COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-028436-194, 500-09-028474-195, 500-09-028476-190
(500-11-049838-150)

DATE: May 21, 2020

CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
LUCIE FOURNIER, J.A.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

No.: 500-09-028436-194

HOME DEPOT OF CANADA INC.
APPELLANT – Impleaded Party
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.)
RAYMOND CHABOT INC.
RESPONDENTS/ INCIDENTAL RESPONDENTS
and
HOME HARDWARE STORES LIMITED
IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party
and
RONA INC.
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
GROUPE BMR INC. (Formerly known as Gestion BMR Inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin Inc.)
MATÉRIAUX LAURENTIENS INC.
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
INTACT INSURANCE COMPANY

L'UNIQUE GENERAL INSURANCE INC.
LA CAPITALE GENERAL INSURANCE INC.
PROMUTUEL INSURANCE BAGOT
PROMUTUEL INSURANCE BORÉALE
PROMUTUEL INSURANCE BOIS-FRANCS
PROMUTUEL INSURANCE CHAUDIÈRE-APPALACHES
PROMUTUEL INSURANCE L'ESTUAIRE
PROMUTUEL INSURANCE DEUX-MONTAGNES
PROMUTUEL INSURANCE LAC AU FLEUVE
PROMUTUEL INSURANCE OUTAOUAIS
PROMUTUEL INSURANCE LA VALLÉE
PROMUTUEL INSURANCE MONTMAGNY-L'ISLET
PROMUTUEL INSURANCE PORTNEUF-CHAMPLAIN
PROMUTUEL INSURANCE RÉASSURANCE
PROMUTUEL INSURANCE RIVE-SUD
PROMUTUEL INSURANCE VALLÉE DU SAINT-LAURENT
PROMUTUEL INSURANCE VAUDREUIL- SOULANGES
PROMUTUEL INSURANCE VERCHÈRES-LES-FORGES
PROMUTUEL INSURANCE LANAUDIÈRE
AIG TAIWAN INSURANCE CO LTD
AVIVA INSURANCE COMPANY OF CANADA
SOVEREIGN GENERAL INSURANCE COMPANY
INTERNATIONAL ASSOCIATION OF PLUMBING AND MECHANICAL OFFICIALS
JYIC INDUSTRIAL CORPORATION
INSURANCE COMPANY OF NORTH AMERICA
IAPMO RESEARCH AND TESTING INC.
FUBON INSURANCE CO. LTD
GEAREX CORPORATION
SEAN MURPHY in his capacity as Canada's attorney for Lloyd's underwriters
IMPLEADED PARTIES – Impleaded Parties

No.: 500-09-028474-195

GROUPE BRM INC. (Formerly known as Gestion BMR inc.)
GROUPE PATRICK MORIN INC. (Formerly known as Patrick Morin inc.)
MATÉRIAUX LAURENTIENS INC.
INTACT INSURANCE COMPANY
APPELLANTS – Impleaded Parties
v.
9323-7055 QUÉBEC INC. (Formerly known as Aquadis International Inc.
RAYMOND CHABOT INC.
RESPONDENTS/INCIDENTAL RESPONDENTS

and

HOME HARDWARE STORES LIMITED

IMPLEADED PARTY/INCIDENTAL APPELLANT– Impleaded party

and

CATHAY CENTURY INSURANCE CO., LTD
JING YUDH INDUSTRIAL CO., LTD
DESJARDINS GENERAL INSURANCE INC.
THE PERSONAL GENERAL INSURANCE INC.
L'UNIQUE GENERAL INSURANCE INC.
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HOME DEPOT OF CANADA INC.
AIG TAIWAN INSURANCE CO LTD
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IMPLEADED PARTIES – Impleaded Parties

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ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA
APPELLANTS – Impleaded Parties
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IMPLEADED PARTIES – Impleaded Parties

JUDGMENT

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[1] On appeal from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier), that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[2] For the reasons of Justice Schrager, J.A., with which Justices Healy and Fournier, JJ.A., concur, **THE COURT**:

In the file 500-09-028436-194

[3] **DISMISSES** the appeal with legal costs;

[4] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-028474-195

[5] **DISMISSES** the appeal with legal costs;

[6] **DISMISSES** the incidental appeal without legal costs

In the file 500-09-28476-190

[7] **DISMISSES** the appeal with legal costs;

[8] **DISMISSES** the incidental appeal without legal costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

LUCIE FOURNIER, J.A. for and at the request of Lucie Fournier, J.A.

Mtre Hubert Sibre
Mtre Rosemarie Sarrazin
MILLER THOMSON
For Home Depot of Canada Inc.

Mtre Pierre Goulet
For Groupe BMR Inc., Groupe Patrick Morin Inc., Matériaux Laurentiens, Intact Compagnie d'assurance inc.

Mtre Julie Himo
Mtre Dominic Dupoy
Mtre Arad Mojtahedi
NORTON ROSE FULBRIGHT CANADA
For Rona Inc., Royal & Sun Alliance Insurance Company of Canada

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
Mtre Antoine Melançon
LAPOINTE ROSENSTEIN MARCHAND MELANÇON
For Raymond Chabot inc.

Mtre Jocelyn Perreault
Mtre Gabriel Faure
McCARTHY TÉTRAULT
For 9323-7055 Québec inc.

Mtre Éric Savard
LANGLOIS AVOCATS
For Desjardins General Insurance Inc., The Personal General Insurance Inc., Intact Insurance Company, L'unique General Insurance Inc., La Capital General Insurance Inc.,

Promutuel Insurance Bagot, Promutuel Insurance Boréale, Promutuel Insurance Bois-Francs, Promutuel Insurance Chaudières-Appalaches, Promutuel Insurance L'estuaire, Promutuel Insurance Deux-Montagnes, Promutuel Insurance Lac Au Fleuve, Promutuel Insurance Outaouais, Promutuel Insurance La Vallée, Promutuel Insurance Montmagny-L'islet, Promutuel Insurance Portneuf-Champlain, Promutuel Insurance Réassurance, Promutuel Insurance Rive-Sud, Promutuel Insurance Vallée Du Saint-Laurent, Promutuel Insurance Vaudreuil-Soulanges, Promutuel Insurance Verchères-Les-Forges, Promutuel Insurance Lanaudière, Royal Sun Alliance Insurance Company of Canada, Aviva Insurance Company of Canada

Mtre Alexandre Bayus
GOWLING WLG (Canada)
For Home Hardware Stores Limited

Date of hearing: March 11, 2020

REASONS OF SCHRAGER, J.A.

