year, possibly after an annual strategic meeting in the first quarter, Partner Re must inform Optimum if it has the intention to start entering the Canadian market as a reinsurer within the next 12 months subsequently following the annual strategic meeting.
>
> However, in the case where PARTNER RE acquires a Canadian life insurance company or a Canadian portfolio of life insurance or reinsurance, right after its public announcement, PARTNER RE and OPTIMUM would discuss what would be the best adjustments to this Agreement. If no adjustment to the satisfaction of both parties is agreed, PARTNER RE commits to continue to support OPTIMUM as a retrocessionaire with a minimum period of one year, unless OPTIMUM indicates a shorter period.
>
> [Soulignement ajouté]

10 En septembre 2016, l'appelante informe verbalement l'intimée de son intention d'entrer sur le marché canadien de la réassurance. Puis, le 20 octobre 2016, elle annonce l'acquisition de la société Aurigen Capital Limited, un réassureur actif sur le marché canadien qui fait concurrence à l'intimée.

11 En avril 2017, les parties négocient et conviennent d'un "*Amendment to the General Agreement*" (l'"Amendement"), lequel comporte une clause de renonciation à l'obligation de non-concurrence assortie de conditions :

> 1. NON COMPETE WAIVER

> OPTIMUM agrees to waive application and enforcement of the NON COMPETE provisions set forth in Section B of the GENERAL AGREEMENT in consideration of and to the extent and on the condition that PARTNER RE :
>
> * pays to OPTIMUM a retrocession reorganization fee of CA $1.5 million, payable within 45 days of the dale at which execution of this Amendment by all parties hereto is completed, and
>
> * provides OPTIMUM with recapture rights, the whole in accordance with the terms set forth in Appendix c.
>
> PARTNER RE recognizes and accepts that should such recaptures fail to occur, for lack of good faith or lack of reasonable diligence or effort by PARTNER RE, the foregoing waiver by OPTIMUM will be deemed null and void and PARTNER RE shall provide a full compensatory payment to OPTIMUM for the non-compliance to the GENERAL AGREEMENT and for the reimbursement of all of OPTIMUM'S incurred and reasonably expected fees and expenses.

12 En vertu de l'Amendement, l'intimée peut exercer des droits de reprise (*recapture rights*) de la totalité ou d'une partie des portefeuilles rétrocédés jusqu'au 15 mars 2019 suivant les modalités prévues dans l'Annexe C. Ces modalités incluent, notamment, le choix des hypothèses devant servir au calcul des valeurs de reprise des portefeuilles rétrocédés (*best estimate assumptions* ou "BEA"), qui doivent être négociées par les parties, ou à défaut d'entente, déterminées par un actuaire canadien indépendant.

13 Tant le *General Agreement* que l'Amendement stipulent expressément que les parties sont régies par les lois du Québec. Ils ne contiennent toutefois aucune clause d'élection de for.

14 En septembre 2017, les parties se rencontrent afin de discuter des BEA. À l'issue de leurs discussions qui se poursuivent jusqu'en mars 2019, l'intimée constate que les parties ne parviendront pas à s'entendre et retient les services d'une actuaire indépendante pour déterminer les BEA.

15 Le 14 mars 2019, l'intimée transmet à l'appelante des avis d'exercice de ses droits de reprise. L'appelante en accuse réception le lendemain, mais avise l'intimée qu'elle n'a pas exercé ses droits de reprise conformément aux modalités prévues dans l'Annexe C, en l'absence d'un engagement irrévocable de sa part.

16 Le 19 mars 2019, l'appelante avise l'intimée qu'elle considère que celle-ci a renoncé à exercer ses droits de reprise.

17 Le 22 mars 2019, l'intimée intente une action en jugement déclaratoire par laquelle elle demande à la Cour supérieure de déclarer que, le 14 mars 2019, elle a validement exercé ses droits de reprise à l'égard des deux portefeuilles, conformément aux modalités prévues dans l'Amendement et dans son Annexe C.

18 Le 26 avril 2019, l'appelante réplique par une demande en rejet fondée sur l'absence de compétence des tribunaux québécois.

19 Le 11 juillet 2019, l'intimée amende sa demande introductive d'instance afin d'y ajouter des allégations visant à asseoir la compétence des tribunaux du Québec. Elle y précise qu'elle a son siège social à Montréal, que les traités de rétrocession conclus avec l'appelante concernent des contrats d'assurances couvrant des assurés québécois, que l'engagement de l'appelante de ne pas lui faire concurrence au Canada inclut le Québec et que l'Amendement a été conclu à Montréal. L'intimée allègue également que le comportement de l'appelante et son refus de reconnaître l'exercice de ses droits de reprise lui causent un préjudice additionnel et continu au Québec dans la gestion de ses portefeuilles, en la privant de plusieurs millions de dollars qu'elle était en droit de recevoir, en l'obligeant à assumer seule le versement des indemnités aux assurés, de même qu'en la privant de l'opportunité de placer une partie du risque relatif à ces portefeuilles auprès d'autres rétrocessionnaires aux conditions prévalant en mars 2019. L'intimée allègue finalement que les agissements de l'appelante l'ont forcée à déployer des efforts et à débourser des sommes considérables au Québec, notamment pour retenir les services d'une actuaire canadienne indépendante.

20 Le 26 juillet 2019, la Cour supérieure rejette la demande de rejet fondée sur l'absence de compétence des tribunaux québécois.

21 Le 11 septembre 2019, l'appelante obtient la permission d'appeler du jugement et la suspension des procédures en première instance[2].

JUGEMENT ENTREPRIS

22 Après avoir énoncé les faits entourant la conclusion du *General Agreement* et de l'Amendement liant les parties et résumé les arguments soulevés par l'appelante au soutien de son moyen déclinatoire, le juge aborde plus précisément les critères du paragraphe 3 de l'article 3148 *C.c.Q.*, sur lequel se fonde l'intimée, pour soutenir que les tribunaux québécois ont compétence pour se saisir du litige.

23 Il précise à cet égard que l'appelante plaide que l'intimée n'allègue pas que la faute a eu lieu au Québec, ni qu'une obligation du contrat devait y être exécutée et soutient que, pour que les tribunaux québécois aient compétence à l'égard d'un litige mettant en jeu l'inexécution d'une obligation contractuelle aux termes de l'article 3148(3) *C.c.Q.*, le contrat doit prévoir expressément que l'obligation doit être exécutée au Québec et non seulement qu'elle pourrait y être exécutée. L'appelante plaide aussi que le seul fait d'alléguer des pertes financières ne permet pas d'asseoir la compétence des tribunaux québécois, surtout dans le contexte d'une demande de jugement déclaratoire où aucun montant ne lui est réclamé.

24 Avant même d'entamer l'analyse des prétentions de l'appelante, le juge rejette l'argument voulant que la nature déclaratoire du recours, qui n'est pas assorti de conclusions en dommages, puisse priver l'intimée du droit de prétendre qu'elle subit un préjudice économique. Il rappelle que le véritable enjeu de l'exercice des droits de reprise, qui est soulevé à titre de difficulté réelle, demeure le versement d'un montant net de 144,7 M de dollars.

25 Puis, dans le cadre de son analyse, il signale que les faits allégués dans la demande introductive d'instance doivent être tenus pour avérés, sauf dans la mesure où la partie adverse conteste ces faits dans sa demande de rejet. Or, puisque l'appelante n'a pas contesté les faits allégués ou les pièces déposées au soutien de la procédure, il estime que le débat lié au moyen déclinatoire ne doit porter que sur l'interprétation des dispositions de l'Annexe C de l'Amendement et des modalités d'exercice des droits de reprise.

26 Il rappelle que, pour bénéficier de l'application du paragraphe 3 de l'article 3148 *C.c.Q.*, l'intimée doit démontrer qu'au moins un des quatre critères qui y sont énoncés est présent et, qu'en l'espèce, il lui suffit de démontrer qu'un préjudice a été subi au Québec ou que l'une des obligations du contrat doit y être exécutée. Il conclut que c'est le cas.

27 Il rappelle que l'intimée allègue, entre autres, dans sa demande modifiée :

* Qu'elle a son siège social et sa place d'affaires à Montréal;
* Que les portefeuilles d'assurance visés par l'Amendement concernent des contrats d'assurance sur la vie de résidents du Québec;
* Que l'Amendement a été conclu à son siège social à Montréal où elle a reçu l'acceptation de sa proposition;
* Qu'au chapitre du préjudice subi, le refus de l'appelante de verser sa part des frais d'actuaires et les débours encourus, en vertu de l'article 1d) de l'Annexe C de l'Amendement, lui cause un préjudice important.

28 Puis, il reproduit intégralement les paragraphes 39, 39.1 et 40 de la demande modifiée dans lesquels l'intimée expose en détail le préjudice subi et la difficulté réelle soulevée.

29 Il aborde ensuite l'argument de l'appelante voulant que l'Amendement et le *General Agreement* forment deux contrats distincts. Il conclut qu'il s'agit plutôt d'un seul et même contrat[3].

30 S'appuyant sur l'approche prise par la Cour dans l'affaire *Poppy Industries Canada inc. c. Diva Delights Ltd.*[4], il détermine que le fait que des obligations contractuelles doivent être exécutées au Québec suffit à établir la compétence des tribunaux québécois, sans que l'intimée soit requise de démontrer que la cause d'action découle d'un manquement à de telles obligations.

31 Il juge que l'obligation de non-concurrence à laquelle s'est engagée l'appelante, qui vise le territoire canadien, s'étend nécessairement à la province de Québec et que l'obligation de l'appelante d'informer l'intimée à l'avance de son intention d'entrer sur le marché canadien, et donc de lui faire concurrence au Canada, doit également y être exécutée. Il retient sur ce point l'argument de l'intimée voulant que l'obligation soit considérée comme devant être exécutée à l'endroit où l'avis s'avère utile, soit au siège social de l'intimée, à Montréal, où elle mène ses opérations[5], s'appuyant à cet égard sur les propos de la Cour suprême dans *Air Canada c. McDonnell Douglas Corp.*[6].

32 Le juge signale que c'est précisément le défaut de l'appelante d'informer l'intimée de l'acquisition d'une entreprise concurrente au Canada qui est à l'origine de l'Amendement par lequel l'appelante a consenti à indemniser l'intimée, en échange de sa renonciation à invoquer la clause de non-concurrence, de même qu'à lui accorder l'option d'exercer des droits de reprise.

33 Il ajoute que l'exercice des droits de reprise nécessite une entente sur les BEA, qui implique nécessairement un échange d'information entre les parties, lui aussi assujetti aux règles énoncées par la Cour suprême dans l'arrêt *Air Canada* précité, laissant ainsi entendre que cette obligation, pour s'avérer utile, doit également être exécutée au Québec, au siège social de l'intimée.

34 Bien que l'existence d'obligations de non-concurrence et d'information devant être exécutées au Québec suffise à donner compétence aux tribunaux québécois en vertu de l'article 3148(3) *C.c.Q.*, le juge poursuit néanmoins son analyse sous l'angle du lieu du préjudice subi.

35 Il rappelle que l'un des buts de la règle d'attribution de compétence de l'article 3148(3) *C.c.Q.* est d'assurer la protection de la victime d'un préjudice en lui permettant d'agir en justice au Québec lorsqu'elle y subit le préjudice en question[7]. Puis, il souligne que l'intimée allègue avoir subi un préjudice au Québec sous trois volets : 1) le préjudice économique découlant du refus de l'appelante de reconnaître la valeur des droits de reprise réclamés par l'intimée; 2) le préjudice lié à la gestion des portefeuilles et des réclamations auxquelles elle doit faire face sans bénéficier du versement de la valeur des droits de reprise et 3) dans une moindre mesure, le préjudice découlant de l'absence de collaboration de l'appelante dans la poursuite de l'exercice des droits de reprise. Il réitère qu'il n'a pas à analyser ces réclamations en détail à ce stade préliminaire, alors qu'il doit tenir les faits allégués comme étant avérés et que ces allégations ne lui paraissent pas frivoles.

36 Il reproduit ensuite les propos de la Cour suprême dans l'affaire *Infineon Technologies AG c. Option Consommateurs*, qui confirment le raisonnement du juge Kasirer, alors qu'il siégeait en appel, et reconnaissent qu'il n'y a pas de raison d'exclure le préjudice purement économique de l'application de l'article 3148(3) *C.c.Q.*, si ce préjudice a été essentiellement subi au Québec, par opposition au préjudice simplement "comptabilisé" au Québec.

37 Le juge reprend également à son compte l'approche proposée par le juge Kasirer dans l'affaire *Infineon* précitée concernant la pertinence du lieu de conclusion du contrat à titre de "fait juridique" dans la détermination du site réel du préjudice et de la compétence des tribunaux québécois.

38 Il conclut ensuite que le refus de l'appelante de reconnaître l'exercice valable des droits de reprise par l'intimée, qui est au coeur du débat et découle des dispositions de l'Amendement, constitue un préjudice important subi par l'intimée au Québec, où les parties ont convenu de l'Amendement en fonction de la loi québécoise.

39 Au final, il détermine que l'ensemble de ses constats l'amène à conclure qu'il y a suffisamment de motifs pour justifier la compétence des tribunaux québécois, sans qu'il lui soit nécessaire d'aborder les autres préjudices allégués.

40 Avant de conclure, le juge aborde l'argument subsidiaire de l'intimée voulant que le contrat de rétrocession puisse être qualifié de contrat d'assurance au sens de l'article 3150 *C.c.Q.* de manière à conférer compétence aux tribunaux québécois lorsque l'assuré ou le bénéficiaire (en l'occurrence l'intimée) est domicilié au Québec. Bien qu'il semble disposé à reconnaître l'application de cet article aux faits de l'affaire, il estime qu'il n'y a pas matière à en décider puisqu'il a conclu à la compétence des tribunaux québécois en vertu de l'article 3148(3) *C.c.Q.* et ne tranche pas de manière définitive la question.

QUESTIONS EN APPEL

41 En appel, l'appelant soulève essentiellement trois questions :

1. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que des obligations contractuelles devaient être exécutées au Québec?
2. Le juge a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que l'intimée aurait subi un préjudice au Québec?
3. Si la réponse aux deux premières questions s'avère affirmative, les tribunaux québécois ont-ils compétence en vertu de l'article 3150 *C.c.Q.*?

ANALYSE

1. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que des obligations contractuelles devaient être exécutées au Québec?

42 L'appelante soulève à cet égard deux arguments.

43 D'une part, l'obligation de non-concurrence et les obligations afférentes d'informer l'intimée de son intention d'entrer sur le marché canadien et de lui faire concurrence n'existent plus : elles ont été éteintes par l'Amendement et ne peuvent donner ouverture à l'application de l'article 3148(3) *C.c.Q.*

44 D'autre part, le contrat ne prévoit pas expressément que les obligations d'informer l'intimée devaient être exécutées au Québec (qu'il s'agisse d'annoncer son intention d'entrer sur le marché canadien ou de communiquer sa position sur les BEA), de sorte que le critère de l'article 3148(3) *C.c.Q.* n'est pas davantage satisfait.

45 J'estime que ni l'un ni l'autre des arguments ne peuvent être retenus.

46 Il m'apparaît utile de reproduire la disposition pertinente :

> **3148.** Dans les actions personnelles à caractère patrimonial, les autorités québécoises sont compétentes dans les cas suivants :
>
> [...]
>
> 3. Une faute a été commise au Québec, un préjudice y a été subi, un fait dommageable s'y est produit ou l'une des obligations découlant d'un contrat devait y être exécutée;

* * *

> **3148.** In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases :
>
> [...]
>
> 3. a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;

47 Les tribunaux interprètent généralement cette disposition de manière large et souple. Dans l'arrêt *Spar Aerospace ltée c. American Mobile Satellite Corp.*[8], la Cour suprême rappelle que "l'article 3148 *C.c.Q.* prévoit une large assise juridictionnelle"[9]. Elle souligne qu'il ressort des termes explicites de cet article que le but du système de droit international privé est d'assurer la présence d'un lien réel et substantiel entre l'action entreprise et le Québec[10]. Elle signale également que chacun des motifs énumérés par l'article 3148(3) *C.c.Q.*, soit la faute, le préjudice, le fait dommageable et l'obligation contractuelle, "semble être un exemple de situations qui constituent un lien réel et substantiel entre la province de Québec et l'action"[11], de sorte qu'ils doivent être considérés comme des critères alternatifs plutôt que cumulatifs[12].

48 Toutefois, pour conférer compétence aux tribunaux québécois en fonction du lieu d'exécution des obligations du contrat, il ne suffit pas à la partie demanderesse de démontrer que l'obligation a été, dans les faits, exécutée au Québec[13]. Elle doit démontrer que l'une des obligations découlant du contrat devait y être exécutée, sans pour autant exiger d'elle qu'elle démontre que la cause d'action est elle-même fondée sur la violation d'une obligation devant être exécutée au Québec, puisque ceci ferait double emploi avec le critère distinct de la faute prévu à l'article 3148(3) *C.c.Q.*[14].

49 En l'espèce, l'appelante ne remet pas en question la conclusion du juge voulant que l'obligation de non-concurrence ait été exécutée en partie au Québec. Elle se limite plutôt à soutenir que cette obligation, tout comme les obligations d'information liées à la non-concurrence et à l'entrée sur le marché canadien, n'existe plus parce qu'elle s'est éteinte lors de la conclusion de l'Amendement.

50 À mon avis, elle a tort.

51 Tel que l'a conclu le juge de première instance, le *General Agreement* et l'Amendement forment un seul et même contrat. La clause 6 de l'Amendement prévoit d'ailleurs expressément que les stipulations du *General Agreement* qui sont demeurées intactes continuent de s'appliquer. L'obligation de non-concurrence contenue dans le *General Agreement* a été en vigueur et sa violation, en raison de l'acquisition par l'appelante d'une société canadienne oeuvrant dans le domaine de l'assurance-vie, est à l'origine de la conclusion de l'Amendement, tel que le prévoyait d'ailleurs le *General Agreement*.

52 Toutefois, dans le cadre de l'Amendement, les parties ont convenu qu'en contrepartie du versement d'une indemnité (*retrocession reorganization fee*) et de l'octroi de droits de reprise (*recapture rights*), l'intimée renonçait à invoquer la clause de non-concurrence contenue dans le *General Agreement*, mais que cette renonciation était conditionnelle à ce que l'appelante fasse preuve de bonne foi et de diligence, et qu'elle mette les efforts requis pour permettre l'exercice des droits de reprise. Cette renonciation serait réputée nulle et sans effet et l'appelante serait tenue de verser à l'intimée une compensation :

> PARTNER RE recognizes and accepts that should such recaptures fail to occur, for lack of good faith or lack of reasonable diligence or effort by PARTNER RE, the foregoing waiver by OPTIMUM will be deemed null and void and PARTNER RE shall provide a full compensatory payment to OPTIMUM for the non-compliance to the GENERAL AGREEMENT and for the reimbursement of all of OPTIMUM'S incurred and reasonably expected fees and expenses.
>
> [Soulignement ajouté]

53 C'est précisément un manquement de la part de l'appelante à cette obligation de bonne foi et de diligence qui lui est reproché dans la procédure.

54 Dans les circonstances, un tel manquement est susceptible d'entraîner la nullité de la renonciation à la clause de non-concurrence. Dès lors, l'appelante a tort de prétendre que l'obligation de non-concurrence est éteinte. Ceci, d'autant que la formulation de la disposition contractuelle par laquelle l'intimée ne fait que renoncer à invoquer la clause de non-concurrence ("*OPTIMUM agrees to waive application and enforcement*") tend à indiquer que celle-ci est simplement suspendue jusqu'à ce que soient remplies les conditions convenues par les parties.

55 De toute manière, le fait de prétendre qu'une obligation serait éteinte lors de l'institution d'un recours n'empêche pas les tribunaux québécois de s'en saisir. La compétence des tribunaux québécois peut s'appuyer sur des obligations déjà exécutées, tel que l'énoncent les professeurs Goldstein et Groffier lorsqu'ils traitent de l'article 3148(3) *C.c.Q.*[15] :

> L'apport du nouvel article est donc que l'autorité québécoise est compétente dès lors qu'une seule obligation d'un contrat doit être exécutée au Québec. Par exemple, l'obligation de payer une somme d'argent au Québec fonde la compétence des autorités québécoises, même au cas où les autres obligations prévues au contrat doivent être exécutées à l'étranger et même si, en l'espèce, le prix a été payé.

56 Qu'en est-il du lieu d'exécution de l'obligation?

57 La clause de non-concurrence contenue dans le *General Agreement*[16] prévoit expressément que l'appelante doit l'informer si elle entre sur le marché canadien. Cette obligation de ne pas faire concurrence au Canada couvre la province de Québec[17] et, à mon avis, il en découle que l'obligation de non-concurrence devait y être exécutée.

58 Considérant ce qui précède, j'estime donc que le juge de première instance n'a pas commis d'erreur en concluant que l'obligation de non-concurrence devait être exécutée au Québec.

59 Il conclut également que les obligations d'information incombant à l'appelante devaient y être exécutées, conformément aux enseignements de la Cour suprême dans l'arrêt *Air Canada*[18]. Dans cette affaire, où la Cour suprême devait déterminer si toute la cause d'action des intimées avait pris naissance au Québec pour fonder la compétence des tribunaux québécois, conformément à l'article 68 a.*C.p.c.*, elle affirmait ceci au sujet du *situs* de la faute d'omission[19] :

> Puisque l'omission d'avertir est un acte qui n'a pas été accompli, il faut recourir à un autre critère que l'omission elle-même pour déterminer le lieu de l'omission aux fins d'établir la compétence conformément à l'al. 68(2) C.p.c. L'omission d'avertir ne constitue une faute que s'il y a une obligation préexistante d'informer de l'existence d'un danger. À mon avis, le lieu de l'omission d'avertir doit donc être déterminé en fonction de l'endroit où l'obligation préexistante aurait dû être remplie. L'obligation d'avertir l'utilisateur de ces biens ne peut être remplie qu'en donnant un avertissement là où il sera utile : de par sa nature même, un avertissement doit être reçu à l'endroit et au moment qui permettront à l'utilisateur des biens d'agir de façon à éviter le danger qui fait l'objet de cet avertissement. Le lieu de l'omission d'avertir est l'endroit où l'avertissement aurait dû être reçu, c'est-à-dire là où se trouve l'utilisateur, ou encore là où les biens sont utilisés.
>
> [Soulignement ajouté]

60 L'appelante prétend que l'affaire *Air Canada*, décidée dans le contexte d'un recours en responsabilité extracontractuelle, ne trouve pas application puisque l'intimée soulève une faute contractuelle. Or, il n'y a pas lieu, à mon avis, de faire une telle distinction. D'abord, puisque dans cette affaire la Cour suprême confirme l'existence du droit d'option, de sorte que la cause d'action aurait pu être tout autant contractuelle qu'extracontractuelle.

Ensuite, puisque la faute reprochée en l'espèce est une faute d'omission à l'égard d'une obligation qui devait avoir lieu au Québec. Le professeur Emanuelli précise d'ailleurs que le même raisonnement doit s'appliquer en matière de faute contractuelle et formule les remarques suivantes[20] :

> La faute en question [à l'article 3148 (3) C.c.Q.] peut être contractuelle ou extracontractuelle. S'il s'agit d'une faute d'omission, le raisonnement suivi par la Cour suprême dans *Air Canada c. McDonnell Douglas* pour déterminer si elle s'est produite au Québec peut être suivi : l'omission constitue une faute seulement si elle contrevient à une obligation préexistante. La faute d'omission a lieu au Québec si l'obligation préexistante devait y être remplie.
>
> [...]
>
> Cette jurisprudence demeure pertinente pour déterminer si la faute d'omission a été commise au Québec.
>
> [Références omises; italique dans l'original]

61 Si l'appelante a raison de prétendre que les modalités d'envoi des avis requis par le *General Agreement* ou l'Amendement n'ont pas été précisées par les parties dans leur contrat, j'estime que, même en l'absence de stipulations expresses, on peut inférer des circonstances que ces avis devaient être expédiés au siège social de l'intimée, à Montréal[21].

62 D'ailleurs, dans l'arrêt *E. Hofmann Plastics Inc. c. Tribec Metals Ltd.*, la Cour n'a pas hésité à conclure que l'obligation de donner un préavis de résiliation devait être exécutée au lieu du siège social de l'intimée, en l'absence d'une stipulation expresse, dans le contexte d'un contrat verbal[22] :

> [7] Furthermore, contrary to what the appellant argues, it is of no consequence that the alleged fault was not based on a written contract between the parties. Indeed, in the context of longstanding contractual relationships, as is the present case, good faith requires some form of notice before terminating, which the appellant did not provide.
>
> [8] This omission alone is sufficient to ground jurisdiction because the obligation to provide notice was to be performed at the respondent's head office in Montreal. In our view, the trial judge correctly applied the principle articulated by the Supreme Court in *Air Canada v McDonnell*.
>
> [Références omises]

63 En ce qui concerne la prétention de l'appelante voulant que son obligation d'informer puisse être accomplie dans n'importe quel lieu aléatoire, notamment en ce qui concerne la communication des BEA, en l'absence de toute stipulation dans le contrat, elle ne peut davantage être retenue. Une telle approche aurait pour conséquence de laisser à la partie qui s'oblige le choix du forum, en lui permettant de choisir le lieu d'exécution de son obligation, non sans par ailleurs susciter une certaine incertitude pour les parties à l'égard du forum compétent.

64 Je conviens donc avec l'intimée que le *situs* des obligations d'information de l'appelante correspond en l'espèce implicitement au lieu de son siège social. La conclusion du juge de première instance à cet égard s'avère fondée et ne donne pas prise à une intervention de la Cour.

> **2. Le juge de première instance a-t-il erré en concluant que les autorités québécoises sont compétentes en vertu de l'article 3148(3) *C.c.Q.* au motif que l'intimée aurait subi un préjudice au Québec?**

65 L'appelante soutient d'abord que le juge a erré en concluant que son refus de payer l'intimée constitue un préjudice subi au Québec, au motif que le contrat y a été conclu. Elle plaide que ceci revient à rétablir la compétence des tribunaux québécois en fonction du lieu de la conclusion du contrat, alors que ce critère, qui prévalait sous l'ancien *Code de procédure civile*, a été écarté par le législateur et, qu'en l'espèce, la conclusion de l'Amendement n'a pas cristallisé le préjudice allégué par l'intimée.

66 Elle ajoute qu'un préjudice qui est seulement comptabilisé à l'endroit où se trouve le patrimoine du créancier n'est pas un préjudice subi au Québec aux fins de l'article 3148(3) *C.c.Q.* Ceci, d'autant plus que l'article 1566 al. 2 *C.c.Q.* prévoit qu'une dette est payable au lieu de la résidence du débiteur (en l'occurrence, aux Bermudes, où l'appelante est domiciliée).

67 L'appelante plaide finalement que le juge ne pouvait considérer le préjudice allégué par l'intimée aux fins de décider de la compétence des tribunaux québécois puisque, dans le contexte d'une demande en jugement déclaratoire où aucune conclusion en dommages-intérêts n'est recherchée, le préjudice potentiel n'est pas pertinent.

68 Les tribunaux reconnaissent qu'en l'absence d'indication contraire du législateur, le préjudice auquel réfère l'article 3148(3) *C.c.Q.* est bel et bien un critère pertinent tant en matière contractuelle qu'extracontractuelle[23]. Il n'est cependant pas nécessaire que le préjudice soit lié à l'endroit où la faute est commise, contrairement à ce qui est prévu à l'article 3148 *C.c.Q.*, qui régit la compétence des tribunaux étrangers[24].

69 Dans *Stormbreaker Marketing and Productions inc.*, la Cour signalait qu'en choisissant le préjudice subi au Québec comme facteur de rattachement, le législateur "a voulu protéger ses ressortissants et d'autres États ont sûrement jugé bon de faire de même. Il n'y a d'ailleurs rien de choquant à ce que la victime d'un préjudice soit "favorisée" aux dépens de la personne qui en est présumément responsable"[25].

70 Le fait que le préjudice est allégué dans le cadre d'une action en responsabilité contractuelle et qu'il est de nature économique ou financière empêche-t-il l'application de l'article 3148(3) *C.c.Q.* en l'espèce?

71 J'estime que non. Je m'explique.

72 Avant toute chose, un bref rappel de l'évolution de la jurisprudence sur la question paraît utile.

73 En 2001, dans l'arrêt *Quebecor Printing Memphis Inc. c. Regenair Inc.*[26] ("*Regenair*"), la Cour d'appel accueillait une demande en rejet fondée sur l'absence de compétence des tribunaux du Québec dans le cadre d'une action sur compte. Bien que le contrat ait été conclu à Montréal, la principale obligation de l'intimée, domiciliée au Québec, était de fournir et d'installer de la machinerie à Memphis, où se situait l'établissement de l'appelante, en contrepartie d'un prix payable par cette dernière. S'appuyant sur l'article 1566 *C.c.Q.*, l'appelante plaidait qu'aucun préjudice n'avait été subi au Québec, puisque le dommage était étroitement lié au lieu du défaut de paiement, soit Memphis.

74 Les juges majoritaires lui ont donné raison[27] :

> [9] D'autre part, le refus par Quebecor d'exécuter son obligation de payer à Memphis ne peut être tenu comme un fait dommageable survenu au Québec et le fait que Regenair, dont le siège social est au Québec, ne reçoit pas le paiement de sa créance, laquelle est payable à Memphis, ne fait pas qu'un préjudice a été subi au Québec.
>
> [10] Si Regenair avait raison, la compétence des tribunaux du Québec serait automatique dans le cas où le demandeur est un résident du Québec et les autres chefs de compétence visés à l'article 3148 C.c.Q. seraient inutiles.
>
> [11] Il n'y a pas lieu d'interpréter d'une façon large l'article 3148 du fait de l'existence de l'article 3135 C.c.Q. Ce dernier article trouve application une fois qu'on a constaté qu'interprété d'une façon raisonnable, l'article 3148 confère juridiction au tribunal québécois.

75 Le juge *ad hoc* Philippon, dissident, était plutôt d'avis que le préjudice économique subi par l'intimée permettait d'asseoir la compétence des tribunaux québécois[28] :

> [30] Selon le texte de l'article 3148 3. C.c.Q., les critères attributifs de compétence sont nombreux, distincts et autonomes les uns les autres. L'existence de l'un d'entre eux suffit.
>
> [31] La notion de préjudice s'attache intrinsèquement au patrimoine. En l'espèce, il s'agit du patrimoine de l'intimée affectée par le défaut de paiement auquel elle aurait droit. Cette atteinte est subie au lieu du domicile de l'intimée, à Ste-Rose, Ville de Laval.
>
> [32] Une telle application de la notion de préjudice peut entraîner la reconnaissance d'une compétence qui s'avère exorbitante. Si tel est le cas, c'est au stade de l'application de la doctrine du forum **non conveniens** que le problème doit être abordé, comme dans le cas où, par analogie, selon les auteurs Goldstein et Groffier, une obligation accessoire d'une valeur minime pourrait fonder la compétence.
>
> [Référence omise]

76 Or, l'année suivante, dans l'arrêt *Spar*, la Cour suprême, sous la plume du juge LeBel, reprenait l'interprétation moins restrictive proposée par le juge dissident dans *Regenair* à l'égard du paragraphe 3148(3) *C.c.Q.* et du caractère large de la notion de préjudice[29] en soulignant que "la doctrine du *forum non conveniens*, telle que codifiée à l'art. 3135, constitue un contrepoids important à la large assise juridictionnelle prévue à l'art. 3148"[30]. Ceci s'inscrivait toutefois dans le contexte d'une réclamation pour un préjudice découlant d'une atteinte à la réputation.

77 Subséquemment, dans *Banque de Montréal c Hydro Aluminum Wells Inc.*, la Cour d'appel reprenait le raisonnement des juges majoritaires dans *Regenair* voulant que le seul préjudice économique ne permette pas d'asseoir la compétence des tribunaux québécois, en distinguant l'arrêt *Spar*, au motif que la Cour suprême n'y aurait pas abordé la question de la nature du préjudice visé par l'article 3148(3) *C.c.Q.*[31] et que le recours visé par la demande d'exception déclinatoire était de nature extracontractuelle[32].

78 Puis, en 2011, dans *Infineon*[33], la Cour d'appel, sous la plume du juge Kasirer, affirmait qu'il n'y a pas lieu d'exclure le préjudice purement économique de l'application de l'article 3148(3) *C.c.Q.* s'il a été pour l'essentiel subi au Québec plutôt que d'y être simplement comptabilisé. Son raisonnement était par ailleurs repris par la Cour suprême en 2013, tout en remettant les propos des juges majoritaires de la Cour d'appel dans l'affaire *Regenair* dans leur contexte :

> [45] Le préjudice subi au Québec constitue un facteur indépendant prévu au par. 3148(3) : il n'est pas nécessaire que le préjudice soit lié à l'endroit où le fait dommageable a été subi ou la faute commise, contrairement par exemple à l'art. 3168. Chacun des quatre facteurs mentionnés au par. 3148(3) créerait un lien suffisant avec la province pour fonder la compétence (voir *Royal Bank of Canada c. Capital Factors Inc.*, *[2004] Q.J. No. 11841* (QL) (C.A.), par. 2; *Spar Aerospace Ltée c. American Mobile Satellite Corp.*, *2002 CSC 78* (CanLII), *[2002] 4 R.C.S. 205*, par. 56). S'agissant du type de préjudice visé par le par. 3148(3), il n'existe aucune raison de principe justifiant d'exclure le préjudice purement économique de l'application de la disposition. Le libellé clair du par. 3148(3) n'empêche pas le préjudice économique de servir de facteur de rattachement, et le droit civil québécois n'interdit pas non plus l'indemnisation de la perte purement économique (voir C. Emanuelli, *Droit international privé québécois* (3e éd. 2011), p. 116-118). Il ressort clairement de la jurisprudence québécoise que le préjudice économique peut servir de facteur de rattachement en vertu du par. 3148(3) (voir, p. ex., *Sterling Combustion inc. c. Roco Industrie inc.*, *2005 QCCA 662* (CanLII); *Option Consommateurs c. British Airways PLC*, *2010 QCCS 140* (CanLII)).
>
> [46] L'affaire *Quebecor Printing*, sur laquelle s'appuient les appelantes, ne devrait pas recevoir une interprétation si large qu'elle exclurait systématiquement la perte purement économique des formes de préjudice auxquelles s'applique le par. 3148(3). Cet arrêt indique plutôt que le fait de simplement comptabiliser au Québec le préjudice financier ne suffit pas pour fonder la compétence en vertu du par. 3148(3). Pour remplir l'exigence du par. 3148(3), le préjudice doit être subi au Québec. Comme l'explique le juge Kasirer dans la décision de la Cour d'appel dans la présente affaire, il importe de distinguer le préjudice subi pour l'essentiel au Québec de celui qui est simplement comptabilisé au Québec, sur le fondement du lieu où se trouve le patrimoine du demandeur :

> [traduction] Il faut établir une distinction entre [le préjudice] et le "dommage", qui représente la conséquence subjective du préjudice se rapportant à la mesure de réparation nécessaire pour compenser la perte. Par conséquent, en précisant qu'"un préjudice y a été subi" comme facteur de rattachement pertinent, le paragraphe 3148(3) vise à identifier le situs réel du "préjudice, qu'il soit corporel, moral ou matériel, que lui cause le défaut du débiteur et qui en est une suite immédiate et directe" (article 1607 C.c.Q.), et non le situs du patrimoine dans lequel la conséquence de ce préjudice est comptabilisée. [par. 65]
>
> [47] Cette application du *C.c.Q.* ne constitue pas, comme l'affirment les appelantes, un élargissement nouveau ou injustifié de la compétence des tribunaux du Québec. Au contraire, elle s'appuie sur le libellé du par. 3148(3) et sur la jurisprudence. Comme l'a affirmé notre Cour au par. 58 de l'arrêt *Spar Aerospace*, "[e]st amplement étayée la thèse selon laquelle l'art. 3148 prévoit une large assise juridictionnelle."
>
> [Soulignements ajoutés]

79 Dans son jugement, le juge de première instance a d'ailleurs jugé opportun de reproduire un extrait des propos de la Cour suprême[34]. Il a également repris à son compte les motifs du juge Kasirer[35] relativement à l'opportunité de considérer le lieu de conclusion du contrat, à l'origine des dommages réclamés, comme un fait juridique susceptible de déterminer le lieu du préjudice subi.

80 L'appelante plaide que, ce faisant, le juge se serait trompé, puisqu'il aurait fondé sa conclusion concernant le lieu du préjudice subi sur le seul fait que le contrat d'Amendement, dont il découle, a été conclu au Québec.

81 L'appelante a raison de soutenir que le législateur a exclu le lieu de la conclusion du contrat comme facteur de rattachement, puisqu'il établissait des liens trop ténus avec les autorités québécoises[36], de sorte qu'il ne peut s'agir d'un critère suffisant pour conférer à lui seul compétence aux tribunaux québécois.

82 Cela dit, l'appelante ne peut prétendre qu'il s'agit du seul facteur ou "fait juridique" qu'a considéré le juge de première instance pour conclure à l'application de l'article 3148(3) *C.c.Q.* J'estime qu'il s'agit plutôt d'un fait juridique retenu parmi d'autres.

83 Il est vrai que le juge ne s'est pas attardé longuement aux autres préjudices invoqués par l'intimée, autrement qu'en les résumant dans son analyse et en reproduisant les allégations de préjudice contenues dans la procédure, qu'il a déclaré tenir pour avérées en l'absence de contestation de l'appelante. Cependant, il n'était pas tenu d'en faire une analyse exhaustive à cette étape, d'autant que le préjudice dont il est question à l'article 3148(3) *C.c.Q.* n'est sujet à aucune restriction quant à son montant ou à sa nature, qu'il n'a pas à être direct et que l'analyse du moyen déclinatoire n'oblige pas le juge des requêtes à se prononcer prématurément sur le fond du litige, comme le signalait la Cour suprême dans *Spar*[37].

84 Cela dit, en l'espèce, le préjudice invoqué par l'intimée est lié non seulement au préjudice économique découlant du fait d'être privé de l'encaissement des valeurs de reprise, mais également au préjudice découlant des difficultés de gestion que lui occasionne le défaut de l'appelante de lui verser ces montants. Suivant les allégations de la procédure, le refus de l'appelante de reconnaître la validité de l'exercice des droits de reprise de l'intimée affecte sa gestion des portefeuilles au Québec, qui comprennent des contrats d'assurance sur la vie d'assurés québécois, et il entraîne une réduction de sa capacité à faire face aux réclamations des assurés au Québec et celle d'y placer de nouveaux risques. C'est également au Québec que l'intimée a dû débourser des honoraires pour l'embauche d'une actuaire aux fins de déterminer les BEA.

85 Il ne s'agit donc pas, dans l'un et l'autre de ces cas, d'un préjudice subi ailleurs et seulement comptabilisé au Québec[38]. Il y a donc ici un contexte bien différent de celui qui prévalait dans les causes invoquées par l'appelante. Qu'il s'agisse, par exemple, de l'affaire *Regenair*[39] mentionnée précédemment (où les obligations devaient être exécutées hors Québec, tout comme le paiement de la dette, bien que le contrat ait été conclu à Montréal) ou de l'affaire *Green Planet Technologies Ltd. c. Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*[40] (où l'intimée, une société québécoise, poursuivait l'appelante au Québec en remboursement d'un acompte versé

pour la livraison de pneus à l'étranger, en invoquant que le virement avait été fait à partir de la banque de l'intimée, située à Montréal, à la banque de l'appelante à Londres), la Cour y avait conclu que le préjudice n'avait pas été subi à Montréal[41], bien que l'intimée ait amendé sa demande introductive d'instance en appel afin de réclamer la perte de profits subie au Québec. La Cour distinguait à cet égard l'arrêt *Federal Corporation*[42] :

> [10] [...] That judgment is inapplicable, however, since in Triangle Tires, the failed transaction resulted in the inability of the Quebec party to sell the products it purchased in Quebec and other eastern Canadian provinces.
>
> [11] The loss of profit in this case arises from the inability of Blackstone to sell OTR tires to its customer operating a mine in Brazil. Therefore, the loss of profit occurred in Brazil, although it would undoubtedly be recorded in Quebec. The mere allegation in Blackstone's amended motion introductive of suit that the loss of profit it claims was suffered in Quebec is a legal characterization of facts that does not bind the Court, and moreover is inconsistent with the documents in the record.
>
> [Référence omise]

86 À noter que, dans l'arrêt *Federal Corporation c. Triangle Tires inc.*[43], la Cour avait conclu que la perte de profits causée à un distributeur québécois, par l'impossibilité de son cocontractant établi à Taïwan de livrer des biens au Québec, avait été subie au Québec, puisque la vente des pneus devait y avoir lieu et permettait de rattacher le préjudice financier au Québec, de manière à conférer compétence aux tribunaux québécois[44].

