

CITATION: Laurentian University of Sudbury, 2022 ONSC 3013
COURT FILE NO.: CV-21-00656040-00CL
DATE: 2022-05-27

SUPERIOR COURT OF JUSTICE - ONTARIO

**RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF LAURENTIAN UNIVERSITY OF
SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Andrew Hanrahan and Mitch Grossell*, for the Applicant

Ashley John Taylor, Elizabeth Pillon, Ben Muller and Maria Konyukhova, for the
Court-appointed Monitor Ernst & Young Inc

Aron Zaltz, for BR

Danielle Stampley and Nora Parker, for Laurentian University Staff Union

Barry Stork, for CURIE

André Claude, Ronald Caza and Andrea Baldy, for US

Andrew J. Hatnay, for Thorneloe University

HEARD: April 8, 2022

ENDORSEMENT

[1] BR seeks leave to bring a motion under the *Rules of Civil Procedure* (the “Rules”), to add Laurentian University of Sudbury (“LU”) as a Defendant to action CV–22–00078337–0000 (the “Action”), on the basis of s. 19(2)(b)(i) of the *Companies’ Creditors Arrangement Act* (“CCAA”).

[2] In the event the relief is not granted, BR seeks leave in the Action:

(a) to join LU as Defendant in the Action; and,

(b) for directions pursuant to the *Rules* including but not limited to:

- i. limiting the enforceability of any judgment in the Action to such insurance proceeds (if any) as are determined to be available to LU, and not as against LU's current or future assets; and,
- ii. the means for determining the extent of insurance, including but not limited to:
 1. cross-examination of Mr. Raymond Coutu and Mr. Normand Lavallee, by way of written questions pursuant to the *Rules*;
 2. making peremptory application, under the *Rules*, for a declaration under s. 97 of the *Courts of Justice Act*, to the effect that LU has insurance coverage corresponding to s. 132 of the *Insurance Act* and/or Rule 30.02(3) of the *Rules*.

[3] BR was an undergraduate student in LU in the years 1978 – 1980. She was enrolled in courses taught by the now deceased Professor J.S., who was employed by University of Sudbury ("US") which, at the time was federated with LU.

[4] BR commenced the Action for damages against US on March 14, 2022, alleging that she was sexually assaulted while she was a student. The Action is proceeding as against US on the grounds of vicarious liability.

[5] In early 2021, LU filed an application under the CCAA and an Initial Order was granted. A Claims Process Order was granted on May 31, 2021, which established a claims process (the "Claims Process").

[6] BR has participated in the Claims Process. BR has filed a proof of claim against LU in the amount of \$5 million on grounds of vicarious liability arising from historical sexual abuse.

[7] US has also filed a proof of claim in the CCAA proceedings, but the US claim does not include any claims for contribution and indemnity against LU for the allegations of sexual abuse made by BR.

[8] US seeks an order pursuant to paragraph 20 of the Claims Process Order to lift the stay of proceedings to move under the *Rules* to either cross claim or bring a third-party claim as against LU.

[9] In the alternative, US seeks an order requiring that LU engage in (i) full documentary production; and (ii) examinations for discovery in respect of BR's claim for sexual assault.

[10] LU takes the position that BR and US allege that the effect of s. 19(2) is that BR should be free to litigate the claim in the ordinary course outside the CCAA proceeding. LU contends that this assertion is incorrect as BR and US misunderstand the purpose and effect of s. 19(2) of the

CCAA, in so far as their argument conflates two separate issues: (i) the terms and conditions upon which certain types of proven claims may be compromised under a plan of arrangement under the CCAA; and (ii) whether a claim asserting an as yet unproven liability of such type can be determined in the Claims Process. LU contends that s. 19(2) addresses the former, but it does not address the latter.