[9] These are appeals from a judgment rendered on July 4, 2019 by the Superior Court, District of Montreal, Commercial Division (the Honourable David R. Collier),[1] that approved a plan of arrangement (the "**Plan of Arrangement**" or the "**Plan**") under the *Companies' Creditors Arrangement Act*[2] ("***CCAA***") relating to Aquadis International Inc. (now the Respondent 9323-7055 Québec Inc.).

[10] The Appellants (sometimes hereinafter the "**Retailers**") oppose the Plan because it authorizes the Respondent Raymond Chabot Inc. (the "**Monitor**") to take legal proceedings against them on behalf of creditors of Aquadis International Inc. ("**Aquadis**" or the "**Debtor**"). Most of the creditors are insurers by way of subrogation in the rights of policy holders whose homes were damaged due to the allegedly defective faucets sold by Aquadis.

[11] The appeals are concerned with the scope of the powers that may be conferred on the Monitor.

[12] The Monitor was authorized to exercise the rights of creditors rather than those of the Debtor. While some reported judgments may present certain analogies, the present case appears to be unique in Canadian jurisprudence.

[13] There are also procedural issues raised against the Appellants' challenge of the specific clause in the Plan of Arrangement. As will be explained below, the Respondents argue primarily that these appeals are an indirect challenge of the *CCAA* judge's November 2016 order to vary the Monitor's powers (the "**November 2016 Order**").

I. FACTS AND PROCEDURAL HISTORY

[14] The case arises from the sale of faucets that were allegedly affected by manufacturing defects and the subsequent claims arising from the resulting water damage suffered by purchasers of the product.

[15] Aquadis imported and distributed bathroom products, including faucets.

[16] Jing Yudh Industrial Co. ("**JYIC**") is a China-based manufacturer of various valve products. The faucets in question were manufactured by JYIC and sold to a Chinese distributor, Gearex, which, in turn, sold them to Aquadis. The latter resold the faucets to

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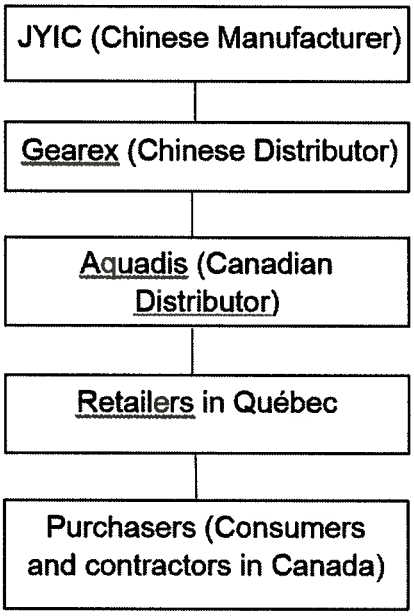
1 Judgment in appeal.

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

various retailers in Quebec. These include the Appellants Rona Inc. ("**Rona**"), BMR Group Inc. ("**BMR**"), The Home Depot of Canada ("**Home Depot**"), Matériaux Laurentiens and Home Hardware Stores Limited ("**Home Hardware**"). The Appellants ultimately resold the faucets to Quebec-based consumers or contractors. The flowchart in the Appellants' factum, appropriately translated, represents the chain of distribution as follows:



[17] It should be noted that the Retailers are not creditors in the insolvency proceedings in that they did not file proofs of claim. Rona sought leave to file two years after the deadline set forth in the court-approved claims protocol. Such leave was denied by the *CCAA* judge on March 13, 2019.[3]

[18] Claiming water damage caused by faulty faucets, many consumers sought compensation from their insurers, who upon payment were subrogated in the rights of their insureds.

[19] The insurers then instituted legal proceedings against Aquadis, the aggregate of which claims exceeded Aquadis' insurance coverage. Faced with this multitude of recourses, Aquadis obtained stays of proceedings through the filing of a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*[4] ("*BIA*") in June 2015, which was continued under the *CCAA* pursuant to an initial order made on December 9, 2015. Raymond Chabot Inc. was appointed Monitor and granted the powers of the board

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3 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2019 QCCS 1396.
4 *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

of directors given the resignation of all members of the board. Legal proceedings instituted against Aquadis or anyone in the distribution chain (i.e., the Retailers) were suspended in accordance with the provisions of the *CCAA*. At the time, approximately 20 actions regrouping several hundred consumers' claims were pending before the courts of Quebec and two other provinces.[5]

[20] On January 6, 2016, the Superior Court issued an order regarding the filing and processing of creditors' claims.

[21] On November 9, 2016, the Monitor sought an order to amend its powers "to conclude transactions or, failing that, to take proceedings against persons having resold or installed defective products purchased from Aquadis, such as distributors, retailers and general contractors". Rona was the only Appellant that was notified of the motion giving rise to such order as it was the only one that had requested to be entered on the service list.

[22] On November 14, 2016, the Court granted the application to vary the Monitor's powers and thus granted the Monitor the right to commence or continue any action for and in the name of Aquadis' creditors having any connection with defective faucets. This is the November 2016 Order referred to above.[6]

[23] That judgment was not appealed nor was there an attempt to seek its revision in the lower court or in the present appeal.

[24] Following the issuance of the November 2016 Order, the Monitor began negotiations with the Retailers that stretched over a period of two years with a view to arriving at a "global settlement" in virtue of which the Retailers would contribute to a litigation pool in exchange for full releases from any liability arising as a result of the sale of any defective faucets.

[25] On December 19, 2016, the Monitor initiated legal proceedings against JYIC and Gearex to enforce the rights of Aquadis regarding the defective faucets. Settlements were reached with some of JYIC's and Gearex's insurers generating the receipt of over $7 million ($4.7 million net of fees and costs) in consideration of full releases. However, the Monitor was unable to reach an agreement with one of JYIC's insurers, Cathay

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5 In virtue of arts. 1728, 1729 and 1730 *C.C.Q.*, each group in the supply chain would have a recourse against relevant parties above them at each step in the chain.