87 Les causes invoquées par l'appelante au soutien de ses prétentions doivent donc être distinguées en l'espèce.

88 Finalement, en ce qui concerne l'argument lié à la nature de la demande en jugement déclaratoire, laquelle empêcherait d'invoquer le préjudice pour justifier la compétence des tribunaux québécois, il m'apparaît également mal fondé.

89 L'appelante fonde en large partie son argument sur l'arrêt *SCFP*[45]. Or, cet arrêt n'a pas la portée qu'elle souhaiterait lui donner puisque, dans ce cas précis, contrairement au présent cas, les requérants n'alléguaient aucun préjudice : la difficulté réelle soulevée ne concernait que le droit de deux sections locales d'un syndicat de nommer un fiduciaire au sein d'un comité de retraite.

90 En l'espèce, l'intimée allègue expressément qu'une variété de préjudices ont été subis au Québec à la suite du refus injustifié de l'appelante de reconnaître l'exercice de ses droits de reprise et donc de la difficulté réelle soulevée à l'égard de l'interprétation de l'Amendement. Par conséquent, la démonstration de la difficulté réelle et, par extension, du préjudice subi, fait partie du fardeau de preuve de l'intimée et le fait qu'aucune conclusion de nature pécuniaire ne soit recherchée, du moins pour le moment, ne la prive pas de soutenir l'existence d'un lien de rattachement avec le Québec.

91 Tel que le souligne l'intimée, la situation n'est d'ailleurs pas ici très différente de celle d'une demande d'injonction qui, bien que ne comportant aucune conclusion en dommages-intérêts, peut comporter un facteur de rattachement lié à un préjudice subi au Québec, tel que l'a reconnu la Cour supérieure dans l'affaire *Transat Tours Canada Inc. c. Tescor, S.A. de C.V*[46] :

> [33] Ces trois défenderesses prétendent aussi qu'aucun préjudice afférent à la présente demande n'a été subi au Québec. Au soutien de cette prétention, elles plaident qu'il s'agit d'une action en injonction dans laquelle Transat ne réclame aucun dommage. [...]
>
> [34] Le tribunal partage l'opinion des trois défenderesses à l'exception de la question du préjudice.
>
> [...]
>
> [38] Il est vrai que pour l'instant, Transat ne réclame pas de dommages-intérêts. Toutefois, pour obtenir une injonction, même provisoire, elle doit démontrer un préjudice. Au stade d'une ordonnance de

> sauvegarde tout comme pour une injonction provisoire, la demanderesse doit même démontrer un préjudice irréparable si le lien de droit qu'elle invoque n'est pas clair.
>
> [...]
>
> [40] Considérant que la demanderesse allègue qu'elle a subi et continue de subir un préjudice sérieux justifiant l'émission d'une ordonnance de sauvegarde et que ce prétendu préjudice est subi à Montréal, lieu de son siège social, le tribunal en conclut qu'il a compétence en vertu de l'article 3148 (3) C.C.Q.

92 De la même façon ici, l'intimée allègue une difficulté réelle (et son intérêt juridique lié à celle-ci) qui lui cause préjudice au Québec, où elle a son siège social et d'où elle gère ses affaires québécoises, en raison d'une divergence dans l'interprétation des modalités d'exercice des droits de reprise stipulées dans le contrat. L'absence d'une conclusion d'ordre pécuniaire n'empêche pas l'intimée de soulever le préjudice comme assise à la compétence des tribunaux québécois.

93 J'en conclus que les tribunaux québécois ont la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) *C.c.Q.* en fonction du lieu du préjudice subi.

> **3. Si la réponse aux deux premières questions s'avère affirmative, les tribunaux québécois ont-ils compétence en vertu de l'article 3150 *C.c.Q.*?**

94 Considérant mes réponses aux deux premières questions et la conclusion à laquelle j'en viens sur l'application de l'article 3148(3) *C.c.Q.*, il ne m'apparaît pas utile d'aborder la question subsidiaire.

95 Aussi, pour l'ensemble des motifs précédemment énoncés, j'estime que le juge de première instance n'a pas commis d'erreur en rejetant la demande en rejet de l'appelante puisque les tribunaux québécois détiennent la compétence voulue pour se saisir du litige en vertu de l'article 3148(3) *C.c.Q.* Je propose donc de rejeter l'appel avec les frais de justice.

L'HONORABLE GENEVIÈVE MARCOTTE J.C.A.

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1 *Optimum Réassurance inc. c. Partner Reinsurance Company Ltd.*, 2019 QCCS 3184 [Jugement entrepris].

2 *Partner Reinsurance Company Ltd. c. Optimum Réassurance inc.*, 2019 QCCA 1487 (J. Schrager).

3 Jugement entrepris, *supra*, note 1, paragr. 50-51.

4 *Poppy Industries Canada Inc. c. Diva Delights Ltd.*, 2018 QCCA 163 [*Poppy*].

5 Jugement entrepris, *supra*, note 1, paragr. 53-54.

6 *Air Canada* c. *McDonnell Douglas Corp.*, [1989] 1 R.C.S. 1554 [*Air Canada*].

7 *Stormbreaker Marketing and Productions inc. v. Weinstock*, 2013 QCCA 269, paragr. 90 [*Stormbreaker*].

8 *Spar Aerospace ltée c. American Mobile Satellite Corp.*, 2002 CSC 78, [2002] 4 R.C.S. 205 [*Spar*]. Cet énoncé sera repris plus tard dans *Infineon Technologies AG c. Option consommateurs*, 2013 CSC 59, [2013] 3 R.C.S. 600 [*Infineon*].

9 *Id.*, paragr. 58.

10 *Id.*, au paragr. 55 : Les dispositions [du Livre dixième du C.c.Q.] doivent s'interpréter comme un tout cohérent et en fonction des principes de courtoisie, d'ordre et d'équité. Selon moi, il ressort des termes explicites de l'art. 3148 et des autres dispositions du Livre dixième que ce système de droit international privé vise à assurer la présence d'un "lien réel et substantiel" entre l'action et la province de Québec, et à empêcher l'exercice inapproprié de la compétence du for québécois.

11 *Spar, supra*, note 8, paragr. 56.

12 *Infineon, supra*, note 8, paragr. 45; *Poppy, supra*, note 4, paragr. 25; *Hoteles Decameron Jamaica Ltd. c. D'Amours*, *2007 QCCA 418*, paragr. 22; *Sterling Combustion inc. c. Roco Industrie inc.*, *2005 QCCA 662*, paragr. 8; *Capital Factors Inc. c. Royal Bank of Canada*, *J.E. 2004-2164*, AZ-04019213, paragr. 2 (C.A.); *Bombardier Inc. c. Honeywell International Inc.*, *2019 QCCS 481*, paragr. 26, demande de permission d'appeler rejetée dans *Honeywell International inc. c. Bombardier inc.*, *2019 QCCA 582*.

13 *Poppy, supra*, note 4, paragr. 28; *Green Planet Technologies Ltd. c. Corporation Pneus OTR Blackstone/OTR Blackstone Tire Corporation*, *2013 QCCA 56*, paragr. 7 [*Green Planet*]; *Banque canadienne impériale de commerce c. Conseils taxes inc.*, *2005 QCCA 888*, paragr. 14; *DDH Aviation Inc. v. Fox*, *J.E. 2002-1293*, *2002 CanLII 41085*, paragr. 27-28 (C.A.); Gérald Goldstein, *Droit international privé*, vol. 2, Commentaires sur le Code civil du Québec (DCQ), Cowansville, Yvon Blais, 2011, p. 216.

14 *Poppy, supra*, note 4, paragr. 30; Claude Emanuelli, *Droit international privé québécois*, 3e éd., Montréal, Wilson & Lafleur, 2011, p. 119, paragr. 194; Gérald Goldstein et Ethel Groffier, *Traité de droit civil - Droit international privé*, t. 1 "Théorie générale", Cowansville, Yvon Blais, 1998, p. 358-359, paragr. 146; H.P. Glenn, "Droit international privé", *La réforme du Code civil*, Textes réunis par le Barreau du Québec et la Chambre des notaires du Québec, t. 3, Sainte-Foy, P.U.L., 1993, p. 754.

15 Gérald Goldstein et Ethel Groffier, *Traité de droit civil - Droit international privé*, t. 1 "Théorie générale", Cowansville, Yvon Blais, 1998, p. 359, paragr. 146. Voir par exemple : *NAD Suppléments inc. c. Spartan Nutritional & Fitness Centres inc.*, *2016 QCCQ 7883*, paragr. 14-17.

16 Voir la clause reproduite précédemment au paragr. 9 du présent arrêt.

17 Il y a lieu à cet égard de distinguer l'affaire *Nour c. Natchev*, *2019 QCCS 708*, en raison de son contexte particulier, puisque, dans ce cas, aucune violation de la clause de non-sollicitation au Québec n'était alléguée et, au surplus, la clause ne comportait aucune limite territoriale et visait uniquement les clients du "book of business" du demandeur, ainsi que ses employés et d'autres personnes affiliées à ses succursales.

18 *Air Canada, supra*, note 6.

19 *Id.*, p. 1569.

20 Claude Emanuelli, *Droit international privé québécois*, 3e éd., Montréal, Wilson & Lafleur, 2011, p. 115-116, paragr. 194. La Cour suprême réfère à cet extrait dans l'affaire *Infineon Technologies AG c. Option consommateurs, supra*, note 8, paragr. 45.

21 *Voir par exemple : Bombardier Inc. c. General Directorate for Defense, Armaments And Investments Of The Hellenic Ministry Of National Defense (HMOD)*, *2018 QCCS 2127*, paragr. 116 [*Bombardier*]; *Republic Bank Ltd. c. Firecash Ltd.*, AZ-5022867, *2004 CanLII 8560*, paragr. 23-26 (C.A.).

22 *E. Hofmann Plastics Inc. c. Tribec Metals Ltd.*, *2013 QCCA 2112*, paragr. 7-8. Voir aussi : *Bombardier, supra*, note 21, paragr. 116.

23 *Federal Corporation c. Triangle Tires Inc.*, *2012 QCCA 434*, paragr. 37 [*Federal Corporation*]; *Gentec inc. c. Eecol Electric Inc.*, *2006 QCCS 2134*, paragr. 15; *Société des technologies de l'aluminium du Saguenay ltée c. Cooper Grainger Technical Bearing Sales Ltd.*, *J.E. 2004-1825*, AZ-50265709, paragr. 18 (C.S.); *Air Saguenay (1980) inc. c. Aero Recip (Canada) Ltd.*, (2003) AZ-50161374, *[2003] J.Q. no 461* paragr. 21 (C.S.). Certains ont remis en question l'applicabilité des critères de préjudice et de faute en matière contractuelle : *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052*, paragr. 32 (C.A.); Sylvette Guillemard, "Commentaire sur la décision Stormbreaker Marketing and Productions Inc. c. World Class Events Ltd. (Sports Legends Challenge) -- Variations sur des questions connues de compétence internationale des tribunaux québécois", dans *Repères*, mars 2013, La référence, EYB2013REP1321.

24 *Infineon, supra*, note 8, paragr. 45.

25 *Stormbreaker supra*, note 7, paragr. 90.

26 *Quebecor Printing Memphis Inc. c. Regenair Inc.*, *[2001] R.J.Q. 966*, *J.E. 2001-958* (C.A.) [*Quebecor*].

27 *Quebecor, supra*, note 26, paragr. 9-11. Ce raisonnement a été réaffirmé par la Cour d'appel dans les arrêts suivants : *Richelieu Projects Inc. c. Western Rail Inc.*, *2006 QCCA 840*, paragr. 7; *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052* (C.A.); *Foster c. Kaycan Ltd.*, *J.E. 2002-163*, *2001 CanLII 38391*, paragr. 7 (C.A.).

28 *Quebecor, supra*, note 26, paragr. 30-32.

29 *Spar, supra*, note 8, paragr. 61. À noter cependant que dans le texte du professeur Catherine Walsh, "*The International Jurisdiction of Québec Authorities in Personal Actions : An Overview*", (2012) 71 *R. du B.* 249, p. 271, cette dernière suggère que ce volet du raisonnement de la Cour a été implicitement mis de côté dans l'arrêt *Club Resorts Ltd. c. Van Breda*, *2012 CSC 17*, *[2012] 1 R.C.S. 572*, paragr. 101, également rendu sous la plume du juge LeBel. Dans cet arrêt, le juge LeBel établit une distinction entre l'établissement de la compétence, pour lequel la présence d'un lien réel et substantiel constitue un impératif constitutionnel, et l'exercice de la compétence, lors de laquelle intervient la doctrine du *forum non conveniens*. Selon la professeure Walsh, une interprétation trop large de l'article 3148(3) *C.c.Q.*, qui se justifierait uniquement par la possibilité de décliner compétence après coup, ne saurait rencontrer les exigences constitutionnelles. Quoique la décision *Van Breda* concerne un litige en provenance de l'Ontario, ses aspects constitutionnels demeurent pertinents en droit québécois.

30 *Spar, supra*, note 8, paragr. 57.

31 *Banque de Montréal c Hydro Aluminum Wells Inc.*, *J.E. 2004-679*, *2004 CanLII 12052*, paragr. 55 (C.A.).

32 *Id.*, paragr. 47.

33 *Infineon Technologies AG c. Option consommateurs*, *2011 QCCA 2116*.

34 Soit le paragraphe 46 du jugement *Infineon* reproduit dans le Jugement entrepris au paragraphe 67.

35 *Infineon, supra*, note 33, *2011 QCCA 2116*, paragr. 49.

36 Ministère de la Justice, *Commentaires* du *ministre de la Justice ? Le Code civil du Québec*, t. 2, Québec, Les Publications du Québec, 1993, p. 2010.

37 *Spar, supra*, note 8, paragr. 32 et 36.

38 Par analogie, dans *7296126 Canada inc. c. YQR Ventures Hotel and Resorts Inc.*, *2017 QCCS 5174*, [*7296126 Canada*], le juge Gaudet, j.c.s., conclut que l'appauvrissement de la demanderesse constitue un préjudice subi au Québec, là où elle mène ses opérations et où se trouve son patrimoine :

> [21] En l'espèce, il ne s'agit pas du cas où le préjudice est subi ailleurs qu'au Québec, mais est ensuite simplement comptabilisé au Québec dans les livres du créancier. Il s'agit plutôt d'un cas où la demanderesse, une compagnie qui est établie au Québec d'où elle mène ses opérations, dit s'être appauvrie au profit du défendeur en payant pour lui des achats *à partir de ses propres fonds*. C'est au Québec que l'appauvrissement de la demanderesse s'est matérialisé lorsqu'elle a avancé des fonds pour l'achat de biens au bénéfice de YQR, même si ces biens ont été livrés en Saskatchewan.

39 *Quebecor Printing Memphis Inc. c. Regenair Inc.*, *[2001] R.J.Q. 966*, *J.E. 2001-958* (C.A.). Voir aussi : *7296126 Canada, supra*, note 38, paragr. 6.

40 *Green Planet, supra*, note 13.

41 *Id.*, paragr. 9 :

> [9] The motion's judge nevertheless arrived at the correct conclusion on the issue of whether damages had been suffered in Quebec. The loss of the deposit undoubtedly was recorded on the books of [the Respondent] in Quebec, but the situs of the loss is where the money is for the purchase -- in the United Kingdom, or, according to the purchase order, where it is deemed to be located -- in Tianjin, China, where the goods were to be shipped FOB by [the Appellant's] supplier. In any event the payment would be deemed as a matter of Quebec civil law to be made at the place of delivery in the case of a sale -- article 1734 C.C.Q. -- and not the place of payment in the domicile of the debtor as if there were no sale -- article 1566 C.C.Q. [Références omises]

42 *Green Planet, supra*, note 13, paragr. 10-11.

43 *Federal Corporation, supra*, note 23.

44 *Id.*, paragr. 43.

45 *Syndicat canadien de la fonction publique c. Syndicat canadien des communications, de l'énergie et du papier, section locale 2013 (SCEP)*, *2015 QCCA 1392*.

46 *Transat Tours Canada Inc. c. Tescor, S.A. de C.V.*, *2005 CanLII 32136*, paragr. 33-34, 37-38 et 40 (C.S.), cette conclusion a été confirmée en appel, bien que l'appel ait été accueilli pour d'autres motifs, *Transat Tours Canada inc. c. Impulsora Turistica de Occidente, s.a. de c.v.*, *2006 QCCA 413*, paragr. 38, appel à la Cour suprême rejeté, *Impulsora Turistica de Occidente, S.A. de C.V. c. Transat Tours Canada Inc.*, *2007 CSC 20*, *[2007] 1 R.C.S. 867*.

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Google Inc. v. Equustek Solutions Inc.

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

Heard: December 6, 2016;

Judgment: June 28, 2017.

File No.: 36602.

[2017] 1 S.C.R. 824 | *[2017] 1 R.C.S. 824* | *[2017] S.C.J. No. 34* | *[2017] A.C.S. no 34* | *2017 SCC 34*

Google Inc. Appellant; v. Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. Respondents, and Attorney General of Canada, Attorney General of Ontario, Canadian Civil Liberties Association, OpenMedia Engagement Network, Reporters Committee for Freedom of the Press, American Society of News Editors, Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., First Amendment Coalition, First Look Media Works, Inc., New England First Amendment Coalition, News Media Alliance (formerly known as Newspaper Association of America), AOL Inc., California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, Online News Association, Society of Professional Journalists, Human Rights Watch, ARTICLE 19, Open Net (Korea), Software Freedom Law Centre, Center for Technology and Society, Wikimedia Foundation, British Columbia Civil Liberties Association, Electronic Frontier Foundation, International Federation of the Phonographic Industry, Music Canada, Canadian Publishers' Council, Association of Canadian Publishers, International Confederation of Societies of Authors and Composers, International Confederation of Music Publishers, Worldwide Independent Network [page825] and International Federation of Film Producers Associations Interveners

(82 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Case Summary

Catchwords:

Injunctions — Interlocutory injunction — Non-party — Technology company bringing action against distributor for unlawful use and sale of its intellectual property through Internet — Company granted interlocutory injunction against Google, a non-party to underlying action, to cease indexing or referencing certain search results on its Internet search engine — Whether Google can be ordered, pending trial of action, to globally de-index websites of distributor which, in breach of several court orders, is using those websites to unlawfully sell intellectual property of another company — Whether Supreme Court of British Columbia had jurisdiction to grant injunction with extraterritorial effect — Whether, if it did, it was just and equitable to do so.

Summary:

E is a small technology company in British Columbia that launched an action against D. E claimed that D, while acting as a distributor of E's products, began to re-label one of the products and pass it off as its own. D also acquired confidential information and trade secrets belonging to E, using them to design and manufacture a

competing product. D filed statements of defence disputing E's claims, but eventually abandoned the proceedings and left the province. Some of D's statements of defence were subsequently struck.

Despite court orders prohibiting the sale of inventory and the use of E's intellectual property, D continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all [page826] over the world. E approached Google and requested that it de-index D's websites. Google refused. E then brought court proceedings, seeking an order requiring Google to do so. Google asked E to obtain a court order prohibiting D from carrying on business on the Internet saying it would comply with such an order by removing specific webpages.

An injunction was issued by the Supreme Court of British Columbia ordering D to cease operating or carrying on business through any website. Between December 2012 and January 2013, Google advised E that it had de-indexed 345 specific webpages associated with D. It did not, however, de-index all of D's websites. De-indexing webpages but not entire websites proved to be ineffective since D simply moved the objectionable content to new pages within its websites, circumventing the court orders. Moreover, Google had limited the de-indexing to searches conducted on google.ca. E therefore obtained an interlocutory injunction to enjoin Google from displaying any part of D's websites on any of its search results worldwide. The Court of Appeal for British Columbia dismissed Google's appeal.

Held (Côté and Rowe JJ. dissenting): The appeal is dismissed and the worldwide interlocutory injunction against Google is upheld.

Per McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. The issue is whether Google can be ordered, pending a trial, to globally de-index D's websites which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company.

The decision to grant an interlocutory injunction is a discretionary one and entitled to a high degree of deference. Interlocutory injunctions are equitable remedies that seek to ensure that the subject matter of the litigation will be preserved so that effective relief will be available when the case is ultimately heard on the merits. Their character as "interlocutory" is not dependent on their duration pending trial. Ultimately, the question is whether granting the injunction is just and equitable in the circumstances of the case.

The test for determining whether the court should exercise its discretion to grant an interlocutory injunction against Google has been met in this case: there is a serious [page827] issue to be tried; E is suffering irreparable harm as a result of D's ongoing sale of its competing product through the Internet; and the balance of convenience is in favour of granting the order sought.

Google does not dispute that there is a serious claim, or that E is suffering irreparable harm which it is inadvertently facilitating through its search engine. Nor does it suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing D's websites. Its arguments are that the injunction is not necessary to prevent irreparable harm to E and is not effective; that as a non-party it should be immune from the injunction; that there is no necessity for the extraterritorial reach of the order; and that there are freedom of expression concerns that should have tipped the balance against granting the order.

Injunctive relief can be ordered against someone who is not a party to the underlying lawsuit. When non-parties are so involved in the wrongful acts of others that they facilitate the harm, even if they themselves are not guilty of wrongdoing, they can be subject to interlocutory injunctions. It is common ground that D was unable to carry on business in a commercially viable way without its websites appearing on Google. The injunction in this case flows from the necessity of Google's assistance to prevent the facilitation of D's ability to defy court orders and do irreparable harm to E. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

Where it is necessary to ensure the injunction's effectiveness, a court can grant an injunction enjoining conduct anywhere in the world. The problem in this case is occurring online and globally. The Internet has no borders -- its

natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates -- globally. If the injunction were restricted to Canada alone or to google.ca, the remedy would be deprived of its intended ability to prevent irreparable harm, since purchasers outside Canada could easily continue purchasing from D's websites, and Canadian purchasers could find D's websites even if those websites were de-indexed on google.ca.

Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating [page828] the laws of that jurisdiction, is theoretical. If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application. In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it is not equitable to deny E the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible.

D and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. E has made efforts to locate D with limited success. D is only able to survive -- at the expense of E's survival -- on Google's search engine which directs potential customers to D's websites. This makes Google the determinative player in allowing the harm to occur. On balance, since the world-wide injunction is the only effective way to mitigate the harm to E pending the trial, the only way, in fact, to preserve E itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

Per Côté and Rowe JJ. (dissenting): While the court had jurisdiction to issue the injunctive order against Google, it should have refrained from doing so. Numerous factors affecting the grant of an injunction strongly favour judicial restraint in this case.

First, the Google Order in effect amounts to a final determination of the action because it removes any potential benefit from proceeding to trial. In its original underlying claim, E sought injunctions modifying the way D carries out its website business. E has been given more injunctive relief than it sought in its originating claim, including requiring D to cease website business altogether. Little incentive remains for E to return to court to seek a lesser injunctive remedy. This is evidenced by E's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so. The Google Order provides E with more equitable relief than it sought [page829] against D and gives E an additional remedy that is final in nature. The order against Google, while interlocutory in form, is final in effect. The test for interlocutory injunctions does not apply to an order that is effectively final. In these circumstances, an extensive review of the merits of this case was therefore required but was not carried out by the court below, contrary to caselaw. The Google Order does not meet the test for a permanent injunction. Although E's claims were supported by a good *prima facie* case, it was not established that D designed and sold counterfeit versions of E's product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

Second, Google is a non-party to the proceedings between E and D. E alleged that Google's search engine was facilitating D's ongoing breach by leading customers to D's websites. However, the prior order that required D to cease carrying on business through any website was breached as soon as D established a website to conduct its business, regardless of how visible that website might be through Google searches. Google did not aid or abet the doing of the prohibited act.

Third, the Google Order is mandatory and requires ongoing modification and supervision because D is launching new websites to replace de-listed ones. Courts should avoid granting injunctions that require such cumbersome court-supervised updating.

Furthermore, the Google Order has not been shown to be effective in making D cease operating or carrying on business through any website. Moreover, the Google Order does not assist E in modifying D's websites, as E

sought in its originating claim for injunctive relief. The most that can be said is the Google Order might reduce the harm to E. But it has not been shown that the Google Order is effective in doing so. D's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. D's websites are open for business on the Internet whether Google searches list them or not.

[page830]

Finally, there are alternative remedies available to E. E sought a world-wide *Mareva* injunction to freeze D's assets in France, but the Court of Appeal for British Columbia urged E to pursue a remedy in French courts. There is no reason why E cannot do what the Court of Appeal urged it to do. E could also pursue injunctive relief against the ISP providers. In addition, E could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites. Therefore, the Google Order ought not to have been granted.

Cases Cited

By Abella J.

Applied:

RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; **considered:** *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133; *Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509; **referred to:** *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110; *Seaward v. Paterson*, [1897] 1 Ch. 545; *York University v. Bell Canada Enterprises* (2009), 311 D.L.R. (4th) 755; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2016] EWCA Civ 658, [2017] 1 All E.R. 700; *Warner-Lambert Co. v. Actavis Group PTC EHF*, [2015] EWHC 485 (Pat.), 144 B.M.L.R. 194; *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, 2007 SCC 20, [2007] 1 S.C.R. 867; *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318; *Babanaft International Co. S.A. v. Bassatne*, [1990] 1 Ch. 13; *Republic of Haiti v. Duvalier*, [1990] 1 Q.B. 202; *Derby & Co. v. Weldon*, [1990] 1 Ch. 48; *Derby & Co. v. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65.

By Côté and Rowe JJ. (dissenting)

RJR -- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; *Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087; *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536; *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949; *Mercedes Benz A.G. v. Leiduck*, [1996] 1 A.C. 284; *John Deere Ltd. v. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641; *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698; *Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680; *McIsaac v. Healthy Body [page831] Services Inc.*, 2009 BCSC 1716; *Plouffe v. Roy*, 2007 CanLII 37693; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140; *1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643; *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048; *Seaward v. Paterson*, [1897] 1 Ch. 545; *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676; *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133; *National Commercial Bank of Jamaica Ltd. v. Olint Corp.*, [2009] 1 W.L.R. 1405; *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652; *Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1; *Attorney General v. Observer Ltd.*, [1990] 1 A.C. 109.

Statutes and Regulations Cited

Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2680 (1998).

Law and Equity Act, R.S.B.C. 1979, c. 224, s. 36.

Law and Equity Act, *R.S.B.C. 1996, c. 253, s. 39*(1).

Authors Cited

Bean, David, Andrew Burns and Isabel Parry. *Injunctions*, 11th ed. London: Sweet & Maxwell, 2012.

Berryman, Jeffrey. *The Law of Equitable Remedies*, 2nd ed. Toronto: Irwin Law, 2013.

Black, Vaughan, and Edward Babin. "Mareva Injunctions in Canada: Territorial Aspects" (1997), 28 *Can. Bus. L.J.* 430.

Fraser, Peter G., John W. Horn and Susan A. Griffin. *The Conduct of Civil Litigation in British Columbia*, 2nd ed. Markham, Ont.: LexisNexis, 2007 (loose-leaf updated December 2016, release 24).

Pitel, Stephen G. A., and Andrew Valentine. "The Evolution of the Extra-territorial *Mareva* Injunction in Canada: Three Issues" (2006), 2 *J. Priv. Int'l L.* 339.

Riordan, Jaani. *The Liability of Internet Intermediaries*. Oxford: Oxford University Press, 2016.

Sharpe, Robert J. *Injunctions and Specific Performance*, loose-leaf ed. Toronto: Canada Law Book, 1992 (updated November 2016, release 25).

Spry, I. C. F. *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 9th ed. Pyrmont, N.S.W.: Lawbook, 2014.

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (Frankel, Groberman and Harris JJ.A.), *2015 BCCA 265*, *75 B.C.L.R. (5th) 315*, *373 B.C.A.C. 240*, 641 W.A.C. 240, *39 B.L.R. (5th) 175*, *71 C.P.C. (7th) 215*, *135 C.P.R. (4th) 173*, *386 D.L.R. (4th) 224*, *[2015] 11 W.W.R. 45*, *[2015] B.C.J. No. 1193* (QL), [page832] *2015 CarswellBC 1590* (WL Can.), affirming a decision of Fenlon J., *2014 BCSC 1063*, *63 B.C.L.R. (5th) 145*, 28 B.L.R. (5th) 265, *374 D.L.R. (4th) 537*, *[2014] 10 W.W.R. 652*, *[2014] B.C.J. No. 1190* (QL), *2014 CarswellBC 1694* (WL Can.), granting an interlocutory injunction against Google. Appeal dismissed, Côté and Rowe JJ. dissenting.

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Written submissions only by *Paul Schabas* and *Kaley Pulfer*, for the interveners Human Rights Watch, ARTICLE 19, Open Net (Korea), the Software Freedom Law Centre and the Center for Technology and Society.

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Written submissions only by *David T. S. Fraser* and *Jane O'Neill*, for the intervener the Wikimedia Foundation.

Justin Safayeni and *Carlo Di Carlo*, for the intervener the British Columbia Civil Liberties Association.

David Wotherspoon and *Daniel Byma*, for the intervener the Electronic Frontier Foundation.

Barry B. Sookman, *Dan Glover* and *Miranda Lam*, for the interveners the International Federation of the Phonographic Industry, Music Canada, the Canadian Publishers' Council, the Association of Canadian Publishers, the International Confederation of Societies of Authors and Composers, the International Confederation of Music Publishers and the Worldwide Independent Network.

Gavin MacKenzie and *Brooke MacKenzie*, for the intervener the International Federation of Film Producers Associations.

The judgment of McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon and Brown JJ. was delivered by

ABELLA J.

1 The issue in this appeal is whether Google can be ordered, pending a trial, to globally de-index the websites of a company which, in breach of several court orders, is using those websites to unlawfully sell the intellectual property of another company. The answer turns on classic interlocutory injunction jurisprudence: is there a serious issue to be tried; would irreparable harm result if the injunction were not granted; and does the balance of convenience favour granting or refusing the injunction. Ultimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case.

[page834]

Background

2 Equustek Solutions Inc. is a small technology company in British Columbia. It manufactures networking devices that allow complex industrial equipment made by one manufacturer to communicate with complex industrial equipment made by another manufacturer.

3 The underlying action between Equustek and the Datalink defendants (Morgan Jack, Datalink Technology

Gateways Inc., and Datalink Technologies Gateways LLC - "Datalink") was launched by Equustek on April 12, 2011. It claimed that Datalink, while acting as a distributor of Equustek's products, began to re-label one of the products and pass it off as its own. Datalink also acquired confidential information and trade secrets belonging to Equustek, using them to design and manufacture a competing product, the GW1000. Any orders for Equustek's product were filled with the GW1000. When Equustek discovered this in 2011, it terminated the distribution agreement it had with Datalink and demanded that Datalink delete all references to Equustek's products and trademarks on its websites.

4 The Datalink defendants filed statements of defence disputing Equustek's claims.

5 On September 23, 2011, Leask J. granted an injunction ordering Datalink to return to Equustek any source codes, board schematics, and any other documentation it may have had in its possession that belonged to Equustek. The court also prohibited Datalink from referring to Equustek or any of Equustek's products on its websites. It ordered Datalink to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek products and directing customers interested in Equustek's products to Equustek's website. In addition, Datalink was ordered to give Equustek a list of customers who had ordered an Equustek product from Datalink.

6 On March 21, 2012, Fenlon J. found that Datalink had not properly complied with this order [page835] and directed it to produce a new customer list and make certain changes to the notices on their websites.

7 Datalink abandoned the proceedings and left the jurisdiction without producing any documents or complying with any of the orders. Some of Datalink's statements of defence were subsequently struck.

8 On July 26, 2012, Punnett J. granted a *Mareva* injunction freezing Datalink's worldwide assets, including its entire product inventory. He found that Datalink had incorporated "a myriad of shell corporations in different jurisdictions", continued to sell the impugned product, reduced prices to attract more customers, and was offering additional services that Equustek claimed disclosed more of its trade secrets. He concluded that Equustek would suffer irreparable harm if the injunction were not granted, and that, on the balance of convenience and due to a real risk of the dissipation of assets, it was just and equitable to grant the injunction against Datalink.

9 On August 3, 2012, Fenlon J. granted another interlocutory injunction prohibiting Datalink from dealing with broader classes of intellectual property, including "any use of whole categories of documents and information that lie at the heart of any business of a kind engaged in by both parties". She noted that Equustek's "earnings ha[d] fallen drastically since [Datalink] began [its] impugned activities" and concluded that "the effect of permitting [Datalink] to carry on [its] business [would] also cause irreparable harm to [Equustek]".

10 On September 26, 2012, Equustek brought an application to have Datalink and its principal, Morgan Jack, found in contempt. No one appeared on behalf of Datalink. Groves J. issued a warrant for Morgan Jack's arrest. It remains outstanding.

[page836]

11 Despite the court orders prohibiting the sale of inventory and the use of Equustek's intellectual property, Datalink continues to carry on its business from an unknown location, selling its impugned product on its websites to customers all over the world.

12 Not knowing where Datalink or its suppliers were, and finding itself unable to have the websites removed by the websites' hosting companies, Equustek approached Google in September 2012 and requested that it de-index the Datalink websites. Google refused. Equustek then brought court proceedings seeking an order requiring Google to do so.

13 When it was served with the application materials, Google asked Equustek to obtain a court order prohibiting

Datalink from carrying on business on the Internet. Google told Equustek it would comply with such an order by removing specific webpages. Pursuant to its internal policy, Google only voluntarily de-indexes individual webpages, not entire websites. Equustek agreed to try this approach.

14 On December 13, 2012, Equustek appeared in court with Google. An injunction was issued by Tindale J. ordering Datalink to "cease operating or carrying on business through any website". Between December 2012 and January 2013, Google advised Equustek that it had de-indexed 345 specific webpages associated with Datalink. It did not, however, de-index *all* of the Datalink websites.

15 Equustek soon discovered that de-indexing webpages but not entire websites was ineffective since Datalink simply moved the objectionable content to new pages within its websites, circumventing the court orders.

16 Google had limited the de-indexing to those searches that were conducted on google.ca. Google's search engine operates through dedicated websites all over the world. The Internet search services are [page837] free, but Google earns money by selling advertising space on the webpages that display search results. Internet users with Canadian Internet Protocol addresses are directed to "google.ca" when performing online searches. But users can also access different Google websites directed at other countries by using the specific Uniform Resource Locator, or URL, for those sites. That means that someone in Vancouver, for example, can access the Google search engine as though he or she were in another country simply by typing in that country's Google URL. Potential Canadian customers could, as a result, find Datalink's websites even if they were blocked on google.ca. Given that the majority of the sales of Datalink's GW1000 were to purchasers outside of Canada, Google's de-indexing did not have the necessary protective effect.

17 Equustek therefore sought an interlocutory injunction to enjoin Google from displaying any part of the Datalink websites on any of its search results worldwide. Fenlon J. granted the order (*374 D.L.R. (4th) 537* (B.C.S.C.)). The operative part states:

> Within 14 days of the date of this order, Google Inc. is to cease indexing or referencing in search results on its internet search engines the [Datalink] websites ..., including all of the subpages and subdirectories of the listed websites, *until the conclusion of the trial of this action or further order of this court*. [Emphasis added.]

18 Fenlon J. noted that Google controls between 70-75 percent of the global searches on the Internet and that Datalink's ability to sell its counterfeit product is, in large part, contingent on customers being able to locate its websites through the use of Google's search engine. Only by preventing potential customers from accessing the Datalink websites, could Equustek be protected. Otherwise, Datalink would be able to continue selling its product online and the damages Equustek would suffer would not be recoverable at the end of the lawsuit. [page838]

19 Fenlon J. concluded that this irreparable harm was being facilitated through Google's search engine; that Equustek had no alternative but to require Google to de-index the websites; that Google would not be inconvenienced; and that, for the order to be effective, the Datalink websites had to be prevented from being displayed on all of Google's search results, not just google.ca. As she said:

> On the record before me it appears that to be effective, even within Canada, Google must block search results on all of its websites. Furthermore, [Datalink's] sales originate primarily in other countries, so the Court's process cannot be protected unless the injunction ensures that searchers from any jurisdiction do not find [Datalink's] websites.[1]

20 The Court of Appeal of British Columbia dismissed Google's appeal (*386 D.L.R. (4th) 224*). Groberman J.A. accepted Fenlon J.'s conclusion that she had *in personam* jurisdiction over Google and could therefore make an order with extraterritorial effect. He also agreed that courts of inherent jurisdiction could grant equitable relief against non-parties. Since ordering an interlocutory injunction against Google was the only practical way to prevent Datalink from flouting the court's several orders, and since there were no identifiable countervailing comity or

freedom of expression concerns that would prevent such an order from being granted, he upheld the interlocutory injunction.

21 For the following reasons, I agree with Fenlon J. and Groberman J.A. that the test for granting an interlocutory injunction against Google has been met in this case.

Analysis

22 The decision to grant an interlocutory injunction is a discretionary one and entitled to a high [page839] degree of deference (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at pp. 155-56). In this case, I see no reason to interfere.

23 Injunctions are equitable remedies. "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited" (Ian Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333). Robert Sharpe notes that "[t]he injunction is a flexible and drastic remedy. Injunctions are not restricted to any area of substantive law and are readily enforceable through the court's contempt power" (*Injunctions and Specific Performance* (loose-leaf ed.), at para. 2.10).

24 An interlocutory injunction is normally enforceable until trial or some other determination of the action. Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits (Jeffrey Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 24-25). Their character as "interlocutory" is not dependent on their duration pending trial.

25 *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific.

26 Google does not dispute that there is a serious claim. Nor does it dispute that Equustek is suffering irreparable harm as a result of Datalink's ongoing [page840] sale of the GW1000 through the Internet. And it acknowledges, as Fenlon J. found, that it inadvertently facilitates the harm through its search engine which leads purchasers directly to the Datalink websites.

27 Google argues, however, that the injunction issued against it is not necessary to prevent that irreparable harm, and that it is not effective in so doing. Moreover, it argues that as a non-party, it should be immune from the injunction. As for the balance of convenience, it challenges the propriety and necessity of the extraterritorial reach of such an order, and raises freedom of expression concerns that it says should have tipped the balance against granting the order. These arguments go both to whether the Supreme Court of British Columbia had jurisdiction to grant the injunction and whether, if it did, it was just and equitable to do so in this case.

28 Google's first argument is, in essence, that non-parties cannot be the subject of an interlocutory injunction. With respect, this is contrary to the jurisprudence. Not only can injunctive relief be ordered against someone who is not a party to the underlying lawsuit, the contours of the test are not changed. As this Court said in *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, injunctions may be issued "in all cases in which it appears to the court to be just or convenient that the order should be made ... on terms and conditions the court thinks just" (para. 15, citing s. 36 of the *Law and Equity Act*, R.S.B.C. 1979, c. 224). *MacMillan Bloedel* involved a logging company seeking to restrain protesters from blocking roads. The company obtained an interlocutory injunction prohibiting not only specifically named individuals, but also "John Doe, Jane Doe and Persons Unknown" and "all persons having notice of th[e] Order" from engaging in conduct which interfered with its operations at specific locations (para. 5). In

upholding the injunction, McLachlin J. noted that

[page841]

> [i]t may be confidently asserted ... *that both English and Canadian authorities support the view that non-parties are bound by injunctions*: if non-parties violate injunctions, they are subject to conviction and punishment for contempt of court. The courts have jurisdiction to grant interim injunctions which all people, on pain of contempt, must obey. [Emphasis added; para. 31.]

See also Berryman, at pp. 57-60; Sharpe, at paras. 6.260 to 6.265.