[11] LU takes the position that the requested relief sought is not the appropriate way to proceed. LU notes that both BR and US (collectively the “Moving Parties”) seek an order lifting the stay of proceedings imposed by the Initial Order to allow them to pursue claims against LU in litigation in the Ontario Superior Court of Justice. LU contends that this relief is premised on an argument that s. 19(2) of the CCAA exempts BR from having her claim determined in the Claims Process and that the effect of s. 19(2) is that BR should be free to litigate her claim in the ordinary course of business, outside the CCAA proceeding.

[12] BR’s claim has been rejected by the Monitor and a Notice of Dispute has been filed. The adjudication of the claim was referred to Claims Officer, the Honourable J. Douglas Cunningham. Case conferences have been held but the adjudication of the dispute is on hold pending the disposition of this motion.

[13] The first issue on this motion relates to how BR’s claim is to be determined. The Moving Parties take the position that the claim of BR cannot be addressed through the Claims Process, but rather, can only be addressed through an adjudication of the Action.

[14] The relevant CCAA statutory provisions read as follows:

2(1) Definitions

“**claim**” means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;

19(1) Claims that may be dealt with by a compromise or arrangement - Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

(2) Exception - A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

- (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
- (b) any award of damages by a court in civil proceedings in respect of
 - (i) bodily harm intentionally inflicted, or sexual assault, or
 - (ii) wrongful death resulting from an act referred to in subparagraph (i);
- (c) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
- (d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; or
- (e) any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (d).

20(1) Determination of amount of claims - For the purposes of this Act, the amount represented by a claim of any secured or unsecured creditor is to be determined as follows:

- (a) the amount of an unsecured claim is the amount
 - (i) in the case of a company in the course of being wound up under the *Winding-up and Restructuring Act*, proof of which has been made in accordance with that Act,
 - (ii) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, proof of which has been made in accordance with that Act, or
 - (iii) in the case of any other company, proof of which might be made under the *Bankruptcy and Insolvency Act*, but if the amount so provable is not admitted by the company, the amount is to be

determined by the court on summary application by the company or by the creditor; and

(b) the amount of a secured claim is the amount, proof of which might be made under the *Bankruptcy and Insolvency Act* if the claim were unsecured, but the amount if not admitted by the company is, in the case of a company subject to pending proceedings under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, to be established by proof in the same manner as an unsecured claim under the *Winding-up and Restructuring Act* or the *Bankruptcy and Insolvency Act*, as the case may be, and, in the case of any other company, the amount is to be determined by the court on summary application by the company or the creditor.

[15] The relevant BIA statutory provision reads as follows:

s. 2 Definitions - “claim provable in bankruptcy”, “provable claim” or “claim provable” includes any claim or liability provable in proceedings under this Act by a creditor;

[16] BR contends that the “exception” provided by s. 19(2)(b)(i) is not just limited to a judgment “debt” for an “award of damages by a court in civil proceedings”, but also encompasses “liability” for such indebtedness.

[17] Counsel for BR contends that “debt” must mean something different than “liability”, as a matter of the scope of the “exception” provided for by s. 19(2)(b)(i) of the CCAA, which not only includes a judgment “debt” for “any award of damages in a civil proceeding in respect of... sexual assault”, but also “liability” for the same. It is liability that is the “broadest common denominator” of the “exception” provided for by s. 19(2)(b)(i). It is on the basis of LU’s liability for an “award of damages by a court in the civil proceeding in respect of... sexual assault” that BR moves for the primary relief sought: leave on grounds of the s. 19(2)(b)(i) “exception”.

[18] Counsel to BR contends that a narrower interpretation of s. 19(2)(b)(i) that would conflate the statutory reference to “any debts or liabilities” with judgment indebtedness would lead to an interpretation whereby claimants faced by any CCAA order corresponding to the provision in the amended and restated Claims Process Order that “any creditor that does not file a proof of claim... shall be and is hereby forever barred” would be forced to either forfeit their rights pursuant to ss. 16(h) and (h.1) of the *Limitations Act*, or have their claims extinguished.