6 The November 2016 Order is in these terms:

> initier ou continuer toute réclamation, poursuite, action en garantie ou autre recours des créanciers de 9323-7055 Québec inc. (anciennement connue sous le nom d'Aquadis International inc., « Aquadis ») au nom et pour le compte de ces créanciers contre des personnes opérant au Canada découlant, directement ou indirectement, ou ayant un lien ou pouvant avoir raisonnablement un lien, direct ou indirect, avec un défaut de fabrication affectant des biens vendus par Aquadis, avec l'accord préalable du comité des créanciers constitue par le paragraphe n° 24 de l'Ordonnance initiale (le « Comite des créanciers »). (Emphasis added)

Century Insurance Co. Ltd. On June 20, 2018, the Superior Court approved these transactions between Aquadis, its insurers and the manufacturer of the products in a judgment executory notwithstanding appeal. The Retailers opposed this because, in their view, the proceedings under the *CCAA* were being used to settle disputes not involving Aquadis' creditors, but rather third parties. On June 28, 2018, Rona sought leave to appeal and a stay of the foregoing judgment which was dismissed by a judge of this Court since the matter had become hypothetical given the completion of the transaction immediately following the issuance of the judgment.[7]

[26] At the beginning of 2019, the Monitor filed the Plan of Arrangement providing for the establishment of a litigation pool made up of all the sums collected by the Monitor in exchange for full releases. The Plan of Arrangement also includes the power of the Monitor to sue the Retailers on behalf of the creditors, which is the subject of these appeals.

[27] The Plan, as amended, was unanimously approved at the meeting of creditors called for such purpose on April 25, 2019. All creditors voting (831 in number representing $20,686,727) were in favour. The total claims in the file (885) are $22,424,476, of which 738 creditors held $18,190,120 (or 81%) of the debt. These 738 creditors, who are represented on the creditors' committee, all voted in favour. They are all insurers of consumers who claimed damages arising from the faucets.

[28] On May 23, 2019, the Monitor instituted actions in damages against the Retailers as contemplated in the Plan. These actions were suspended pending judgment in these appeals. The Monitor seeks condemnations against the Retailers based on the total amount of claims received for damages incurred by consumers divided amongst the Retailers on the basis of the proportion of defective faucets sold. The validity of the approach is not in issue in these appeals. The eventual success or failure of these actions based on the evidence presented will be for another day in another court.

[29] The Plan of Arrangement, as amended at the meeting of creditors, was approved by the Superior Court on July 4, 2019 despite the Retailers' contestation. This is the judgment in appeal.

II. THE JUDGMENT IN APPEAL

[30] The *CCAA* judge emphasized from the outset that the Retailers' opposition was based primarily on the fact that Aquadis had no right of action against them. He undertook an analysis of the Plan of Arrangement in light of the three criteria developed by the case law as relevant to approval: (1) that all statutory provisions are complied with; (2) that nothing was done that was not authorized by the *CCAA*; and (3) that the plan is fair and reasonable.

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7 Arrangement relatif à 9323-7055 Québec inc., 2018 QCCA 1345 (Schrager, J.A.).

[31] The first two criteria were not in issue. The judge concluded that the Plan of Arrangement satisfies the third criterion since the Monitor's main objective was to achieve an overall solution to all the actions brought against Aquadis. The Monitor's proceedings against the Retailers were therefore aimed at maximizing Aquadis' assets in liquidation, which is a proper purpose recognized in the case law. Thus, the Plan would, upon resolution of the law suits, allow for distribution of all the sums collected in partial satisfaction of creditors' claims.

[32] The judge rejected the Appellants' argument that the objectives of the *CCAA* are being thwarted by allowing the Monitor to pursue a remedy to which it is not entitled. He characterized this argument as technical and unconvincing because, in the absence of consensual settlements, recourse against the Retailers (and JYIC) is the only possible avenue leading to a global treatment of Aquadis' liabilities. Thus, the powers sought by the Monitor were deemed necessary in order to materially advance the restructuring process. The judge accepted this course of action as the only practical resolution of this case. As such, he indicated that the solution chosen was a sensible use of judicial resources since it avoids the multiplication of individual actions outside the framework of the Plan of Arrangement. He also pointed out that the Appellants cannot complain that they are prejudiced by having to defend themselves against a single action rather than a "cascade of litigation by individual insurers".

[33] Finally, the judge noted that the Retailers were aware, in 2016, of the November 2016 Order granting the Monitor the power to sue them but failed to challenge it. As such, their challenge of such power in the Plan of Arrangement was late.

[34] The judge thus approved the Plan of Arrangement.

III. ISSUES

[35] The Appellants submit two questions to the Court:

a) Can a monitor appointed under the provisions of the *CCAA* exercise the rights, not of the insolvent debtor, but of certain creditors of the insolvent debtor to sue third parties for damages?

b) Does the mere fact that the Retailers did not challenge the November 2016 Order mean that they could not challenge the application for approval of the corresponding provision of the Plan of Arrangement?

[36] The Respondent Monitor adds that the appeal should be dismissed as hypothetical, since the November 2016 Order granting it the power to sue is not challenged and as such will remain in effect even if this Court allows the appeals.

IV. APPELLANTS' POSITION

[37] The Appellants submit to the Court that the judge of first instance erred in granting the Monitor the right to bring actions on behalf of Aquadis' creditors against the Retailers, because this power is not "in respect of the company" within the meaning of section 23 of the *CCAA* which enumerates the Monitor's duties.

[38] In addition, they argue that since these claims are not assets of the Debtor, the mere fact that the law suits relate to products distributed by the Debtor is insufficient to give the Monitor the right to sue the Retailers on behalf of the creditors. The Appellants contend that the Monitor cannot pursue recourses between the various creditors of an insolvent company given the lack of a sufficient connection with the insolvency of the Debtor. Stays of proceedings granted by a *CCAA* judge should apply only to actions against the debtor and its assets. Lawsuits by the creditors against the Retailers fall outside the *CCAA* estate and should not be stayed or otherwise dealt with in the file.