29 In other words, where a non-party violates a court order, there is a principled basis for treating the non-party as if it had been bound by the order. The non-party's obligation arises "not because [it] is bound by the injunction by being a party to the cause, but because [it] is conducting [itself] so as to obstruct the course of justice" (*MacMillan Bloedel*, at para. 27, quoting *Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.), at p. 555).

30 The pragmatism and necessity of such an approach was concisely explained by Fenlon J. in the case before us when she offered the following example:

> ... a non-party corporation that warehouses and ships goods for a defendant manufacturing company might be ordered on an interim injunction to freeze the defendants' goods and refrain from shipping them. That injunction could affect orders received from customers around the world. Could it sensibly be argued that the Court could not grant the injunction because it would have effects worldwide? The impact of an injunction on strangers to the suit or the order itself is a valid consideration in deciding whether to exercise the Court's jurisdiction to grant an injunction. It does not, however, affect the Court's authority to make such an order.[2]

31 *Norwich* orders are analogous and can also be used to compel non-parties to disclose information or documents in their possession required by a claimant (*Norwich Pharmacal Co. v. Customs and [page842] Excise Commissioners*, [1974] A.C. 133 (H.L.), at p. 175). *Norwich* orders have increasingly been used in the online context by plaintiffs who allege that they are being anonymously defamed or defrauded and seek orders against Internet service providers to disclose the identity of the perpetrator (*York University v. Bell Canada Enterprises* *(2009), 311 D.L.R. (4th) 755* (Ont. S.C.J.)). *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm. In *Norwich*, this was characterized as a duty to assist the person wronged (p. 175; *Cartier International AG v. British Sky Broadcasting Ltd*., [2017] 1 All E.R. 700 (C.A.), at para. 53). *Norwich* supplies a principled rationale for granting injunctions against non-parties who facilitate wrongdoing (see *Cartier*, at paras. 51-55; and *Warner-Lambert Co. v. Actavis Group PTC EHF*, 144 B.M.L.R. 194 (Ch.)).

32 This approach was applied in *Cartier*, where the Court of Appeal of England and Wales held that injunctive relief could be awarded against five non-party Internet service providers who had not engaged in, and were not accused of any wrongful act. The Internet service providers were ordered to block the ability of their customers to access certain websites in order to avoid facilitating infringements of the plaintiff's trademarks. (See also Jaani Riordan, *The Liability of Internet Intermediaries* (2016), at pp. 412 and 498-99.)

33 The same logic underlies *Mareva* injunctions, which can also be issued against non-parties. *Mareva* injunctions are used to freeze assets in order to prevent their dissipation pending the conclusion of a trial or action (*Mareva Compania Naviera S.A. v. International Bulkcarriers S.A.*, [1975] 2 Lloyd's Rep. 509 (C.A.); *Aetna Financial Services Ltd. v. Feigelman*, *[1985] 1 S.C.R. 2*). A *Mareva* injunction that requires a defendant not to dissipate his or her assets sometimes requires the assistance of a non-party, which in turn can result in an injunction against the non-party if it is just and equitable to do so (Stephen Pitel and Andrew Valentine, "The Evolution of the [page843] Extra-territorial *Mareva* Injunction in Canada: Three Issues" (2006), 2 *J. Priv. Int'l L.* 339, at p. 370; Vaughan Black and Edward Babin, "Mareva Injunctions in Canada: Territorial Aspects" (1997), 28 *Can. Bus. L.J.* 430, at pp. 452-

53; Berryman, at pp. 128-31). Banks and other financial institutions have, as a result, been bound by *Mareva* injunctions even when they are not a party to an underlying action.

34 To preserve Equustek's rights pending the outcome of the litigation, Tindale J.'s order of December 13, 2012 required Datalink to cease carrying on business through the Internet. Google had requested and participated in Equustek's obtaining this order, and offered to comply with it voluntarily. It is common ground that Datalink was unable to carry on business in a commercially viable way unless its websites were in Google's search results. In the absence of de-indexing these websites, as Fenlon J. specifically found, Google was facilitating Datalink's breach of Tindale J.'s order by enabling it to continue carrying on business through the Internet. By the time Fenlon J. granted the injunction against Google, Google was aware that in not de-indexing Datalink's websites, it was facilitating Datalink's ongoing breach of Tindale J.'s order, the purpose of which was to prevent irreparable harm to Equustek.

35 Much like a *Norwich* order or a *Mareva* injunction against a non-party, the interlocutory injunction in this case flows from the necessity of Google's assistance in order to prevent the facilitation of Datalink's ability to defy court orders and do irreparable harm to Equustek. Without the injunctive relief, it was clear that Google would continue to facilitate that ongoing harm.

36 Google's next argument is the impropriety of issuing an interlocutory injunction with extraterritorial effect. But this too contradicts the existing jurisprudence.

[page844]

37 The British Columbia courts in these proceedings concluded that because Google carried on business in the province through its advertising and search operations, this was sufficient to establish the existence of *in personam* and territorial jurisdiction. Google does not challenge those findings. It challenges instead the global reach of the resulting order. Google suggests that if any injunction is to be granted, it should be limited to Canada (or google.ca) alone.

38 When a court has *in personam* jurisdiction, and where it is necessary to ensure the injunction's effectiveness, it can grant an injunction enjoining that person's conduct anywhere in the world. (See *Impulsora Turistica de Occidente, S.A. de C.V. v. Transat Tours Canada Inc.*, *[2007] 1 S.C.R. 867*, at para. 6; Berryman, at p. 20; Pitel and Valentine, at p. 389; Sharpe, at para. 1.1190; Spry, at p. 37.) *Mareva* injunctions have been granted with worldwide effect when it was found to be necessary to ensure their effectiveness. (See *Mooney v. Orr (1994), 98 B.C.L.R. (2d) 318* (S.C.); Berryman, at pp. 20 and 136; *Babanaft International Co. S.A. v. Bassatne*, [1990] 1 Ch. 13 (C.A.); *Republic of Haiti v. Duvalier*, [1990] 1 Q.B. 202 (C.A.); *Derby & Co. v. Weldon*, [1990] 1 Ch. 48 (C.A.); and *Derby & Co. v. Weldon (Nos. 3 and 4)*, [1990] 1 Ch. 65 (C.A.); Sharpe, at paras. 1.1190 to 1.1220.)

39 Groberman J.A. pointed to the international support for this approach:

> I note that the courts of many other jurisdictions have found it necessary, in the context of orders against Internet abuses, to pronounce orders that have international effects. Several such cases are cited in the arguments of [International Federation of Film Producers Associations and International Federation of the Phonographic Industry], including *APC v. Auchan Telecom*, 11/60013, Judgment (28 November 2013) (Tribunal de Grande Instance de Paris); *McKeogh v. Doe* (Irish High Court, case no. 20121254P); *Mosley v. Google*, 11/07970, Judgment (6 November 2013) (Tribunal de Grande Instance de Paris); *Max Mosley v. Google* (see "Case Law, Hamburg District Court: *Max Mosley v. Google Inc.* online: Inform's Blog https: //inforrm.wordpress.com/2014/02/05/case-law-hamburg-district-court-max-mosley-v-google-inc- google-go-down-again-this-time-in-hamburg-dominic-crossley/) [page845] and *ECJ Google Spain SL, Google Inc. v. Agencia Espanola de Protección de Datos, Mario Costeja González*, C-131/12 [2014], CURIA.[3]

40 Fenlon J. explained why Equustek's request that the order have worldwide effect was necessary as follows:

> The majority of GW1000 sales occur outside Canada. Thus, quite apart from the practical problem of endless website iterations, the option Google proposes is not equivalent to the order now sought which would compel Google to remove the [Datalink] websites from all search results generated by any of Google's websites worldwide. I therefore conclude that [Equustek does] not have an out-of-court remedy available to [it].[4]
>
> . . .
>
> ... to be effective, even within Canada, Google must block search results on all of its websites.[5]

As a result, to ensure that Google did not facilitate Datalink's breach of court orders whose purposes were to prevent irreparable harm to Equustek, she concluded that the injunction had to have worldwide effect.

41 I agree. The problem in this case is occurring online and globally. The Internet has no borders - its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates - globally. As Fenlon J. found, the majority of Datalink's sales take place outside Canada. If the injunction were restricted to Canada alone or to google.ca, as Google suggests it should have been, the remedy would be deprived of its intended ability to prevent [page846] irreparable harm. Purchasers outside Canada could easily continue purchasing from Datalink's websites, and Canadian purchasers could easily find Datalink's websites even if those websites were de-indexed on google.ca. Google would still be facilitating Datalink's breach of the court's order which had prohibited it from carrying on business on the Internet. There is no equity in ordering an interlocutory injunction which has no realistic prospect of preventing irreparable harm.

42 The interlocutory injunction in this case is necessary to prevent the irreparable harm that flows from Datalink carrying on business on the Internet, a business which would be commercially impossible without Google's facilitation. The order targets Datalink's websites - the list of which has been updated as Datalink has sought to thwart the injunction - and prevents them from being displayed where they do the most harm: on Google's global search results.

43 Nor does the injunction's worldwide effect tip the balance of convenience in Google's favour. The order does not require that Google take any steps around the world, it requires it to take steps only where its search engine is controlled. This is something Google has acknowledged it can do - and does - with relative ease. There is therefore no harm to Google which can be placed on its "inconvenience" scale arising from the global reach of the order.

44 Google's argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical. As Fenlon J. noted, "Google acknowledges that most countries will [page847] likely recognize intellectual property rights and view the selling of pirated products as a legal wrong".[6]

45 And while it is always important to pay respectful attention to freedom of expression concerns, particularly when dealing with the core values of another country, I do not see freedom of expression issues being engaged in any way that tips the balance of convenience towards Google in this case. As Groberman J.A. concluded:

> In the case before us, there is no realistic assertion that the judge's order will offend the sensibilities of any other nation. It has not been suggested that the order prohibiting the defendants from advertising wares that violate the intellectual property rights of the plaintiffs offends the core values of any nation. The order made against Google is a very limited ancillary order designed to ensure that the plaintiffs' core rights are respected.
>
> ... the order in this case is an interlocutory one, and one that can be varied by the court. In the unlikely event that any jurisdiction finds the order offensive to its core values, an application could be made to the court to modify the order so as to avoid the problem.[7]

46 If Google has evidence that complying with such an injunction would require it to violate the laws of another

jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.

47 In the absence of an evidentiary foundation, and given Google's right to seek a rectifying order, it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally [page848] permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google.

48 This is not an order to remove speech that, on its face, engages freedom of expression values, it is an order to de-index websites that are in violation of several court orders. We have not, to date, accepted that freedom of expression requires the facilitation of the unlawful sale of goods.

49 And I have trouble seeing how this interferes with what Google refers to as its content neutral character. The injunction does not require Google to monitor content on the Internet, nor is it a finding of any sort of liability against Google for facilitating access to the impugned websites. As for the balance of convenience, the only obligation the interlocutory injunction creates is for Google to de-index the Datalink websites. The order is, as Fenlon J. observed, "only a slight expansion on the removal of individual URLs, which Google agreed to do voluntarily".[8] Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google's facilitating Datalink's breach of court orders.

50 Google did not suggest that it would be inconvenienced in any material way, or would incur any significant expense, in de-indexing the Datalink websites. It acknowledges, fairly, that it can, and often does, exactly what is being asked of it in this case, that is, alter search results. It does so to avoid generating links to child pornography and websites containing "hate speech". It also complies with notices it receives under the US *Digital Millennium [page849] Copyright Act*, Pub. L. No. 105-304, 112 Stat. 2680 (1998), to de-index content from its search results that allegedly infringes copyright, and removes websites that are subject to court orders.

51 As for the argument that this will turn into a permanent injunction, the length of an interlocutory injunction does not, by itself, convert its character from a temporary to a permanent one. As previously noted, the order requires that the injunction be in place "until the conclusion of the trial of this action or further order of this court". There is no reason not to take this order at face value. Where an interlocutory injunction has been in place for an inordinate amount of time, it is always open to a party to apply to have it varied or vacated. Google has brought no such application.

52 Datalink and its representatives have ignored all previous court orders made against them, have left British Columbia, and continue to operate their business from unknown locations outside Canada. Equustek has made efforts to locate Datalink with limited success. Datalink is only able to survive - at the expense of Equustek's survival - on Google's search engine which directs potential customers to its websites. In other words, Google is how Datalink has been able to continue harming Equustek in defiance of several court orders.

53 This does not make Google liable for this harm. It does, however, make Google the determinative player in allowing the harm to occur. On balance, therefore, since the interlocutory injunction is the only effective way to mitigate the harm to Equustek pending the resolution of the underlying litigation, the only way, in fact, to preserve Equustek itself pending the resolution of the underlying litigation, and since any countervailing harm to Google is minimal to non-existent, the interlocutory injunction should be upheld.

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54 I would dismiss the appeal with costs in this Court and in the Court of Appeal for British Columbia.

The following are the reasons delivered by

CÔTÉ AND ROWE JJ. (dissenting)

55 Equustek Solutions Inc., Robert Angus and Clarma Enterprises Inc. ("Equustek") seek a novel form of equitable relief an effectively permanent injunction, against an innocent third party, that requires court supervision, has not been shown to be effective, and for which alternative remedies are available. Our response calls for judicial restraint. While the court had jurisdiction to issue the June 13, 2014 order against Google Inc. ("Google Order") (*2014 BCSC 1063*, *374 D.L.R. (4th) 537*, per Fenlon J.), in our view, it should have refrained from doing so. The authority to grant equitable remedies has always been constrained by doctrine and practice. In our view, the Google Order slipped too easily from these constraints.

56 As we will explain, the Google Order is effectively final redress against a non-party that has neither acted unlawfully, nor aided and abetted illegal action. The test for interlocutory injunctions established in *RJR MacDonald Inc. v. Canada (Attorney General)*, *[1994] 1 S.C.R. 311*, does not apply to an order that is effectively final, and the test for a permanent injunction has not been satisfied. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and there are alternative remedies available to Equustek.

I. Judicial Restraint

57 The power of a court to grant injunctive relief is derived from that of the Chancery courts of England (*Fourie v. Le Roux*, [2007] UKHL 1, [2007] 1 All E.R. 1087, at para. 30), and has been confirmed [page851] in British Columbia by the *Law and Equity Act*, *R.S.B.C. 1996, c. 253, s. 39*(1):

> **39** (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

58 In *Fourie*, Lord Scott explained that "provided the court has in personam jurisdiction over the person against whom an injunction, whether interlocutory or final, is sought, the court has jurisdiction, in the strict sense, to grant it" (para. 30). However, simply because a court has the jurisdiction to grant an injunction does not mean that it should. A court "will not according to its settled practice do so except in a certain way and under certain circumstances" (Lord Scott, at para. 25, quoting from *Guaranty Trust Co. of New York v. Hannay & Co.*, [1915] 2 K.B. 536, at p. 563; see also *Cartier International AG v. British Sky Broadcasting Ltd.*, [2014] EWHC 3354 (Ch.), [2015] 1 All E.R. 949, at paras. 98-100). Professor Spry comes to similar conclusions (I. C. F. Spry, *The Principles of Equitable Remedies* (9th ed. 2014), at p. 333):

> The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. [Footnote omitted.]

59 The importance of appropriately modifying judicial restraint to meet the needs of justice was summarized by Lord Nicholls in *Mercedes Benz A.G. v. Leiduck*, [1996] 1 A.C. 284 (P.C.), at p. 308: "As circumstances in the world change, so must the situations in which the courts may properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice."

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60 Changes to "settled practice" must not overshoot the mark of avoiding injustice. In our view, granting the Google Order requires changes to settled practice that are not warranted in this case: neither the test for an interlocutory nor a permanent injunction has been met; court supervision is required; the order has not been shown to be effective; and alternative remedies are available.

II. Factors Suggesting Restraint in This Case

A. *The Effects of the Google Order Are Final*

61 In *RJR MacDonald*, this Court set out the test for interlocutory injunctions a serious question to be tried, irreparable harm, and the balance of convenience but also described an exception (at pp. 338-39):

> Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial....
>
> . . .
>
> The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind. [Emphasis added.]

62 In our view, the Google Order "in effect amount[s] to a final determination of the action" because it "remove[s] any potential benefit from proceeding to trial". In order to understand this conclusion, it is useful to review Equustek's underlying claim. Equustek sought, in its Further Amended Notice of Civil Claim against Datalink, damages, declarations, and:

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A temporary and permanent injunction restraining the Defendants from:

a. using the Plaintiffs' trademarks and free-riding on the goodwill of any Equustek products on any website;

b. making statements disparaging or in any way referring to the Equustek products;

c. distributing the offending manuals and displaying images of the Plaintiff's products on any website; and

d. selling the GW1000 line of products which were created by the theft of the Plaintiff's trade secrets;

and obliging them to:

e. immediately disclose all hidden websites;

f. display a page on all websites correcting [their] misrepresentations about the source and continuing availability of the Equustek products and directing customers to Equustek.

In short, Equustek sought injunctions modifying the way in which Datalink carries out its website business, along with damages and declarations. On June 20, 2012, Datalink's response was struck and Equustek was given leave to apply for default judgment. It has not done so. On December 13, 2012, Justice Tindale ordered that

> [t]he Defendants Morgan Jack, Datalink Technologies Gateways Inc. and Datalink Technologies Gateways LLC (the "Datalink Defendants") cease operating or carrying on business through any website, including those contained in Schedule "A" and all associated pages, subpages and subdirectories, and that these Defendants immediately take down all such websites, until further order of this court. ["December 2012 Order"]

The December 2012 Order gives Equustek *more* than the injunctive relief it sought in its originating claim. Rather than simply ordering the modification of Datalink websites, the December 2012 Order requires the ceasing of website business altogether. In our view, little incentive remains for Equustek [page854] to return to court to seek a

lesser injunctive remedy. This is evidenced by Equustek's choice to not seek default judgment during the roughly five years which have passed since it was given leave to do so.

63 As for the Google Order, it provides Equustek with an additional remedy, beyond the December 2012 Order and beyond what was sought in its original claim. In our view, granting of the Google Order further erodes any remaining incentive for Equustek to proceed with the underlying action. The effects of the Google Order are final in nature. Respectfully, the pending litigation assumed by our colleague Abella J. is a fiction. The Google Order, while interlocutory in form, is final in effect. Thus, it gives Equustek more relief than it sought.

64 Procedurally, Equustek requested an interlocutory order in the course of its litigation with Datalink. While Equustek's action against Datalink could technically endure indefinitely (P. G. Fraser, J. W. Horn and S. A. Griffin, *The Conduct of Civil Litigation in British Columbia* (2nd ed. (loose-leaf)), at s. 14.1) and thus the interlocutory status of the injunction could technically endure indefinitely it does not follow that the Google Order should be considered interlocutory. Courts of equity look to substance over form, because "a dogged devotion to form has often resulted in injustice" (*John Deere Ltd. v. Firdale Farms Ltd.* (1987), 45 D.L.R. (4th) 641 (Man. C.A.), at p. 645). In *Parkin v. Thorold* (1852), 16 Beav. 59, 51 E.R. 698, at p. 701, Lord Romilly explained it thus:

> ... Courts of Equity make a distinction in all cases between that which is matter of substance and that which is matter of form; and if [they do] find that by insisting on the form, the substance will be defeated, [they hold] it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.
>
> [page855]

In our view, the substance of the Google Order amounts to a final remedy. As such, it provides Equustek with more equitable relief than it sought against Datalink, and amounts to final resolution via Google. It is, in effect, a permanent injunction.

65 Following *RJR MacDonald* (at pp. 338-39), an extensive review of the merits is therefore required at the first stage of the analysis (*Schooff v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, 323 D.L.R. (4th) 680, at paras. 26-27). Yet this was not done. When Justice Fenlon considered Equustek's application for an interim injunction enjoining Google to cease indexing or referencing Datalink's websites, she did not conduct an extensive review of the merits. She did however note that Equustek had raised an arguable case, and that Datalink was presumed to have admitted the allegations when its defenses were struck (para. 151). The rule is not immutable that if a statement of defense is struck, the defendant is deemed to have admitted the allegations contained in the statement of claim. While the facts relating to Datalink's liability are deemed to be admitted, the court can still exercise its discretion in assessing Equustek's claims (*McIsaac v. Healthy Body Services Inc.*, 2009 BCSC 1716, at paras. 42 and 44 (CanLII); *Plouffe v. Roy*, 2007 CanLII 37693 (Ont. S.C.J.), at para. 53; *Spiller v. Brown* (1973), 43 D.L.R. (3d) 140 (Alta. S.C. (App. Div.)), at p. 143). Equustek has avoided such an assessment. Thus, an extensive review of the merits was not carried out.

66 The Google Order also does not meet the test for a permanent injunction. To obtain a permanent injunction, a party is required to establish: (1) its legal rights; (2) that damages are an inadequate remedy; and (3) that there is no impediment to the court's discretion to grant an injunction (*1711811 Ontario Ltd. v. Buckley Insurance Brokers Ltd.*, 2014 ONCA 125, 371 D.L.R. (4th) 643, at paras. 74-80; Spry, at pp. 395 and 407-8). Equustek has shown the inadequacy of damages (damages are ascertainable but unlikely to be recovered, and the wrong is continuing). However, in our view, it is unclear whether [page856] the first element of the test has been met. Equustek's claims were supported by a good *prima facie* case, but it was not established that Datalink designed and sold counterfeit versions of its product, or that this resulted in trademark infringement and unlawful appropriation of trade secrets.

67 In any case, the discretionary factors affecting the grant of an injunction strongly favour judicial restraint. As we will outline below, the Google Order enjoins a non-party, yet Google has not aided or abetted Datalink's wrongdoing; it holds no assets of Equustek's, and has no information relevant to the underlying proceedings. The Google Order is mandatory and requires court supervision. It has not been shown to be effective, and Equustek has

alternative remedies.

B. *Google Is a Non-Party*

68 A court order does not "technically" bind non-parties, but "anyone who disobeys the order or interferes with its purpose may be found to have obstructed the course of justice and hence be found guilty of contempt of court" (*MacMillan Bloedel Ltd. v. Simpson*, *[1996] 2 S.C.R. 1048*, at paras. 23 and 27). In *MacMillan Bloedel*, the injunction prohibiting named individuals from blocking a logging road also caused non-parties to face contempt proceedings for doing the act prohibited by the injunction.

69 The instant case is not one where a non-party with knowledge of a court order deliberately disobeyed it and thereby deprecated the court's authority. Google did not carry out the act prohibited by the December 2012 Order. The act prohibited by the December 2012 Order is Datalink "carrying on business through any website". That act occurs [page857] whenever Datalink launches websites to carry out business not when other parties, such as Google, make it known that such websites exist.

70 There is no doubt that non-parties also risk contempt proceedings by aiding and abetting the doing of a prohibited act (*Seaward v. Paterson*, [1897] 1 Ch. 545 (C.A.); D. Bean, A. Burns and I. Parry, *Injunctions* (11th ed. 2012), at para. 9-08). Lord Denning said in *Acrow (Automation) Ltd. v. Rex Chainbelt Inc.*, [1971] 1 W.L.R. 1676 (C.A.), at p. 1682:

> It has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who, knowing of an injunction, aids and abets the defendant in breaking it. The reason is that by aiding and abetting the defendant, he is obstructing the course of justice.

71 In our view, Google did not aid or abet the doing of the prohibited act. Equustek alleged that Google's search engine was facilitating Datalink's ongoing breach by leading customers to Datalink websites (Fenlon J.'s reasons, at para. 10). However, the December 2012 Order was to cease carrying on business through any website. That Order was breached as soon as Datalink established a website to conduct its business, regardless of how visible that website might be through Google searches. If Equustek's argument were accepted, the scope of "aids and abets" would, in our view, become overbroad. It might include the companies supplying Datalink with the material to produce the derivative products, the companies delivering the products, or as Google argued in its factum, it might also include the local power company that delivers power to Datalink's physical address. Critically, Datalink breached the December 2012 Order simply by launching websites to carry out business, regardless of whether Google searches ever reveal the websites.

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72 We agree with our colleague Justice Abella that *Mareva* injunctions and *Norwich* orders can operate against non-parties. However, we respectfully disagree that the Google Order is similar in nature to those remedies. *Mareva* injunctions are granted to freeze assets until the completion of a trial they do not enforce a plaintiff's substantive rights (*Mercedes Benz*, at p. 302). In contrast, the Google Order enforces Equustek's asserted intellectual property rights by seeking to minimize harm to those rights. It does not freeze Datalink's assets (and, in fact, may erode those assets).

73 *Norwich* orders are made to compel information from third parties. In *Norwich Pharmacal Co. v. Customs and Excise Commissioners*, [1974] A.C. 133 (H.L.), at p. 175, Lord Reid identified

> a very reasonable principle that if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers.

Lord Reid found that "without certain action on [Customs'] part the infringements could never have been committed" (p. 174). In spite of this finding, the court did not require Customs to take specific action to prevent importers from infringing the patent of Norwich Pharmacal; rather the court issued a limited order compelling Customs to disclose the names of importers. In *Cartier*, the court analogized from *Norwich* to support an injunction requiring Internet service providers ("ISPs") to block access to trademark-infringing websites because "it is via the ISPs' services" that customers view and purchase the infringing material (para. 155). That injunction did not extend to parties merely assisting in finding the websites.

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74 In the case at bar, we are of the view that Google does not play a role in Datalink's breach of the December 2012 Order. Whether or not the December 2012 Order is violated does not hinge on the degree of success of the prohibited website business. Rather, the December 2012 Order is violated merely by Datalink conducting business through a website, regardless of the visibility of that website or the number of customers that visit the website. Thus Google does not play a role analogous to Customs in *Norwich* nor the ISPs in *Cartier*. And unlike the order in *Norwich*, the Google Order compels positive action aimed at the illegal activity rather than simply requiring the provision of information to the court.

C. *The Google Order Is Mandatory*

75 While the distinction between mandatory and prohibitive injunctions has been questioned (see *National Commercial Bank of Jamaica Ltd. v. Olint Corp.*, [2009] 1 W.L.R. 1405 (P.C.), at para. 20), courts have rightly, in our view, proceeded cautiously where an injunction requires the defendant to incur additional expenses to take positive steps (*Redland Bricks Ltd. v. Morris*, [1970] A.C. 652 (H.L.), at pp. 665-66; J. Berryman, *The Law of Equitable Remedies* (2nd ed. 2013), at pp. 199-200). Also relevant to the decision of whether to grant a mandatory injunction is whether it might require continued supervision by the courts, especially where the terms of the order cannot be precisely drawn and where it may result in wasteful litigation over compliance (*Co-operative Insurance Society Ltd. v. Argyll Stores (Holdings) Ltd.*, [1998] A.C. 1 (H.L.)).

76 The Google Order requires ongoing modification and supervision because Datalink is launching new websites to replace de-listed ones. In fact, the Google Order has been amended at least seven times to capture Datalink's new sites (orders [page860] dated November 27, 2014; April 22, 2015; June 4, 2015; July 3, 2015; September 15, 2015; January 12, 2016 and March 30, 2016). In our view, courts should avoid granting injunctions that require such cumbersome court-supervised updating.

D. *The Google Order Has Not Been Shown to Be Effective*

77 A court may decline to grant an injunction on the basis that it would be futile or ineffective in achieving the purpose for which it is sought (Spry, at pp. 419-20; Berryman, at p. 113). For example, in *Attorney General v. Observer Ltd.*, [1990] 1 A.C. 109 (H.L.), the *Spycatcher* memoirs of an M.I.5 agent were already readily available, thus making a perpetual injunction against publication by the defendant newspapers ineffective.

78 In our view, the Google Order is not effective in enforcing the December 2012 Order. It is recalled that the December 2012 Order requires that Datalink "cease operating or carrying on business through any website" - it says nothing about the visibility or success of the website business. The December 2012 Order is violated as soon as Datalink launches websites to carry on business, regardless of whether those websites appear in a Google search. Moreover, the Google Order does not assist Equustek in modifying the Datalink websites, as Equustek sought in its originating claim for injunctive relief.

79 The most that can be said is that the Google Order might reduce the harm to Equustek which Fenlon J. found "Google is inadvertently facilitating" (para. 152). But it has not been shown that the Google Order is effective in

doing so. As Google points out, Datalink's websites can be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. Datalink's websites are open for business on the Internet whether Google searches list them or not. In our [page861] view, this lack of effectiveness suggests restraint in granting the Google Order.

80 Moreover, the quest for elusive effectiveness led to the Google Order having worldwide effect. This effect should be taken into consideration as a factor in exercising discretion. Spry explains that territorial limitations to equitable jurisdiction are "to some extent determined by reference to questions of effectiveness and of comity" (p. 37). While the worldwide effect of the Google Order does not make it more effective, it could raise concerns regarding comity.

E. *Alternatives Are Available*

81 Highlighting the lack of effectiveness are the alternatives available to Equustek. An equitable remedy is not required unless there is no other appropriate remedy at law (Spry, at pp. 402-3). In our view, Equustek has an alternative remedy in law. Datalink has assets in France. Equustek sought a world-wide *Mareva* injunction to freeze those assets, but the Court of Appeal for British Columbia urged Equustek to pursue a remedy in French courts: "At present, it appears that the proposed defendants reside in France... . The information before the Court is that French courts will assume jurisdiction and entertain an application to freeze the assets in that country" (*2016 BCCA 190*, *88 B.C.L.R. (5th) 168*, at para. 24). We see no reason why Equustek cannot do what the Court of Appeal urged it to do. Equustek could also pursue injunctive relief against the ISPs, as was done in *Cartier*, in order to enforce the December 2012 Order. In addition, Equustek could initiate contempt proceedings in France or in any other jurisdiction with a link to the illegal websites.

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III. Conclusion

82 For these reasons, we are of the view that the Google Order ought not to have been granted. We would allow the appeal and set aside the June 13, 2014 order of the Supreme Court of British Columbia.

Appeal dismissed with costs, CÔTÉ *and* ROWE JJ. *dissenting.*

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Solicitors for the intervener the Canadian Civil Liberties Association: Blake, Cassels & Graydon, Vancouver.

Solicitor for the intervener the OpenMedia Engagement Network: Cynthia Khoo, Vancouver.

Solicitors for the interveners the Reporters Committee for Freedom of the Press, the American Society of News Editors, the Association of Alternative Newsmedia, The Center for Investigative Reporting, Dow Jones & Company, Inc., the First Amendment Coalition, First Look Media Works, Inc., the New England First Amendment Coalition, the News Media Alliance (formerly known as the Newspaper Association of America), AOL Inc., the California Newspaper Publishers Association, The Associated Press, The Investigative Reporting Workshop at American University, the Online News Association and the Society of Professional Journalists: Blake, Cassels & Graydon, Toronto.

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Solicitors for the intervener the International Federation of Film Producers Associations: MacKenzie Barristers, Toronto.

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1 Paragraph 148.

2 Paragraph 147.

3 Paragraph 95.

4 Paragraph 76.

5 Paragraph 148.

6 Paragraph 144.

7 Paragraphs 93-94.

8 Paragraph 137.

COURT OF APPEAL FOR ONTARIO

CITATION: Actava TV, Inc. v. Matvil Corp., 2021 ONCA 105
DATE: 202102019
DOCKET: C68521

Fairburn A.C.J.O., Pepall and Roberts JJ.A.

BETWEEN

Actava TV, Inc., Master Call Communications, Inc., Master Call Corporation and Rouslan Tsoutiev

Applicants (Respondents)

and

Matvil Corp.

Respondent (Appellant)

Clifford Cole and Alex D. Zavaglia for the appellant

Kevin O'Brien, Lauren Harper and Carla Breadon for the respondents

Heard: November 10, 2020 by video conference

On appeal from the order of Justice Barbara A. Conway of the Superior Court of Justice, dated July 6, 2020.

Pepall J.A.:

INTRODUCTION

[1] This appeal addresses the enforcement of a letter of request ("LoR"). The enforcement order compels a non-party to produce its confidential and proprietary financial and valuation documents for one purpose: to assist the expert of parties to an action in the United States calculate their damages using comparative industry data.

[2] The application judge in the case under appeal granted such an order to the respondents, Actava TV, Inc. ("Actava") and other Actava-related parties, the plaintiffs in the U.S. action, against the appellant, Matvil Corp. ("Matvil"), an Ontario company that is a non-party in that action. One of the defendants in the U.S. action, Kartina Digital GmbH ("Kartina"), is Matvil's main competitor.

[3] For the reasons that follow, I would allow the appeal.

FACTS

(1) Russian TV Channels' First U.S. Lawsuit

[4] On February 19, 2016, various Russian owners, operators, and producers of television channels that are broadcast in Russian (the "Russian TV Channels") sued Actava, the other Actava-related respondents in this appeal, and Matvil in the United States District Court, Southern District of New York, for allegedly broadcasting content without proper licences.

[5] Although its business has now changed, at the time of the lawsuit, Actava was in the business of streaming Russian-language TV channels to customers in North America. The other Actava respondents, Rouslan Tsoutiev, Master Call Communications, Inc. and Master Call Corporation, are the Chief Executive Officer of Actava and two other companies he controls.

[6] Matvil is a private, Ontario-based global streaming service that broadcasts television content, predominantly from Russia, Ukraine, and former Commonwealth of Independent States countries, to customers around the world. It re-transmits content from the Russian TV Channels to subscribers. It has operated for two decades and has approximately 32 employees in Canada.

[7] Shortly after the commencement of the Russian TV Channels' U.S. action, Matvil established that it did have the necessary licences, and the Russian TV Channels withdrew their claims against it. In contrast, Actava did not have the necessary licences and, together with the other Actava respondents, entered into a settlement of the lawsuit. As part of that settlement, Actava and the other Actava respondents agreed to be bound by injunctions that prohibited certain broadcasting absent consent of the Russian TV Channels.

(2) Referral Agreement

[8] In September of 2016, Actava and Matvil entered into a 24-month referral agreement, whereby Actava was to provide Matvil with marketing services and refer customers to Matvil from five states in the northeastern U.S. From September

2016 to August 2018, Actava referred some customers to Matvil. Actava's referrals represented a very small percentage of Matvil's customers. Matvil terminated the referral agreement in August 2018.

(3) Russian TV Channels' Second U.S. Lawsuit Against Actava

[9] On December 13, 2016, the Russian TV Channels sued Actava and the other Actava respondents for contempt, alleging that they had breached the injunctions entered into as part of the parties' settlement of the first action. This second action was dismissed in the fall of 2017. During the lifespan of this lawsuit, Actava continued to refer new clients to Matvil but placed its advertising services on pause.

(4) Actava's U.S. Lawsuit Against Russian TV Channels and Kartina

[10] On July 23, 2018, Actava and the other Actava respondents sued the Russian TV Channels in the United States District Court, Southern District of New York. They later added Kartina as a defendant.

[11] In their lawsuit, Actava and the other Actava respondents allege that the Russian TV Channels and Kartina engaged in an unlawful campaign to interfere with Actava's business. They assert that the Russian TV Channels and Kartina's actions prevented Actava from performing its referral agreement with Matvil for approximately 10 months and that they pressured Matvil to terminate the referral agreement. Actava and the other Actava respondents claim damages for tortious interference, malicious prosecution, breach of contract, and unfair and deceptive

business practices in violation of s. 349 of the New York General Business Law. The damages requested include Actava's lost revenue and profits arising from the termination of the referral agreement.

[12] Matvil is not a party to Actava's U.S. action nor do any of the parties to that action make any allegations of wrongdoing against it. Its conduct is not in issue and it has no interest in the U.S. action.

[13] Actava has in its possession all documents concerning Actava that were exchanged between any Russian TV Channel and Matvil between June 1, 2016 and December 31, 2018 and all documents concerning Matvil's termination or prospective termination of the referral agreement.[1]

(5) The LoR

(a) The Request for Matvil's Financial Information

[14] To calculate Actava's damages in the U.S. action, Actava's U.S. damages expert, Sidney Blum, was of the view that he would like to calculate Actava's damages using the "yardstick" method of assessment. This looks at Actava's actual growth during the subject period and compares it to the financial results of "other 'comparable' companies in the same industry".[2] There are no publicly-traded companies that carry on business similar to that of Actava and, although there is

[1] This was confirmed in oral argument.
[2] In contrast, Matvil's expert opines that both the "sales projection" and the "before-and-after" methodologies could be used to calculate Actava's damages and that neither methodology requires Matvil's documents to do so.

illegal activity, only two other companies legally provide Russian broadcasting services in North America: Kartina and Matvil.

[15] Actava hypothesizes that its own revenues would have followed an upward trajectory similar to Matvil's. That said, there is no evidence that Matvil's profits were on an upward trajectory, a fact acknowledged by Actava's counsel in oral submissions before us. Indeed, the affidavit of Actava's general counsel speculates that "[i]f Matvil's market share in the United States and Canada grew, Actava's position is that its profits would have followed a similar upward trajectory."

[16] Actava attempted unsuccessfully to get the documents it desired from Matvil some months before it commenced its action against the Russian TV Channels and Kartina. Later, Actava and the other respondents moved before the U.S. court for an LoR. The proceeding was in writing and summary in nature. The only evidence filed in support was a declaration from the Actava respondents' U.S. litigation counsel. He described the U.S. action and stated that it was Actava's intention to argue at trial a theory of damages that linked Actava's growth (but for the tortfeasors) to the growth of other streaming entertainment services. In the recitals, the LoR repeats Actava's allegation that its business would have grown at a trajectory similar to that of other providers, "including but not limited to Matvil". Actava advised Matvil that it would be bringing a motion and provided a copy of the draft request, however no consent was forthcoming from Matvil. Matvil was not

given notice of the motion or served with the motion material, nor did it participate in the motion.

(b) The Issuance of the LoR

[17] The U.S court granted Actava's motion and issued the LoR. The LoR originally sought the production by Matvil of all documents, including communications, between the Russian TV Channels and Matvil concerning either Actava or Mr. Tsoutiev between June 1, 2016 and December 31, 2018; and all documents, excluding communications, concerning Matvil's termination or prospective termination of the referral agreement, including correspondence between Matvil, on the one hand, and either Actava or Mr. Tsoutiev on the other. Matvil agreed to provide this information and, as mentioned, has done so. This information is not in issue.[3]

[18] Before the application judge and on appeal, only two categories of documentation sought in the LoR are in issue. The LoR seeks: (i) yearly reports, from 2015 to present, of the revenue and/or profits derived by Matvil; and (ii) all documents, from 2015 to present, containing or constituting an appraisal of Matvil's valuation.

[19] Thus, the contested production sought both pre-dates and post-dates the period of time (2016 to 2018) during which the referral agreement was in effect; it

[3] The issue in dispute is production of documents although the LoR also requested that a representative from Matvil attend a deposition.

is not limited to business carried on under the referral agreement but extends to Matvil's entire global business; and it includes not just raw data but also Matvil's work product, that is, documents that summarize, review, analyze, value, or comment on Matvil's financial performance, including, for example, financial statements and valuation reports prepared by external advisors. It would also require disclosure of operating expenses, including the licensing fees Matvil paid for content with different licensors, including the Russian TV Channels. The information sought is private, proprietary, and not publicly available. Other than the subset of information relating to Actava's referrals which Matvil has already provided and which is not in issue, there is no factual nexus between Matvil's materials and the alleged wrongful conduct on the part of the defendants to the U.S. action.

[20] In summary, the information in issue is sought not because of Matvil's involvement in the factual matrix but because it is a comparator company. Put differently, the documents are desired to assist the expert in his calculation of Actava's damages, nothing more.

(6) Actava's Application to Enforce the LoR

[21] Actava and the other Actava respondents then brought an application in the Ontario Superior Court of Justice to enforce the LoR. Matvil contested the application, asserting that it has a legitimate interest in protecting the information

sought from competitors. In an affidavit sworn November 27, 2019, Matvil's Chief Executive Officer explained some of its concerns:

> Even if Kartina is excluded from the parties who are provided access to the disclosure, Kartina has a close relationship with many of the Channels. The Channels operate primarily in Russia. Even with a confidentiality order in place, I believe there is a real risk of persons sharing Matvil's financial information with Kartina and the Channels which can prove to be detrimental to the future operation of Matvil. I believe based on my experiences Canadian or US confidentiality orders are not a sufficient deterrent because of the difficulty in enforcing such orders in Russia and the importance placed there on personal relationships in business over legal obligations.
>
> I am also concerned that Actava may attempt to resume its former business of broadcasting foreign language programming in the future, and thus may resume being one of Matvil's main competitors. Disclosing our confidential financial information to Actava may put us at a significant competitive disadvantage if, for example, Actava settles the litigation with the Channels and the injunction is lifted.