[19] Counsel for US submits that the first step in interpreting s. 19(2) of the CCAA is to look at the context of the CCAA as a whole with particular attention to the provisions surrounding it. Sections 19 and 20 operate together to set out which types of claims are the proper subject of compromises or arrangements under the CCAA. Further, to qualify as a proper claim for proceedings under the CCAA, the claim must (i) have a value that is determinable under section 20; and (ii) not be caught by the exceptions under s. 19(2). A sexual assault claim is a provable claim that must be evaluated outside of the CCAA proceedings. It is also captured by s. 19(2).

[20] US contends that the exceptions set out in s. 19(2) of the CCAA are not the proper subject of compromise or arrangement pursuant to the CCAA because they cannot be compromised without accounting for the moral element of the reprehensible behaviour, which will only be achieved if the “victim” of the reprehensible conduct consents to the compromise or arrangement.

[21] Further, s. 20 provides another reason for which sexual assault is not the proper subject of the CCAA compromise or arrangement as the claim cannot be properly valued under the CCAA proceedings which would require a determination of the claim by the court on summary application. Accordingly, counsel submits that s. 20 only addresses unsecured claims that have either (i) been proven in accordance with another act that forms part of the insolvency legislative scheme; or (ii) can be determined by the court on summary application. Sexual assault claims do not fall into either of these categories.

[22] Counsel submits that determining liability for sexual assault requires full documentary production, examinations for discovery, and the opportunity to test opponents on the evidence and credibility. Valuation and liability are not determinable on summary application.

[23] Counsel referenced *Montreal (City) v. Deloitte Restructuring Inc.*, 2021 SCC 53 (“*Montreal*”) at para. 24, in support of the proposition that s. 19(2) could be interpreted by reference to similar wording in s. 178(1) of the BIA. At para. 32 of the factum, counsel states:

[The issue] can be determined by referring to the case law and academic commentary in s. 178(1)(e) of the [BIA], which is analogous in every respect to s. 19(2)(d) of the CCAA. As this Court noted, in *Ted Leroy Trucking Ltd.* [...] these two statements “for [m] part of an integrated body of insolvency law”. (Emphasis Added)

[24] It is both necessary and important to note that the wording of para. 24 in *Montreal* differs from that set out in the US factum. In *Montreal* para. 24, the decision of the Supreme Court reads as follows:

“The burden of proof applicable to this scheme can be determined ...” (Emphasis Added)

[25] As I will explain, the characterization of para. 32 of the US factum is significantly different than the actual wording authored by the Supreme Court.

[26] On this issue LU takes a very different position. LU contends that the Moving Parties fundamentally misunderstand the purpose and effect of s. 19(2) of the CCAA and their argument conflates two separate issues: (i) the terms and conditions upon which certain types of proven claims may be compromised under a plan of arrangement; and (ii) whether the claim asserting an as yet unproven liability of such type can be determined in the CCAA process. Section 19(2) addresses the former, but it does not affect the latter. Put simply, s. 19(2) deals with how certain claims be dealt with in a plan and provides that such claims cannot be “crammed down” by the votes of other creditors.

[27] Counsel to LU submits that what s. 19(2) does not do is provide that particular claims are exempt from determination in the Claims Process, and the creditors who may wish to assert such claims are free to pursue the determination of their claims in ordinary litigation outside of the CCAA process. Further, the reference in s. 19(2) to the claimant's vote on the plan of arrangement presupposes that its claim has been proven and accepted within the Claims Process.

[28] Counsel to LU also submits that whether and in what circumstances BR's claim, if proven, can ultimately be compromised under the plan is a separate issue which is not before the Court. The issue of how the claim may be treated in the plan only requires determination if the claimant establishes a valid claim against LU, which BR has not done yet. Further, s. 19(2) does not come into play because BR does not have a proven claim that might be considered in a compromise or arrangement. BR has only filed the proof of claim that has been disallowed by the Monitor and a dispute of that disallowance is pending before the Claims Officer. The order appointing the Claims Officer provides direction on the process and procedure for the determination of all filed claims against LU within the CCAA Claims Process.