[39] The Appellants further submit that the Monitor's exercise of remedies on behalf of Aquadis' creditors compromises the Monitor's duty of neutrality. They argue that by exercising the rights of the creditors the Monitor is acting for the benefit of some of the Debtor's creditors. They also point out that the Monitor failed to act transparently in the process leading up to the November 2016 Order and that the contingency fee agreed upon with the creditors' committee places the Monitor in a conflict of interest.

[40] The Appellants contend that the hearings of damage actions based on the *Civil Code of Québec* before the Commercial Division of the Superior Court results in inappropriate preferential treatment of such claims over similar ones filed before the Civil Division, which is contrary to the proper administration of justice. Specifically, the Monitor, by instituting proceedings in the Commercial Division, avoids the filing of a case protocol[8] and may improperly rely on the *Canada Evidence Act*.[9] They add that their rights of appeal under the *CCAA* are subject to leave[10] whereas under the *Code of Civil Procedure* they would have a right of appeal for any condemnation exceeding $60,000.[11]

[41] The Appellants also argue that, according to established and recognized principles of statutory interpretation, a tribunal must favour an interpretation of the law that is respectful of the division of powers under the *Canadian Constitution*.[12] They point out that an interpretation conferring rights on the Monitor to exercise remedies on behalf of solvent creditors against solvent defendants (the Retailers) constitutes an unwarranted intrusion by Parliament into the jurisdiction of the provincial legislatures over

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8 Under arts. 148 and following *Code of Civil Procedure* [*C.C.P.*].

9 *Canada Evidence Act*, R.S.C. 1985, c. C-5 [*CEA*].

10 See s. 13 *CCAA*.

11 See art. 30 *C.C.P.*

12 *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5 [*Constitution Act*].

property and civil rights, thereby contravening the division of powers. They argue that the interpretation of the scope of *CCAA* jurisdiction should be directed to a result that is constitutionally coherent.

[42] As for the second question in appeal, the Appellants argue that they are entitled to challenge the Plan of Arrangement and are not precluded from doing so despite the absence of any contestation of the November 2016 Order, now or previously.

[43] For the Appellants, the Plan of Arrangement is not merely a confirmation of the powers granted by the November 2016 Order, but rather has the effect of replacing the interlocutory orders. In that sense, the present challenge is not, in their view, a collateral attack on the November 2016 Order. Moreover, since that order is the product of an interlocutory decision, it does not benefit from the presumption of *res judicata*.

[44] The Appellants further indicate that they were not notified of the application to vary the Monitor's powers until two years after the fact and, in that sense, they could not oppose the granting of the November 2016 Order. They further state that the consumers or their insurers (i.e. the creditors) are not prejudiced by the failure to challenge the November 2016 Order as this has had no impact on any party who chose to settle.

[45] In addition, the Appellants contend that even if they are effectively precluded from challenging the November 2016 Order, the question as to whether the judge had jurisdiction to sanction a plan of arrangement granting the Monitor the right to exercise the rights of creditors against the Retailers remains open. In that sense, the November 2016 Order does not, in the Appellants' view, establish the validity of any such power under a plan of arrangement made pursuant to the *CCAA*.

V. DISCUSSION

[46] I am of the view that the judge's approval of the Plan of Arrangement and, specifically, the Monitor's power to institute proceedings to recover from the Retailers damages allegedly suffered by consumers is not tainted by a reviewable error. Though I think that reasoning in addition to that found in the judgment is required to justify such a position, the result is not an erroneous or unreasonable exercise of the judge's discretion. As such, I propose to dismiss the appeals.

[47] Given such results, it is not strictly necessary to dispose of the Appellants' second ground regarding the right to challenge the Plan given the November 2016 Order, but I think a few words are appropriate to set the record straight from the point of view of both Appellants and Respondent Monitor, because of the emphasis put on such matter by the parties.

[48] The judge said this:

> [27] It bears mention that the Opposing Retailers were aware in November 2016 of the Court's Order authorizing the Monitor to institute legal action against Canadian distributors. They did not oppose the Order at that time, or thereafter attempt to have it set aside or varied. The Opposing Retailers claim they are not challenging the Order now, but they are clearly doing so, and their complaint is late. The Plan merely continues the power granted to the Monitor over two and a half years ago.

[49] This, essentially, is in answer to the Monitor's argument, reiterated in appeal, that the contestation of the Plan of Arrangement by the Appellants constitutes a collateral attack against the November 2016 Order long after the expiry of the time limit to appeal and after the expiry of any time limit which could be reasonable to either revoke it (under the *Code of Civil Procedure*)[13] or vary it (under the comeback clause in the initial order issued under the *CCAA*), the whole given the Appellants' lack of diligence in the matter.

[50] The time limit to seek leave to appeal under the *CCAA* is 21 days.[14] The "comeback clause" in the initial order[15] permits parties such as the Appellants, who may be affected by an order of the *CCAA* court, to seek to vary such provision even after the expiry of the time limit to appeal. Even in the absence of such a clause, a party that was not served with the proceedings could seek its revision.[16] However, a party seeking "comeback relief" must act diligently.[17]

[51] The Appellants underline that with the exception of Rona, they were not served with the proceedings giving rise to the November 2016 Order as they were not on the service list. They contend that they were only informed two years after the fact as disclosed by the correspondence filed as exhibits.[18] However, and though the record does not *per se* disclose it, the fact of not being on the service list is, experience indicates, purely a result of not asking the Monitor or its counsel to be placed on the list.[19]

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13 Arts. 347 and 348 *C.C.P.*

14 S. 14 (2) *CCAA*.

15 Paragraph 44 of the Order of December 9, 2016.

16 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Toronto, Carswell, 2013, pp. 58-60. *Indalex Limited (Re)*, 2011 ONCA 265, para. 55 [*Indalex*]; *Canada North Group Inc (Companies' Creditors Arrangement Act)*, 2017 ABQB 550, para. 48 [*Canada North Group*].

17 See *Indalex*, *supra*, note 16, paras. 157, 161 and 166, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271; *Parc Industriel Laprade Inc. v. Conporec Inc.*, 2008 QCCA 2222, paras. 7 and 17; *Montréal, Maine & Atlantique Canada Cie (Arrangement relatif à)*, 2015 QCCS 3236, para. 33; *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679, para. 238; *Muscletech Research and Development Inc., Re*, 2006 CanLII 1020 (Ont. Sup. Ct.), para. 5; *Canada North Group Inc*, *supra*, note 16, para. 48.