[22] Actava had obtained the LoR prior to completing its discovery process in the U.S. action and before it had sought comparable information from Kartina who, as mentioned, carries on a business comparable to that of Matvil. Actava admitted that it is "impossible" and "simply not believable" that Kartina, a party to the U.S. action, does not have the sort of information Actava is seeking. It did not conduct an oral examination of Kartina. The application judge gave Actava an opportunity to seek equivalent information from Kartina, which it did. Actava's expert then said that the productions he received were insufficient for him to opine on the damages.

For its part, Matvil continued to express concern about producing the information sought and protecting its financial information.

[23] On May 17, 2019, a generic protective order was issued in the U.S. action independent of the LoR. Among other things, the order provides that a producing party may designate material as “confidential”, “attorneys’ eyes only” (“AEO”) or “experts’ eyes only” (“EEO”). Where the material is designated confidential, other persons subject to the order may disclose the information to various persons, including the parties, various counsel, various witnesses, and stenographers. Where the information is designated for AEO or EEO, other persons subject to the order may disclose such information only to experts and various persons, including various counsel and stenographers. A party can object to the designation. Although the order is generic in nature, it would encompass Matvil’s productions.

[24] The protective order further provides that it applies only to the pretrial phase of the action. Moreover, the parties may refer to documents marked confidential, AEO or EEO in support of written or oral argument, subject to certain requirements. To the extent any designated material is contained or reflected in any filing, counsel must make a motion to file the submission under seal. If the motion is granted, a redacted version of the sealed submission must be filed together with the sealed submission so that the public may access the redacted version. The protective order can also be amended or modified.

[25] Unchallenged expert evidence from a U.S. attorney filed by Matvil on Actava's application to enforce the LoR stated that the protective order falls short of adequately protecting Matvil's financial information. He noted that the confidentiality designation may be challenged by a party and left to the discretion of the U.S. court. It does not apply to oral testimony or oral submissions. It does not preclude publication by anyone reporting on the trial.

[26] Significantly, as Actava's expert seeks to use Matvil's information as a single-source comparator analysis, the identity of Matvil as the comparator will be self-evident despite the terms of any protective order. As the U.S. attorney opined, redacting or anonymizing Matvil in public filings would do little to protect Matvil's sensitive business information.

[27] On July 6, 2020, the application judge granted Actava's application to enforce the LoR.

THE APPLICATION JUDGE'S REASONS FOR DECISION

[28] The application judge noted that the parties were satisfied that the statutory preconditions for enforcing the LoR had been met. She also observed that the U.S. court's decision is entitled to considerable deference and she was not sitting on appeal from that decision. She considered the six factors identified in *Presbyterian Church of Sudan v. Taylor* (2006), 215 O.A.C. 140 (C.A.), at para. 20.

[29] She discussed the issue of relevance, the first factor from *Presbyterian Church*, noting that Actava's expert considered Matvil's financial information to be

highly relevant to his calculation of damages as "it is to be used as a comparator to Actava's actual performance under the yardstick approach." Matvil did not dispute that it would be relevant for these purposes, but its expert suggested that different valuation methods, such as the "before-and-after" method or the "sales projection" method, could be used. The application judge stated that Actava's financial prospects were tied to Matvil's through the referral agreement and hence the documents were relevant to the calculation of damages.

[30] She also concluded that the second factor in *Presbyterian Church* was met. The evidence was necessary for and would be used at trial, if admissible.

[31] Turning to the third *Presbyterian Church* factor as to whether the evidence was otherwise obtainable, Matvil had argued before the application judge that Kartina, whom Actava had named as a defendant in the U.S. action, operated in the same industry as Matvil and Actava, and that the necessary information could be obtained from Kartina. The application judge concluded, at para. 39, that "the evidence sought from Matvil is of greater value to Actava in preparing its damages calculation than the productions obtained or sought from Kartina. Even if Actava pursues Kartina for further and better productions, Actava's damages expert, Mr. Blum, makes it clear that the nexus between Matvil and Actava provides an additional dimension that does not exist with the Kartina financial information."

[32] The application judge then turned to the issue of public policy, the fourth factor from *Presbyterian Church*. Matvil submitted that requiring a non-party to

disclose confidential financial information for purposes of a single-source comparator analysis was contrary to public policy. Its concern was heightened by the fact that Kartina was a competitor and Actava could be too. The application judge stated that Matvil was part of the factual matrix, and that concerns about confidentiality could be addressed by the terms of the U.S. protective order and additional conditions proposed by Actava. These were that the order would be conditional on the U.S. court ordering that: Actava's general counsel would not receive or review the financial data; the financial data would not be provided to Actava, Kartina, or the other U.S. defendants, but only to their experts and external legal counsel subject to the terms of the protective order; and the financial data would be treated as for attorneys' and experts' eyes only throughout the entirety of the proceeding.

[33] She considered Matvil's concern that the use of its confidential information would necessarily be revealed in a single-source comparator damages calculation. She dismissed this risk as speculative and overstated.

[34] Lastly, she was satisfied that the information sought was specified and identifiable, and that the order sought was not unduly burdensome.[4]

[4] At para. 57 of her reasons, the application judge stated that Actava had already received the data from Matvil in the course of their previous business relationship. However, counsel for Actava candidly advised the panel on appeal that this was a misstatement. It may be that the application judge was confusing the documentation relating to Matvil's and Actava's short-term relationship that had been produced with Matvil's financial and valuation data that was unrelated to Actava and that was in dispute.

[35] The application judge accordingly granted the order requested.

THE APPEAL

[36] Matvil appealed from the application judge's order. The order has been stayed pending disposition of the appeal.

[37] Matvil advances numerous grounds of appeal, but in oral argument focused its submissions on relevance and public policy within the construct of principles of sovereignty and the applicable case law. At its most fundamental, Matvil submits that the order under appeal is the first and only order in any commonwealth jurisdiction, including Ontario, to direct a non-party to produce documentation and information for the sole purpose of informing an expert to assist a party in calculating damages. It argues that the order failed to satisfy the test for enforcement of an LoR and that the application judge erred in her application of the test and in her relevance and public policy analyses.

[38] To place the dispute in context, I will first address the evolution of LoRs and the governing legal principles. I will then turn to how those principles apply to this case.

(1) Legal Principles

(a) Definition of an LoR

[39] An LoR (sometimes also known as a letter rogatory) is the medium whereby one country, speaking through its court, seeks foreign judicial assistance that

allows for the taking of evidence for use in legal proceedings: *The Signe*, 37 F. Supp. 819 (E.D. La. 1941), at p. 820. In Ontario, evidence may be provided voluntarily, in which case an LoR is not required. However, absent agreement, an order from an Ontario court is required to compel the production of evidence. Put differently, an LoR is unenforceable standing on its own and an Ontario court must give effect to the request by granting an order enforcing the LoR.

(b) Statutory Requirements

[40] The authority to enforce an LoR is found in both s. 46 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and s. 60 of the *Ontario Evidence Act*, R.S.O. 1990, c. E.23. Although there is some debate on whether the authority is the subject matter of federal or provincial jurisdiction, as a practical matter, this is of no moment, as the statutory requirements are the same. The statutory preconditions to enforcement of an LoR are: (i) a foreign court has authorized the obtaining of evidence; (ii) the witness whose evidence is sought is within Ontario's jurisdiction; (iii) the evidence sought relates to a proceeding pending before the foreign court; and (iv) the foreign court is a court of competent jurisdiction. The decision to grant or refuse enforcement is a discretionary one and a court may refuse to enforce LoRs even if the statutory conditions have been met.

(c) Supreme Court Jurisprudence

[41] The statutory requirements for enforcing LoRs have been augmented by jurisprudence. The leading decision on LoRs in Canada is the 1981 decision of the

Supreme Court in *R. v. Zingre*, [1981] 2 S.C.R. 392, a case involving a request for assistance from Switzerland. There, at pp. 400-1, Dickson J. (as he then was), wrote:

> As that great jurist, U.S. Chief Justice Marshall, observed in *The Schooner Exchange v. M'Faddon & Others* [(1812), 7 Cranch's Reports 116] , at pp. 136-37, the jurisdiction of a nation within its own territory is necessarily exclusive and absolute, susceptible of no limitation not imposed by itself, but common interest impels sovereigns to mutual intercourse and an interchange of good offices with each other.
>
> It is upon this comity of nations that international legal assistance rests. Thus the courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction, not as a matter of obligation but out of mutual deference and respect. A foreign request is given full force and effect unless it be contrary to the public policy of the jurisdiction to which the request is directed (see *Gulf Oil Corporation v. Gulf Canada Limited et al.* [[1980] 2 S.C.R. 39]) or otherwise prejudicial to the sovereignty or the citizens of the latter jurisdiction.

[42] Thus, three elements were said to animate the enforcement of an LoR: comity, public policy of the jurisdiction to which the request is directed, and absence of prejudice to the sovereignty or the citizens of that jurisdiction.

[43] The first element, comity, is a flexible concept that "must be adjusted in light of a changing world order": *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at p. 1097. In *Morguard*, a case about the recognition by the courts of one province of a judgment of the courts of another province, the Supreme Court

of Canada adopted, at p. 1097, the Supreme Court of the United States' definition of comity from *Hilton v. Guyot*, 159 U.S. 113 (1895), at pp. 163-64:

> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws[.] [Emphasis added.]

[44] In doing so, the court in *Morguard*, at p. 1097, suggested that the modern system of private international law is grounded in principles of order and fairness, and that the content of comity must adapt to a changing world order.

[45] An example of such adaptation is found in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, a case that involved a request to enforce a U.S. non-monetary award. The whole court agreed that an appropriate understanding of comity suggested revising the traditional common law rule against enforcing non-monetary judgments.[5] At para. 27, Deschamps J., for the majority, wrote: "Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens." She noted that courts must take care not to emphasize the factor of respect for a nation's acts to the point of imbalance.[6]

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[5] The court split on whether the judgment in the case ought to be enforced, with Deschamps J. writing for the majority holding that it ought not to and McLachlin C.J. writing to the contrary.

[6] Deschamps J. was referring to equitable orders. Presumably, her comment would apply to an order made against a non-party.

[46] In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, the Supreme Court noted, at para. 74, that comity is "a very flexible concept" and that while fairness and justice were necessary characteristics of a legal system, they could not be divorced from the requirement of predictability and stability which assure order in the conflicts system.

[47] Of course, although each of *Van Breda*, *Pro Swing*, and *Morguard* addressed the concept of comity, none of them involved enforcement of an LoR. In any event, I do not conclude from a reading of those cases that there has been a retreat from the principles espoused by the court in *Zingre*.

[48] Importantly, in *Zingre*, the Supreme Court recognized that the principles underlying the enforcement of LoRs may at times come into conflict. Notably, Dickson J. explained, at p. 401, that where sovereignty has conflicted with comity, Canadian courts have refused to order testimony for use in foreign proceedings in a number of situations. Examples given included where: (i) a request for production of documents was vague and general; (ii) discovery was sought against a non-party to the litigation, in violation of local laws of civil procedure; and (iii) the main purpose of the examination was to serve as a "fishing expedition", a procedure which was not allowed in Canadian courts.

[49] I take from these examples the need for Canadian courts to carefully consider the principles underlying the enforcement of LoRs. There is no doubt that, with globalization, the world's community of nations, and Canada's relationships

within that community, look very different in 2021 than they did 40 years earlier in 1981 when *Zingre* was decided. Moreover, it must be remembered that the process for enforcement of an LoR in Canada is the same regardless of the identity of the foreign court. In my view, these considerations further reinforce the need to apply the *Zingre* principles rigorously.

(d) Ontario Jurisprudence

[50] Following *Zingre*, courts in Ontario have applied and supplemented the principles espoused by Dickson J. concerning the enforcement of LoRs. In 1986, in *Re Friction Division Products, Inc. and E.I. Du Pont de Nemours & Co. Inc. et al. (No. 2)* (1986), 56 O.R. (2d) 722 (H.C.), at p. 732, Osborne J. (as he then was) stated that for enforcement, the evidence (including the LoR) had to establish that: (i) the evidence sought is relevant; (ii) the evidence sought is necessary for trial and will be adduced at trial, if admissible; (iii) the evidence is not otherwise obtainable; (iv) the order sought is not contrary to public policy; (v) the documents sought are identified with reasonable specificity; and (vi) the order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried here. In *Fecht v. Deloitte & Touche* (1996), 28 O.R. (3d) 188 (Gen. Div.) ("*Fecht (Gen. Div.)*"), aff'd (1997), 32 O.R. (3d) 417 (C.A.) *("Fecht (C.A.)*"), Blair J. (as he then was) adopted these factors. So did this court in *Presbyterian Church*, at para. 20, and in *Connecticut Retirement Plans and Trust Funds v. Buchan*, 2007 ONCA 462, 225 O.A.C. 106,

at para. 7. In *Lantheus Medical Imaging Inc. v. Atomic Energy of Canada Ltd.*, 2013 ONCA 264, 115 O.R. (3d) 161, at para. 61, and most recently in *Glegg v. Glass*, 2020 ONCA 833, at para. 51, this court described the factors, with the exception of public policy, as "useful guideposts".

[51] In *Connecticut Retirement Plans*, having listed the six factors, Weiler J.A. for this court stated, at para. 7, that "[i]n addition, the court is required to balance two broad considerations in deciding whether to exercise its discretion to enforce the Letter Rogatory. Those considerations are the impact on Canadian sovereignty and whether justice requires the taking of commission evidence." In *Lantheus*, at para. 59, Hoy J.A. for this court quoted from Doherty J.A. in *France (Republic) v. De Havilland Aircraft of Canada Ltd.* (1991), 3 O.R. (3d) 705 (C.A.), at para. 37, stating:

> The test requires that the court,
>
> > consider whether the request imposes any limitation or infringement on Canadian sovereignty, and whether justice requires an order for the taking of commission evidence. The considerations encompassed by the phrase "Canadian sovereignty"… include a[n] assessment of whether the request would give extra-territorial authority to foreign laws which violate relevant Canadian or provincial laws…; whether granting the request would infringe on recognized Canadian moral or legal principles…; and whether the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested.

See also *Glegg*, at para. 49. Thus “Canadian sovereignty” was framed as including a consideration of whether the LoR would: (i) violate relevant Canadian or provincial law; (ii) infringe on recognized Canadian moral or legal principles; (iii) impose an undue burden on the entity of whom the request is made; or (iv) do prejudice to that entity. In addition, the justice of the enforcement request must be weighed in the balance.

[52] To sum up, the principles of comity, public policy, and the absence of prejudice to the sovereignty or the citizens of Canada described by Dickson J. in *Zingre* are elements that continue to animate the enforcement of LoRs. In applying these principles, courts have developed a number of factors to help guide their decisions. The six non-exclusive guideposts first identified in *Friction Division* assist in making that determination.[7] They are not rigid preconditions: *Lantheus*, at para. 61; *Perlmutter v. Smith*, 2020 ONCA 570, 152 O.R. (3d) 185, at para. 25; and a court is not required to systematically examine each. *De Havilland* is an example where the court did not systematically examine each *Friction Division* factor. However, a court must not lose sight of the principles described in *Zingre*. Ultimately, this requires a court to step back and balance Canadian sovereignty considerations with the justice of the enforcement request: *Connecticut Retirement*

[7] I will discuss in more detail later in these reasons the factors of relevance and public policy.

Plans, at para. 7; *Glegg*, at para. 49. The six *Friction Division* guideposts are not mere proxies for those considerations.

(e) Distinctions Between U.S. and Ontario

[53] As mentioned, the law on LoRs in Canada applies to LoRs from all foreign jurisdictions. Given that the U.S. is Canada's largest trading partner and neighbour, the opportunity for engagement in each other's courts is high. As Bradley J. Freedman and Gregory N. Harney stated in their oft-quoted 1987 article "Obtaining Evidence from Canada: The Enforcement of Letters Rogatory by Canadian Courts" (1987) 21 UBC L. Rev. 351, at p. 351, "[t]he increasingly extensive business and social interaction between Canadian and foreign individuals and business entities, especially those of the United States of America, has resulted in Canadian residents becoming involved with increasing frequency in foreign civil and criminal proceedings." Further, "a liberal approach by Canadian courts to the enforcement of foreign letters rogatory serves … to maintain harmonious international relations in general": at p. 353. The authors noted the foundational principle of international comity and that "[i]mplicit in a request for international judicial assistance is a pledge of reciprocity: a promise that the courts of the requesting state will, in the future, provide similar assistance to the courts of the state to which the request is directed": at p. 353.

[54] Similar assistance is a laudable objective. That said, as the parties acknowledged on this appeal, while the U.S. and Canada have somewhat

comparable justice systems, the rules relating to discovery are significantly dissimilar. This is highlighted in the "Sedona Canada Commentary on Enforcing Letters Rogatory Issued by an American Court in Canada: Best Practices & Key Points to Consider", a June 2011 publication of The Sedona Conference. As the title suggests, the commentary reviews discovery in Canada and the U.S. The points raised include the following:

– The rules governing discovery in the two countries differ including the scope of discovery, the ability to obtain discovery from non-parties, subsequent use of the evidence, objections to questions on discovery, and the availability of any implied undertaking rule. (Differences were also noted by the Supreme Court in *Zingre*, at p. 402.)

– The U.S. court issuing the LoR may have done so in a perfunctory manner without consideration of the matters at issue or testing the evidence relied on in support of the request and without notice to a non-party. (I do not read this observation as a criticism; rather, it reflects the very broad discovery rules that exist in the U.S.)

– Blocking statutes or legal issues such as privilege may prevent the Canadian court from enforcing an LoR.

[55] On the issue of scope of discovery in the U.S., the Sedona authors point out, at p. 5, that if there is "*any possibility* the information sought *may be* relevant" (emphasis in original), it is discoverable. Ontario's regime is very different. On

January 1, 2010, the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, were amended to limit the scope of relevance to evidence that is "relevant to a matter in issue" from the former broader test of "semblance of relevance" that had developed in the jurisprudence in Ontario: The Sedona Conference, at pp. 5-6; see O. Reg. 438/08, ss. 26, 27, and 30; O. Reg. 453/09, ss. 1, 2. As the Sedona authors state, at p. 6, "[t]he evidence must be relevant to matters actually in issue, and does not include evidence that is only sought because it could lead to other matters, or 'may' be relevant, or may be relevant to other matters that *could* be in issue" (emphasis in original). Similarly, as Pamela D. Pengelley wrote in "A Compelling Situation: Enforcing American Letters Rogatory in Ontario" (2006) 85 Can. Bar. Rev. 345, at p. 353, "[c]ourts may be extremely reluctant to enforce letters rogatory that prove only that the evidence is 'marginally relevant' or 'potentially relevant'" (footnotes omitted).

[56] In addition, as stated in *Riverview-Trenton Railroad Company v. Michigan Department of Transportation*, 2018 ONSC 2124, 13 L.C.R. (2d) 95, at para. 35, discovery from non-parties is the norm in U.S. civil litigation. This is not the case in Ontario. Indeed, unlike in the U.S., in Ontario, an order of the court is required to examine a non-party[8] or to compel a non-party to produce documents: see *Rules*

[8] Rule 31.10 of the *Rules of Civil Procedure* was enacted in 1985 to permit such an examination.

of Civil Procedure, rr. 31.10, 30.10. Thus, examination of, and production from, a non-party is the exception, not the rule, in Ontario.

[57] Given the vastly more permissive rules governing discovery in the U.S., it is fair to conclude that reciprocity is not an even balance. However, as this court observed in *Appeal Enterprises Ltd. v. First National Bank of Chicago* (1984), 10 D.L.R. (4th) 317 (Ont. C.A.), at p. 319, "the comity of nations upon which international legal assistance rests does not require precise reciprocity" between the laws of Canada and the laws of the requesting state: see also *Perlmutter*, at para. 63. That said, differences in discovery between Canada and the U.S. highlight the need to be attentive to all of the elements in the LoR analysis including sovereignty and the justice of the request.

[58] Finally, in the interest of comprehensiveness, I will briefly touch upon the issue of blocking statutes identified by the Sedona authors. The relevant statute in Ontario is the *Business Records Protection Act*, R.S.O. 1990, c. B.19. It is a very short statute concerning the sending and removal of certain business records out of the province. It consists of only two provisions. Section 1 states:

> No person shall, under or under the authority of or in a manner that would be consistent with compliance with any requirement, order, direction or summons of any legislative, administrative or judicial authority in any jurisdiction outside Ontario, take or cause to be taken, send or cause to be sent or remove or cause to be removed from a point in Ontario to a point outside Ontario, any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material in any way

> relating to any business carried on in Ontario, unless such taking, sending or removal,
>
> > (a) is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organization outside Ontario material relating to a branch or subsidiary company or organization carrying on business in Ontario;
> >
> > (b) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario and as to a jurisdiction outside Ontario in which the securities of the company or person have been qualified for sale with the consent of the company or person;
> >
> > (c) is done by or on behalf of a company or person as defined in the *Securities Act*, carrying on business in Ontario as a dealer or salesperson as defined in the *Securities Act*, and as to a jurisdiction outside Ontario in which the company or person has been registered or is otherwise qualified to carry on business as a dealer or salesperson, as the case may be; or
> >
> > (d) is provided for by or under any law of Ontario or of the Parliament of Canada.

[59] In *De Havilland*, in *obiter*, Doherty J.A. reasoned that an order enforcing an LoR did not fall within the parameters of s. 1 and in any event, s. 46 of the *Canada Evidence Act* triggered the exception set out in s. 1(d). This *obiter* was adopted by Lax J. and affirmed by this court in *Local Court of Stuttgart of the Federal Republic of Germany v. Canadian Imperial Bank of Commerce* (1997), 31 O.R. (3d) 684 (Gen. Div.), aff'd 1998 CarswellOnt 1999 (C.A.).

[60] For the purposes of this appeal, I would add that it is of note that business records receive express legislative protection, no doubt in recognition of the sensitivity of the nature of such information and its vulnerability to misuse or misappropriation.

[61] This then is the legal context within which the present appeal is to be decided.

(2) Standard of Review

[62] Given the discretionary nature of the decision to grant or refuse an application to enforce an LoR, absent reviewable error, this court will give deference to the lower court's decision: *Perlmutter*, at para. 26; *Presbyterian Church*, at paras. 19, 30. As the Supreme Court noted in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, [2003] 3 S.C.R. 371, at para. 43, the definition and misapplication of the criteria for the exercise of a judicial discretion raise questions of law which are subject to appellate review.

[63] The Supreme Court cases involving LoRs have not expressly addressed the standard for appellate intervention. Other cases involving discretionary decisions suggest that an appellate court will defer to a discretionary decision absent an error in principle, a misapprehension of or failure to take into account the evidence, or a clearly wrong or unreasonable result. See for example: *Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, [2012] 1 S.C.R. 636, at para. 41; *Cowper Smith v. Morgan*, 2017 SCC 61, [2017] 2 S.C.R. 754, at para. 46; *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31, 433 D.L.R. (4th) 631, at para. 35; *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27; and *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. This would include the wrongful exercise of discretion arising from a failure to give

any or insufficient weight to a relevant consideration: see *Penner*, at para. 27; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, at pp. 76-77; and *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, at p. 588.

[64] There are numerous examples of the application of the appropriate standard of review for the discretionary decision to enforce LoRs. In *Presbyterian Church*, at para. 30, the court held that the failure to "meaningfully address" the *Friction Division* factors constituted an error in principle. See also *Liu v. Zhi*, 2019 BCCA 427, at para. 22. In *Lantheus*, this court reversed a lower court decision in circumstances where the application judge set out the *Friction Division* factors but treated the factors as preconditions and misapplied them: at paras. 67-71, rev'g 2012 ONSC 3582, 25 C.P.C. (7th) 256. Further, appellate intervention may be warranted where the application judge fails to give sufficient consideration to sovereignty as a factor in the exercise of discretion. As the Supreme Court observed in *Zingre*, at p. 403, courts "must balance the possible infringement of Canadian sovereignty with the natural desire to assist the courts of justice of a foreign land."

(3) Analysis

[65] Applying the principles I have discussed, I would allow the appeal. Following the parties' submissions, the application judge identified the *Friction Division* factors but failed to keep in mind the principles underlying the enforcement of LoRs. Below, I discuss how considerations of relevance, public policy, and

sovereignty lead me to conclude that the application judge fell into error and that appellate intervention is therefore warranted.

(a) Relevance

[66] As mentioned, Matvil submits that the application judge erred in her relevance analysis particularly given that the financial data that is the subject matter of the LoR merely serves to inform an expert about the business in which the parties to the U.S. action are engaged. Actava states that Matvil's financial performance is relevant to Actava's damages due to Matvil's and Actava's contractual relationship and common industry.

[67] "Evidence is relevant if, as a matter of logic and human experience, it renders the existence or absence of a material fact in issue more or less likely": *R. v. Truscott* (2006), 216 O.A.C. 217 (C.A.), at para. 22; see also *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, at para. 47; *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15, at para. 94. As a result, in assessing the relevance of evidence sought through an LoR, the issues in the underlying litigation should be examined: see *Presbyterian Church*, at para. 34. Pengelley's observation, at p. 353, bears repeating:

> The evidence sought by letters rogatory should be directly relevant to issues raised in the foreign proceedings. Courts may be extremely reluctant to enforce letters rogatory that prove only that the evidence is "marginally relevant" [citing *Pecarsky v. Lipton Wiseman Altbaum & Partners* (1999), 38 C.P.C. (4th) 170 (Ont. S.C.)] or "potentially relevant," [citing *Fecht* (C.A.),

> aff'g *Fecht (Gen. Div.)*] and may narrow their orders accordingly. [Footnotes omitted.]

[68] In considering whether to enforce an LoR from a U.S. court, the broader scope of discovery permitted in the U.S. compared to Canada may be a relevant consideration: *Aker Biomarine AS et al. v. KGK Synergize Inc.*, 2013 ONSC 4897, 47 C.P.C. (7th) 284, at para. 27; The Sedona Conference, at pp. 5-6. And, as we have seen, not only is the term "relevant" in the context of discovery interpreted more narrowly in Canada than in the U.S., discovery of non-parties is more limited: *Aker Biomarine AS*, at para. 27; The Sedona Conference, at pp. 5-6. The broader scope of discovery in the U.S. is not *per se* a bar to the enforcement of LoRs, but to give effect to the request, the Ontario court must be satisfied that the requirements of Ontario law are met: see *Presbyterian Church*, at para. 32. If the request seeks "evidence in terms so wide that they go well beyond" the issues in the litigation, the relevance requirement will not have been met: *Presbyterian Church*, at para. 35.

[69] The parameters of relevance are determined by the U.S. pleadings. To recap, in the underlying U.S. action, Actava and the other respondents claim that the defendants — various owners, operators, and producers of TV channels that are broadcast in Russia and elsewhere, and Kartina, a licensed distributor of these channels — engaged in an unlawful campaign to interfere with Actava's business by initiating frivolous contempt proceedings against it, which were ultimately dismissed but which resulted in losses to Actava's business, including the

termination of the referral agreement with Matvil. Actava and the Actava respondents seek financial information from Matvil not to establish that the Russian TV Channels and Kartina interfered with Actava's business, but rather to assist its expert to calculate damages.

[70] In my view, the application judge erred in her relevance analysis for several reasons.

[71] First, even though it is the case that Actava and Matvil had a short-term referral agreement, the documents requested have nothing to do with the referral agreement. Actava has all the documents, including all financial documents, in Matvil's possession that concern that relationship. These documents have already been produced and were not the subject matter of the issues before the application judge. Actava does not suggest otherwise.

[72] Second, the scope of the request in the LoR is extraordinarily broad. Actava seeks production of yearly reports, from 2015 to present, of Matvil's revenues and profits as well as all documents, from 2015 to present, containing or constituting an appraisal of Matvil's valuation. Notably, the request encompasses all of Matvil's global business, not simply the small part that relates to Actava or the business lines in which Actava operates. Moreover, it extends to the work product of Matvil personnel and external service providers on the company's valuation. It is difficult to see how financial statements and valuation reports, prepared by Matvil for its own internal purposes and involving parts of its business unrelated to Actava,

could possibly be relevant to the U.S. action. The application judge did not address the relevance of the requested information as it related to the breadth of the request.

[73] Third, the relevance of the requested evidence is entirely speculative. In oral argument, counsel confirmed that Actava has no knowledge of what the evidence will reveal. There is no evidence that Matvil's revenues, profits, and value increased during the time period requested, and it is hard to imagine that evidence showing a decrease would be advanced in support of Actava's claim for substantial damages. Evidence anchored in speculation is incompatible with a characterization of relevance.

[74] Fourth, the purpose of the production request also undercuts the request. The existence of damages and the calculation of those damages are separate matters. Actava does not seek production of the evidence to establish that it suffered damages. Nor does it plead that its damages are linked to Matvil's financial performance, profitability or valuation. The production is sought for the sole purpose of potentially assisting the damages expert with his preferred methodology so as to quantify the extent of any loss.

[75] Relevance is not simply a matter of determining whether there is any possibility that the financial information sought from Matvil will assist Actava in calculating its damages. As Matvil's valuation expert, Andrew Freedman, explained, it is important to distinguish between "want" and "need", and that in

essentially any loss quantification and business valuation engagement, the incumbent financial expert will “want” to obtain data on the financial performance of comparable businesses and/or industry information. Often, such comparable industry data is not publicly available. This does not render it “relevant” for the purposes of obtaining its production from a disinterested non-party such as Matvil. Although the financial performance of unrelated comparable companies may be useful to an expert, this does not mean that the documentation is both relevant to the issues in dispute in the U.S. action and producible. If it were otherwise, an argument could be made that proprietary financial performance and valuation evidence be produced by an innocent corporate bystander in every case involving a claim for loss of profits by a player in a comparable industry. This is not, and ought not to be, the law.

[76] In sum, the application judge was not alive to the issues of breadth and purpose, the absence of any true linkage between the referral agreement and the productions sought, the relevance to the material issues in the U.S. pleadings, and the speculative nature of the request. The application judge erred in her determination of relevance. The failure to meaningfully address the relevance of the evidence sought constitutes an error in principle warranting appellate intervention.

(b) Public Policy

[77] Matvil also argues that the application judge erred in not finding that public policy precluded enforcement of the LoR. Actava and the other Actava respondents reject the argument that public policy prohibited production of Matvil's financial information.

[78] The court will decline to enforce an LoR if enforcement is contrary to public policy: *Perlmutter*, at para. 25; *Treat America Limited v. Nestlé Canada Inc.*, 2011 ONCA 560, 282 O.A.C. 311, at para. 12. There is no defined list of the various public policy considerations that may lead a court to refuse to enforce an LoR. That said, the focus is on whether granting the request, not the underlying foreign proceeding, contravenes Canadian public policy: *Presbyterian Church*, at para. 23.

[79] As recognized by this court in *Glegg*, public policy considerations include interference with solicitor-client privilege and confidentiality concerns. See also *De Havilland* on business confidentiality concerns,[9] *Westinghouse Electric Corp. v. Duquesne Light Co.* (1977), 16 O.R. (2d) 273 (H.C.) on Crown privilege, and *Optimight Communications Inc. v. Innovance Inc.* (2002), 155 O.A.C. 202 (C.A.), on trade secrets.[10]

[9] Although the court in *De Havilland* could not conclude that legitimate confidentiality concerns would be compromised by the request in issue in the LoR in that case, it did not conclude that it was an error to consider them as part of the public policy analysis.
[10] Although public policy was not explicitly referred to, the court in *Optimight* recognized that a non-party had a privacy interest in its trade secrets.

[80] Accordingly, confidentiality concerns may be considered as part of the public policy analysis.

[81] As a starting proposition it is contrary to public policy in the circumstances of this case to require Matvil to disclose the information sought given its sensitive nature. Matvil is a privately-held corporation. According to the affidavit filed by Matvil's Chief Executive Officer in opposition to the application to enforce the LoR, the financial documents and records Actava seeks are highly sensitive. They include information about the value of the company, its profitability, and the licensing fees paid for content with different licensors, information that Matvil has not ever knowingly or voluntarily made public.

[82] It is important to stress the nature of the information sought from Matvil. Financial performance and valuation evidence strike at the heart of a corporation. Nothing could be more confidential and open to abusive use.

[83] Although there is a protective order in the U.S. action, it falls short of effectively protecting Matvil's financial information. As mentioned, the order, which was issued prior to and independently of the LoR, allows Matvil to mark the confidential documents or information it produces so that it is accessible only to the lawyers and experts in the U.S. action. In addition, Actava agreed to additional conditions to limit the sharing of Matvil's financial information, including that: (i) Actava's general counsel not receive or review it; (ii) it not be provided to Actava, Kartina, or any of the other defendants in the action, except for their experts and

external legal counsel, and (iii) it be treated as for attorneys' and experts' eyes only throughout the entirety of the action. The application judge granted Actava's application to enforce the LoR subject to the U.S. court making an order incorporating these additional conditions, which it now has.

[84] Nevertheless, notwithstanding the expanded protections, the protective order and additional conditions do not really address the confidentiality concerns that arise in this case. First, while Matvil may mark materials as confidential, its designation is not necessarily controlling, as the protective order provides a mechanism for parties in the U.S. action to challenge a producing party's confidentiality designation. Of course, Matvil is not a party and at best would have to attend in the U.S. and attorn to the jurisdiction of the U.S. court to even attempt to seek relief.

[85] Second, because Actava seeks to use Matvil's financial information as part of a single-source comparator analysis, redacting or anonymizing the information in public filings or court proceedings will not protect Matvil's sensitive business information. The application judge stated that this risk was speculative and overstated. However, anyone viewing the filings or proceedings and the expert's opinion will readily identify Matvil as the source of the information. The fact that Kartina already knows that Matvil is the comparator does not alleviate this concern as suggested by the application judge; on the contrary, it exacerbates it.

[86] Third, the protective and additional orders do not relieve Matvil from the prospect of overly broad, irrelevant, and unduly burdensome production. See *Optimight*, at para. 31.

[87] Lastly, although not determinative, such production by a non-party would be unparalleled in Ontario. Actava cites no case in which LoRs have been enforced requiring a non-party to disclose confidential and proprietary information for the sole purpose of assisting a party to calculate damages. Indeed, even with the broader discovery rules in the U.S., counsel for Actava was unable to refer this court to any U.S. authority to that effect either.

[88] It must also be recalled that, at a minimum, Kartina is a competitor of Matvil. The risks associated with any such order for Matvil, a non-party to the U.S. litigation, far outweigh any hypothetical benefit to Actava. In my view, this incursion into Matvil's confidential proprietary financial performance and valuation information is clearly wrong and contrary to public policy.

(c) Sovereignty

[89] This brings me to the issue of sovereignty. As the Supreme Court observed in *Pro Swing*, at para. 27, "[c]omity is a balancing exercise". As explained, comity requires the court to engage in an analysis that takes into account the impact of the proposed order on Canadian sovereignty and whether justice requires that the LoR be enforced and the evidence requested be produced: *Zingre*, at p. 403; *Connecticut Retirement Plans*, at para. 7; and *Lantheus*, at para. 59.

[90] Here, with respect, the application judge did not engage in any real balancing exercise and gave no consideration to Canadian sovereignty or whether justice required that the LoR be enforced and the evidence requested be produced. Indeed, the application judge's reasons do not mention sovereignty or justice at all, and they fail to focus on the prejudice to Matvil — apart from, without any true explanation, summarily dismissing its concerns as overstated and speculative. In fairness, although sovereignty and the justice of the request permeate the case law relied upon by the parties, they were not the dominant focus of the parties' submissions. However, LoRs are not simply an enabling mechanism for the requesting party; there must be some balancing and consideration of whether the order is "prejudicial to the sovereignty or the citizens" of the receiving state: *Zingre*, at p. 401.

[91] As we have seen from *De Havilland* and *Lantheus*, the phrase "Canadian sovereignty" encompasses: whether the LoR gives extra-territorial authority to foreign laws that violate Canadian or provincial laws; whether granting the request would infringe on recognized Canadian moral or legal principles; whether the order would impose an undue burden on the individual whose evidence is requested; and whether the order would do prejudice to that individual.

[92] Although the *Business Records Protection Act*, a blocking statute, highlights the importance of confidential financial records to corporations in Ontario, based on the *De Havilland* and *Canadian Imperial Bank of Commerce* decisions,

enforcing the LoR in this case does not expressly violate a Canadian or provincial law. Rule 30.10 of the *Rules of Civil Procedure*, which addresses the need for an order for the production of documents from non-parties in proceedings in Ontario, also does not contain an outright prohibition.

[93] However, r. 30.10 can provide guidance on whether the other examples, identified in *De Havilland* and *Lantheus* as being encompassed by the term "Canadian sovereignty", have been met.[11] Indeed, it is reasonable to consider r. 30.10 in addressing the impact of the requested order on Canadian sovereignty: *Pecarsky*, at para. 21, citing *Fecht (C.A.)*, at p. 420. The application of the rule is not determinative but provides assistance in the assessment of whether the requested order is prejudicial to Canadian sovereignty.

[94] As noted, r. 30.10 provides that an order of the court is required for an order for production from a non-party. The moving party must establish that the documents requested are relevant to a material issue in the action and that it would be unfair to require the moving party to proceed to trial without having discovery of them.

[95] In *Morse Shoe (Canada) Ltd. v. Zellers Inc.* (1997), 100 O.A.C. 116 (C.A.), at para. 19, this court stated that orders under r. 30.10 should not be made as a

[11] These examples are whether granting the request would infringe on recognized Canadian moral or legal principles, and whether the request would impose an undue burden on, or do prejudice to, the individual whose evidence is requested.

matter of course but only in exceptional cases. And in *Ontario (Attorney General) v. Ballard Estate* (1995), 129 D.L.R. (4th) 52 (Ont. C.A.), at p. 56, this court affirmed that "[s]ave in the circumstances specifically addressed by the rules, non-parties are immune from the potentially intrusive, costly and time-consuming process of discovery and production." As the court observed, "[b]y its terms, rule 30.10 assumes that requiring a party to go to trial without the forced production of relevant documents in the hands of non-parties is not *per se* unfair": *Ballard Estate*, at p. 56.

[96] In *Castel & Walker: Canadian Conflict of Laws*, loose-leaf (2020-Rel. 4), 6th ed. (Markham, Ont.: LexisNexis Canada, 2004), Professor Walker writes, at para. 6.2(c): "Particularly in the case of non-parties, the court will be guided by the principle of proportionality, and will be disinclined to permit an order that does not reflect the local standards for examining non-parties" (footnote omitted). See also *Optimight*, at paras. 28-31.

[97] In this case, I have no hesitation in concluding that had a comparable request for production been made in a proceeding in Ontario under r. 30.10, the order would not have been granted. As mentioned, the LoR is extraordinarily broad, capturing, among other things, the yearly reports of Matvil's revenues and profits and all documents on Matvil's valuation since 2015.

[98] The application judge did not properly distinguish between evidence relevant to the issues in dispute, which Actava already possesses, and evidence for

quantification of damages using a comparative indicator. The request is speculative in nature and the risks associated with Matvil being the obvious single-source comparator are significant. Although the application judge offered recourse to the U.S. court as a mechanism available to Matvil to protect its interests, that would involve Matvil, a non-party against whom no allegations of wrongdoing are asserted, having to attorn to the jurisdiction of a foreign court in a foreign land. The application judge failed to recognize Matvil's sovereignty interest and neglected to consider the justice of the case. She was not alive to the breadth and purpose of the request, its speculative nature, and the absence of linkage between the referral agreement and the productions sought. Sanctioning an order of this nature constitutes a reviewable error.

(d) Other

[99] In light of my proposed disposition, there is no need to address the two procedural and evidentiary arguments raised in Matvil's factum, neither of which was pressed in oral submissions.

DISPOSITION

[100] For these reasons, I would allow the appeal.

[101] As agreed by the parties, Actava and the other Actava respondents shall pay Matvil its costs of the appeal and the stay motion, fixed in the amounts of $15,000 and $10,000 respectively, each inclusive of disbursements and applicable

tax, and the costs below of $90,000 in favour of the respondents are reversed and made in favour of the appellant.

Released: February 19, 2021 (“J.M.F.”)