18 The record indicates that this is not the case for all of the Appellants (*infra*, para. [55]).

19 Para. 41 of the Initial Order of December 9, 2015 provides for service of proceedings to all who have given notice to the Monitor or its counsel.

[52] The Respondents contend that the Appellants have not acted with sufficient diligence in the matter and point to analogous situations arising before the Ontario Court of Appeal in *Indalex* and before the Quebec Superior Court in *Aveos*.[20]

[53] In *Indalex*, the interim lender sought the benefit from the proceeds of asset sales in the repayment of loans in accordance with the priority granted by the *CCAA* court three months earlier. The debtor company's pension fund sought to enforce its alleged priority over the monies, which the monitor contested, pleading that the pension fund was in effect attacking the security previously granted the lenders in priority to the pension fund. The Ontario Court of Appeal held that the pension fund had acted in a timely manner since it was only upon the court application to distribute the funds received from the asset sales that "it became clear" that the debtor company was abandoning the pension plans in their underfunded states.

[54] In *Aveos*, the Superintendent of Financial Institutions claimed that the statutory deemed trust created in its favour afforded a priority for monthly pension plan contributions to defray the pension plan deficit. These payments were stopped with court approval at the inception of the *CCAA* process. The present Respondents quote the undersigned, then the *CCAA* judge treating the argument, as follows:

> [92] The Initial Order was renewed six (6) times. The Superintendent has been on the service list. It is not sufficient to reserve one's rights. These rights must be exercised. Where a failure to exercise those rights may cause prejudice to other parties, those rights, though not time barred by statute, may be subject to an estoppel in virtue of the doctrine of laches in common law or as a result of the doctrine of "fin de non-recevoir" in civil law.
>
> (...)
>
> [95] Accordingly, in the opinion of the undersigned, the Superintendent is barred from seeking an amendment to the Initial Order at this time to, in effect, retroactively reverse the power of Aveos to interrupt the pension payments and to order Aveos to pay to the pension fund the $2,804,450.00.[21]

Aveos does not support the Respondents' position on the matter of delay since, in effect, the secured creditor in *Aveos* would have retroactively been obliged to cede priority to the $2.8 million of pension deficit. The debtor company and the secured creditor acted throughout on the premise arising from the court's order that the pension payments need not be made in priority to repayments to the secured creditor. In the present matter, the inaction of the Appellants since November 2016 has not caused the Monitor to act to its detriment. The only material prejudice the Monitor points to is the time and energy

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[20] *Aveos Fleet Performance Inc./Aveos Performance aéronautique inc. (Arrangement relatif à)*, 2013 QCCS 5762 [*Aveos*] and Indalex, *supra*, note 16, reversed on other grounds in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[21] *Aveos*, *supra*, note 20, paras. 85, 91-95.

invested in negotiating with the Retailers, but there is no quantification of a proof of loss and, in any event, the Monitor's fees are calculated on a contingency basis, not on a "time spent on the matter" basis.

[55] In the cases at bar, the Appellants contend that until the Plan was approved (and almost simultaneously the legal proceedings against them filed) it was not clear that their potential liability in the matter would be the object of litigation rather than negotiated settlements. However, they had previously received demand letters from the Monitor[22] and contested the approval of settlements reached by the Monitor with the insurers of the Debtor and the manufacturer. The judgment of Collier, J.S.C., approving the settlements, refers specifically to the November 2016 Order, and counsel for the Appellants Home Depot, Rona and BMR were heard on the application.[23]

[56] The Appellants appear to have had sufficient knowledge of the November 2016 Order prior to the filing of the Plan in 2019. However, even if I were to ignore this, I think that they would still be barred from seeking the revision of the November 2016 Order as part of their contestation of the Plan of Arrangement simply because they have not sought any formal conclusions regarding the November 2016 Order. They target only the powers afforded the Monitor in clause 6.2 of the Plan of Arrangement. The Respondents plead that even if the Plan is set aside, the same powers subsist under the November 2016 Order.[24] As such, the Monitor maintains that the Appellants' contestation is an indefensible collateral attack[25] on the November 2016 Order or, alternatively, that the appeal raises a moot point,[26] because, as stated above, even if section 6.2(c) of the Plan is set aside, the power to sue the Retailers subsists under the November 2016 Order.

[57] I would tend to think that, on the facts, no reviewable error is made out in the judge's conclusion that the attack is late. Moreover, the November 2016 Order would survive the Plan sanction and, in all events, the Appellants do not directly seek conclusions contrary to said order. However, as mentioned earlier, these questions do not require definite resolution given my answer to the primary point of the appeal, which

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22 BMR, Groupe Patrick Morin inc. and Rona appear to have received the letters in 2016 while Home Hardware and Matériaux Laurentiens inc. received one in 2018. No letter addressed to Home Dépôt is filed in the record.

23 *Arrangement relatif à 9323-7055 Québec inc. (Aquadis International Inc.)*, 2018 QCCS 2945.

24 Moreover, the Monitor amended the Plan at the meeting of creditors to provide that the previous orders survive the Plan sanction: "6.2(d) ... the Initial Order remains in effect ... until the final distribution date." This is reflected in para. 19 of the sanction order.

25 See for example: *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585 par. 61; *Boucher v. Stelco Inc.*, 2005 SCC 64, [2005] 3 S.C.R. 279, para. 35; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, paras. 33-34.

26 *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. See also: *R. v. Oland*, 2017 SCC 17; [2017] 1 S.C.R. 250; *R. v. McNeil*, 2009 SCC 3, [2009] 1 S.C.R. 66; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Forget v. Québec (Attorney General)*, [1988] 2 S.C.R. 90, paras. 67-68. Art. 10, para. 3 *C.C.P.*

is the validity of the power granted the Monitor in the Plan to sue on behalf of a group of creditors rather than in the exercise of the Debtor's rights. I now address that issue.

* * *

[58] As indicated in the review of the facts above, parties in the distribution chain would in the normal course have recourse against those above them in the flowchart. The recourses (exercised or not) of the ultimate purchasers of the faucets (and their insurers) and the Retailers were stayed upon the initial insolvency filing in 2015. The November 2016 Order led to some negotiated settlements. The consumers (or their insurers) filed proofs of claim; the Retailers did not, nor did they settle any claims asserted by the Monitor. It is against this factual background that the Monitor was granted the power to sue the Retailers under the Plan of Arrangement.

[59] The purpose of the proposed legal proceedings is consonant with a legitimate purpose under the *CCAA,* as the Monitor seeks to establish a "litigation pool" with a view to paying creditors of Aquadis on a *pro rata* basis. In itself, this more than satisfies the spirit of the *CCAA,* but is also supported by examples in the reported cases. Specifically, and of close resemblance is the arrangement in the matter of *Muscletech*,[27] where the debtor was a distributor of dietary supplements in the middle of a multi-tier distribution chain between the manufacturer at one end and ultimate consumers at the other. The plan of arrangement provided for releases from liability to be given to those in the chain who paid into the litigation pool as compensation arising from selling the defective product. The scheme was voluntary – i.e. the monitor was not given power to sue. However, the situation is similar to that in the case at bar. Other examples of voluntary litigation pools where contributors receive releases exist, but the precise factual matrix of the present plan, where the Monitor is empowered to sue, appears to be novel.[28]

[60] The granting of releases for third parties in consideration of their contribution to a litigation pool to satisfy creditors' claims is now well entrenched in *CCAA* jurisprudence.[29]

[61] The *CCAA* expressly provides for certain powers and duties of the monitor.[30] These powers and duties may be extended, because s. 23 *CCAA* provides that a monitor is required to "do anything in respect of the company that the court directs the monitor to do".[31] Thus, while the law does provide the basic framework within which the monitor

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27 *Muscletech Research and Development Inc. (Re)*, 2007 CanLII 5146 (Ont. Sup. Ct.).

28 *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403, paras. 6 and 33; *Metcalfe & Mansfield Alternative Investments II Corp (Re)*, 2008 ONCA 587, paras. 69-71 [*Metcalfe*]; *Montreal, Maine & Atlantic City Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235.

29 *Metcalfe*, *supra*, note 28.

30 S. 23 *CCAA*.

31 S. 23 (1) (*k*) *CCAA*.

must act, the courts may use their discretion to grant additional powers considered appropriate.[32]

[62] This discretion cannot be exercised arbitrarily; it must be exercised in a manner consistent with and directed toward the attainment of the objectives of the *CCAA*. In *Century Services Inc.,* Justice Deschamps observed for the Supreme Court that:

> [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". (References omitted)

She added that judicial discretion may be exercised in furtherance of the *CCAA*'s purposes,[33] which in the case at bar is the maximization of creditor recovery, since Aquadis has ceased carrying on business.

[63] The courts, however, have expressed reservations regarding the imposition of third-party settlements under the *CCAA,* indicating that the purpose of the *CCAA* is not to settle disputes between parties other than the debtor and its creditors.[34] Nonetheless, the precise point in issue – i.e. whether a judge may allow a monitor to exercise the rights and remedies of certain creditors against other persons or creditors of a debtor appears to be without precedent.

[64] In *Urbancorp*,[35] the Ontario Superior Court of Justice refused to recognize the power of a monitor to claw back a payment in kind made by the debtor to a third party who was a creditor of a company related to the debtor. While Justice Myers acknowledged that "... Monitors can certainly be empowered to bring legal proceedings to act on behalf of *CCAA* debtors",[36] he disagreed that the monitor should act as a bankruptcy trustee to bring proceedings in the place of *CCAA* creditors. The latter could initiate their own proceedings outside of the insolvency or provoke a bankruptcy for a trustee to initiate those proceedings for them. It should be emphasized that a single payment was in issue in *Urbancorp*. Justice Myers distinguished *Essar*,[37] which is relied on by Respondents. In that case, the Ontario Court of Appeal confirmed the lower

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32 *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014, paras. 105-106 [*Essar*]; *MEI Computer Technology Group Inc. (Bankruptcy), Re*, 2005 CanLII 15656 (Qc. Sup. Ct.), para. 20.

33 *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, para. 59.

34 The courts have also indicated that proceedings under the *CCAA* were not intended to alter priorities amongst creditors: "The *CCAA* is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders (sic) position at the expense of others - there should be no confiscation of legal rights.": *843504 Alberta Ltd., Re*, 2003 ABQB 1015, para. 13. See also: *Royal Oak Mines Inc., Re*, 1999 CanLII 14843 (Ont. Sup. Ct.), para. 1.

35 *Urbancorp Cumberland 2 GP Inc., (Re)*, 2017 ONSC 7649.

36 *Ibid*.

37 *Essar*, *supra*, note 32.

court's authorization of the monitor to institute oppression proceedings for the benefit of various creditors (or stakeholders) in the *CCAA* estate: "(...) the Monitor could efficiently advance an oppression claim, representing a conglomeration of stakeholders, namely the pensioners, retirees, employees, and trade creditors (...)".[38] The court noted as well that the debtor would also benefit from such proceedings, particularly in the sense that an impediment to restructuring would potentially be removed by the oppression remedy.

[65] The result in *Urbancorp* was echoed in *Pacific Costal Airlines*,[39] where the British Columbia Supreme Court indicated that "proceedings under the *CCAA* are not intended to resolve disputes between a creditor and third parties":

> [24] It is true that, in addition to alleging breach of contract by Canadian, the Dispute Notice made reference to allegations against Air Canada for inducing breach of contract, breach of fiduciary duty and other economic torts. However, the Plaintiff could not have pursued those claims in the *CCAA* proceedings. The purpose of a *CCAA* proceeding, as reflected in the preamble to the legislation, is to "facilitate compromises and arrangements between companies and their creditors". Its purpose is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in *CCAA* proceedings, it is not a proper use of a *CCAA* proceeding to determine disputes between parties other than the debtor company.[40]

[66] The *Stelco*[41] case, for its part, raised issues relating to a dispute between certain creditors near the end of the debtor's restructuring process over the distribution of certain amounts payable to holders of subordinated notes and the priority entitlement to interest payments. Farley, J. commented as follows:

> [7] The *CCAA* is styled as "An act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company.[42] (References omitted)

[67] The *dicta* in all of these cases reflect the orthodox view of the law put forward by the Appellants. However, none of the fact patterns resemble the chain of distribution in the present case. Nor were these judgments focused on a huge number of claims, which were stayed in this case and are effectively replaced by the Monitor's proceedings

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38 *Essar*, *supra*, note 32, para. 124.