“S.E. Pepall J.A.”
“I agree. Fairburn A.C.J.O.”
“I agree. L.B. Roberts J.A.”

Pro Swing Inc. v. Elta Golf Inc.

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Bastarache, LeBel, Deschamps, Fish, Abella and Charron JJ.

Heard: December 15, 2005;

Judgment: November 17, 2006.

File No.: 30529.

[2006] 2 S.C.R. 612 | *[2006] 2 R.C.S. 612* | *[2006] S.C.J. No. 52* | *[2006] A.C.S. no 52* | *2006 SCC 52*

Pro Swing Inc., Appellant; v. Elta Golf Inc., Respondent.

(123 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Catchwords:

Private international law — Foreign judgments — Recognition and enforcement of foreign non-monetary judgments — Whether common law should be changed to permit enforcement of foreign non-monetary judgments — Considerations relevant to recognition and enforcement of such judgments or orders.

Summary:

Pro Swing manufactures and sells customized gold clubs and golf club heads. It owns the Trident trademark in the U.S. Elta Golf carries on business in Ontario, and it offered for sale on its Website goods bearing marks which resembled Trident. Pro Swing filed a complaint in Ohio for trademark infringement. The parties entered into a settlement agreement, which was endorsed by a consent decree of the U.S. District Court. The decree enjoined Elta Golf from purchasing, marketing or selling golf clubs or golf club components bearing the Trident mark or confusingly similar variations. In 2002, Pro Swing brought a motion for contempt of court alleging that Elta Golf had violated the consent decree, and a contempt order was issued. Pro Swing then filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. The motions judge held that non-money foreign judgments can be enforced and declared the consent decree valid and enforceable in Ontario. She also found that the contempt order was restitutionary in nature and that parts of that order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized the severed portions of the contempt order and declared them to be [page613] enforceable. The Court of Appeal set aside the motions judge's decision, concluding that both foreign orders were not enforceable in Ontario because they were ambiguous in respect of material matters, in particular on the critical issue of the scope of the extraterritorial application of these orders.

Held (McLachlin C.J. and Bastarache and Charron JJ. dissenting): The appeal should be dismissed.

Per LeBel, Deschamps, Fish and Abella JJ.: The traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments should be changed. Such a change requires a cautious

approach and must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system. A departure from the common law rule will necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation and will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. Consequently, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether to enforce one. [paras. 14-16] [paras. 30-31]

Here, the consent decree and the contempt order are not enforceable in Ontario. These orders are problematic from many points of view. The contempt order is quasi-criminal in nature, and a Canadian court will not enforce a penal order, either directly or indirectly. While [page614] the U.S. distinguishes between civil and criminal contempt orders, in Canada, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order in Canada is underscored by the criminal law protections afforded to the person against whom such an order is sought and by the sanction that person faces, which could include imprisonment. The "public law" element of a declaration of contempt and the opprobrium attached to it eclipse the impact of a simple restitutionary award. Furthermore, when faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered. In the case of a contempt order, because of the different approaches in the U.S. and Canada, the conflict is real. Courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations. [paras. 34-36] [paras. 49-51] [para. 62]

If injunctive relief is to be enforced, its territorial scope has to be specific and clear. Here, the intended territorial scope of the injunctive relief in the consent decree is uncertain. In the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide. Moreover, the contempt order imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing's trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality. Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. [para. 25] [paras. 56-58] [para. 62]

On the issue of the appropriate remedy and the use of judicial resources, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Letters rogatory might have been a more useful means to obtain the evidence [page615] required by the American judge to finalize the damage award in the contempt proceeding in the U.S. Further, a court may also consider whether the matter merits the involvement of the Canadian court. Here, there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent. When the circumstances give rise to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with. [paras. 45-47] [para. 62]

Finally, there are public policy concerns regarding parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure. Courts should be mindful of the quasi-constitutional nature of the protection of personal information. [paras. 59-60]

Accordingly, in the case at bar, to refuse to enforce the consent decree and the contempt order is an appropriate

exercise of equitable discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested. [para. 63]

Per McLachlin C.J. and Bastarache and Charron JJ. (dissenting): The common law should be extended to permit the enforcement of foreign non-money judgments in appropriate circumstances. The common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships. That evolution must take place both incrementally and in a principled way, taking into account, in the context of foreign non-money judgments, the underlying principles of comity, order and fairness. [para. 66] [paras. 78-79]

A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not look beyond the judgment to the merits of the case. While different non-money remedies and different circumstances will raise different considerations, for the purposes of this case, there are three categories of restrictions on the recognition and enforcement of foreign non-money judgments that should be considered. First, with respect to the general requirements for enforcement, a foreign non-money judgment will not be enforced if the issuing court did not properly take jurisdiction, or if fairness considerations render such enforcement inadvisable or unjust. The existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most [page616] recognizable forms. Second, courts should decline to enforce foreign non-money orders that are not final and clear. Where finality is concerned, a foreign order must establish an obligation that is complete and defined; as regards clarity, an order must be sufficiently unambiguous to be enforced. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. Mere speculation would not suffice. Third, Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. [paras. 87-92] [paras. 95-101]

Here, the motions judge's decision should be restored. Elta Golf conceded that the general requirements for enforcement are met. The consent decree and the portions of the contempt order the motions judge held to be enforceable in Ontario were final. The orders were complete and in no need of future elaboration. The hypothetical possibility of the need for future court supervision should not preclude the recognition of a foreign order. The orders were also sufficiently clear. In particular, an examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. Lastly, while foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts, the same should not be said of foreign civil contempt orders. A distinction between civil and criminal contempt exists in Canada and there is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf's violations. The motions judge found that the contempt order was restitutionary in nature, not penal. That conclusion is unassailable. [paras. 104-116]

While parts of the contempt order may raise privacy concerns, to bring up this issue at this stage when it was never argued before this or any other court would amount to an inappropriate transformation of the proceedings. In any event, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal. [para. 121]

[page617]

Cases Cited

By Deschamps J.

Applied:*Morguard Investments Ltd. v. De Savoye*, *[1990] 3 S.C.R. 1077*; **considered:***Beals v. Saldanha*, *[2003] 3 S.C.R. 416*, *2003 SCC 72*; **referred to:***Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *[2003] 3 S.C.R. 3*, *2003 SCC 62*; *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, *[2003] 2 S.C.R. 63*, *2003 SCC 40*; *Hunt v. T&N plc*, *[1993] 4 S.C.R. 289*; *Hilton v. Guyot*, 159 U.S. 113 (1895); *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, *[1992] 2 S.C.R. 1065*; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911); *P.-*

A.P. v. A.F., [1996] R.D.J. 419; *Westfair Foods Ltd. v. Naherny* (1990), 63 Man. R. (2d) 238; *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897; *District Court of the United States, Middle District of Florida v. Royal American Shows, Inc.*, [1982] 1 S.C.R. 414; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38; *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2; *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, 2004 SCC 45; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7; *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416.

By McLachlin C.J. (dissenting)

Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289; *Beals v. Saldanha*, [2003] 3 S.C.R. 416, 2003 SCC 72; *R. v. Salituro*, *[1991] 3 S.C.R. 654*; *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc.*, [1998] 9 W.W.R. 688; *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, 2003 SCC 62; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53.

Statutes and Regulations Cited

Canada Evidence Act, R.S.C. 1985, c. C-5, ss. 4, 46.

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Civil Code of Québec, S.Q. 1991, c. 64, art. 3155(2).

Evidence Act, R.S.O. 1990, c. E.23, s. 60.

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5, s. 7(3)(*c*).

Rules of Civil Procedure, *R.R.O. 1990, Reg. 194, r. 60.11*.

Authors Cited

Berryman, Jeff. "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005), 30 *Adv. Q.* 413.

Black, Vaughan. "Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*" (2006), 42 *Can. Bus. L.J.* 81.

Briggs, Adrian. "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004), 8 *SYBIL* 1.

British Columbia. British Columbia Law Institute. *Report on the Enforcement of Non-money Judgments from Outside the Province*. Vancouver: The Institute, 1999.

Castel, Jean-Gabriel, and Janet Walker. *Canadian Conflict of Laws*, vol. 1, 6th ed. Markham, Ont.: LexisNexis Butterworths, 2005 (loose-leaf updated March 2006, release 3).

Dicey and Morris on the Conflict of Laws, vol. 1, 13th ed. under the general editorship of Lawrence Collins. London: Sweet & Maxwell, 2000.

Hanbury & Martin Modern Equity, 17th ed. by Jill E. Martin. London: Sweet & Maxwell, 2005.

MacDonald, Ken. "A New Approach to Enforcement of Foreign Non-Monetary Judgments" (2006), 31 *Adv. Q.* 44.

Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf updated November 2005, release 13).

Spry, I. C. F. *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 6th ed. Canada: Carswell, 2001.

Talpis, Jeffrey, and Joy Goodman. "A comity of errors", *Law Times*, vol. 14, No. 2, January 20, 2003, p. 7.

Uniform Law Conference of Canada. *Uniform Law Conference of Canada: Commercial Law Strategy*. Ottawa: The Conference, 2005 (loose-leaf).

Walker, Janet. "*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002), 5 *Can. Int'l Law.* 28.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (Moldaver, Gillese and Blair JJ.A.) *(2004), 71 O.R. (3d) 566*, *[2004] O.J. No. 2801* (QL), setting aside an order of Pepall J. *(2003), 68 O.R. (3d) 443*, [page619] *30 C.P.R. (4th) 165*, *[2003] O.J. No. 5434* (QL). Appeal dismissed, McLachlin C.J. and Bastarache and Charron JJ. dissenting.

Counsel

Raymond F. Leach and *Janet A. Allinson*, for the appellant.

No one appeared for the respondent.

The judgment of LeBel, Deschamps, Fish and Abella JJ. was delivered by

DESCHAMPS J.

1 Modern-day commercial transactions require prompt reactions and effective remedies. The advent of the Internet has heightened the need for appropriate tools. On the one hand, frontiers remain relevant to national identity and jurisdiction, but on the other hand, the globalization of commerce and mobility of both people and assets make them less so. The law and the justice system are servants of society, not the reverse. The Court has been asked to change the common law. The case for adapting the common law rule that prevents the enforcement of foreign non-money judgments is compelling. But such changes must be made cautiously. Although I recognize the need for a new rule, it is my view that this case is not the right one for implementing it.

I. Background and Judicial History

2 The appellant, Pro Swing Inc., manufactures and sells customized golf clubs and golf club heads. It owns the Trident trademark in the U.S. On April 27, 1998, Pro Swing filed a complaint against eight defendants for trademark infringement in the United States District Court for the Northern District of Ohio Eastern Division ("Ohio court"). The respondent, Elta Golf Inc., an Ontario resident, was named as a defendant. In the action, Pro Swing alleged that Elta was offering and selling golf clubs or golf club heads on its Web site under the infringing trademark Rident. On July 6, 1998, in Ontario, Mr. Frank Lin, as president of Elta, signed a declaration in which he stated that he now knew of Pro Swing's trademark. He declared that he had [page620] three golf clubs or golf club heads bearing the mark Rident, that he had never sold any and that he would discontinue advertising and distributing the clubs or club heads. The declaration was incorporated into a settlement agreement which stated that Pro Swing relied on the representations of Elta as to the use of Rident on golf clubs or golf club heads. Elta further represented in the agreement that it had discontinued marketing or using golf clubs or golf club heads bearing the mark Trident, Rident, Riden or Trigoal, and it undertook not to purchase, sell or use club components bearing those marks or a confusingly similar mark without the authorization of Pro Swing. It also undertook to deliver to Pro Swing's counsel any clubs or golf club heads and marketing material in its possession, and to modify its Web page. On July 28, 1998, a consent decree was endorsed by Matia J. of the Ohio court (see Appendix A).

3 On December 20, 2002, Pro Swing filed a motion for contempt of court, alleging that Elta had violated the consent decree by failing to surrender the items and by advertising and selling club heads. Pro Swing filed a declaration stating that an investigator had purchased two golf club heads on the Internet, one bearing the Trident and the other the Rident mark, for delivery in Ohio. On February 25, 2003, after finding that Elta had violated the consent decree, Matia J. issued a contempt order (see Appendix B).

4 As the Superior Court judge noted, the orders overlap to a certain extent (*(2003), 68 O.R. (3d) 443*). The relevant elements are as follows:

1. an injunction prohibiting Elta from purchasing, marketing, selling or using golf clubs or components bearing Pro Swing's trademark or any [page621] confusingly similar variations of it (consent decree, at para. 7; contempt order, at para. 2);
2. an order that Elta surrender and deliver all infringing clubs and/or components in its possession, along with any advertising, packaging, promotional or other materials, to counsel for Pro Swing (consent decree, at para. 8; contempt order, at para. 6);
3. an order for an accounting of all infringing golf clubs and/or components sold since the consent decree (contempt order, at para. 3);
4. an order for compensatory damages based on profits derived through sales of infringing goods since the consent decree (contempt order, at para. 4);
5. an order for costs and attorney's fees against Elta (contempt order, at para. 5);
6. an order that Elta provide the names of and contact information for the suppliers and purchasers of infringing goods, and that it pay the costs of a corrective mailing (contempt order, at paras. 7 and 8); and
7. an order that Elta recall all counterfeit and infringing goods (contempt order, at para. 9).

5 In June 2003, Pro Swing filed in the Ontario Superior Court of Justice a motion for recognition and enforcement of the consent decree and the contempt order. Elta objected that the two judgments could not be recognized or enforced because they did not meet the common law requirements of being final judgments *in personam* for a fixed sum of money and that the contempt order was excluded from recognition and enforcement because it was quasi-criminal in nature.

6 While acknowledging that the traditional common law rule required that the judgment be for a fixed sum of money, the Superior Court judge found that the latest jurisprudence opened the way for a relaxation of the rule. She found it clear from the terms of the consent decree that extraterritorial application was intended. She declared the consent decree valid and enforceable in Ontario. On the contempt order, she was of the view that it was restitutionary in nature and engaged a dispute between private parties. She found that parts of the contempt order were duplicative of the consent decree and were not final, and concluded that the portions not offending the finality requirement could be severed. She recognized paras. 3, 7, 8 and 9 of the contempt order and declared them to be enforceable.

7 Elta appealed the Superior Court's judgment, asking for its reversal. Pro Swing cross-appealed, asking for recognition and enforcement of the entire contempt order. The Court of Appeal stated that it was inclined to agree that the "time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments" (*(2004), 71 O.R. (3d) 566*, at para. 9), quoting the following passage from *Morguard Investments Ltd. v. De Savoye*, *[1990] 3 S.C.R. 1077*, at p. 1098:

> The world has changed since the above rules [concerning the recognition and enforcement of foreign judgments] were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.

8 However, the Court of Appeal found that the orders were not "sufficiently certain in [their] [page623] terms" to be enforced, giving as an example the issue of extraterritoriality it qualified as critical. The Court of Appeal also noted that Pro Swing could have taken action in Ontario based on the settlement agreement, or for infringement of its trademark rights if such rights extended to Canada. As well, the court was of the view that Pro Swing could have instituted proceedings to obtain the information it required to provide to the Ohio judge the proposed damage award contemplated in the contempt order. The Court of Appeal allowed the appeal and dismissed the cross-appeal. Pro Swing was granted leave to appeal to this Court.

9 Two issues are raised in this appeal: whether foreign non-money judgments can be recognized and enforced, and whether such a change to the existing common law rule entails additional considerations reflecting the new needs created by expanding judicial assistance to foreign countries and litigants in this way. This last issue is not formally raised by the appellant, but it is inherently linked to the departure from the traditional rule. To allow for the recognition and enforcement of non-money orders will open the door to a number of equitable orders. The crux of this issue is to determine the considerations relevant to the recognition and enforcement of such orders.

II. Traditional Common Law Rule

10 The traditional common law rule is clear and simple. In order to be recognizable and enforceable, a foreign judgment must be "(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and (b) final and conclusive, but not otherwise" (*Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75 (footnotes omitted)). Similarly, J.-G. Castel and J. Walker, in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), at para. 14.6, state that "[a] foreign judgment *in personam* given by a court of competent jurisdiction is enforceable [page624] provided that it is final and conclusive, and for a definite sum of money."

11 The foreign judgment is evidence of a debt. All the enforcing court needs is proof that the judgment was rendered by a court of competent jurisdiction and that it is final, and proof of its amount. The enforcing court then lends its judicial assistance to the foreign litigant by allowing him or her to use its enforcement mechanisms.

Professor Vaughan Black explains the consequences of the recognition and enforcement of a money judgment at common law in "Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*" (2006), 42 *Can. Bus. L.J.* 81, at p. 89:

> That is, [the Canadian court] always uses its own rules on such matters as the availability of garnishment, the effect of garnishment on employment, the effect of a payment into court, the date of conversion from a foreign currency into the local money, and the proper procedures for seizure and attachment. Likewise, even when enforcing a money judgment from [a foreign court, the Canadian court] employs its own exemptions legislation, its own rules for controlling competition among judgment creditors, and its own rules on post-judgment interest. In short, when a Canadian court recognizes a foreign judgment that says that the defendant must pay the plaintiff a sum of money, that foreign judgment is simply *evidence* of a debt. The recognizing court goes about collection (or limiting collection) of that debt in its own way. [Emphasis in original.]

12 As this Court confirmed in *Beals v. Saldanha*, *[2003] 3 S.C.R. 416*, *2003 SCC 72*, absent evidence of fraud or of a violation of natural justice or of public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction in which the judgment sought to be enforced domestically was rendered.

13 It is significant that, under the traditional common law rule, the recognition and enforcement of a money judgment does not require an interpretation of the foreign law, nor does it reach deeply into the structure of the domestic court's justice system, since the money obligation created by the foreign judgment is sufficient evidence to enforce it in the [page625] Canadian justice system. Care must thus be taken not to lose sight of the limited impact the common law rule has on our justice system. Judicial assistance under the new rule will move beyond triggering mechanisms necessary to collect a debt. The separation of judicial systems is thus likely to be altered, since a domestic court enforcing a foreign non-money judgment may have to interpret and apply another jurisdiction's law. Professor Black illustrates this by way of the following example (at p. 89):

> A [foreign court] might issue an injunction which spells out in great detail what, when and how a defendant must do (or refrain from doing) something. If [a Canadian court] recognizes such an injunction then the courts in [the foreign country] have been permitted to reach deeply into the enforcement regime of [Canada]. It is the original [foreign order] (albeit confirmed by [a Canadian court]) that will control what the defendant must and must not do in [Canada]. Of course, if the defendant in [Canada] fails to comply with the order then any contempt proceedings in [Canada] will be conducted in accordance with [Canadian] procedure. But apart from that, when [a Canadian court] agrees to enforce an injunction issued by a court in [a foreign country], then [the foreign country] is dictating and controlling the enforcement process in [Canada], something that does not occur when [the Canadian court] enforces a foreign money judgment.

14 To depart from the fixed-sum component of the traditional common law rule will open the door to equitable orders such as injunctions, which are key to an effective modern-day remedy. The recognition and enforcement of equitable orders will require a balanced measure of restraint and involvement by the domestic court that is otherwise unnecessary when the court merely agrees to use its enforcement mechanisms to collect a debt.

15 I agree that the time is ripe to revise the traditional common law rule that limits the recognition and enforcement of foreign orders to final money judgments. However, such a change must be accompanied by a judicial discretion enabling the [page626] domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system.

III. Case for Changing the Common Law Rule

16 I have read the Chief Justice's reasons, and I agree that there is a compelling rationale for a change in the common law requirement. However, it must be recognized that a departure from the common law rule will

necessarily affect both commercial activity and judicial assistance in an era of large-scale cross-border commerce, e-commerce and cross-border litigation.

17 For these reasons, it is important to bear in mind the need to proceed cautiously in implementing any change. Professor Black recognizes that the principles of comity, order and fairness articulated in *Morguard* favour the recognition and enforcement of foreign non-money judgments, but he tempers his observation by noting the need to develop a careful and nuanced approach that attends to the features of non-money orders. In the same vein, Professor Jeff Berryman, in "Cross-Border Enforcement of Mareva Injunctions in Canada" (2005), 30 *Adv. Q.* 413, underscores the fact that equitable remedies are context-dependent and subject to amendment at the time of enforcement; he maintains that they do not lend themselves well to simply being endorsed by Canadian courts.

18 On a more general note, a number of law professors and practitioners have commented on the enforcement of foreign judgments and have insisted on the need to adapt the possible defences and to redefine the approach to comity to ensure that foreign judgments do not conflict with domestic law. Professor Adrian Briggs, in "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004), 8 *SYBIL* 1, comments positively on the *Morguard* test as applied to international law but questions whether the acceptance of new bases of jurisdictional competence should [page627] entail the development of new defences tailored specifically to them. Similarly, Professor Jeffrey Talpis and Joy Goodman, in "A comity of errors", *Law Times*, vol. 14, No. 2, January 20, 2003, at p. 7, suggest that the public policy defence should be widened to allow a court to refuse to enforce a judgment that is manifestly unreasonable under the law of the domestic forum. Finally, Professor Janet Walker, in "*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002), 5 *Can. Int'l Law.* 28, stresses that the "requirements of comity as they are reflected in the rules for enforcing foreign judgments are changing along with the circumstances in which they operate" (p. 29).

19 In summary, most of the commentators are not against finding new ways to adjust the law to suit modern realities, but they insist on the need for a cautious approach. As Briggs puts it, at p. 22: "It cannot be right to make radical changes to [jurisdiction] while supposing that this has no impact on the [defences]... . [I]ncremental, intuitive, coherent, development is what common law does best, and is how the common law conflict of laws works best."

20 *Morguard* has led the way to developing the common law to better serve the interests of all litigants, foreign and domestic. The need to move towards a rule more flexible than a total bar is compelling. However, the change must be made having regard to issues that the old rule was not concerned with. The instant case provides an opportunity to consider how the rule against enforcing non-monetary judgments can be changed in the context of equitable orders, like injunctions, and how the specific nature of such orders makes it necessary to view enforcement from a new perspective.

IV. Nature of Equitable Judgments

21 A change in the traditional common law rule will be as important as was the passage, for the purpose of establishing jurisdiction over a [page628] defendant, from the service or attornment of the defendant requirement to the real and substantial connection test. The latter test is flexible and its formulation has allowed it to be applied in various and evolving circumstances. Similarly, the change from the traditional common law rule to the recognition and enforcement of foreign non-money judgments should be accompanied by the incorporation of flexible factors that reflect the specific, and varied nature of equitable orders.

22 At common law, the typical remedy is an award for damages. However, a wide range of equitable remedies are available, and they take various forms. Their commonality is that they are awarded at the judge's discretion. Judges do not apply strict rules, but follow general guidelines illustrated by such maxims as "Equity follows the law", "Delay defeats equities", "Where the equities are equal the law prevails", "He who comes to equity must come with clean hands" and "Equity acts *in personam*" (*Hanbury & Martin Modern Equity* (17th ed. 2005), at paras. 1-024 to 1-036, and I. C. F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (6th ed. 2001), at p. 6). The application of equitable principles is largely dependent on the

social fabric. As Spry puts it:

> ... the maxims of equity are of significance, for they reflect the ethical quality of the body of principles that has tended not so much to the formation of fixed and immutable rules, as rather to a determination of the conscionability or justice of the behaviour of the parties according to recognised moral principles. This ethical quality remains, and its presence explains to a large extent the adoption by courts of equity of broad general principles that may be applied with flexibility to new situations as they arise. [p. 6]

23 The traditional rule does not leave any room for discretion as regards such considerations or forms of relief. In contrast, equitable orders are crafted in accordance with the specific circumstances of each case. The most relevant equitable remedies for the purposes of the present case are specific [page629] performance, that is, an order by the court to a party to perform its contractual obligations, and the injunction, that is, an order to a party to do or refrain from doing a particular act.

24 Despite their flexibility and specificity, Canadian relief orders are fashioned following general guidelines. The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order. Also, the courts do not usually watch over or supervise performance. While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources. This factor is discussed by R. J. Sharpe, in *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at para. 7.480:

> From this perspective, the supervision concern differs from other criteria determining the availability of specific relief. It is based not upon the weighing of relative advantage and disadvantage to the parties but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. This fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern. The cost to society of providing the resources necessary to implement specific performance decrees is properly considered by the court when weighing the advantages the specific relief might otherwise offer.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3, 2003 SCC 62, a case in which the judge retained jurisdiction to [page630] supervise compliance with an order enjoining the Government of Nova Scotia to use its best efforts to provide French language facilities and programs, demonstrates the possible extent of judicial involvement where injunctive relief is ordered. This burden on the judicial system may be justified in the context of the constitutional protection afforded to linguistic minorities, but may not be warranted when the cost is not proportionate to the importance of the order. The Latin maxim *de minimis non curat praetor* conveys the long-established rule that claims will be entertained only if they are important enough to warrant the expenditure of public resources.

25 Equally important concerns can be raised by other types of orders, like anti-suit injunctions, and search or freezing orders. The question of their territorial scope is highly relevant. In *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63, 2003 SCC 40, and *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 , the Court refused to give extraterritorial effect to provincial statutes. The frontiers of the foreign state are the very reason why its judgments need to be recognized and enforced abroad. Should the orders not be assessed to ensure that their form is compatible with domestic law? Under the traditional rule, the issue of clarity and specificity is not a concern, but if injunctive relief is to be enforced, its territorial scope has to be specific and clear. Canadian residents should not be made subject to unforeseen obligations from a foreign court or to orders in a form unknown to Canadian courts. This issue goes not to the jurisdiction of the foreign court, but either to the framing of new conditions for

recognition and enforcement or to new defences.

V. Considerations Particular to Equitable Orders

26 Under the traditional common law rule, courts have relied on the notion of comity to justify the [page631] recognition and enforcement of foreign judgments. But it is worth noting that in *Morguard*, the Court took a balanced approach to comity. In that case, La Forest J. first referred to (at p. 1096):

> ... the real nature of the idea of comity, an idea based not simply on respect for the dictates of a foreign sovereign, but on the convenience, nay necessity, in a world where legal authority is divided among sovereign states of adopting a doctrine of this kind.

He adopted the more complete formulation of the concept of comity (at p. 1096) developed by the U.S. Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895), at p. 164:

> ... the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

27 Comity is a balancing exercise. The relevant considerations are respect for a nation's acts, international duty, convenience and protection of a nation's citizens. Where equitable orders are concerned, courts must take care not to emphasize the factor of respect for a nation's acts to the point of imbalance. An equitable order triggers considerations of both convenience for the enforcing state and protection of its judicial system. I mention these two considerations because they will be of particular relevance in the present case.

28 Under the traditional rule, once the jurisdiction of the enforcing court is established, the petitioner must show that he or she meets the conditions for having the judgment recognized and enforced. In the case of an equitable order, it is at this stage that considerations specific to the particular nature of such orders should be contemplated. If the particular concerns raised by equitable orders are considered by the judge at the stage of determining whether the order is suitable for enforcement, they [page632] will not ordinarily need to be raised again at the defence stage. The traditional defences relating to the merits or to procedure, which are summarized in *Beals*, should not be different for equitable orders than for common law judgments. However, there might be other considerations, such as laches, that would make it inequitable to enforce a foreign judgment. Such considerations should not generally entail revisiting the merits of the case.

29 The present case does not require the consideration of defences particular to the nature of equitable orders. Thus, I do not have to expand on Major J.'s *dictum* in *Beals* that the evolution of private international law may require the creation of new defences (para. 42). The existing defences do not need to be broadened for the purposes of the case at bar. Similarly, the finality requirement, which is indispensable, although more complex in the context of an equitable order than in that of a common law order, could be the object of further commentary. However, these topics need not be fully addressed in the present case. Revisiting the defences and defining the finality requirement in the context of equitable orders are better left for another day.

30 In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. *Forum non conveniens* and letters rogatory are mechanisms that, like the enforcement of foreign judgments, rely on comity. For these mechanisms, as for the enforcement of equitable orders, the balancing exercise of comity requires a careful review of the relief ordered by the foreign court. This review ensures that the Canadian court does not extend judicial assistance if the Canadian justice system would be used in a manner not available in strictly domestic litigation. It could be tempting to use form over substance as the distinctive criterion. However, the distinction between form and substance can sometimes be elusive or even misleading. In [page633] considering the order it is asked to enforce, the domestic court should instead scrutinize the impact of the order. Relevant considerations may

thus include the criteria that guide Canadian courts in crafting domestic orders, such as: Are the terms of the order clear and specific enough to ensure that the defendant will know what is expected from him or her? Is the order limited in its scope and did the originating court retain the power to issue further orders? Is the enforcement the least burdensome remedy for the Canadian justice system? Is the Canadian litigant exposed to unforeseen obligations? Are any third parties affected by the order? Will the use of judicial resources be consistent with what would be allowed for domestic litigants?

31 The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.

VI. Application to the Case at Bar

A. *Preliminary Comments*

32 I reviewed the facts at the beginning of these reasons and need not expand on them save to mention the peculiar circumstances in which the case proceeded in this Court. Elta's factum was due on [page634] September 7, 2005. On October 17, 2005, Elta's attorney filed a notice of withdrawal and on October 26, Mr. Frank Lin, who signed the 1998 declaration for Elta, informed the Registrar that the company's "financial circumstances" did not permit it to incur further legal fees. He confirmed the information by fax on a sheet of paper bearing no letterhead. The hearing proceeded *ex parte*, a circumstance that could not have been foreseen when leave was granted.

33 Since equity is about ethics and the prevention of unconscionable conduct, it may be tempting to spring into action to remedy conduct by Elta that looks like blatant defiance of the law and the judicial system. However, care must be taken to ensure that the law and the justice system are not harmed by engaging them too quickly in a manner that accommodates only one aspect of comity. Three issues are relevant to determining whether the orders rendered in this case meet the conditions for recognition and enforcement. The first, raised by Elta, relates to the quasi-criminal nature of a contempt order, the second to the burden on the judicial system and the third to the extraterritorial nature of the orders. In addition, I feel bound to say a few words concerning the public policy defence. While it might have been possible to resolve some of the issues had Elta appeared before the Court, its absence, and the reasons given for its absence, reinforce my conclusion that the circumstances do not lend themselves well to the recognition and enforcement of the orders.

B. *Quasi-Criminal Nature of the Contempt Order*

34 It is well established that Canadian courts will not enforce a penal order, either directly or indirectly (Castel and Walker, at para. 8.3). This point is pertinent only to the recognition and enforcement of the contempt order. The Superior Court judge reasoned that the contempt order was restitutionary in nature and engaged a dispute between private parties (para. 17). This narrow view of contempt of court conflicts with Matia J.'s finding that, "[b]ased [page635] upon these violations, Elta Golf is in contempt of this Court" (A.R., at p. 102), and with this Court's finding in *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, *[1992] 2 S.C.R. 1065*:

> The penalty for contempt of court, even when it is used to enforce a purely private order, still involves an element of "public law", in a sense, because respect for the role and authority of the courts, one of the foundations of the rule of law, is always at issue. [p. 1075]

In *Vidéotron*, the Court opted for a unified approach to the nature of the contempt of court order, thus setting aside

the distinction between the civil and criminal aspects that prevails in the United States: *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911), at p. 441.

35 In Canadian law, a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. Consequently, a motion for contempt of court cannot be reduced to a way to put pressure on a defaulting debtor or a means for an aggrieved party to seek indemnification. The gravity of a contempt order is underscored by the criminal law protections afforded to the person against whom such an order is sought. Not only is that person not compellable (*Vidéotron*, at p. 1078) but he or she is not competent to act as a witness for the prosecution: *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 4; *P.-A.P. v. A.F.*, [1996] R.D.J. 419 (C.A.). The significance of a contempt order is also evident from the sanction faced by the offender. In Canada, an individual in contempt of court can be committed to jail (see Ontario *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194, r. 60.11*) or may face the imposition of any other sanction available for a criminal offence, such as a fine or community service: *Westfair Foods Ltd. v. Naherny* (1990), 63 Man. R. (2d) 238 (C.A.). Thus, both the process used to issue a declaration of contempt and the sanction bear the imprint of criminal law.

36 The "public law" element of a declaration of contempt and the opprobrium attached to it eclipse [page636] the impact of a simple restitutionary award. As a matter of principle, the quasi-criminal nature of the contempt order precludes the enforcement of such orders in Canada.

37 The Superior Court judge did not acknowledge the differences between the Canadian and American views on contempt. She ignored the declaration of contempt, expunged the duplicative parts from the contempt order and declared only the new injunctive relief to be recognizable and enforceable. I am not satisfied that it was appropriate to reconfigure the order in this way.

38 The reconfiguration led the court to attribute to the contempt order a nature different from the usual nature of such orders in Canada. To sidestep the difficulty by severing the order hardly addresses the argument based on the quasi-criminal nature of the order and is a course to be avoided. Severance requires the receiving court to consider the merits of the order and risks affecting its substance. Even if severance does not distort the purpose of the order, it tests the limits of the enforcing court's familiarity with the foreign law, a topic discussed below.

39 Because of their criminal component, contempt orders should not be enforceable in Canada. I note, on this issue, that according to K. MacDonald, in "A New Approach to Enforcement of Foreign Non-Monetary Judgments" (2006), 31 *Adv. Q.* 44, at p. 56, citing the *Restatement of the Law (Third): The Foreign Relations Law of the United States* (1987), Part IV, ch. 8, s. 481, the U.S. courts, while allowing the recognition of judgments granting injunctions, will not generally enforce such orders. According to this view, neither the consent decree nor the reconfigured contempt order would be enforced in the U.S.

C. *Integrity of the Justice System*

40 In choosing a remedy, a court of equity must consider whether the remedy is appropriate. Such is [page637] the case when deciding whether to issue an injunction. Judicial economy is one of the many considerations the court must evaluate. In private international law, this concern is addressed in the principle of comity. As mentioned above, comity concerns not only respect for a foreign nation's acts, international duty and convenience, but also the protection of a nation's citizens and domestic values.

41 In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, the Court recognized that prejudice to a party is relevant to the choice of forum. Similarly, if a plaintiff has a choice between courses of action and one of these is less burdensome for the receiving court, he or she can rightly be asked to take the less burdensome one.

42 On the issue of the use of judicial resources, the Court of Appeal stated that the denial of recognition and enforcement did not leave Pro Swing without a remedy. It in fact mentioned two other possible courses of action for

Pro Swing to take: a separate action and letters rogatory. The first would be burdensome for Pro Swing and would not give full faith and credit to the Ohio judgment. However, letters rogatory should have been considered.

43 Letters rogatory are used to obtain evidence in the form of testimony, statements or documents for use in proceedings before foreign courts: *Canada Evidence Act*, s. 46, and Ontario *Evidence Act*, R.S.O. 1990, c. E.23, s. 60. This form of judicial assistance, like the recognition and enforcement of foreign orders and *forum non conveniens*, rests on the principle of comity: *District Court of the United States, Middle District of Florida v. Royal American Shows, Inc.*, [1982] 1 S.C.R. 414.

44 Letters rogatory are allowed by virtue of s. 46 of the *Canada Evidence Act* and applicable provincial legislation. One of the requirements is that a [page638] proceeding be pending before the Ohio court: *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Re International Association of Machinists & Aerospace Workers and Qantas Airways Ltd.* (1983), 149 D.L.R. (3d) 38 (Ont. H.C.J.). In this case, the proceeding may be considered to be pending before the Ohio court because the very reason the order is rendered is to enable Pro Swing to return before Matia J. to determine the damage award.

45 Subject to their being duly obtained, letters rogatory may be viewed as a useful means to obtain the evidence required by Matia J. to finalize the damage award in the contempt proceeding in Ohio. This course of action would have the benefit of avoiding duplication of the enforcement proceedings in Ontario with those in Ohio. Moreover, letters rogatory are truly incidental to the proceedings, which is how the Superior Court judge characterized the parts of the contempt order she agreed to recognize and enforce.

46 In addition to considering alternate means to reach a particular outcome, a court may consider whether the matter merits the involvement of the Canadian court. The receiving court's willingness to extend its judicial resources may depend on the importance of the case compared to the damage the plaintiff would suffer if his or her request were refused. In the present case, given the facts that the consent agreement was concluded on the basis of only three golf clubs or golf club heads, that only two golf club heads were purchased in the investigation and that Elta chose not to appear owing to "financial circumstances", there is a concern that the judicial machinery could be deployed only to find that Pro Swing's debtor is insolvent.

47 True, it would encourage deceit, fraud and similar misconduct if courts were systematically to require litigants to demonstrate the damage they would suffer should enforcement be denied. Nevertheless, when the circumstances give rise [page639] to legitimate concerns about the use of judicial resources, the litigant bears the burden of reassuring the court that the matter is worth going forward with.

48 The appropriateness of using local judicial resources is a factor included in the convenience aspect of the principle of comity. It does not allow judges to determine whether the order is correct, but provides minimal protection for our justice system.

D. *Familiarity With the Foreign Law*

49 I alluded earlier to the problem of interpreting a foreign order in light of Canadian law, which might be different from the foreign law. When faced with the need to interpret the law, the receiving court must ensure that no conflict results from the nature attributed to the order after the enforcement judgment is rendered.

50 In the case of a contempt order, because of the different approaches in the U.S. and in Canada, the conflict is real. In the U.S., according to *Gompers*, a civil contempt order is remedial only and is issued for the benefit of the complainant. However, if the same contempt order is recognized and enforced in Canadian law, it becomes a Canadian contempt order that has a quasi-criminal nature and exposes the offender to imprisonment.

51 Differences in laws might trigger different obligations. It is important that the receiving court does not have to venture into uncertain territory to interpret orders whose terms are based on rules with which the court is not

familiar. Also, courts should not expose litigants to consequences to which they would not be exposed under the foreign law. Aware of their limitations, receiving courts should use their discretion to refrain from enforcing orders that subject Canadian litigants to unforeseen obligations.

[page640]

E. *Extraterritoriality*

52 The Superior Court was of the view that the wording of the consent decree made it clear that extraterritoriality was intended by the parties. However, the judge did not comment on the contempt order. The Court of Appeal found both orders unclear as to the scope of their extraterritorial application. The issue is important both because the transactions were made over the Internet and because the trademark was protected only in the U.S.

53 Extraterritoriality is a long-recognized concern not only because a law normally applies solely in the jurisdiction where it is enacted, but also because courts lack familiarity with foreign justice systems. Courts will tend to find solutions to limit spheres of conflict. In *Hunt*, a Quebec statute was found not to prevent the enforcement of a B.C. order. In *Unifund*, an Ontario statute was held not to apply to a B.C. corporation. In *Aetna Financial Services Ltd. v. Feigelman*, *[1985] 1 S.C.R. 2*, the Court was of the view that a *Mareva* injunction should have been refused because the assets in question were not at risk when moved to Quebec.

54 This Court commented on the particular nature of an Internet transaction in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, *[2004] 2 S.C.R. 427*, *2004 SCC 45*. It stated that "a telecommunication from a foreign state to Canada, or a telecommunication from Canada to a foreign state, 'is both here and there'" (para. 59).

55 Truly, when Mr. Frank Lin signed the declaration stating that he had three golf clubs or golf club heads in inventory and agreed to surrender them to Pro Swing's counsel, he must have understood that an eventual incorporation of the settlement [page641] agreement into a consent decree could bind him to deliver goods located in Ontario.

56 However, the same extraterritorial application cannot be said of the orders contained in the consent decree and the contempt order that enjoined him from purchasing and selling the material. Since the trademark protection is the one recognized in the U.S. and the Internet transaction took place in both Ohio and Ontario, the transaction can be said to have occurred in Ohio. The Internet component does not transform the U.S. trademark protection into a worldwide one. Whether Elta could, by consent, have agreed to such an extension is a matter of interpretation. The Superior Court found the terms clear, but the Court of Appeal found them doubtful. In my view, in the absence of explicit terms making the settlement agreement a worldwide undertaking, the consent decree cannot be said to clearly apply worldwide.

57 In addition to prohibiting the purchase and sale of designated material, the contempt order enjoins Elta "to make an accounting to Pro Swing of all golf club and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree ... [and to] include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components ...". It imposes an obligation to account for all sales, even sales that may fall outside the scope of Pro Swing's trademark protection. To interpret the contempt order as applying outside the U.S. would offend the principle of territoriality.