39 *Pacific Coastal Airlines Ltd. v. Air Canada*, 2001 BCSC 1721, para. 24; see also *Stelco Inc., Re*, 2005 CanLII 42247 (Ont. C.A.), para. 32 [*Stelco*].

40 *Id.*, para. 24.

41 *Stelco*, *supra*, note 39.

42 *Stelco Inc., Re*, 2005 CanLII 41379 (Ont. Sup. Ct.).

authorized under the Plan. This factual distinction makes these judgments of limited instructive or precedential value.

[68] What is inescapable and particularly applicable here is the acceptance, in the practice and case law, of the liquidating *CCAA*[43] and the expanded view of the role of the monitor, indeed the baptism of the "super monitor".[44] The Appellants concede, if only indirectly, that the Monitor could be authorized to exercise rights of the Debtor against third parties as could a bankruptcy trustee. However, they object to the Monitor's power to sue one group of creditors (the Respondents) on behalf of another group of creditors (the consumers or their insurers).

[69] In my opinion, the Appellants objections are not well founded.

[70] Firstly, the bankruptcy trustee analogy is only a half truth. Trustees are the assignees of a bankrupt's property, and as such, exercise the patrimonial rights of the debtor but they also wear a second hat.[45] Trustees exercise rights and recourses on behalf of creditors against other creditors and against third parties.[46] Such rights and recourses arise from the *BIA* (for example, under s. 95 for preferences) as well as under the civil law generally (for example, the paulian action under arts. 1631 and following *C.C.Q.*). Most significantly, the *BIA* recourses to attack preferences, transfers under value and dividends paid by insolvent corporations have been available to *CCAA* monitors since the amendments adopted in 2007.[47] Thus, the mere fact that the judgment in appeal empowers the Monitor to sue to enforce rights of creditors is not conceptually foreign to the general framework of insolvency law.

[71] Moreover, and without making too fine a point, the Appellants' are not creditors of the *CCAA* estate. They might have been, but they chose not to file claims. As such, they are third parties. This eliminates another conceptual, if not legal, difficulty in that, they do not potentially share in the litigation pool after contributing to it.

[72] The Appellants also object, saying that the power given to the Monitor to sue runs contrary to the principle of a monitor's neutrality. However, the case law and literature recognize that this neutrality is far from absolute:

> [110] Of necessity, the positions taken will favour certain stakeholders over others depending on the context. Again, as stated by Messrs. Kent and Rostom:

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43 *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, para. 42 [*Callidus*].

44 Luc Morin and Arad Mojtahedi, "In Search of a Purpose: The Rise of Super Monitors & Creditor-Driven *CCAA*s" in Jill Corraini and Blair Nixon (eds.), Annual Review of Insolvency Law, Toronto, Thomson Reuters, 2019, p. 650.

45 *Giffen (Re)*, 1998 CanLII 844 (SCC), [1998] 1 S.C.R. 91, para. 33.

46 *Lefebvre (Trustee of); Tremblay (Trustee of)*, 2004 SCC 63, [2004] 3 S.C.R. 326, paras. 32-40.

47 S. 36.1 *CCAA*.

> 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.
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> (...)
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> [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), 2006 CanLII 34551 (ON CA), 83 O.R. (3d) 108 (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.
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> [120] However, in exceptional circumstances, it may be appropriate for a monitor to serve as a complainant. (...).[48]

[73] As long as the monitor is objective and not biased and takes positions based on reasoned criteria to further legitimate *CCAA* purposes, it now appears inescapable that the neutrality it must maintain is attenuated.

[74] It must be repeated that the Retailers are not creditors in the *CCAA* estate as they did not file proofs of claim. As such, their status as "stakeholders" is tenuous, so that any resulting duty to them by the Monitor is questionable.

[75] Neither is the contingency fee arrangement of the Monitor and its counsel a valid ground to attack the Monitor's neutrality. The contingency fee may give the Monitor an interest in the outcome of the litigation, but such arrangements have a long history, particularly with lawyers' mandates, and are recognized as legitimate and, indeed, as enhancing access to justice. The fee arrangement dates back to the initial order. Given that Aquadis had no assets, there would be no other way to pay professionals to act in the matter. In effect, the professionals are financing the recovery efforts.

[76] The Appellants also submitted that the Monitor has lacked transparency. This position has no merit. The Plan sanction was the product of a legal process served on parties that appeared in the record by entry on the service list and followed a creditors' meeting and a court hearing before an impartial judge. The Monitor's agenda was not hidden.

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[77] I agree with the judge that on practical and equitable grounds the power accorded to the Monitor to sue the Retailers in the context of the present matter makes *CCAA*

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[48] *Essar*, *supra*, note 32.

sense. In my mind, however, that is not enough to justify the judge's exercise of discretion to approve the Plan.

[78] The broad judicial discretion propounded in much of the case law and literature is not boundless.[49] It, like all judicial discretion, must be exercised judiciously, meaning that it must be based on legal rules and principles. In my opinion mere commercial expediency or good sense is not enough to qualify the exercise of judicial discretion under the *CCAA* as appropriate[50] nor for a plan to qualify as fair and reasonable. Rulings (even discretionary ones) must have some measure of predictability if confidence in the legal system is to be maintained.[51] That predictability stems from adherence to the application of the law. I am not willing to cross the Rubicon from the realm of the law to the land of the lore.

[79] That being said, there is, in the present case, legal and not merely commercial or practical justification for the judgment. The Appellants attack it based on an analogous reasoning of the powers of a bankruptcy trustee to exercise the debtor's rights against third parties but not the rights of creditors. However, this is not really true as I have indicated above. The trustee in bankruptcy can exercise rights for the benefit of creditors.

[80] Significantly, the creditors voted unanimously that their rights against the Retailers be exercised by the Monitor in their place and stead and for their benefit through the proposed proceedings and the litigation pool within the *CCAA* framework.