58 Extraterritoriality and comity cannot serve as a substitute for a lack of worldwide trademark protection. The Internet poses new challenges to trademark holders, but equitable jurisdiction cannot solve all their problems. In the future, when considering cases that are likely to result in proceedings in a foreign jurisdiction, judges will no doubt be alerted to the need to be clear as regards [page642] territoriality. Until now, this was not an issue because

judgments enforcing trademark rights through injunctive relief were, by nature, not exportable.

F. *Public Policy Defence*

59 Elta did not raise a public policy defence. However, public policy and respect for the rule of law go hand in hand. Courts are the guardians of Canadian constitutional values. They are sometimes bound to raise, *proprio motu*, issues relating to public policy. An obvious example of values a court could raise *proprio motu* can be found in *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7. In that case, the Court took Canada's international commitments and constitutional values into consideration in deciding to confirm a direction to the Minister to make a surrender subject to assurances that the death penalty would not be imposed. Public policy and constitutional requirements may also be at stake when the rights of unrepresented third parties are potentially affected by an order. In the case at bar, over and above the concerns articulated by the Court of Appeal and the defences raised by Elta, there are, in my view, concerns with respect to parts of the contempt order inasmuch as it requires the disclosure of personal information that may *prima facie* be protected from disclosure.

60 The quasi-constitutional nature of the protection of personal information has been recognized by the Court on numerous occasions: *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, [2006] 1 S.C.R. 441, 2006 SCC 13, at para. 28; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, at para. 24; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66. In *Burns*, the Court required assurances that our constitutional protections would be extended to individuals found on Canadian soil; in the same way, courts should be mindful of the values that merit constitutional or quasi-constitutional protection. In light of the [page643] quasi-constitutional status attributed to privacy, the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic. The range of documents is wide and most of them contain personal information that might be protected.

61 Because no submissions were made on this point, we do not know if there is any information or evidence relevant to applicable exceptions. The documents contain personal information that may *prima facie* be protected for the benefit not of the person from whom disclosure is sought, but of the persons to whom the information belongs. This is but an example of public policy considerations that judges must consider before agreeing to recognize and enforce a judgment on a foreign country's behalf.

G. *Summary*

62 In summary, the orders are problematic from many points of view. The contempt order is quasi-criminal in nature and the intended territorial scope of the injunctive relief in the consent order is uncertain. Moreover, it is unclear that recognition and enforcement of the judgment is the appropriate tool amongst the various judicial assistance mechanisms or that the matter is an appropriate one for lending judicial assistance in the form requested. Additional concerns relating to the potential violation of privacy rights should also be addressed.

63 The list of problems is long, too long to use the courts' equitable jurisdiction to accommodate Pro Swing. In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), Blair J.A. stated that the courts had the choice of throwing up their hands in despair or protecting the public against impugned conduct. In the case at bar, the choice is not as clear, as this is an instance where a court's refusal to enforce the orders cannot be equated with an abdication of its duties. To refuse to enforce the orders is an appropriate exercise of equitable [page644] discretion and amounts to allowing the Ohio court to continue the proceedings with the judicial assistance of the Ontario courts, but to a lesser extent than has been requested.

VII. Conclusion

64 Private international law is developing in response to modern realities. The real and substantial connection test and the enforcement of equitable relief granted in foreign countries are but two examples of its evolution. The Internet puts additional pressure on the courts to reach out to the same extent as the Web. At the same time, courts

must be cautious to preserve their nation's values and protect its people. The time is ripe to change the common law rule against the enforcement of foreign non-monetary judgments, but, owing to problems with the orders the appellant seeks to have enforced, the Court cannot accede to its request.

65 For these reasons, I would dismiss the appeal.

The reasons of McLachlin C.J. and Bastarache and Charron JJ. were delivered by

McLACHLIN C.J. (dissenting)

1. Introduction

66 This case requires the Court to consider whether the common law should be extended to permit the enforcement of foreign non-money judgments and, if so, in what circumstances. I would hold that these judgments are enforceable in appropriate circumstances. On application to these facts, I would conclude that the motions judge did not err in enforcing parts of the order of an Ohio court.

2. Facts

67 The appellant, Pro Swing Inc., is the owner of the Trident trademark for a type of golf club. Its trademark is registered in the United States, where [page645] it carries on business. The respondent, Elta Golf Inc., carries on business in Toronto, Ontario. In the course of that business, it offered for sale on its Website goods bearing marks which resembled Trident.

68 In April 1998, Pro Swing filed a complaint against Elta Golf for trademark infringement and dilution, use of a counterfeit mark, unfair competition, and deceptive trade practices. The complaint was filed in the United States District Court for the Northern District of Ohio Eastern Division.

69 In July 1998, the parties entered into a settlement agreement. It was endorsed by a consent decree of the court, signed by both parties. The consent decree acknowledged that Pro Swing was the owner of the Trident trademark and enjoined Elta Golf from purchasing, marketing, selling or using golf clubs or golf club components bearing that mark or confusingly similar variations. The order stated that the court would retain jurisdiction over the parties for purposes of enforcement and the parties agreed not to contest the jurisdiction of the U.S. courts in any action to enforce the settlement.

70 In December 2002, Pro Swing learned that Elta Golf was violating the consent decree and launched a civil contempt proceeding to enforce it and to obtain compensation for damages sustained. Elta Golf was served but did not respond. On February 25, 2003, the Ohio court found Elta Golf in contempt of court and confirmed the injunction. It also awarded compensatory damages to Pro Swing based on Elta Golf's profits and ordered Elta Golf to provide an accounting to the plaintiff for purposes of calculating these damages. Again, the court ordered Elta Golf to deliver up offending material, provide names and addresses of suppliers and purchasers to the plaintiff, and recall all counterfeit and infringing golf clubs or golf club components. Again, the U.S. court stated it retained jurisdiction to enforce the consent decree and contempt order. Finally, it [page646] awarded Pro Swing costs against Elta Golf subject to accounting.

71 Elta Golf did not comply with this order. As a result, Pro Swing was unable to provide the Ohio court with its proposed damage award or costs bill.

3. Legal History

72 In 2003, Pro Swing commenced these proceedings in Ontario, asking the court to recognize and enter the 1998 consent decree and the 2003 contempt order. In response, Elta Golf filed a defence arguing that the U.S. orders could not be recognized and enforced in Canada because they were not final judgments for a fixed sum of money. Elta Golf raised two principal issues relating to the two U.S. orders:

1. Is the consent decree of July 28, 1998 unenforceable in Ontario in that it is in the nature of injunctive relief and not for a fixed sum of money?
2. Is the order of February 25, 2003 unenforceable in Ontario as it is not in the nature of a final order and is penal in nature?

73 The motions judge, Pepall J., reviewed the jurisprudence and concluded that there was no reason in principle why non-money judgments of foreign courts should not be enforced (*(2003), 68 O.R. (3d) 443*). In her view, the principles enunciated in *Morguard Investments Ltd. v. De Savoye*, *[1990] 3 S.C.R. 1077*, apply equally to monetary and non-money judgments. She noted that Elta Golf conceded that the 1998 Ohio decree met the general requirements of *Morguard*. The only issue was whether the common law requirement of a fixed sum had been abrogated by *Morguard* and subsequent decisions. She concluded that it had not, but that the principles espoused in *Morguard* permitted the [page647] requirement to be relaxed or removed depending on the circumstances of the case. As a result, she held that in principle the orders might be enforceable in Canada. The motions judge then examined whether the orders in question were final and conclusive. She concluded that the 1998 decree was final and conclusive, noting that it reflected a settlement between the parties and that "[b]y its terms, it is clear that extraterritorial application was intended" (para. 16). By contrast, aspects of the February 2003 order were left outstanding and could not be enforced. However, the general declaration and the orders for an accounting and the provision of names, information and recalled clubs and components were, in her opinion, final and enforceable in Ontario.

74 Elta Golf appealed, on grounds that the motions judge had erred in concluding that non-money foreign orders could be enforced. The Court of Appeal agreed with the motions judge "that the time is ripe for a re-examination of the rules governing the recognition and enforcement of foreign non-monetary judgments" (*(2004), 71 O.R. (3d) 566*, at para. 9). However, it held that the orders in this case could not be enforced because they were ambiguous in that "the scope of the extra-territorial application of the foreign orders is unclear" (para. 11).

75 Pro Swing appeals to this Court. It endorses the view of the law taken by the courts below that non-money foreign judgments may be enforceable. It takes issue, however, with the Court of Appeal's conclusion that the orders in this case could not be enforced because the extraterritorial application of the orders was unclear. Elta Golf did not appear on the proceedings before this Court.

4. Analysis

76 Three questions arise. The first is whether Canadian courts can recognize and enforce foreign [page648] non-money judgments. If the answer to this question is affirmative, the question arises of when it is appropriate to recognize and enforce such judgments. Finally, the principles developed must be applied to the foreign orders at issue to determine whether they can be enforced in Ontario.

4.1 *Recognition of Foreign Non-Money Judgments*

77 The traditional common law position is that foreign judgments are recognizable and enforceable only if they meet two conditions. First, they must be for a definite sum of money. Second, they must be final and conclusive. These requirements ensure that in ordinary cases the merits of foreign judgments are not considered by an enforcing court. Barring exceptional concerns, a court's focus when enforcing a foreign judgment is not on the substantive and procedural law on which the judgment is based, but instead on the obligation created by the judgment itself.

78 In *Morguard*, La Forest J. discussed the need to ensure that the evolution of the common law keeps pace with the acceleration, intensification, and nature of cross-border social and economic activity. He noted:

> The world has changed since the above rules were developed in 19th century England. Modern means of travel and communications have made many of these 19th century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal. [p. 1098]

In *Hunt v. T&N plc*, *[1993] 4 S.C.R. 289*, La Forest J. further described rigidity in this area of the law as resting on an "outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness" (pp. 321-22). The common law must evolve in a way that takes [page649] into account the important social and economic forces that shape commercial and other kinds of relationships.

79 That evolution must take place both incrementally and in a principled way. Although the enforcement of money judgments across provincial boundaries raises unique considerations and constitutional dimensions, the underlying principles of comity, order and fairness must apply both interprovincially and internationally. As Major J. noted in *Beals v. Saldanha*, *[2003] 3 S.C.R. 416*, *2003 SCC 72*, "[t]he principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law" (para. 27). These principles do not exclude the enforcement of non-monetary judgments from another country. At the same time, comity, which requires respect for the legitimate sovereignty of others and for the needs created by relationships that "involve a constant flow of products, wealth and people across the globe", may favour it: *Hunt*, at p. 322.

80 A number of law reform agencies have recognized the need for a more flexible approach to the enforcement of foreign non-money judgments. While the present case concerns the enforcement of U.S. orders, the common law prohibition on such enforcement also applies between the Canadian provinces, reinforcing the need for its reconsideration.

81 At the interprovincial level, proposals for reconsideration of the rule have been advanced. The Uniform Law Conference of Canada proposed two statutes that would allow for the enforcement of non-money judgments within Canada: the *Uniform Enforcement of Canadian Decrees Act* (1997) and the *Uniform Enforcement of Canadian Judgments and Decrees Act* (1997). In an introductory comment to both proposed statutes, the Uniform Law Conference explained that:

[page650]

> Apart from legislation that addresses particular types of orders, there is no statutory scheme or common law principle which permits the enforcement in one province of a non-money judgment made in a different province. This is in sharp contrast to the situation that prevails with respect to money judgments which have a long history of enforceability between provinces and states both under statute and at common law. With the increasing mobility of the population and the emergence of policies favouring the free flow of goods and services throughout Canada, this gap in the law has become highly inconvenient. UECJDA [*Uniform Enforcement of Canadian Judgments and Decrees Act*] provides a rational statutory basis for the enforcement of non-money judgments between the Canadian provinces and territories.
>
> (*Uniform Law Conference of Canada: Commercial Law Strategy* (2005 (loose-leaf)), Tab 7, p. 3)

82 The British Columbia Law Institute recommended the adoption of the *Uniform Enforcement of Canadian Judgments and Decrees Act* (or, alternatively the *Uniform Enforcement of Canadian Decrees Act*) in its *Report on the Enforcement of Non-money Judgments from Outside the Province* (August 1999). The Report cited the

following passage from *Morguard* as an illustration of the existing deficiencies in Canadian private international law:

> It seems anarchic and unfair that a person should be able to avoid legal obligations arising in one province simply by moving to another province. Why should a plaintiff be compelled to begin an action in the province where the defendant now resides, whatever the inconvenience and costs this may bring, and whatever degree of connection the relevant transaction may have with another province? And why should the availability of local enforcement be the decisive element in the plaintiff's choice of forum?
>
> (Report, at p. 4; *Morguard*, at pp. 1102-3)

83 Finally, with respect to *all* non-Quebec judgments, the *Civil Code of Québec*, S.Q. 1991, c. 64, does not distinguish between money judgments and non-money judgments in its recognition [page651] and enforcement provisions, although the finality requirement has been maintained:

> **3155.** A Québec authority recognizes and, where applicable, declares enforceable any decision rendered outside Québec except in the following cases:
>
> ...
>
> (2) the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;

84 These developments establish that the absolute common law ban on the enforcement of all foreign non-money judgments may no longer be useful and should be reconsidered.

85 A final question is whether abolition of the rule against recognition and enforcement of foreign non-money judgments satisfies the principles this Court has recognized on the development of the common law. As a general rule, the common law must evolve to take into account societal changes, but that evolution must proceed incrementally: *R. v. Salituro*, *[1991] 3 S.C.R. 654*, at p. 666.

86 The possibility of enforcing foreign non-money judgments would represent an incremental change in the common law of Canada. The principled approach to recognition of foreign monetary judgments in cases such as *Morguard* and *Beals* invites application of the same principles to non-money judgments in order to preserve the consistency and logic of this body of the law. Lower courts have discussed the need to modify the traditional ban on enforcement of foreign non-money judgments or have suggested that the law may have already moved in that direction: *Uniforêt Pâte Port-Cartier Inc. v. Zerotech Technologies Inc.*, [*[1998] 9 W.W.R. 688*](#) (B.C.S.C.); *Barrick Gold Corp. v. Lopehandia* [*(2004), 71 O.R. (3d) 416*](#) (C.A.), at para. 77. Provincial law reform agencies have done detailed studies on the issue and the Province of Quebec already permits recognition and enforcement. Loosening the common law strictures on enforcement is arguably a small and necessary step in the development of the common law in this area. On the other hand, the matter is complex and difficult, [page652] as attested to by the fact that reform proposals have not produced legislative reform. Acceptance of the possibility of recognizing and enforcing foreign non-monetary judgments is an incremental step. At the same time, care must be taken to ensure that recognition is confined to cases where it is appropriate and does not create undue problems for the legal system of the enforcing state or unfair results for the parties. Caution is in order.

87 The time has come to permit the enforcement of foreign non-money orders where the general principles of *Morguard* are met and other considerations do not render recognition and enforcement of the foreign judgment inadvisable or unjust.

88 If foreign non-money judgments may sometimes be enforceable, the next question is when that will be appropriate. This is not a simple matter. As Professor Vaughan Black cautions, "[a]ny move to enforce foreign non-money orders requires caution and close attention to the unique features of such remedies": "Enforcement of Foreign Non-money Judgments: *Pro Swing v. Elta*" (2006), 42 *Can. Bus. L.J.* 81, at p. 96. Different non-money remedies and different circumstances will raise different considerations.

89 Before discussing the considerations applicable in this case, it may be useful to reiterate the theoretical basis for the recognition and enforcement of foreign judgments. While established in the context of money judgments, the theory also applies to the enforcement of non-money judgments. The foreign court order is seen as creating a new obligation on the defendant. In the case of a money judgment, this is a debt. In the case of a non-money judgment, it is a different sort of obligation. A court enforcing a foreign judgment is enforcing the obligation created by that judgment. In principle, it should not [page653] look beyond the judgment to the merits of the case. It enforces the obligation created by the foreign judgment by its own machinery. As confirmed in *Beals*, as long as the foreign court properly has jurisdiction to adjudicate the dispute, absent evidence of fraud or a judgment contrary to natural justice or public policy, the enforcing court is not interested in the substantive or procedural law of the foreign jurisdiction. All the enforcing court needs is proof of the foreign order; its own legal mechanisms take over from there. This can be understood as the principle of the separation of judicial systems.

90 The first category of restrictions on the recognition and enforcement of foreign non-money judgments should flow from the general enforcement requirements set out in *Morguard.* These ensure that jurisdiction was properly taken by the issuing court and that there are no general fairness considerations that should require the court to hesitate before enforcing the foreign judgment. As noted in *Beals*, the existing defences of fraud, public policy and natural justice are designed to guard against unfairness in its most recognizable forms. Although designed to apply to money judgments, these requirements must also be applicable in cases involving non-money remedies. They are narrowly drawn and limited to particular cases where unfairness is clear. Both in the case of money and non-money judgments, they are non-exhaustive and may be supplemented in extraordinary circumstances: *Beals*, at paras. 41-42.

91 The second category of restrictions on the recognition and enforcement of foreign non-money judgments should relate to finality and clarity. These twin requirements are based on the principles of judicial economy and the separation of judicial systems, which themselves stem from comity, order and fairness. Finality and clarity are distinct concepts. The first requires completeness; the second lack of ambiguity. However, in practice they may overlap. An order that is not final is likely to be unclear and vice versa.

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92 The related requirements of finality and clarity should ensure that the function of enforcing courts will be limited to enforcement of the obligation created by the foreign order and will not include re-litigation of the issues considered by the issuing court. On the level of principle, an attempt to enforce an order that is not final and clear will almost invariably amount to the inappropriate assumption of jurisdiction by the enforcing court over the dispute. It is settled law that the enforcing court does not consider the merits of the foreign decision, absent fraud, violation of natural justice or violation of public policy. On the practical level, it may be difficult for the enforcing court to supervise an incomplete or unclear order. Difficulties may stem from the enforcing judge's unfamiliarity with the foreign law and its procedures or from the cost burden on the enforcing court. An order that is not final may be changed by the foreign court, with the result that the enforcing court finds itself enforcing something that is no longer an obligation in the foreign country. Finally, an enforcing court should not be obliged to re-litigate foreign disputes or use valuable resources to duplicate what would be best done in the originating jurisdiction. For these reasons, courts should decline to enforce foreign non-money orders that are not final and clear.

93 The related requirements of finality and clarity should thus be seen as flowing from the theory by which foreign judgments are enforced. What is enforced, as discussed, is an obligation created by the foreign court, not the rights or responsibilities that gave rise to it. Finality and clarity will ensure that this distinction is respected. Requiring that

the order to be enforced be final and clear also makes practical sense. Where supervision would be particularly difficult for the enforcing court and where the issuing court could engage in supervision much more efficiently, judicial economy suggests that it would be appropriate to decline to enforce.

94 The B.C. Supreme Court decision in *Uniforêt* rejected enforcement of a foreign non-money order for lack of finality. At issue was the enforceability of a Quebec arbitration award that ordered Zerotech, a B.C. company, to give Uniforêt access [page655] to documents and allow it to make copies. After reviewing the judgments in *Morguard, Hunt* and *Tolofson v. Jensen*, *[1994] 3 S.C.R. 1022*, Clancy J. opined at para. 26 that "[t]here is no principled reason why judgments other than monetary judgments should not be recognized and enforced." Clancy J. nevertheless declined to enforce the order because it violated the finality requirement in that it was lacking in precision and would have required variation or addition before it could be enforced. Clancy J. stated: "If clarification or variation is required, particulars of how that must be done is a matter to be decided by the arbitrators or by the Superior Court of Quebec, not by this court" (para. 28). Similarly, art. 3155(2) of the *Civil Code of Québec* does not permit enforcement if the decision "... is not final or enforceable at the place where it was rendered".

95 Finality demands that a foreign order establish an obligation that is complete and defined. The obligation need not be final in the sense of being the last possible step in the litigation process. Even obligations in debt may not be the last step; orders for interest and costs may often follow. But it must be final in the sense of being fixed and defined. The enforcing court cannot be asked to add or subtract from the obligation. The order must be complete and not in need of future elaboration.

96 Clarity, which is closely related to finality, requires that an order be sufficiently unambiguous to be enforced. Just as the enforcing court cannot be asked to supplement the order, so it cannot be asked to clarify ambiguous terms in the order. The obligation to be enforced must clearly establish what is required of the judicial apparatus in the enforcing jurisdiction.

97 Clarity means that someone unfamiliar with the case must be able to ascertain what is required to meet the terms of the order. Sometimes the judge who made the order is the best person to determine whether its terms have been fulfilled. For example, Rule 60.11 of the Ontario *Rules of Civil Procedure*, [page656] *R.R.O. 1990, Reg. 194*, provides that a contempt order to enforce an order requiring a party to do an act or refrain from doing an act "may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made". This reflects the view that before finding a person in contempt -- a serious imputation -- the judge who made the order should assess the infringing conduct to be sure that it merits the sanction. This point is taken up by J.-G. Castel and J. Walker in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), vol. 1, who posit that "[i]t stands to reason that the court that makes an order requiring a party to perform a contract or to deliver goods may be in a unique position to know whether the terms of the order have been met" (p. 14-21). A court asked to enforce a foreign judgment of this type would have to assess whether questions may arise as to what constitutes compliance with the obligation. If there is a real risk that such questions may arise, enforcement of the judgment may be inappropriate.

98 Having discussed the requirements of finality and clarity and the rationale that supports them, I turn to how they may be assessed. A court should not refuse to enforce a foreign non-monetary judgment merely because there is a theoretical possibility that questions may arise in the course of enforcement. The hypothetical possibility that enforcement may require active supervision is not enough to permit a court to decline enforcement. A decision not to enforce on the grounds of lack of finality or clarity would have to be based on concerns apparent on the face of the order or arising from the factual or legal context. As elsewhere in the law, mere speculation would not suffice.

99 Deschamps J. suggests that the equitable nature of injunctions and other non-monetary judgments may require Canadian courts to revisit the meaning of the finality requirement and recognize new defences. She highlights the potential costs of supervising equitable orders. I agree that judicial economy is a legitimate consideration (see para. 93). But judicial economy should not [page657] be overemphasized. In recent years, courts have taken an active approach, imposing orders requiring supervision when necessary. *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *[2003] 3 S.C.R. 3*, *2003 SCC 62*, is the best-known example, but search orders and freezing orders are

part of the same general trend (see generally R. J. Sharpe, *Injunctions and Specific Performance* (2nd ed. (loose-leaf)), at paras. 1.260-1.490).

100 Orders with penal consequences would constitute a third type of restriction on the enforcement of non-money judgments. It is generally accepted that Canadian courts will not enforce a foreign penal law or judgment, either directly or indirectly. As Castel and Walker explain:

> A penal law is a law that imposes a punishment for a breach of a duty to the state -- as opposed to a remedial law, which secures compensation for a breach of a duty owed to a private person... . Liability that is restitutionary in nature and that is not imposed with a view to punishment of the party responsible is not regarded as penal in nature. [Footnotes omitted; p. 8-2.]

It is for each state to impose its own punishments, penalties and taxes, and other states are not obliged to help them. When we move to penal orders, we move out of the realm of private international law and into public law. As a result, Canadian courts will not entertain an action for the enforcement of a foreign penal, revenue, or other public law, nor will they enforce a foreign judgment ordering the payment of taxes or penalties that gives effect to the sovereign will of a foreign power.

101 For the purpose of this case, the three classes of restrictions on enforcement of non-money judgments discussed above should suffice. It may be that as the law develops other types of problems will be recognized. However, that can be left for future cases.

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4.3 *Application*

102 The motions judge granted a declaration that the 1998 consent decree was valid and enforceable in Canada.

103 More particularly, the motions judge accepted the following terms of the 2003 Ohio contempt order as enforceable in Canada:

1. An accounting by Elta Golf to Pro Swing for profits on all golf clubs sold bearing the Trident or Rident marks;
2. Provision by Elta Golf to Pro Swing of names and contact information of Elta Golf's suppliers of the Trident and Rident golf clubs;
3. Provision by Elta Golf to Pro Swing of the names and addresses of each purchaser of the Trident and Rident golf clubs or components since entry of the Consent Decree;
4. Recall by Elta Golf and delivery to Pro Swing of all counterfeit and infringing golf clubs or golf club components bearing Trident or Rident marks or confusingly similar designations.

The motions judge refused to enforce other parts of the February 2003 order on the ground that they were not final and conclusive in nature. The issue is whether the motions judge erred in these conclusions.

104 Elta Golf's first defence was that all the relief should have been refused on the ground that foreign non-money judgments are not enforceable at common law. As discussed above, the common law prohibition on enforcement of such judgments must be replaced by a principled approach which may permit the enforcement of foreign non-money judgments in appropriate circumstances. Elta Golf conceded that the general requirements for enforcement set out in *Morguard* are met here. Elta Golf's argument based on the common law rule against enforcement should therefore be rejected.

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105 Elta Golf's second defence was that the orders should not be enforced because they were penal in nature. The motions judge rejected this defence on the ground that the orders were restitutionary in nature since they engaged a private dispute between the parties and sought to compensate the wronged party. In my view, this conclusion is unassailable.

106 I respectfully disagree with Deschamps J.'s characterization of the contempt order as "penal". This Court has long maintained a distinction between civil and criminal contempt orders. In *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, it was held at p. 943 that "[t]he purpose of criminal contempt was and is punishment for conduct calculated to bring the administration of justice by the courts into disrepute. On the other hand, the purpose of civil contempt is to secure compliance with the process of a tribunal including, but not limited to, the process of a court" (Sopinka J. dissenting, but not on this point).

107 *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, which Deschamps J. cites as authority for the "unified approach" to contempt orders, is clearly distinguishable. *Vidéotron* dealt with the possibility of imprisonment for contempt under the Quebec *Code of Civil Procedure* and the guarantees against compulsory self-incrimination under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*. In my view, *Vidéotron* stands for the principle that persons cited for contempt are entitled to constitutional procedural protections *vis-à-vis* state coercion. It does not transform the private, restitutionary or compensatory aspects of a civil contempt order into public law.

108 Foreign criminal contempt orders are clearly penal and cannot be enforced by Canadian courts. The same should not be said of foreign civil contempt orders. When a foreign court issues a [page660] contempt order to secure compliance with a private remedy flowing from a private dispute, the order does not necessarily contain a "penal" aspect that should preclude enforcement by Canadian courts. Some foreign orders for "civil" contempt could nevertheless contain penal elements sufficient to disqualify them from enforcement by Canadian courts; in other cases, the penal elements could be severable, allowing Canadian courts to enforce the private elements only. The development of these principles can be left for future cases.

109 There is nothing penal about the contempt order in this case. The terms of the order are designed to reinforce the consent decree and to provide Pro Swing with restitution for Elta Golf's violations. The motions judge held that the contempt order was restitutionary rather than penal. The Court of Appeal did not interfere with this holding, and I see no reason to do so now.

110 The next issue concerns the finality and clarity of the orders held to be enforceable in Ontario. The motions judge rejected parts of the U.S. order on this ground, but found other portions sufficiently clear and complete and thus enforceable. The Court of Appeal reversed this decision, finding that the orders were too ambiguous:

> In our view, the foreign orders in question are ambiguous in respect of material matters. For example, the critical issue of the scope of the extra-territorial application of the foreign orders is unclear. Do the foreign orders mean that the appellant is enjoined from purchasing, marketing, selling or using infringing golf clubs within the jurisdiction of the U.S. District Court, or do they mean that the appellant is enjoined from doing those things anywhere in the world? [para. 11]

Elta Golf did not appear before us to defend the Court of Appeal's conclusion. In my view, the record supports the findings of the motions judge, and the Court of Appeal was wrong to reverse her decision.

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111 Finality, as discussed above, refers not to whether the order represents the ultimate step in the proceeding, but rather to whether the order is incomplete and not in need of future elaboration. This was how the motions judge understood it: "A domestic court does not wish to be faced with enforcing a foreign judgment that is later changed" (para. 18).

112 I am satisfied that the portions of the judgment that the motions judge held to be enforceable in Ontario are final in this sense. The orders for the accounting and the production of records, names, golf clubs and golf club components represent complete and finite obligations. It would be impossible to add more precision. As discussed above, finality does not mean that no further steps can be taken. Compliance with the order for an accounting and production of records might lead the United States court to issue an order quantifying damages, for example. However, this does not detract from the finality and certainty of the orders as enforced in Canada.

113 If Elta Golf were to refuse to comply with a final order enforceable in Ontario, the remedy would be an application for an order that Elta Golf is in contempt of court. In theory, issues could arise as to whether the accounting or production is complete. This in turn could involve the Ontario courts in supervising the accounting or production. On the other hand, the prevalence of cross-border commerce suggests that in the absence of an indication that the accounting or production of names, records and goods may raise problems, the order for enforcement of the foreign order should not be refused.

114 Throughout these proceedings, Elta Golf has never suggested that accounting or production will pose difficulties, and has confined its defence to more general points. In these circumstances, the hypothetical possibility of the need for future court supervision should not preclude the recognition of the foreign order. There is therefore no reason to displace the motions judge's conclusions [page662] that the portions of the order she accepted were final.

115 The motions judge also found the order to be sufficiently clear. On the question of its territorial scope, she held: "By its terms, it is clear that extraterritorial application was intended" (para. 16). The Court of Appeal disagreed and found that ambiguity in the orders on this point made them unenforceable. Pro Swing argues that this conclusion is not supported by the record and that Elta Golf understood that the consent decree was intended to be enforced extraterritorially. As Elta Golf did not appear before this Court, we are left to evaluate the Court of Appeal's conclusion on the basis of the record and the findings of the motions judge.

116 An examination of the content of the consent decree and the contempt order reveals no ambiguities about their extraterritorial application. First, the decree is cast in general terms. There are no explicit limits on the territory in which it applies, and nothing to suggest such limits were contemplated. Second, the orders were premised on the operation of an Ontario-based Website by Elta Golf and so can be seen as pre-supposing extraterritorial application. Finally, and most compelling, the terms include the surrender of Elta Golf's offending inventory and all promotional, packaging or other materials containing the mark in question or confusingly similar marks. These terms only make sense if the prohibition was meant to be universal in application. An outright surrender of inventory and marketing materials is incompatible with sales of any kind, not simply with sales within a particular jurisdiction. These considerations undermine the Court of Appeal's conclusion that the order was ambiguous.

117 My colleague Deschamps J. acknowledges the extraterritoriality of the orders requiring Elta Golf to surrender inventory, but she declines to infer this same extraterritoriality in the orders enjoining Elta [page663] Golf from purchasing and selling the infringing goods. For the injunction to apply extraterritorially, Deschamps J. would require "explicit terms making the settlement agreement a worldwide undertaking" (para. 56). There is no need for such an artificially high standard when a plain reading of the decree makes its extraterritoriality sufficiently clear.

118 It might be argued that the words "any other confusingly similar designations" are ambiguous. To be sufficiently clear, however, an order need not describe in detail every hypothetical violation of its terms. There is no argument before us that determining confusingly similar designations raises difficulties in this case. As already noted, enforcement concerns must be apparent on the face of the order or arise from the factual or legal context. No such concerns exist here.

119 It may be that the Court of Appeal was concerned that the contempt order was founded on a violation of a U.S. trademark, raising questions about whether that trademark extends to Canada. However, this issue is resolved by the terms of the order itself. As noted above, the order is clearly enforceable in Canada. None of the restrictions on

enforcement apply. The principle of separation of judicial systems discussed above prevents the court in the enforcing jurisdiction, Ontario, from entering into the substantive merits of the case that led to the consent decree. Except in cases of fraud or where a judgment is contrary to natural justice or public policy, the court considering the issue of the enforcement of a foreign judgment cannot look behind its terms: *Beals*.

120 Finally, I address briefly the public policy concerns raised by Deschamps J. This Court has upheld the quasi-constitutional nature of privacy legislation as it applies to federal government authorities: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, *[2002] 2 S.C.R. 773*, *2002 SCC 53*, at para. 24. It is unclear whether the same status should be accorded to legislation governing information collected by private organizations [page664] such as Elta Golf. In this regard, I would note s. 7(3)(*c*) of the *Personal Information Protection and Electronic Documents Act*, *S.C. 2000, c. 5*, which allows private organizations to disclose personal information without the knowledge or consent of the individual if this disclosure is "required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records".

121 I agree with Deschamps J. that "the order enjoining Elta to provide all credit card receipts, accounts receivable, contracts, etc. could be problematic" (para. 60). To raise this issue at this stage however, when it was never argued before this or any other court, would amount to an inappropriate transformation of the proceedings. Furthermore, a majority of this Court has held that the public policy defence should be given a narrow application: *Beals*, at para. 75, *per* Major J. It may be necessary to revisit this holding in the context of the enforcement of non-monetary judgments, but it is not necessary to do so here. Finally, if the offending parts of the contempt order cannot be enforced for public policy reasons, they can be severed. The public policy issue therefore should not determine the outcome of this appeal.

122 I conclude that the Court of Appeal erred in holding that the portions of the orders enforced by the motions judge could not be enforced in Ontario because of ambiguity about the scope of their extraterritorial application.

5. Conclusion

123 For the foregoing reasons, I would allow the appeal, reverse the decision of the Court of Appeal and reinstate the decision of the motions judge.

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* * * * *

APPENDIX A

Consent Decree

Upon consideration of the parties' consent to judgment being entered against defendant Elta Golf Inc. ("ELTA") in this matter, NOW THEREFORE, IT IS STIPULATED AND AGREED by and between plaintiff Pro Swing, Inc. ("PRO SWING") and defendant ELTA that in connection with the settlement of this action, ELTA agrees to the following:

1. PRO SWING is the owner of U.S. Trademark Registration No. 1,941,922 for the mark TRIDENT in international class 28 which issued on December 19, 1995 (hereinafter referred to as the "MARK") for use in conjunction with golf clubs which it sells throughout the United States of America and overseas;

2. The MARK is valid and through use has come to identify PRO SWING as the source for golf clubs bearing the MARK;

3. ELTA has previously, without consent of PRO SWING, used and advertised golf clubs and/or golf club heads bearing the name RIDENT, a confusingly similar variation of the MARK;

4. ELTA has represented to PRO SWING the nature and extent of its use and advertising of golf clubs and/or golf club heads bearing the name RIDENT including the quantities in inventory or purchased from Third Parties, if any;

5. PRO SWING is, in entering this settlement, relying upon the representations of ELTA as to its use of RIDENT on golf clubs and/or golf club heads which representations are material hereto.

6. Each party will bear its own costs and attorney's fees. The Court shall retain jurisdiction over the parties for the purpose of enforcing this consent decree. The parties agree not to contest jurisdiction in any action in this Court to enforce this settlement.

7. ELTA is enjoined from purchasing, marketing, selling or using golf clubs or golf club components bearing the MARK or other confusingly similar variations of the MARK, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than on golf clubs or golf club components purchased by ELTA from PRO SWING or its authorized distributors.

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8. Within ten (10) days of execution of this order ELTA will surrender and deliver to PRO SWING's counsel, postage prepaid, all infringing golf clubs and/or golf club components, if any, (TRIDENT, RIDENT, RIDEN and/or TRIGOAL) in its possession, along with all copies of any advertising, packaging, promotional or other materials, if any, containing the MARK or any confusingly similar mark, including but not limited to RIDENT, RIDEN and/or TRIGOAL.

9. This consent decree is binding upon the parties, as well as their respective shareholders, directors, officers, employees, representatives, agents, predecessors, successors, parents, subsidiaries, affiliates, assigns, and all other related business entities.

In consideration of the foregoing and conditioned upon compliance by defendant ELTA with the various terms and provisions of the settlement provided for above, this action shall be discontinued and dismissed with prejudice only with respect to defendant ELTA.

APPENDIX B

Contempt Order

Based upon the foregoing findings and conclusions, IT IS ORDERED that:

1. The Consent Decree entered on July 31, 1998 remains in full force and effect, and the Court retains jurisdiction to enforce the Consent Decree and this Order.

2. Elta Golf is again permanently enjoined from purchasing, marketing, selling or using golf clubs or golf club components which bear the TRIDENT mark, or any other confusingly similar designations, including but not limited to RIDENT, RIDEN and/or TRIGOAL, other than golf clubs or golf club components purchased by Elta Golf from Pro Swing.

3. Elta Golf is to make an accounting to Pro Swing of all golf clubs and/or golf club components it has sold which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Elta Golf shall provide this accounting to Pro Swing within fourteen (14) days from the date of this Order. The accounting shall include a sworn statement of account of all gross and net income derived from sales of TRIDENT and RIDENT golf clubs or golf club components, together with all business and accounting records relating to these sales, since the [page667] entry of the Consent Decree to present, including but not limited to:

a. records of all sales, credit card receipts, accounts receivable and contracts for all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks;

b. records of all expenses related to all sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks; and,

c. any and all balance sheets, profit and loss statements, cash flow reports or other accounting reports or summaries.

4. Pro Swing is hereby awarded compensatory damages based upon the profits derived by Elta Golf through its sales of golf clubs or golf club components bearing the TRIDENT or RIDENT marks, or any other confusingly similar designation, since the entry of the Consent Decree. Pro Swing shall provide its proposed damage award to the Court after Elta Golf's compliance with the accounting requirements set forth in Section III(3) of this Order.

5. Pro Swing is hereby awarded costs and attorneys fees incurred herein. Plaintiff shall submit a cost bill and fee petition within fourteen (14) days of entry of the money judgment set forth in Section III(4) of this Order.

6. Elta Golf is to surrender for destruction, all golf clubs or golf club components which bear the TRIDENT or RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward these golf clubs or golf club components to Pro Swing's counsel (Hahn Loeser & Parks LLP, 1225 West Market Street, Akron, Ohio 44313-7188) within fourteen (14) days from the date of this Order.

7. Elta Golf is to provide Pro Swing with the names and all contact information of Elta Golf's suppliers of the TRIDENT and RIDENT golf club components. Elta Golf shall provide this information within fourteen (14) days from the date of this Order.

8. Elta Golf is to provide Pro Swing with the names and addresses of each purchaser of the TRIDENT and RIDENT golf clubs or golf club components sold by Elta Golf since the entry of the Consent Decree. Elta Golf shall provide this information within fourteen (14) days from the date of this Order. Elta Golf is to pay [page668] Pro Swing the costs of a corrective mailing to each of these consumers.

9. Elta Golf is to recall all counterfeit and infringing golf clubs or golf club components which bear the TRIDENT and RIDENT marks, or any other confusingly similar designation. Elta Golf shall forward all such golf clubs or golf club components to Pro Swing's counsel within fourteen (14) days of the receipt of each of these items.

Solicitors

Solicitors for the appellant: Siskind, Cromarty, Ivey & Dowler, London.

Independence Plaza 1 Associates, L.L.C. v. Figliolini

Ontario Reports

Court of Appeal for Ontario,

Strathy C.J.O., Pardu and D.M. Brown JJ.A.

January 18, 2017

136 O.R. (3d) 202 | *2017 ONCA 44*

Case Summary

Limitations — Foreign judgments — Section 16(1)(b) of Limitations Act, 2002 not applying to proceeding on foreign judgment — Two-year limitation period applying to proceeding on foreign judgment — Limitation period starting to run when time to appeal foreign judgment has expired or at date of appeal decision — Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 16(1)(b). [page203]

The respondent obtained a judgment against the appellant in the New Jersey Superior Court on January 24, 2013. An appeal from that judgment was dismissed on July 17, 2014. On May 1, 2015, the respondent brought an application in the Ontario Superior Court of Justice to recover damages based on the New Jersey judgment. The application judge rejected the appellant's argument that the proceeding was time-barred and granted judgment in favour of the respondent. The appellant appealed.

Held, the appeal should be dismissed.

Section 16(1)(b) of the Limitations Act, 2002, which provides that there is no limitation period in respect of "a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of the court", applies only to a proceeding to enforce an order of a domestic court and not to a proceeding on a foreign judgment.

The standard two-year limitation period in s. 4 of the Limitations Act, 2002 applies to a proceeding on a foreign judgment. The limitation period begins to run when the time to appeal the foreign judgment has expired or, if an appeal is taken, on the date of the appeal decision. The time may be longer if the claim is not "discovered" within the meaning of s. 5 of the Limitations Act, 2002 until a date later than the appeal decision. The application in this case was brought within two years from the date of the appeal decision and was not time-barred.

Cases referred to

407 ETR Concession Co. v. Day *(2016), 133 O.R. (3d) 762*, *[2016] O.J. No. 5006*, *2016 ONCA 709*, *403 D.L.R. (4th) 385*, *1 M.V.R. (7th) 175*, *270 A.C.W.S. (3d) 624*; Cavell Insurance Co. (Re) *(2006), 80 O.R. (3d) 500*, *[2006] O.J. No. 1998*, *269 D.L.R. (4th) 679*, *212 O.A.C. 48*, *25 C.B.R. (5th) 7*, *39 C.C.L.I. (4th) 159*, *30 C.P.C. (6th) 1*, *[2006] I.L.R. I-4510*, *148 A.C.W.S. (3d) 243* (C.A.); Chevron Corp. v. Yaiguaje, *[2015] 3 S.C.R. 69*, *[2015] S.C.J. No. 42*, *2015 SCC 42*, *335 O.A.C. 201*, *22 C.C.L.T. (4th) 1*, *73 C.P.C. (7th) 1*, *38 B.L.R. (5th) 171*, *388 D.L.R. (4th) 253*, *474 N.R. 1*, *2015EXP-2554*, *J.E. 2015-1413*, *EYB 2015-256214*, *256 A.C.W.S. (3d) 583*; Commission de la Construction du Québec v. Access Rigging Services Inc. *(2010), 104 O.R. (3d) 313*, *[2010] O.J. No. 5055*, *2010 ONSC 5897*, *7 C.P.C. (7th) 365*, *195 A.C.W.S. (3d) 680* (S.C.J.); Continental Casualty Co. v. Symons Estate *(2015), 127 O.R. (3d) 758*, *[2015] O.J. No. 5653*, *2015 ONSC 6394* (S.C.J.); Four Embarcadero Center Venture v. Mr. Greenjeans Corp. *(1988), 64 O.R. (2d) 746*, *[1988] O.J. No. 210*, *26 C.P.C. (2d) 248*, *9 A.C.W.S. (3d) 348* (H.C.J.); Laasch v. Turenne, *[2012] A.J. No. 75*, *2012 ABCA 32*, *56 Alta. L.R. (5th) 53*, *14 C.P.C. (7th) 349*, *522 A.R. 168*, *347 D.L.R. (4th) 514*, *215 A.C.W.S. (3d) 992*; Lax v. Lax *(2004), 70 O.R. (3d) 520*, *[2004] O.J. No. 1700*, *239 D.L.R. (4th) 683*, *186 O.A.C. 20*, *50 C.P.C. (5th) 266*, *3 R.F.L. (6th) 387*, *130 A.C.W.S. (3d) 850* (C.A.); Morguard Investments Ltd. v. De Savoye, *[1990] 3 S.C.R. 1077*, *[1990] S.C.J. No. 135*, *76 D.L.R. (4th) 256*, *122*

N.R. 81, [1991] 2 W.W.R. 217, J.E. 91-123, 52 B.C.L.R. (2d) 160, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 24 A.C.W.S. (3d) 478; PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resource Corp., [2013] O.J. No. 4339, 2013 ONSC 5913 (S.C.J.); Yugraneft Corp. v. Rexx Management Corp., [2010] 1 S.C.R. 649, [2010] S.C.J. No. 19, 2010 SCC 19, 401 N.R. 341, EYB 2010-174202, 2010EXP-1696, J.E. 2010-926, 318 D.L.R. (4th) 257, 68 B.L.R. (4th) 1, 22 Alta. L.R. (5th) 166, 84 C.P.C. (6th) 201, [2010] 6 W.W.R. 387, 482 A.R. 1, 188 A.C.W.S. (3d) 330, consd

Other cases referred to

Aetna Financial Services Ltd. v. Feigelman, [1985] 1 S.C.R. 2, [1985] S.C.J. No. 1, 15 D.L.R. (4th) 161, 56 N.R. 241, [1985] 2 W.W.R. 97, 32 Man. R. (2d) 241, 29 B.L.R. 5, 55 C.B.R. (N.S.) 1, 4 C.P.R. (3d) 145, J.E. 85-192, EYB 1985-150475, 29 A.C.W.S. (2d) 267; [page204] Ayr Farmers Mutual Insurance Co. v. Wright (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, 61 C.C.L.I. (5th) 64, 2 M.V.R. (7th) 31, 272 A.C.W.S. (3d) 401; Beals v. Saldanha, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 2003 SCC 72, 234 D.L.R. (4th) 1, 314 N.R. 209, J.E. 2004-127, 182 O.A.C. 201, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 113 C.R.R. (2d) 189, 127 A.C.W.S. (3d) 648; Bedell v. Gefaell (No. 1), [1938] O.R. 718, [1938] O.J. No. 463, [1938] O.W.N. 435 (C.A.); Boyce v. Toronto (City) Police Services Board, [2012] O.J. No. 1531, 2012 ONCA 230, affg [2011] O.J. No. 7, 2011 ONSC 53, 195 A.C.W.S. (3d) 1149 (S.C.J.); Brown v. Baum, [2016] O.J. No. 2317, 2016 ONCA 325, 348 O.A.C. 251, 84 C.P.C. (7th) 231, 397 D.L.R. (4th) 161, 265 A.C.W.S. (3d) 477; Chitel v. Rothbart (1982), 39 O.R. (2d) 513, [1982] O.J. No. 3540, 141 D.L.R. (3d) 268, 30 C.P.C. 205, 69 C.P.R. (2d) 62, 17 A.C.W.S. (2d) 200 (C.A.); Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572, [2012] S.C.J. No. 17, 2012 SCC 17, 291 O.A.C. 201, 2012EXP-1452, J.E. 2012-788, EYB 2012-205198, 429 N.R. 217, 343 D.L.R. (4th) 577, 91 C.C.L.T. (3d) 1, 10 R.F.L. (7th) 1, 17 C.P.C. (7th) 223, 212 A.C.W.S. (3d) 712; Crombie Property Holdings Ltd. v. McColl-Frontenac Inc. (Texaco Canada Ltd.), [2017] O.J. No. 142, 2017 ONCA 16, 6 C.E.L.R. (4th) 1, 406 D.L.R. (4th) 252, 274 A.C.W.S. (3d) 411; Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd. (2013), 117 O.R. (3d) 81, [2013] O.J. No. 4432, 2013 ONCA 550, 310 O.A.C. 282, 368 D.L.R. (4th) 1, 235 A.C.W.S. (3d) 310; Dslangdale Two LLC v. Daisytek (Canada) Inc., [2004] O.J. No. 5281, [2004] O.T.C. 1133, 6 C.P.C. (6th) 363, 135 A.C.W.S. (3d) 1035 (S.C.J.); Endean v. British Columbia, [2016] 2 S.C.R. 162, [2016] S.C.J. No. 42, 2016 SCC 42, 401 D.L.R. (4th) 577, 91 C.P.C. (7th) 1, 88 B.C.L.R. (5th) 1, [2016] 12 W.W.R. 1, 488 N.R. 246, 2016EXP-3278, J.E. 2016-1814, EYB 2016-271669, 270 A.C.W.S. (3d) 704; Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors (2012), 113 O.R. (3d) 401, [2012] O.J. No. 5683, 2012 ONCA 851, 299 O.A.C. 151, 357 D.L.R. (4th) 480, 221 A.C.W.S. (3d) 460; Girsberger v. Kresz (2000), 50 O.R. (3d) 157, [2000] O.J. No. 4216, 143 O.A.C. 228, 45 C.P.C. (4th) 77, 1 C.P.C. (5th) 250, 101 A.C.W.S. (3d) 910 (C.A.), affg (2000), 47 O.R. (3d) 145, [2000] O.J. No. 266, 97 A.C.W.S. (3d) 1108 (S.C.J.); Hare v. Hare (2006), 83 O.R. (3d) 766, [2006] O.J. No. 4955, 277 D.L.R. (4th) 236, 218 O.A.C. 164, 24 B.L.R. (4th) 230, 153 A.C.W.S. (3d) 1243 (C.A.); Inland Revenue Commissioners v. Hinchy, [1960] A.C. 748, [1960] 1 All E.R. 505, [1960] 2 W.L.R. 448, 38 T.C. 625, 39 A.T.C. 13, [1960] T.R. 33 (H.L.); Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada *(2015), 128 O.R. (3d) 658*, [2015] O.J. No. 6954, *2015 ONCA 764*, *55 C.C.L.I. (5th) 94*, *393 D.L.R. (4th) 329*, *89 M.V.R. (6th) 1*, *341 O.A.C. 240*, *261 A.C.W.S. (3d) 617* [Leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 10 and [2016] S.C.C.A. No. 11]; Kadiri v. Southlake Regional Health Centre, [2015] O.J. No. 6387, 2015 ONCA 847, 343 O.A.C. 186, 261 A.C.W.S. (3d) 473, affg [2015] O.J. No. 356, 2015 ONSC 621 (S.C.J.); M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, 96 D.L.R. (4th) 289, 142 N.R. 321, J.E. 92-1644, 57 O.A.C. 321, 14 C.C.L.T. (2d) 1, EYB 1992-67549, 36 A.C.W.S. (3d) 466; Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623, [2013] S.C.J. No. 14, 2013 SCC 14, 291 Man. R. (2d) 1, 441 N.R. 209, 2013EXP-799, J.E. 2013-429, [2013] 2 C.N.L.R. 281, 27 R.P.R. (5th) 1, [2013] 4 W.W.R. 665, 355 D.L.R. (4th) 577, 223 A.C.W.S. (3d) 941; Markel Insurance Co. of Canada v. ING Insurance Co. of Canada (2012), 109 O.R. (3d) 652, [2012] O.J. No. 1505, 2012 ONCA 218, 290 O.A.C. 75, [2012] I.L.R. I-5264, 348 D.L.R. (4th) 744, 8 C.C.L.I. (5th) 210, 214 A.C.W.S. (3d) 249; McConnell v. Huxtable (2014), 118 O.R. (3d) 561, [2014] O.J. No. 477, 2014 ONCA 86, 41 R.P.R. (5th) 1, 42 R.F.L. (7th) 157, 370 D.L.R. (4th) 554, 237 A.C.W.S. (3d) 505, 315 O.A.C. 3, affg (2013), 113 O.R. (3d) 727, [2013] O.J. No. 612, 2013 ONSC 948, 42 R.F.L. (7th) 93, 226 A.C.W.S. (3d) 1165 (S.C.J.); Opitz v. Wrzesnewskyj, [2012] 3 S.C.R. 76, [2012] S.C.J. No. 55, 2012 SCC 55, 270 C.R.R. (2d) 23, 296 O.A.C. 82, 435 N.R. 259, 2012EXP-3766, J.E. 2012-2014, EYB 2012-212994, 351 D.L.R. (4th) 579, 220 A.C.W.S. (3d) 350; [page205] Pro Swing Inc. v. Elta Golf Inc., [2006] 2 S.C.R. 612, [2006] S.C.J. No. 52, 2006 SCC 52, 273 D.L.R. (4th) 663, 354 N.R. 201, J.E. 2006-2235, 218 O.A.C. 339, 41 C.P.C. (6th) 1, 52 C.P.R. (4th) 321, EYB 2006-

111169, 152 A.C.W.S. (3d) 70; R. v. Hajivasilis (2013), 114 O.R. (3d) 337, [2013] O.J. No. 253, 2013 ONCA 27, 302 O.A.C. 65, 41 M.V.R. (6th) 175, 104 W.C.B. (2d) 1210; Rutledge v. United States Savings and Loan Co. (1906), 37 S.C.R. 546, [1906] S.C.J. No. 31; SA Horeca Financial Services v. Light, 2014 ONSC 4551 (unreported); SA Horeca Financial Services v. Light (2014), 123 O.R. (3d) 542, [2014] O.J. No. 5490, 2014 ONCA 811, 327 O.A.C. 128, 70 C.P.C. (7th) 38, 246 A.C.W.S. (3d) 508; Tolofson v. Jensen, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110, 120 D.L.R. (4th) 289, 175 N.R. 161, [1995] 1 W.W.R. 609, J.E. 95-61, 51 B.C.A.C. 241, 100 B.C.L.R. (2d) 1, 77 O.A.C. 81, 26 C.C.L.I. (2d) 1, 22 C.C.L.T. (2d) 173, 32 C.P.C. (3d) 141, 7 M.V.R. (3d) 202, 52 A.C.W.S. (3d) 40; U-Pak Disposals (1989) Ltd. v. Durham (Regional Municipality), [2014] O.J. No. 926, 2014 ONSC 1103 (S.C.J.); York Condominium Corp. No. 382 v. Jay-M Holdings Ltd. (2007), 84 O.R. (3d) 414, [2007] O.J. No. 240, 2007 ONCA 49, 220 O.A.C. 311, 59 C.L.R. (3d) 15, 36 C.P.C. (6th) 233, 30 M.P.L.R. (4th) 161, 154 A.C.W.S. (3d) 1205; Young v. Verigin, [2007] B.C.J. No. 2427, 2007 BCCA 551, 72 B.C.L.R. (4th) 332, 289 D.L.R. (4th) 368, 48 C.P.C. (6th) 8, 248 B.C.A.C. 145

Statutes referred to

Civil Remedies Act, 2001, S.O. 2001, c. 28 [as am.]

Enforcement of Canadian Judgments and Decrees Act, *S.B.C. 2003, c. 29*

Limitation Act, S.B.C. 2012, c. 13, s. 7(a)

Limitations Act, R.S.A. 2000, c. L-12 [as am.]

Limitations Act, R.S.O. 1990, c. L.15 [as am.], s. 45(1)(c), (g)

Limitations Act, S.B.C. 1975, c. 37 [rep.], s. 3(2)(f)

Limitations Act, S.N.L. 1995, c. L-16.1, s. 6(1)(g)

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, ss. 2(1) [as am.], 4, 5 [as am.], (1), (a), (iv), (b), (2), 16 [as am.], (1) [as am.], (b)

Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5 [as am.], s. 8

Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. 1990, c. R.6, Part III, Art. III, s. 1

Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(f)

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 19(1) [as am.]

The Limitation of Actions Act, C.C.S.M., c. L150, s. 2(1)(l)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 60

Authorities referred to

Mew, Graeme, The Law of Limitations, 3rd ed. (Toronto: LexisNexis, 2016)

Pitel, Stephen G.A., and Nicholas S. Rafferty, Conflict of Laws, 2nd ed. (Toronto: Irwin Law, 2016)

Report of the Ontario Law Reform Commission on the Limitation of Actions (Toronto: Department of the Attorney General, 1969)

Sullivan, Ruth, Statutory Interpretation, 3rd ed. (Toronto: Irwin Law, 2016)

Sullivan, Ruth, Sullivan on the Construction of Statutes, 6th ed. (Markham, Ont.: LexisNexis, 2014)

Walker, Janet, and Jean-Gabriel Castel, Canadian Conflict of Laws, looseleaf (Rel. 54-3/2016 Pub.5911), 6th ed. (Toronto: LexisNexis, 2005) [page206]

APPEAL from the judgment of Carey J. of the Superior Court of Justice dated February 5, 2016 for the respondent.

Larry M. Belowus, for appellant.

David M. McNevin, for respondent.

The judgment of the court was delivered by

STRATHY C.J.O.: —

[1] This appeal raises two questions:

(a) what limitation period applies to a proceeding on a foreign judgment in Ontario; and

(b) when does that limitation period begin to run?

[2] The motion judge found that the limitation period was the two-year "basic limitation period" specified in s. 4 of the Limitations Act, 2002, *S.O. 2002, c. 24, Sch. B*. It began to run when the appeal of the foreign judgment was dismissed.

[3] For the reasons that follow, I would dismiss the appeal and answer the questions it raises as follows:

(a) a two-year limitation period applies to a proceeding on a foreign judgment; and

(b) the limitation period begins to run, at the earliest, when the time to appeal the foreign judgment has expired or, if an appeal is taken, the date of the appeal decision. The time may be longer if the claim was not "discovered" within the meaning of s. 5 of the Limitations Act, 2002, until a date later than the appeal decision.

A. Background

[4] On January 24, 2013, the respondent obtained a judgment against the appellant in the New Jersey Superior Court for the payment of US$115,248. An appeal to the Appellate Division was dismissed on July 17, 2014.

[5] On May 1, 2015, the respondent brought an application in the Ontario Superior Court of Justice to recover damages based on the New Jersey judgment, in an equivalent amount expressed in Canadian dollars. The application was commenced more than two years after the New Jersey judgment was rendered, but less than two years after the dismissal of the appeal.

[6] The appellant pleaded that the proceeding was time-barred. He argued that the limitation period was two years [page207] under s. 4 of the Limitations Act, 2002 and that time ran from the date of the first-instance New Jersey judgment. The result, he said, was that the limitation period expired before the application was commenced in Ontario.

[7] The application judge rejected this defence and granted judgment in favour of the respondent.

B. The Application Judge's Reasons

[8] The application judge held that the proceeding on the New Jersey judgment was in time because it was commenced within two years of the dismissal of the New Jersey appeal.

[9] He found support for his decision that time ran from the date of the New Jersey appeal in Part III, art. III, s. 1 of the Reciprocal Enforcement of Judgments (U.K.) Act, R.S.O. c. R.6 ("REJUKA"), which provides that a judgment of a United Kingdom court may be enforced in Ontario within six years after the date of judgment "or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings" (emphasis added).

[10] He also found support in the Supreme Court of Canada's decision in Yugraneft Corp. v. Rexx Management Corp., *[2010] 1 S.C.R. 649*, *[2010] S.C.J. No. 19*, *2010 SCC 19*. Rothstein J. held, at para. 57, that a judgment debtor's non-performance of the obligation created by a foreign arbitration judgment is only discoverable under the Alberta Limitations Act, *R.S.A. 2000, c. L-12*, "on the date the appeal period expires or, if an appeal is taken, the date of the appeal decision" (emphasis added).

[11] In the application judge's view, it would be inefficient and promote a multiplicity of proceedings to require a foreign judgment creditor to commence an Ontario proceeding pending an appeal of the underlying judgment.

[12] The application judge found it unnecessary to consider the respondent's alternative argument that its proceeding on the New Jersey judgment fell under s. 16(1)(b) of the Limitations Act, 2002, which states that there is no limitation period in respect of "a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court". He suggested, however, that this court might wish to reconsider its decision in Lax v. Lax *(2004), 70 O.R. (3d) 520*, *[2004] O.J. No. 1700* (C.A.), which dealt with the limitation period for a proceeding on a foreign judgment under the predecessor to the Limitations Act, 2002. [page208]

C. The Submissions of the Parties

(1) The appellant

[13] The appellant submits that the application judge erred in holding that the limitation period began to run from the disposition of the New Jersey appeal. He submits it ran from the date of the first-instance judgment in New Jersey.

[14] He relies on this court's decision in Lax, holding that a foreign judgment is characterized as a simple contract debt, and argues that the basic two-year limitation period in s. 4 of the Limitations Act, 2002 applies. He also relies on a line of Ontario jurisprudence establishing that a foreign judgment is final for the purpose of suing on it in Ontario even if the time for appeal has not expired or an appeal is pending: see Four Embarcadero Center Venture v. Mr. Greenjeans Corp. *(1988), 64 O.R. (2d) 746*, *[1988] O.J. No. 210* (H.C.J.); and Continental Casualty Co. v. Symons Estate *(2015), 127 O.R. (3d) 758*, *[2015] O.J. No. 5653*, *2015 ONSC 6394* (S.C.J.).

(2) The respondent

[15] The respondent maintains that no limitation period applies to a proceeding on a foreign judgment because it falls under s. 16(1)(b) of the Limitations Act, 2002.

[16] Alternatively, it says that if there is a two-year limitation period, the case law concerning when a foreign judgment becomes final has no application under the Limitations Act, 2002 and that time does not begin to run until appeal rights in the foreign jurisdiction have been exhausted.

D. Analysis

[17] The correct approach to resolving the two questions raised by this appeal begins and ends with the provisions of the Limitations Act, 2002, which is a comprehensive and exhaustive scheme for dealing with limitation periods: Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada *(2015), 128 O.R. (3d) 658*,

[2015] O.J. No. 6954, *2015 ONCA 764*, at paras. 53-56, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 10 and [2016] S.C.C.A. No. 11.

[18] Accordingly, I will begin my analysis by explaining the purpose of statutes of limitation. I will then examine the relevant provisions of the former Ontario Limitations Act, R.S.O. 1990, c. L.15 and their interpretation in the case law. Finally, I will discuss the legislative history of the Limitations Act, 2002 [page209] and the relevant provisions of the statute. Against this background, I will address the two questions raised by this appeal.

(1) Discussion

(i) The purposes of statutes of limitation

[19] Limitations statutes reflect public policy about efficiency and fairness in the justice system. There are three broad policy justifications for limitation statutes: Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623, [2013] S.C.J. No. 14, 2013 SCC 14, at paras. 231-34.

[20] First, they promote finality and certainty in legal affairs by ensuring that potential defendants are not exposed to indefinite liability for past acts: Hare v. Hare (2006), 83 O.R. (3d) 766, [2006] O.J. No. 4955 (C.A.), at para. 41. They reflect a policy that, after a reasonable time, people should be entitled to put their business and personal pasts behind them and should not be troubled by the possibility of "stale" claims emerging from the woodwork.

[21] Second, they ensure the reliability of evidence. It is inefficient and unfair to try old claims because evidence becomes unreliable with the passage of time. Memories fade, witnesses die and evidence gets lost. After a reasonable time, people should not have to worry about the preservation of evidence: M. (K.) v. M. (H.), [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, at p. 30 S.C.R.

[22] Third, and related to this, limitation periods promote diligence because they encourage litigants to pursue claims with reasonable dispatch.

[23] Other justifications have been given, including the interest in the efficient use of public resources through the expeditious resolution of disputes and the desirability of adjudicating disputes on the basis of contemporary values and standards: see Graeme Mew, The Law of Limitations, 3rd ed. (Toronto: LexisNexis, 2016), at pp. 16-18.

(ii) The former Limitations Act, R.S.O. 1990, c. L.15

[24] Section 45(1)(g) of the former Limitations Act contained a six-year limitation period for an action on a simple contract or debt. A long line of cases held that an action on a foreign judgment was an action on a simple contract debt for limitations purposes and therefore subject to that six-year limitation period: see Lax, at para. 11; Rutledge v. United States Saving & Loan Co. (1906), 37 S.C.R. 546, [1906] S.C.J. No. 31, at p. 547 S.C.R.; and Bedell v. Gefaell (No. 1), [1938] O.R. 718, [1938] O.J. No. 463 (C.A.), at [page210] p. 720 O.R. This view was based on the fiction of an implied promise by the foreign judgment debtor to pay the amount of the judgment. As Feldman J.A. noted, at para. 13 of Lax, this fiction was necessary because, "unlike a domestic judgment, a foreign judgment cannot be directly enforced [in Ontario] by execution. Rather, an action must be brought to enforce the debt it creates".

[25] Section 45(1)(c) of the former Limitations Act also contained a 20-year limitation period on an "action upon a judgment or recognizance". In Lax, at paras. 20-25, Feldman J.A. confirmed that this provision did not apply to an action on a foreign judgment. It applied to an action brought in order to toll the limitation period to enforce a domestic judgment using the execution procedures set out in Rule 60 of the Rules of Civil Procedure, *R.R.O. 1990, Reg. 194*.

[26] The practice of bringing an action on a domestic judgment to toll the limitation period for its enforcement within the province was discussed by the British Columbia Court of Appeal in Young v. Verigin, [2007] B.C.J. No. 2427, 2007 BCCA 551, 72 B.C.L.R. (4th) 332, at paras. 4-8. Newbury J.A. observed that in British Columbia, the limitation period for an action on a domestic judgment for the payment of money was reduced from 20 to ten years by the Limitations Act, S.B.C. 1975, c. 37, s. 3(2)(f). That provision was then amended by the Enforcement of Canadian Judgments and Decrees Act, *S.B.C. 2003, c. 29* by inserting the word "local" before the word "judgment",

presumably to clarify that the provision did not apply to foreign judgments: see Limitation Act, *S.B.C. 2012, c. 13, s. 7*(a).

[27] In Lax, this court rejected the suggestion of Cumming J., in obiter, in Girsberger v. Kresz *(2000), 47 O.R. (3d) 145*, *[2000] O.J. No. 266* (S.C.J.), at paras. 30-50, affd on other grounds *(2000), 50 O.R. (3d) 157*, *[2000] O.J. No. 4216* (C.A.), that the historical classification of foreign judgments as simple contract debts should be abandoned in order to give "full faith and credit" to foreign judgments on the basis of comity, order and fairness. Cumming J.'s suggestion would have subjected foreign judgments to the 20-year limitation period in s. 45(1)(c) of the former Limitations Act.

(iii) The history of the Limitations Act, 2002

[28] The Limitations Act, 2002 was the culmination of several attempts, beginning in the late 1960s, to reform, consolidate and simplify the law of limitations in Ontario. The history of those attempts was set out by Weiler J.A. in York Condominium Corp. No. 382 v. Jay-M Holdings Ltd. *(2007), 84 O.R. (3d) 414*, *[2007] O.J. No. 240*, *2007 ONCA 49*, at paras. 27-30. See, also, [page211] McConnell v. Huxtable *(2013), 113 O.R. (3d) 727*, *[2013] O.J. No. 612*, *2013 ONSC 948* (S.C.J.), at paras. 62-73, affd *(2014), 118 O.R. (3d) 561*, *[2014] O.J. No. 477*, *2014 ONCA 86*.

[29] The purpose of the new statute was to replace a complex, obscure and confusing regime of multiple limitation periods with a simple and comprehensive scheme. The new scheme consists of a basic two-year limitation period applicable to most claims, an "ultimate limitation period" of 15 years, and a statutorily enshrined discoverability principle. It was intended to promote certainty and clarity in the law of limitation periods: see Dilollo Estate (Trustee of) v. I.F. Propco Holdings (Ontario) 36 Ltd. *(2013), 117 O.R. (3d) 81*, *[2013] O.J. No. 4432*, *2013 ONCA 550*, at para. 61.

(iv) The Limitations Act, 2002

[30] The following provisions of the Limitations Act, 2002 are relevant:

Definitions

1. In this act,

. . . . .

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission[.]

. . . . .

Application
2(1) This Act applies to claims pursued in court proceedings other than . . . [not applicable].

. . . . .

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and [page212]

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

. . . . .

No limitation period

16(1) There is no limitation period in respect of,

. . . . .

(b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court[.]

[31] Because the proceeding on the New Jersey judgment brought by the respondent in this appeal is a "claim pursued in a court proceeding", it falls within the comprehensive and exhaustive scheme of the statute.

[32] The Limitations Act, 2002 eliminated its predecessor's 20-year limitation period for an action "upon a judgment or recognizance". However, it included a "proceeding to enforce an order of a court or any other order that may be enforced in the same way as an order of a court" in the proceedings for which there is no limitation period under s. 16(1).

(2) Does s. 16(1)(b) apply to a proceeding on a foreign judgment?

[33] I turn now to the first question raised in this appeal -- whether there is any limitation period applicable to a proceeding on a foreign judgment. Section 16(1) of the Limitations Act, 2002, which had no counterpart in the former statute, created a class of claims that are subject to no limitation period, rather than the "basic" two-year limitation period or the "ultimate" 15-year limitation period.

[34] The matters covered by s. 16(1) are, in summary, as follows:

- claims for declaratory relief, if no consequential relief is sought;
-
- claims to enforce an order of a court or any other order that may be enforced in the same way as an order of
- a court; [page213]

-- claims for support or maintenance in family law matters;

-- proceedings to enforce a domestic arbitration award;

- proceedings under the Civil Remedies Act, 2001, S.O. 2001, c. 28;
-

-- claims by debtors or creditors in possession of collateral;

- claims in relation to sexual assault, sexual misconduct in relation to minors and assault on minors; and
-

- certain proceedings by the Crown or other agencies in relation to claims by the Crown or in relation to
- government programs, loans or grants.

[35] The interpretation of s. 16(1)(b) has been the subject of conflicting decisions of the Ontario Superior Court of Justice. In Commission de la Construction du Québec v. Access Rigging Services Inc. *(2010), 104 O.R. (3d) 313*, *[2010] O.J. No. 5055*, *2010 ONSC 5897* (S.C.J.), McLean J. dealt with an application to enforce a 2005 Quebec judgment in Ontario. The application was brought in 2010. Quebec is not a reciprocating party to the Reciprocal Enforcement of Judgments Act, *R.S.O. 1990, c. R.5* ("REJA"). Hence, the basic two-year limitation period applied unless the claim fell within s. 16(1)(b) of the Limitations Act, 2002. The judgment debtor sought to dismiss the application as time-barred.

[36] The judgment creditor, relying on Morguard Investments Ltd. v. De Savoye, *[1990] 3 S.C.R. 1077*, *[1990] S.C.J. No. 135* and Girsberger argued that comity supported a liberal interpretation of s. 16(1)(b) as being applicable to foreign judgments.

[37] McLean J. rejected this argument, finding that the two-year limitation period applied. Relying on Lax, he held that nothing in the wording of "order of a court" in s. 16(1)(b) shows an intention to change the common law position that a foreign judgment cannot be directly enforced in Ontario and that it must be converted into a domestic judgment that is enforceable in Ontario. In previous iterations of the Act, the analogous term "judgment" referred to domestic judgments that could be enforced in Ontario without bringing a proceeding on the judgment.

[38] Moreover, McLean J. held that to interpret s. 16(1)(b) as applicable to proceedings on foreign judgments would be inconsistent with REJA, which contains a six-year limitation period for the registration of judgments of the courts of other provinces [page214] and territories, except Quebec.[1] He found that the judgment creditor's argument would lead to the incongruous result that there was no limitation period applicable to proceedings on Quebec judgments in Ontario, but proceedings on the judgments of other provinces would have a six-year limitation period.

[39] McLean J. observed that the purpose of the Limitations Act, 2002 was to simplify the previously complex scheme of limitations and said it would have been simple enough to include foreign judgments in s. 16(1)(b), had that been the legislature's intention. It was not the court's responsibility to make a change that the legislature had not.

[40] In PT ATPK Resources TBK (Indonesia) v. Diversified Energy and Resources Corp., *[2013] O.J. No. 4339*, *2013 ONSC 5913* (S.C.J.), Newbould J. questioned the reasoning in Access Rigging. He suggested that knowledge of a foreign judgment did not fit well with the language of knowledge of "injury, loss or damage" in the discoverability provision in s. 5 of the Limitations Act, 2002. In his view, it made more sense to treat a claim for the enforcement of a foreign judgment as having no limitation period under s. 16(1)(b), to which the discoverability provision does not apply. This, he said, would also be more consistent with the principles of comity expressed by the Supreme Court of Canada in Beals v. Saldhana, *[2003] 3 S.C.R. 416*, *[2003] S.C.J. No. 77*, *2003 SCC 72* and Pro Swing Inc. v. Elta Golf Inc., *[2006] 2 S.C.R. 612*, *[2006] S.C.J. No. 52*, *2006 SCC 52*.

[41] In S.A. Horeca Financial Services v. Light, 2014 ONSC 4551,[2] Murray J. disagreed with Access Rigging and preferred the reasoning in PT ATPK. He also referred to Beals, noting the importance of comity. In contrast to the view taken in Access Rigging, he suggested that the legislature's failure to exclude foreign judgments from s. 16(1)(b) was significant.

[42] It falls to this court, as a matter of first impression, to interpret whether s. 16(1)(b) applies to a proceeding on a foreign judgment. The words of s. 16(1)(b) are to be read in light of the language of the provision as a whole, their context within the [page215] statutory scheme, and the purposes of the Limitations Act, 2002: see R. v. Hajivasilis *(2013), 114 O.R. (3d) 337*, *[2013] O.J. No. 253*, *2013 ONCA 27*, at para. 23; and Ayr Farmers Mutual Insurance Co. v. Wright *(2016), 134 O.R. (3d) 427*, *[2016] O.J. No. 5556*, *2016 ONCA 789*, at paras. 26, 28-29, 31-32.

[43] First, therefore, I consider the language of s. 16(1)(b) as a whole.

[44] Phrases serving parallel functions and associated by the disjunction "or" in a statutory provision influence each other's meaning. The parallelism "invites the reader to look for a common feature among the terms" to resolve any ambiguities: Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed. (Markham, Ont.: LexisNexis, 2014), at p. 230. The Supreme Court has stated that "a term or an expression should not be interpreted without taking the surrounding terms into account" in order to identify a "common thread": Opitz v. Wrzesnewskyj, *[2012] 3 S.C.R. 76*, *[2012] S.C.J. No. 55*, *2012 SCC 55*, at paras. 40, 43.

[45] In my view, the term "order of a court" in s. 16(1)(b) takes its meaning, in part, from the parallel phrase immediately associated with it -- namely, "any other order that may be enforced in the same way as an order of a court" (emphasis added). I observe that a similar parallel phrase is found in s. 19(1) of the Statutory Powers Procedure Act, *R.S.O. 1990, c. S.22*, which provides that "[a] certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such" (emphasis added).

[46] The "common feature" or "common thread" linking these parallelisms is the concept of enforceability. Section 16(1)(b) of the Limitations Act, 2002 applies to court orders and to other orders, such as those of persons exercising a statutory power of decision, that are enforceable in the same way as a court order.

[47] This common thread within s. 16(1)(b) does not extend to foreign judgments. The domestic judgments contemplated by the provision are directly enforceable in Ontario by means of the execution procedures in Rule 60 of the Rules of Civil Procedure, including writs of seizure and sale, garnishment or the appointment of a receiver: Lax, at para. 21. By contrast, like an order of a foreign arbitral tribunal, the debt obligation created by a foreign judgment cannot be directly enforced in Ontario in the absence of reciprocal enforcement legislation such as REJA or REJUKA. A proceeding in Ontario must be brought first: see Lax, at paras. 11-13; Yugraneft, at para. 45; Chevron Corp. v. Yaiguaje, *[2015] 3 S.C.R. 69*, *[2015] S.C.J. No. 42*, *2015 SCC 42*, at para. 43. [page216] That proceeding may result in a judgment or order of the Ontario court. The resulting order may be enforced as an order of the court, with no applicable limitation period.

[48] Thus, the judgment of a foreign court is one step removed from being an order of a court for the purpose of s. 16(1)(b) of the Limitations Act, 2002. It is not on the same level as an order of an Ontario court or any other order, such as an order of an Ontario statutory decision maker, which may be enforced as an order of a domestic court. This was adverted to by Feldman J.A. in Lax, at para. 31, in explaining why she did not agree with the approach taken by Cumming J. in Girsberger:

> As long as only domestic judgments can be enforced by execution and the other methods discussed above, and therefore foreign judgments must be transformed into domestic judgments or registered before they are enforceable as domestic judgments, there is not parity of treatment.

[49] There are good reasons for giving different treatment for limitations purposes to the enforcement in Ontario of a judgment of an Ontario court, on the one hand, and a judgment of a foreign court, on the other hand. The principle of territorial sovereignty means that the judgment of a court has effect only inside the territory in which the court is located and cannot be enforced outside its borders: Stephen G.A. Pitel and Nicholas S. Rafferty, Conflict of Laws, 2nd ed. (Toronto: Irwin Law, 2016), at p. 162. The extraterritorial enforcement of a court's order is not a legitimate exercise of state power: see Tolofson v. Jensen, *[1994] 3 S.C.R. 1022*, *[1994] S.C.J. No. 110*, at p. 1052

S.C.R.; Club Resorts Ltd. v. Van Breda, *[2012] 1 S.C.R. 572*, *[2012] S.C.J. No. 17*, *2012 SCC 17*, at para. 31; Chevron, at paras. 47-48; and Endean v. British Columbia, *[2016] 2 S.C.R. 162*, *[2016] S.C.J. No. 42*, *2016 SCC 42*, *401 D.L.R. (4th) 577*, at para. 45.

[50] Thus, while a domestic judgment can be enforced as of right in Ontario, it is necessary to bring a proceeding on a foreign judgment. If that proceeding is successful, it will give rise to an Ontario judgment which can be directly enforced in the province.

[51] Furthermore, a judgment creditor who brings an Ontario proceeding on a foreign judgment must show that the foreign court had jurisdiction and that the judgment is final and for the payment of money (or that it would be appropriate for the Ontario court to recognize it as enforceable within the province even if it is interlocutory or non-monetary): see Pro Swing; Chevron; and Cavell Insurance Co. (Re) *(2006), 80 O.R. (3d) 500*, *[2006] O.J. No. 1998* (C.A.), at para. 41. [page217]

[52] The foreign judgment debtor is entitled to raise defences to the proceeding, such as fraud, denial of natural justice and public policy: see Beals. These defences "distinguish foreign judgments from local judgments, against which the sole recourse is an appeal": Janet Walker and Jean-Gabriel Castel, Canadian Conflict of Laws, looseleaf (Rel. 54-3/2016 Pub.5911), 6th ed. (Toronto: LexisNexis, 2005), at para. 14.3.

[53] I conclude that the language of s. 16(1)(b) of the Limitations Act, 2002 suggests that the term "order of a court" refers to an order of a domestic court.

[54] Second, I consider the statutory context of s. 16(1)(b) of the Limitations Act, 2002.

[55] Section 16(1)(b) also takes its meaning from the surrounding provisions of s. 16. When statutory provisions are grouped together, the legislature is presumed to have drafted each with the others in mind: Inland Revenue Commissioners v. Hinchy, [1960] A.C. 748, [1960] 1 All E.R. 505 (H.L.), at p. 766 A.C. They tend to illuminate each other's meaning because they "share a single idea": Ruth Sullivan, Statutory Interpretation, 3rd ed. (Toronto: Irwin Law, 2016), at p. 175.

[56] The other provisions grouped together in s. 16 pertain to claims such as family law support awards, sexual assault claims and government claims that are considered so important that, for one policy reason or another, they should have no limitation period at all. For example, the policy reason underlying the exemption for sexual assault claims "is grounded in the likelihood that the dynamic of the relationship will impede the autonomy of the victim": Boyce v. Toronto (City) Police Services Board, *[2011] O.J. No. 7*, *2011 ONSC 53* (S.C.J.), at para. 40, affd *[2012] O.J. No. 1531*, *2012 ONCA 230*.

[57] In this context, it is important to identify the policy reason for including claims "to enforce an order of a court" in the subset of claims that have no limitation period under s. 16. In my view, the reason is that such claims have already passed a limitations hurdle under Ontario law -- a court order can only be obtained if the underlying cause of action giving rise to it was not time-barred.

[58] This was the policy reason suggested by the British Columbia Law Reform Commission, in its 1974 Report on Limitations, for the argument that no limitation period should apply to claims to enforce domestic court orders. As quoted by Newbury J.A. in Young v. Verigin, at para. 7, the commission wrote:

> Furthermore, the successful plaintiff cannot be said to have slept on his rights. He has taken action, and as a consequence recovered judgment. [page218] It might be argued, with considerable justification, that no limitation period whatsoever should exist with respect to the enforcement of judgments. It may seem unfair that the plaintiff who has been put to the trouble and expense of obtaining a judgment to enforce a right or obligation should face a further limitation period with respect to the exercise of his rights under the judgment. Why should he not be free to pursue his rights under the judgment at his leisure if he so chooses?

[59] It follows that the term "order of a court" in s. 16(1) (b) should be interpreted as referring to an order of a domestic court only. A proceeding on a foreign judgment has not passed any Ontario limitations hurdle. If the action on the foreign judgment is successful, it results in an Ontario judgment, which is subject to no limitation period. But that can only be justified if the underlying cause of action based on the foreign judgment has already passed a limitations hurdle in Ontario.

[60] I find support for this conclusion in the Report of the Ontario Law Reform Commission on the Limitation of Actions (Toronto: Department of the Attorney General, 1969), at pp. 50-51. The report stated, at p. 49, that there was good reason to apply the longer 20-year limitation period in the former Limitations Act to actions on domestic judgments because, in terms later adopted by the British Columbia report, "the successful plaintiff cannot be said to have slept on his rights. He has taken action and, as a consequence, recovered judgment". However, the report nevertheless recommended that foreign judgments should remain subject to the six-year limitation period governing debts in the former Limitations Act, notwithstanding the artificiality of treating them as simple contract debts.