[81] Absent a *CCAA* process, the creditors would have been free to consensually assign their rights or subrogate others, including, by way of example, a trustee of a litigation trust. Again, there is precedent in *CCAA* matters for such litigation trusts,[52] which trusts include rights of actions against third parties.[53] With the *CCAA* file, the Monitor, through the Plan, the vote and the sanctioning judgment in appeal, is in such position to exercise those rights against the Retailers. The Monitor is putting into effect the collective will of the creditors expressed through their unanimous vote approving the Plan of Arrangement. Giving effect to creditor democracy reflected in the *CCAA*[54] is a sound basis for a court to approve the Plan.

[82] Accordingly and in conclusion, given that the parties being sued are third parties vis-à-vis the *CCAA* estate and as such, have no claim on the litigation pool, and given that the creditors/beneficiaries of the litigation pool voted unanimously in favour of the

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49 *Callidus*, *supra*, note 43, paras. 48-49.

50 *Ibid*.

51 See Sharpe, Robert J., *Good judgment – Making Judicial Decisions*, Toronto, University of Toronto Press, 2018, p. 129; *Nechi Investments Inc. v. Autorité des marchés financiers*, 2011 QCCA 214, paras. 22-23.

52 Plan of Compromise and re-organization of Sino-Forest Corporation, December 3, 2012, Ont. Sup. Ct. CV-12-9667-00CL.

53 *Lutheran Church Canada (Re)*, 2016 ABQB 419, paras. 125, 134 and 135.

54 S. 6 *CCAA*.

Plan of Arrangement, there is sufficient legal rationale to grant the power in question. In addition, as indicated by the trial judge, the mechanism is a direct and practical way to maximize recovery for creditors.

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[83] The Appellants have also argued that granting the Monitor the power to sue is a misuse of the resources of the Commercial Division of the Superior Court, since the proposed proceedings should be taken in the Civil Division. This, however, is purely a matter of case management for the Superior Court. There is but one Superior Court; its administrative divisions, such as the Commercial Division, are not separate and distinct tribunals.[55] Accordingly, there is no valid argument based on the jurisdiction of the Superior Court which can be brought to bear against the judgment of the lower court.

[84] The Appellants submit that they are prejudiced by the judgment in that eventual rights of appeal are restricted because leave is required under the *CCAA* but not under the *C.C.P.* for awards exceeding $60,000. The argument is not persuasive given that the judgment is not erroneous, the Monitor's recourses against the Retailers fall under the *CCAA* and consequently eventual appeals would be governed by s. 14 *CCAA*.

[85] In addition, the Appellants put forward a constitutional argument claiming that since the creditors and Retailers are not insolvent, proceedings of one against the other under the umbrella of the *CCAA* should not apply to them.

[86] The constitutional validity of the *CCAA* is grounded in Parliament's jurisdiction under s. 91(21) of the *Constitution Act*[56] with respect to bankruptcy and insolvency. The statute should be applied, say the Appellants, in a manner consistent with its constitutional foundation.

[87] The Ontario Court of Appeal made it clear in *Metcalfe & Mansfield* that the granting of releases to solvent third parties in proceedings under the *CCAA* is not contrary to the constitutional division of powers. To the extent that the granting of such powers to the Monitor enables the objectives of the *CCAA* to be achieved, the impact of the exercise of ancillary powers in respect of solvent third parties (such as suing the Retailers) cannot constitute an infringement of the constitutional division of powers. Rather, the powers granted to the Monitor in clause 6.2 of the Plan arise out of, and are necessary for, the valid exercise of federal jurisdiction.[57]

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55 *Re Arctic Gardens Inc.*, 1990 R.J.Q. 6 (Qc. C.A.). See also *TVA Publications inc. v. Quebecor World Inc.*, 2009 QCCA 1352, para. 71 (Morissette, J.A.); *Formula E Operations Limited v. Ville de Montréal*, 2019 QCCS 884.

56 *Constitution Act*, *supra*, note 12, s. 91; See *Reference re constitutional validity of the Companies Creditors Arrangement Act (Dom.)*, [1934] S.C.R. 659.

57 *Metcalfe*, *supra*, note 28.

[88] In the case at bar, the Plan provides for releases to be granted to, *inter alia*, Retailers who contribute to the litigation pool destined to satisfy claims of creditors against the Debtor. The Monitor has the additional power to compel such contribution by instituting legal proceedings. Such actions are calculated to maximize creditor recovery, a proper *CCAA* purpose[58] falling within the ambit of s. 91(21) of the *Constitution Act*. Moreover, the parties who might have raised a contestation analogous to that of the objecting parties in *Metcalfe & Mansfield* are the consumers (or their insurers) who can no longer sue the Retailers outside of the Plan of Arrangement. However, they voted unanimously in favour of the arrangement.

[89] As for the other consequence for the Appellants, their direct recourse for any loss would be against Aquadis, but that recourse is stayed and such stay of proceedings is, self-evidently, a valid exercise by way of the *CCAA* of federal jurisdiction in insolvency matters under s. 91(21) of the *Constitution Act*.

[90] The Appellants' submissions based on the division of powers have no merit.

* * *

[91] Plans of arrangement are sanctioned by the courts where considered "fair and reasonable", which raises mixed questions of fact and law. Accordingly, the standard of review is one of deference.[59] Appellate intervention is only warranted where the judgment is affected by an error of principle or results from an unreasonable exercise of judicial discretion.[60] The Appellants have failed to satisfy this standard.

[92] For all the foregoing reasons, I propose that the appeals be dismissed with legal costs.

MARK SCHRAGER, J.A.

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58 *Essar*, *supra*, note 32, para. 103.

59 *Metcalfe*, *supra*, note 28.

60 *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, para. 20; *Ivaco Inc., Re*, 2006 CanLII 34551 (Ont. C.A.), para. 71; *Re Air Canada*, 2003 CanLII 36792 (Ont. C.A.), para. 25; *Re Royal Crest Lifecare Group Inc.*, 2004 CanLII 19809 (Ont. C.A.), para. 23; *Algoma Steel Inc. v. Union Gas Ltd.*, 2003 CanLII 30833 (Ont. C.A.), para. 16.