[61] It is also noteworthy that several provinces have subjected foreign judgment proceedings to a special limitation period that is distinct from the one that applies to proceedings on domestic judgments. British Columbia's Limitation Act subjects "local" judgment proceedings to a ten-year limitation period in s. 7, but it deals with "extraprovincial judgments" separately. Section 2(1)(l) of Manitoba's The Limitation of Actions Act, *C.C.S.M., c. L150* treats "Canadian judgments" differently from other judgments. Newfoundland sets a six-year limitation period on an action "to enforce a foreign judgment" and a ten-year period on actions to enforce a judgment of a court in the province: see Limitations Act, *S.N.L. 1995, c. L-16.1, s. 6*(1)(g). And Prince Edward Island's Statute of Limitations, *R.S.P.E.I. 1988, c. S-7, s. 2*(1)(f) distinguishes between "extraprovincial judgments" and other judgments.

[62] The statutory context therefore suggests that the language of s. 16(1)(b) of the Limitations Act, 2002 is confined to orders of domestic courts. [page219]

[63] Third, and finally, I consider s. 16(1)(b) in light of the purposes of limitations statutes.

[64] It would be contrary to the purposes of limitations statutes to interpret s. 16(1)(b) as exempting foreign judgments from any limitation period. If it were always possible to bring a proceeding on a foreign judgment in Ontario without time limitation, no matter when and where it was obtained, the debtor would be indefinitely exposed to the prospect of defending such proceedings in Ontario. As was pointed out in the Ontario Law Reform Commission's report, at p. 50, problems associated with the preservation and reliability of evidence are especially pronounced for foreign judgment debtors. This militates in favour of having some limitation period apply to proceedings on foreign judgments. As well, exempting such proceedings from a limitation period would not encourage diligence or reasonable dispatch on the part of the foreign judgment creditor, who, unlike domestic judgment creditors, has not already surmounted an Ontario limitations hurdle.

[65] Before concluding, I would remark that, despite their undoubted importance, the principles of comity expressed in Morguard, Beals, Chevron and Cavell do not require the absence of any limitation period for a proceeding on a foreign judgment. Nor do they supersede the equally important policy rationales for limitations statutes. It is one thing to remove barriers to the extraterritorial recognition of foreign judgments. But it is quite another to grant them more generous status than any other debt obligation or to give them the same status as a domestic judgment for limitations purposes, thereby circumventing the very reasons for limitation periods.

[66] I conclude, therefore, that s. 16(1)(b) of the Limitations Act, 2002 does not apply to proceedings on foreign judgments, and the applicable limitation period for the respondent's proceeding on the New Jersey judgment at issue in this appeal is the basic two-year period in s. 4. The result is that time begins to run when the claim is "discovered" within the meaning of s. 5. I turn to that question next.

(3) When does time begin to run on a proceeding on a foreign judgment in Ontario?

[67] The application judge found that the limitation period for the respondent to commence his proceeding on the New Jersey judgment ran from the date the New Jersey appeal was dismissed. As I have noted, he found that this was consistent with REJUKA and with the Supreme Court's approach to the enforcement of foreign arbitral awards in Yugraneft. [page220]

[68] The appellant submits that this is inconsistent with previous authorities, including the decision of Henry J. in Four Embarcadero and, more recently, the decision of Glustein J. in Continental Casualty. Those cases stand for the proposition that a proceeding on a foreign judgment may be commenced in Ontario even if the judgment is not final, in the sense that the time to appeal it in the foreign jurisdiction has not expired or it is actually under appeal.

[69] In my view, those cases are of no assistance in resolving the issue of when time begins to run in a proceeding on a foreign judgment. The question of a judgment's finality is relevant not to statutory limitation periods to commence a proceeding on a foreign judgment, but to the conditions that a foreign judgment creditor must satisfy to succeed on the proceeding: see Cavell, at paras. 41-43.

[70] The test under the Limitations Act, 2002 is not whether the judgment is "final"; it is when the claim is discovered, a fact that is ascertained through the application of s. 5(1), aided by the presumption in s. 5(2).

[71] I acknowledge the point made by Newbould J. in PT ATPK that, in the context of s. 5(1) of the Limitations Act, 2002, a proceeding on a foreign judgment does not fall particularly neatly into the definition of "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". However, the statute was meant to be comprehensive and exhaustive. Section 2(1) provides that it applies to "claims pursued in court proceedings", and s. 4 provides that the basic two-year limitation period applies "unless this Act provides otherwise".

[72] The words "injury, loss or damage" in s. 5(1) can reasonably refer to the debt obligation created by a foreign judgment and owed by the foreign judgment debtor to the creditor. The "act or omission" can reasonably refer to the debtor's failure to discharge the obligation once it became final. Viewed in this light, s. 5(1) can reasonably be viewed as applying to a proceeding on a foreign judgment.

[73] I note, in this regard, that the discoverability provision in Alberta's Limitations Act differs from the Ontario provision in that it contains a definition of "injury" that includes the non-performance of an obligation. Rothstein J. adverted to this definition in Yugraneft, at para. 50. Although Newbould J.'s comment in PT ATPK is a fair one, Justice Rothstein's reference lends weight to the observation that fitting a foreign judgment within the definition of "injury" in s. 5(1) of the Limitations Act, 2002 is not as strained as it might seem. [page221]

[74] Section 5(1) provides that a claim is discovered on the earlier of (a) the day on which the claimant first knew, among other things, "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it"; and (b) the day on which "a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)". The test in s. 5(1)(a) has been referred to as a "subjective test" because it looks to the claimant's actual knowledge, and the test in s. 5(1)(b) as a "modified objective" test because it looks to what a reasonable person with the abilities and in the circumstances of the claimant ought to have known: see Ferrera v. Lorenzetti Wolfe Barristers and Solicitors *(2012), 113 O.R. (3d) 401*, *[2012] O.J. No. 5683*, *2012 ONCA 851*, at para. 70; and Crombie Property Holdings Ltd. v. McColl-Frontenac Inc. (Texaco Canada Ltd.), *[2017] O.J. No. 142*, *2017 ONCA 16*, at para. 35.

[75] In 407 ETR Concession Co. v. Day *(2016), 133 O.R. (3d) 762*, *[2016] O.J. No. 5006*, *2016 ONCA 709*, at para. 48, Laskin J.A. explained that "one reason why the legislature added aeappropriate means' [in s. 5(1)(a)] as an element of discoverability was to enable courts to function more efficiently by deterring needless litigation". "Appropriate" means "legally appropriate". For example, a tactical choice to delay commencement of a proceeding to engage in settlement discussions after a loss, injury or damage is known does not make the proceeding inappropriate: Markel Insurance Co. of Canada v. ING Insurance Co. of Canada *(2012), 109 O.R. (3d) 652*, *[2012] O.J. No. 1505*, *2012 ONCA 218*, at para. 24.

[76] Appropriateness must be assessed on the facts of each case, and case law applying s. 5(1)(a)(iv) is of limited assistance: Brown v. Baum, *[2016] O.J. No. 2317*, *2016 ONCA 325*, *348 O.A.C. 251*, at para. 41. However, it is noteworthy that courts have held that a proceeding is not legally appropriate until other mechanisms for resolving a dispute, such as a statutory remedial process, have been exhausted: see 407 ETR, at para. 40; U-Pak Disposals (1989) Ltd. v. Durham (Regional Municipality), *[2014] O.J. No. 926*, *2014 ONSC 1103* (S.C.J.), at paras. 22-25; Kadiri v. Southlake Regional Health Centre, *[2015] O.J. No. 356*, *2015 ONSC 621* (S.C.J.), at paras. 52-57, affd *[2015] O.J. No. 6387*, *2015 ONCA 847*; and Mew, at pp. 95-96.

[77] In the usual case, it will not be legally appropriate to commence a legal proceeding on a foreign judgment in Ontario until the time to appeal the judgment in the foreign jurisdiction has expired or all appeal remedies have been exhausted. The [page222] foreign appeal process has the potential to resolve the dispute between the parties. If the judgment is overturned, the debt obligation underlying the judgment creditor's proceeding on the foreign judgment disappears.

[78] This approach is consistent with the decision of the Alberta Court of Appeal in Laasch v. Turenne, *[2012] A.J. No. 75*, *2012 ABCA 32*, *522 A.R. 168*. In that case, the court determined that the statutory limitation period to commence a proceeding on a Montana judgment began to run even while the creditor sought to register the judgment under Alberta's reciprocal enforcement legislation. The existence of the reciprocal enforcement statute did not displace the common law process for a proceeding on a foreign judgment. Therefore, the proceeding was "warranted" within the meaning of the discoverability provision of Alberta's Limitations Act even while the creditor sought registration.

[79] To regard a claim based on the foreign judgment as discoverable and appropriate only when all appeals have been exhausted is also consistent with the observations of Rothstein J. in Yugraneft. He stated, at para. 57, that the limitation period to enforce a foreign arbitral judgment under Alberta's Limitations Act starts to run when the time to appeal the judgment has expired or, where an appeal is taken, the date of the appeal decision.

[80] Finally, as the application judge noted, this approach avoids the risk of multiplicity of proceedings by not requiring the judgment creditor to commence a proceeding on a foreign judgment in Ontario before all proceedings in the foreign jurisdiction have run their course. It furthers the purpose of s. 5(1)(a)(iv) of the Limitations Act, 2002 by deterring the unnecessary litigation that may result from commencing an Ontario proceeding on a foreign judgment that is subsequently overturned.

[81] The foregoing approach to the discoverability of a foreign judgment does not preclude a foreign judgment creditor seeking an interim Mareva injunction to freeze exigible assets of the judgment debtor in Ontario before a proceeding on the foreign judgment is commenced in the province and the foreign appeal process is still running its course: see Chitel v. Rothbart *(1982), 39 O.R. (2d) 513*, *[1982] O.J. No. 3540* (C.A.); and Aetna Financial Services v. Feigelman, *[1985] 1 S.C.R. 2*, *[1985] S.C.J. No. 1*. Nor does the approach preclude a foreign judgment debtor obtaining a stay of execution of an Ontario judgment that the creditor obtained after successfully suing on a foreign judgment that is still under appeal: see DSlangdale Two LCC v. Daisytek (Canada) Inc., *[2004] O.J. No. 5281*, *[2004] O.T.C. 1133* (S.C.J.), at paras. 13-16. [page223]

[82] In a particular case, a claim based on a foreign judgment may not be discovered under s. 5 of the Limitations Act, 2002 until such time as the judgment creditor knew or ought to have known that the judgment debtor had exigible assets in Ontario and could be served with process: see Yugraneft, at paras. 49. 58, 61. As s. 5(1)(b) makes clear, the discoverability assessment, including the appropriateness criterion, must take account of the factual context and the plaintiff's actual circumstances, and I reiterate that each case must be decided on its own facts: see 407 ETR, at paras. 34, 45-46.

[83] In the present case, I conclude that the respondent's claim based on the New Jersey judgment was discoverable on July 17, 2014, the date the appeal was dismissed in New Jersey. The respondent would not have reasonably known that a proceeding in Ontario would be an appropriate means to seek to remedy its loss until that date. Thus, the limitation period for the respondent to commence its proceeding on the New Jersey judgment began on that date. The respondent brought the proceeding on May 1, 2015, within the applicable two-year limitation period. Hence, the proceeding was not time-barred.

E. Order

[84] For these reasons, I would dismiss the appeal, with costs to the respondent in the amount of $9,000, inclusive of interest and all applicable disbursements.

Appeal dismissed.

Notes

1 REJA is not exclusive, as s. 8 provides that "nothing in this Act deprives any judgment creditor of the right to bring an action for the recovery of the amount of a judgment instead of proceeding under this Act." It would appear, therefore, that the judgment creditor can either bring a proceeding on the foreign judgment or proceed under REJA.

2 The decision of Murray J. is unreported. However, it is discussed by Weiler J.A. in the context of a motion to lift a stay pending its appeal to this court. See SA Horeca Financial Services v. Light *(2014), 123 O.R. (3d) 542*, *[2014] O.J. No. 5490*, *2014 ONCA 811*.

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Jugements du Québec

Cour d'appel du Québec

District de Montréal

Les honorables René Dussault J.C.A., Marie-France Bich J.C.A. et Paul Vézina J.C.A.

Entendu : 8 février 2006.

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No : 500-09-016045-056 (500-17-026513-054)

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TRANSAT TOURS CANADA INC., appelante-demanderesse c. IMPULSORA TURISTICA DE OCCIDENTE, S.A. DE C.V. et VISION CORPORATIVA Y FISCAL, S.A. DE C.V. et HOTELERA QUALTON, S.A. DE C.V., intimées-défenderesses et TESCOR, S.A. DE C.V., mise en cause-défenderesse et MYTRAVEL CANADA HOLIDAYS INC., mise en cause

(53 paragr.)

Résumé

International — Conflits de juridiction et d'autorités — Actions personnelles — Élection de for — Forum conveniens et forum non conveniens — Procédure de détermination — Lors de sa détermination du forum le plus approprié pour entendre le litige, le juge de première instance ne peut se fonder uniquement sur sa conclusion qu'il n'a pas le pouvoir d'émettre une ordonnance d'injonction à portée extraterritoriale — Appel rejeté — Code civil du Québec, art. 3148.

Procédure civile — Injonction — Forme et application — Application extraterritoriale — Personnes liées — Transat dépose une requête en injonction provisoire, interlocutoire, pour ordonnance de sauvegarde et pour injonction permanente contre Tescor afin de faire respecter la clause d'exclusivité — Cette injonction aura une portée extraterritoriale — La Cour supérieure a le pouvoir d'émettre une ordonnance à portée purement extraterritoriale — Appel rejeté — Code civil du Québec, art. 3148.

Procédure civile — Procédures préliminaires et incidentes — Moyens préliminaires — Moyens déclinatoires — Incompétence rationae personae — Les tribunaux québécois étant compétents quant à l'émission de l'injonction, la requête en rejet d'action intentée par Impulsora sur la base du "forum non conveniens" est rejetée — Appel rejeté — Code civil du Québec, art. 3148.

Transat Tours Canada inc. (Transat) en appelle d'une décision de la Cour supérieure accueillant la requête en rejet d'action de Impulsora Turistica de Occidente, s.a. de c.v. (Impulsora et rejetant la requête en injonction intentée par Transat contre Impulsora. Transat, grossiste en voyage canadien, a signé un contrat avec Tescor, s.a. de c.v. (Tescor), compagnie mexicaine, qui louait et opérait l'hôtel Qualton au Mexique. Ce contrat assurait à Transat le droit exclusif d'offrir des chambres à l'hôtel Qualton pour l'ensemble de ses clients résidant au Canada. Le contrat stipule qu'il est régi par les lois québécoises et que les tribunaux québécois ont une compétence exclusive en cas de litige. Un an plus tard, Transat apprend que MyTravel Canada Holidays inc. (MyTravel), compagnie concurrente, fait la même offre à ses clients résidant au Canada. Transat dépose alors une injonction contre Tescor afin de faire

respecter son exclusivité. Transat apprend que MyTravel avait signé son contrat avec une compagnie qui est la propriété de Impulsora. Impulsora dépose des requêtes en rejet d'action au motif que la Cour supérieure n'est pas compétente pour entendre le litige et qu'elle devrait décliner compétence en faveur des tribunaux mexicains.

DISPOSITIF : Appel accueilli.

Selon l'article 3148 al.1(3) C.c.Q., la Cour supérieure est compétente en matière de droit international privé. Qu'elle puisse avoir de la difficulté à sanctionner un éventuel non-respect de ses ordonnances ne constitue pas un facteur affectant son pouvoir d'émettre une ordonnance d'injonction. On ne peut tenir pour acquis que Impulsora ne respecterait pas une éventuelle ordonnance. Selon l'analyse globale des critères jurisprudentiels applicables, les autorités québécoises sont davantage à même de trancher le litige. De plus, toutes les compagnies mexicaines sont liées les unes aux autres. Impulsora n'a pas démontré que les facteurs de rattachement faisaient du Mexique un for nettement plus approprié que le Québec pour trancher le litige. Il est dans l'intérêt des parties et de la justice que les tribunaux québécois demeurent saisis de la requête en injonction de Transat.

Législation citée :

Code civil du Québec, art. 3148, al. 1(3), art. 3135

Code de procédure civile, Art. 46, al. 1

Avocats

Richard A. Hinse, Élise Poisson et Bruno Verdon (Lavery De Billy), pour l'appelante. Denis Godbout et Maxime Soucy (Péloquin Kattan), pour les intimées. Stéphane Pitre (Borden Ladner Gervais), pour la mise en cause, Tescor. Karim Renno et Michael Vathilakis (Osler Hoskin & Harcourt), pour la mise en cause, Mytravel Canada Holidays inc.

ARRÊT

1 LA COUR; - Statuant sur le pourvoi de l'appelante contre un jugement de la Cour supérieure, district de Montréal, rendu le 9 septembre 2005 par l'honorable Benoît Emery, qui accueillait, sur la base du *forum non conveniens*, les requêtes des intimées en rejet d'action (exception déclinatoire) et rejetait avec dépens la requête en injonction intentée contre elles;

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

3 Pour les motifs du juge Dussault, auxquels souscrivent les juges Bich et Vézina;

4 ACCUEILLE le pourvoi avec dépens;

5 INFIRME en partie le jugement de la Cour supérieure et REJETTE avec dépens les requêtes des intimées en rejet d'action pour moyen déclinatoire.

RENÉ DUSSAULT, J.C.A.
MARIE-FRANCE BICH, J.C.A.
PAUL VÉZINA, J.C.A.

MOTIFS DU JUGE DUSSAULT

6 L'appelante se pourvoit contre un jugement de la Cour supérieure, district de Montréal, rendu le 9 septembre 2005 par l'honorable Benoît Emery, qui accueillait, sur la base du *forum non conveniens*, les requêtes des intimées en rejet d'action (exception déclinatoire) et rejetait avec dépens la requête en injonction intentée contre elles.

7 L'appelante est un important grossiste en voyages au Canada et a son siège social à Montréal.

8 Tescor, S.A. de C.V. et/ou Qualton Hotels & Resorts [ci-après Tescor] est une compagnie mexicaine qui, jusqu'au 1er juillet 2005, louait et opérait l'hôtel Qualton à Puerto Vallarta au Mexique.

9 Le 27 avril 2004, l'appelante signe un contrat avec Tescor lui assurant, jusqu'en décembre 2007 et pour l'ensemble de ses clients résidant au Canada, le droit exclusif d'offrir des chambres à l'hôtel Qualton. Une clause d'élection de for au contrat prévoit que ce dernier est régi par les lois québécoises et octroie une compétence exclusive aux tribunaux québécois sur tout litige qui pourrait en découler.

10 Le 16 juin 2005, l'appelante apprend que MyTravel Canada Holidays Inc. faisant affaire sous la raison sociale Sunquest [ci-après MyTravel], une de ses concurrentes au Canada qui, bien qu'ayant son siège social en Ontario serait présente au Québec où elle aurait des actifs, offre aussi à ses clients résidant au Canada la possibilité de séjourner à l'hôtel Qualton.

11 Le même jour, l'appelante fait parvenir des lettres de mise en demeure à Tescor et à MyTravel, enjoignant à la première de se conformer au contrat et demandant à la seconde d'arrêter d'offrir les chambres de l'hôtel Qualton.

12 MyTravel répond par lettre le lendemain, informant l'appelante qu'elle offre en exclusivité les chambres de l'hôtel Qualton en vertu d'un contrat qu'elle a signé le 24 mai 2005 avec Qualton, Hotel & Resorts. Elle indique qu'elle ignorait l'existence d'un contrat entre l'appelante et Tescor.

13 L'appelante dépose alors une requête en injonction provisoire, interlocutoire, pour ordonnance de sauvegarde et pour injonction permanente contre Tescor présentable le 8 juillet 2005.

14 Les parties conviennent cependant de reporter l'audition, l'appelante ayant appris, à la lecture d'affidavits circonstanciés produits par Tescor, que MyTravel avait plutôt signé son contrat avec une compagnie du nom de Vision Corporativa y Fiscal [ci-après Vision].

15 Grâce à d'autres affidavits circonstanciés, l'appelante apprend qu'à la suite d'une restructuration la propriétaire de l'hôtel Qualton serait Impulsora Turistica de Occidente, S.A. de C.V. [ci-après Impulsora], que sa locataire et principale gestionnaire serait Hotelera Qualton S.A. de C.V. [ci-après Hotelera] et que Vision aurait, en vertu d'une promesse de sous-bail de cette dernière, la responsabilité d'exploiter l'hôtel. Ces trois compagnies [ci-après intimées] ont leur siège social au Mexique et n'ont ni place d'affaires, ni établissement, ni actif au Québec. L'appelante poursuit ses recherches et se rend compte que les intimées et Tescor sont liées les unes aux autres par les mêmes dirigeants et représentants.

16 Le 15 juillet 2005, l'appelante amende sa requête introductive d'instance pour y inclure Impulsora et Vision comme défenderesses. Le 25 juillet 2005, ces deux dernières répondent par une requête en rejet d'action (exception déclinatoire). Le 5 août 2005, l'appelante réamende sa requête introductive d'instance pour y inclure Hotelera qui, le 9 août 2005, répond elle aussi par une requête en rejet d'action.

17 Finalement, le juge de première instance est saisi d'une requête en ordonnance de sauvegarde de l'appelante à l'égard Tescor et des deux requêtes en rejet d'action des intimées qui plaident que la Cour supérieure n'a pas compétence pour entendre le litige et, subsidiairement, qu'en raison des règles du *forum non conveniens*, cette

dernière devrait décliner compétence en faveur des tribunaux mexicains, nettement plus compétents que les tribunaux québécois pour entendre le litige.

18 Le juge traite d'abord des deux requêtes des intimées en rejet d'action. Il conclut que la Cour est théoriquement compétente pour entendre le litige puisque, conformément au paragraphe 3. du premier alinéa de l'article 3148 du *Code civil du Québec*, le préjudice allégué par l'appelante et tenu pour avéré s'est produit à son siège social à Montréal (paragr. [40] et [51]).

19 Il se penche alors sur l'argument subsidiaire des intimées fondé sur le *forum non conveniens*, moyen déclinatoire exceptionnel codifié à l'article 3135 C.c.Q. Énumérant d'abord les 10 critères qui, lors de l'étude d'un tel moyen, méritent considération d'après la jurisprudence, pour déterminer s'il y a lieu de décliner compétence, - 1 lieu de résidence des parties et des témoins, 2 situation des éléments de preuve, 3 lieu de formation et d'exécution du contrat, 4 existence et contenu d'une action entreprise à l'étranger, 5 situation des biens du défendeur, 6 loi applicable au litige, 7 avantage dont jouit la demanderesse dans le for choisi, 8 intérêt de la justice, 9 intérêt des deux parties, 10 nécessité éventuelle d'une procédure d'exemplification à l'étranger - il rappelle que ces critères ne sont pas exhaustifs et que certains sont plus déterminants que d'autres.

20 Puis, s'attachant au caractère extraordinaire, discrétionnaire et surtout public de l'injonction recherchée par l'appelante, le juge de première instance pose le principe que la Cour supérieure doit s'assurer du respect de ses ordonnances. D'après lui, "il coule de source que les pouvoirs de la Cour supérieure du Québec n'ont pas de portée extraterritoriale" ([paragr. [46]) et que "toute injonction prononcée contre un défendeur étranger ne peut avoir d'effet au-delà du territoire québécois" (paragr. [48]). De plus, il souligne qu'un éventuel jugement sanctionnant le non-respect de l'injonction par un tel défendeur étranger n'ayant ni siège social, ni établissement, ni biens au Canada, ne serait pas susceptible d'exécution, ce que la Cour supérieure ne peut cautionner.

21 Il conclut donc, s'appuyant sur le critère 8, qu'il "n'est pas dans l'intérêt de la justice que les autorités du Québec prononce[nt] l'ordonnance" en injonction, les autorités mexicaines étant "nettement plus appropriées" pour le faire (paragr. [52]).

22 Le juge de première instance accueille donc les requêtes en rejet d'action des intimées fondées sur le *forum non conveniens*, mais réserve cependant les droits de l'appelante de poursuivre ces dernières en dommages-intérêts à nouveau au Québec ou ailleurs.

23 Quant à la requête en ordonnance de sauvegarde de l'appelante à l'égard de Tescor, le juge la rejette avec dépens. Toutefois, seules les conclusions accueillant les requêtes des intimées en rejet d'action et rejetant la requête en injonction contre celles-ci font l'objet du pourvoi. Tescor n'est donc pas une partie visée par l'appel.

24 L'appelante soulève deux moyens principaux.

25 Premièrement, elle soutient que le juge de première instance a erré en droit en concluant qu'il ne pouvait émettre d'injonction à portée extraterritoriale contre une compagnie étrangère n'ayant ni siège social, ni établissement, ni biens au Québec, son pouvoir discrétionnaire lui permettant de le faire (*Dargaud Éditeur c. Presse-Import Léo Brunelle Inc.* [1990] R.D.J. 341 (C.A.), *Voxco inc. c. KLJ Computer Solutions inc.*, [2003] J.Q. no 7592 (5 juin 2003), Montréal 500-09-013278-031, 2003BE-515 (C.A.), *Encaissement de chèque de Montréal ltée c. Softwise* (19 janvier 1999), Montréal 500-05-044580-981, J.E. 99-470 (C.S.)).

26 Deuxièmement, elle plaide que le juge aurait commis des erreurs de droit et des erreurs de fait dominantes dans l'évaluation de la preuve documentaire en accueillant les requêtes en rejet d'action. En reconnaissant la compétence de la Cour supérieure pour un recours en dommages-intérêts, le juge devait la reconnaître aussi pour un recours en injonction. Ce dernier aurait contourné l'application des 10 critères jurisprudentiels propres à une demande de *forum non conveniens* qu'il ne fait qu'énumérer, fondant sa décision uniquement sur sa conclusion selon laquelle une ordonnance en injonction ne pourrait être exécutée au Mexique contre des défenderesses

étrangères. Il se serait donc erronément privé d'exercer son pouvoir discrétionnaire. L'appelante se dit d'avis qu'un réel examen de ces critères confirmerait sa position selon laquelle les tribunaux québécois ayant des liens plus étroits avec le litige, le juge de première instance aurait erré en concluant que le Québec n'était pas un forum nettement plus approprié que le Mexique pour l'entendre.

27 Les intimées, soutenues en cela par Tescor, répondent au premier moyen qu'un Tribunal québécois n'ayant pas la compétence *in personam* sur elles, le juge de première instance a eu raison de conclure qu'il n'avait pas le pouvoir d'émettre une ordonnance d'injonction contre elles, seuls les tribunaux mexicains étant compétents pour le faire. En plus d'être inutile car inexécutable et contraire à l'intérêt de la justice, une ordonnance en injonction prononcée par la Cour supérieure serait donc également illégale. D'après elles, il ne suffit pas que le Tribunal québécois ait compétence, encore faut-il qu'il ait le pouvoir d'émettre l'ordonnance recherchée. Elles proposent donc que le Tribunal aurait dû commencer par statuer sur sa compétence, pour ensuite déterminer s'il a ou non le pouvoir d'émettre l'ordonnance recherchée et finalement, s'il y a lieu, procéder à l'étude des critères du *forum non conveniens* et alors exercer le pouvoir discrétionnaire que lui confère cette doctrine.

28 Au second moyen, elles répondent que le juge de première instance a judicieusement usé de son pouvoir discrétionnaire dans l'évaluation des critères d'application de l'article 3135 C.c.Q. Lors de cette évaluation, il s'est sûrement laissé influencer par sa conclusion selon laquelle il n'avait pas le pouvoir d'émettre l'ordonnance recherchée, mais a eu raison de conclure, dans un contexte où seuls les tribunaux mexicains sont compétents pour entendre un litige, que le Mexique était un forum nettement plus approprié que le Québec.

29 Pour sa part, MyTravel répond aux moyens de l'appelante par un argument principal et par un argument subsidiaire.

30 Principalement, elle plaide que le juge de première instance n'a commis aucune erreur en accueillant les requêtes en rejet d'action. D'après elle, il aurait correctement énoncé le test applicable à une demande en *forum non conveniens*, correctement apprécié la preuve et judicieusement exercé le pouvoir discrétionnaire que lui confère l'article 3135 C.c.Q. Que le juge ait mis l'accent sur le critère de l'intérêt de la justice ne justifierait pas la Cour d'intervenir puisqu'il ressortirait des paragraphes [51] et [52] du jugement qu'il a procédé à un exercice de pondération de l'ensemble des critères et que leur analyse individuelle confirmerait, de toute façon, sa conclusion.

31 Subsidiairement, bien qu'elle estime que le juge de première instance a traité cette question sur un mode purement théorique, MyTravel soutient que ce dernier a eu raison de conclure que, dans la mesure où la Cour supérieure n'a aucune compétence *in personam* sur les intimées, celle-ci n'avait pas le pouvoir d'émettre une ordonnance en injonction dont la portée serait strictement extraterritoriale.

32 Je ne peux retenir l'argument des intimées selon lequel une Cour compétente pourrait ne pas avoir le pouvoir d'émettre une ordonnance d'injonction à portée purement extraterritoriale.

33 D'une part, l'article 46, alinéa 1 C.p.c. énonce que "[l]es tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence".

34 D'autre part, dans la mesure où l'article 3148 C.c.Q. définit l'étendue de la compétence des tribunaux québécois en droit international privé et qu'en l'espèce la Cour supérieure est compétente en vertu du paragraphe 3. du premier alinéa de cet article pour trancher le litige, elle a le pouvoir d'émettre une ordonnance d'injonction contre les intimées.

35 Que la Cour supérieure puisse avoir de la difficulté à sanctionner un éventuel non-respect de ses ordonnances ne constitue pas un facteur affectant son pouvoir d'émettre une ordonnance d'injonction. Ainsi que le souligne le juge Barclay de la Saskatchewan Court of Queen's Bench, "[a]lthough the Courts are reluctant to grant injunctions against parties not within the jurisdiction, the power does exist" (*Super Seamless Steel Siding of Canada Ltd. v. Eastside Machine Co.* *(1993), 103 Sask. R. 293*, au paragr. [47], se reportant à Robert J. Sharpe, *Injunctions and*

Specific Performance, Toronto, Canada Law Book, 1983, au paragr. 123 et Looseleaf Edition, 2005, au paragr. 1.1190).

36 C'est plutôt lors de l'exercice du pouvoir discrétionnaire que lui confère l'article 3135 C.c.Q. qui lui permet, "[b]ien qu'elle soit compétente pour connaître d'un litige, [...] exceptionnellement et à la demande d'une partie, [de] décliner cette compétence si elle estime que les autorités d'un autre État sont mieux à même de trancher le litige" qu'elle aura à tenir compte des difficultés liées à la sanction d'un éventuel non-respect de l'ordonnance recherchée (I.C.F. Spry, *The Principles of Equitable Remedies*, Scarborough, Carswell, 1984, à la p. 38)

37 Selon moi, ayant établi en l'espèce la compétence internationale de la Cour supérieure (art. 3148, alinéa 1, paragr. 3.), le juge de première instance commet une erreur de droit parce qu'au lieu de décliner cette compétence pour le motif qu'un Tribunal étranger serait "mieux à même de trancher le litige", il nie cette compétence en concluant qu'il n'a pas le pouvoir d'émettre une injonction à portée extraterritoriale et que, pour cette raison, "seules les autorités du Mexique seraient compétentes pour rendre une injonction mandatoire contre une compagnie mexicaine n'ayant ni siège social, ni établissement, ni bien" (paragr. 51) au Québec.

38 Ce faisant, le juge de première instance se trouve, d'une part, à contredire sa propre conclusion - ni erronée ni portée en appel - selon laquelle, vu le préjudice subi au Québec, la Cour supérieure est compétente pour entendre le litige (art. 3148, alinéa 1, paragr. 3.) et, d'autre part, à se priver de l'exercice de son pouvoir discrétionnaire.

39 En effet, contrairement à ce que MyTravel plaide, j'estime que lors de sa détermination du forum le plus approprié pour entendre le litige, le juge de première instance n'a pas procédé à un exercice de pondération des 10 critères développés par la jurisprudence et n'a pas traité de façon purement théorique la question du pouvoir de la Cour supérieure d'émettre une injonction à portée extraterritoriale. Au contraire, sa décision d'accueillir les requêtes en rejet d'action des intimées sur la base du *forum non conveniens* se fonde uniquement sur sa conclusion qu'il n'a pas le pouvoir d'émettre une telle ordonnance.

40 Cette conclusion étant erronée, la décision qu'elle fonde l'est également. Je ne peux donc davantage retenir l'argument des intimées selon lequel le juge de première instance aurait judicieusement usé de son pouvoir discrétionnaire pour décliner compétence.

41 Au demeurant, en réservant à l'appelante le droit d'intenter une poursuite en dommages-intérêts contre les intimées au Québec, le juge de première instance semble indiquer que n'eût été sa conclusion sur le pouvoir d'un Tribunal québécois d'émettre une ordonnance à portée extraterritoriale, il aurait conclu que le Québec demeure le forum le plus approprié pour entendre la requête en injonction de l'appelante.

42 Selon moi, une analyse globale des critères jurisprudentiels démontre que les autorités québécoises sont mieux à même de trancher le litige, ni les facteurs de rattachement ni les possibles difficultés liées à la sanction d'un éventuel non-respect de celle-ci ne justifiant l'application de la doctrine du *forum non conveniens* en faveur des tribunaux mexicains.

43 Notre Cour (*Oppenheim forfait GMBH c. Lexus Maritime inc.*, 9 juillet 1998, Montréal 500-09-006253-983, *J.E.98-1592* (C.A.), juge Pidgeon, à la p. 6) a déjà établi que :

> Aucun [des 10] critères n'est déterminant en soi, il faut plutôt les évaluer globalement et garder à l'esprit que le résultat de leur application doit désigner de façon claire un forum unique. Donc, s'il ne se dégage pas une impression nette tendant vers un seul forum étranger, le Tribunal devrait alors refuser de décliner compétence particulièrement lorsque les facteurs de rattachement sont contestables.

44 Une appréciation de ces critères pourrait laisser croire à première vue que le Mexique constitue ce forum unique, quatre des cinq parties au litige y résidant, la quasi-totalité des témoins s'y trouvant, tout comme les biens

des intimées. Toutefois, cette impression ne résiste pas à un examen du contexte particulier dans lequel ces critères doivent ici être appréciés.

45 Le juge de première instance indique au paragraphe [56] de son jugement que "[p]our les motifs susmentionnés [lesquels concernent tous l'absence de pouvoir d'émettre une injonction à portée extraterritoriale, paragr. [45] à [54]], aucune injonction mandatoire ne peut être prononcée contre Tescor par la Cour supérieure du Québec". Dans la mesure où je considère que les "motifs susmentionnés" sont erronés, l'inférence qu'il en tire, bien que non portée en appel, l'est également.

46 De plus, le litige entre les parties est né de la prétendue violation par Tescor d'un contrat qui la liait à l'appelante et qui contenait une clause la soumettant aux lois québécoises et conférant une compétence exclusive aux tribunaux du Québec. C'est donc à bon droit que l'appelante a institué au Québec son recours contre Tescor, d'ailleurs toujours pendant devant la Cour supérieure (*GreCon Dimter inc. c. J.R. Normand inc.*, *[2005] 2 R.C.S. 401*).

47 Comme l'appelante l'allègue, il appert de la preuve que Tescor et les intimées sont liées les unes aux autres par les mêmes représentants et administrateurs. La preuve, autant testimoniale que documentaire, à administrer devant le Tribunal québécois dans le cadre du recours en injonction contre Tescor sera donc non seulement sensiblement la même que celle à évaluer dans le cadre d'un recours en injonction contre les intimées, mais encore lui sera souvent indissociable. J'ajoute qu'une partie importante de la preuve documentaire pertinente est déjà traduite et déposée au dossier de la Cour supérieure. Dans les circonstances, les intimées n'ont donc pas démontré que les facteurs de rattachement font du Mexique un for nettement plus approprié que le Québec pour trancher le litige.

48 Comme je l'ai déjà indiqué au paragr. [42], je ne peux non plus retenir l'argument des intimées selon lequel les possibles difficultés liées à la sanction d'un éventuel non-respect d'une ordonnance d'injonction émise par un Tribunal québécois aurait dû commander au juge de première instance, s'il avait exercé sa discrétion, de décliner compétence en faveur des tribunaux mexicains.

49 Tout d'abord, on ne peut tenir pour acquis que les intimées ne respecteraient pas une éventuelle injonction de la Cour supérieure. C'est plutôt la présomption contraire qui doit être retenue, ainsi que l'a déjà reconnu notre Cour dans *Dargaud Éditeur c. Presse-Import Léo Brunelle Inc.*, *[1990] R.D.J. 341* (C.A.), juge Chevalier (ad hoc), à la p. 351) :

> [...] le juge saisi d'une demande visant à ordonner l'exécution spécifique d'une obligation n'est pas dans une position tellement différente de celui de qui on requiert une condamnation en deniers, lequel n'a évidemment pas à savoir si le débiteur est solvable ou non. [...] on ne saurait, en matière d'exécution en nature, [tenir] d'avance pour acquis que l'ordonnance ne sera pas respectée; à mon avis c'est plutôt la présomption contraire qui devrait seule être retenue.

50 Il est vrai que cet énoncé revêt un caractère théorique dans la mesure où Dargaud, compagnie française contre qui l'injonction était recherchée, possédait ou était susceptible de posséder des biens au Québec. Cependant, le principe demeure et a d'ailleurs été repris la Cour supérieure (*Encaissement de chèque Montréal ltée c. Softwise Inc.* , *[1999] J.Q. no 200*, 19 janvier 1999, Montréal 500-05-044580-981, *REJB 1999-10668* (C.S.), juge Grenier) :

> 40 L'injonction étant *in personam*, la sanction étant l'outrage au Tribunal, il est évident qu'une désobéissance pourrait entraîner des difficultés. Toutefois, il ne s'agit pas d'un facteur dirimant. Il faut [tenir] pour acquis que dans le cas d'une éventuelle défaite, les requérants respecteraient le jugement rendu par un Tribunal québécois et non l'inverse. Le par. 3148(4) C.c.Q. consacre le principe du choix des parties. Deux étrangers peuvent s'entendre pour soumettre leur litige aux autorités québécoises. Admettre cette possibilité c'est admettre que le législateur n'a pas considéré que l'efficacité d'un jugement était un critère

> déterminant dans la détermination de la question relative à la compétence internationale des tribunaux québécois.
>
> [Soulignements ajoutés.]

Dans cette affaire, deux des défendeurs étaient dans une position similaire à celle des intimées.

51 De plus, dans l'hypothèse où les intimées refuseraient de respecter l'ordonnance d'injonction, elle ne serait pas inutile pour autant. En effet, la requête introductive d'instance de l'appelante contient la conclusion suivante : "**ORDER** the mise-en-cause [MyTravel] to take knowledge of the judgment rendered herein and to be bound therewith". Si elle était accueillie, MyTravel, présente au Québec, ne pourrait alors faire affaires avec les intimées sous peine d'un outrage au Tribunal que la Cour supérieure pourra sanctionner.

52 Dans ces circonstances, je suis d'avis qu'il est dans l'intérêt des parties et de la justice, pour éviter les dédoublements, que les tribunaux québécois demeurent saisis de la requête en injonction de l'appelante contre les intimées, d'autant plus qu'il faut tenir pour acquis que celles-ci respecteront une ordonnance émise contre elles qui, même dans l'éventualité contraire, demeurera efficace.

53 Pour tous ces motifs, je propose donc d'accueillir le pourvoi avec dépens, d'infirmer en partie le jugement de la Cour supérieure et de rejeter avec dépens les requêtes des intimées en rejet d'action pour moyen déclinatoire.

RENÉ DUSSAULT, J.C.A.

Fin du document

Nº **500-11-048114-157**

SUPERIOR COURT (Commercial Division)
DISTRICT OF MONTREAL
PROVINCE OF QUEBEC

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

BLOOM LAKE GENERAL PARTNER LIMITED & AL.
Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP & AL.
Mises-en-cause

-and-

FTI CONSULTING CANADA INC.
Monitor

-and-

TWIN FALLS POWER CORPORATION
CHURCHILL FALLS (LABRADOR) CORPORATION LIMITED
Mises-en-cause

BOOK OF ADDITIONAL AUTHORITIES
TWIN FALLS POWER CORPORATION

ORIGINAL

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