[29] Counsel contends that LU's interpretation of s. 19(2) is consistent with both the ordinary meaning and the overall statutory purpose of the CCAA. Conversely, the Moving Parties' reading of s. 19(2) would directly conflict with the CCAA single proceeding model. It would mean that any claim of the types mentioned in s. 19(2) – which is a broad category of claims including fraud, misappropriation, and misrepresentation – would not be capable of being determined in the CCAA claims process and could proceed in ordinary litigation. This would create chaos and is precisely what the Supreme Court of Canada stated the CCAA was designed to prevent when it said that “the single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt” (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 22).

[30] LU puts forth a second argument, namely that s. 19(2)(b)(i) does not apply to BR's claim.

[31] By its express terms, s. 19(2)(b)(i) applies to claims for “any award of damages by a court in civil proceedings in respect of... sexual assault”. LU submits that BR has not asserted a claim based on “an award of damages by a court in civil proceedings”, as there has been no award of damages by a court. BR has only filed the proof of claim that attaches an unissued, unproven Statement of Claim. LU submits a plain reading of s. 19(2)(b)(i) makes clear that the section is not engaged by this claim: there has been no award of damages by a court in civil proceedings.

[32] With respect to whether the claim can be determined in the CCAA process, LU takes the position that it is routine for the Monitor and/or a Claims Officer to make determinations as to liability in the quantum. In addition, the Order appointing the Claims Officers gives the Claims Officers discretion to determine the process and procedure for the adjudication of any claims. Accordingly, to the extent that extensive discovery or *viva voce* evidence is required to determine BR's claim, the Claims Officer has the authority to order that procedure.

[33] With respect to the crossclaim of US, LU submits that none of the purported arguments for allowing BR to lift the stay apply to US's request and the US has not offered a separate rationale

that would justify lifting the stay for its crossclaim or third-party claim. To the extent that US believes that it has an additional claim against LU related to the action, US could seek to amend the proof of claim it has already filed in the Claims Process.

[34] Finally, LU opposes the US's request for full discovery rights against LU. This alternative relief would require that the stay be lifted and LU be ordered to provide full documentary production and participate in examinations. If granted, LU contends that such an order would require it to invest significant time and resources in responding to requests for documentary production. It contends that this relief should not be granted in that it is contrary to the purpose of the stay of proceedings. Laurentian is currently negotiating a plan of arrangement and the determination of the claimant's claim is an important part of that process and timeline.

[35] Further, BR's request to lift the stay of proceedings to proceed against any available insurance proceeds should be denied because no such insurance proceeds of policies have been located.

Analysis

[36] The interpretation of s. 19(2) of the CCAA was recently considered by the Supreme Court of Canada in *Montréal* and, in my view, the guidance provided by the Supreme Court provides a complete answer to issues on this motion.

[37] By way of background, in August 2018, the Superior Court of Québec made an initial order by which SM Group became subject to proceedings under the CCAA. Following the initial order, SM Group continued to perform work for the City of Montréal (the "City"). However, the City refused to pay for that work and invoked its right to set-off. The claims involved in the set-off are related to the application of an act to ensure the recovery of amounts or property paid as a result of fraud or fraudulent tactics in connection with public contracts and, according to the City, resulted from fraud on SM Group's part. The first claim arose from the settlement agreement entered into under the Voluntary Reimbursement Program ("VRP"). The second claim is based on a proceeding brought by the City against SM Group, in which it claimed money from SM Group for allegedly having colluded in relation to a call for tenders for a water metre contract.

[38] In response to the City's refusal to pay for the work done by SM Group after the initial order, the Monitor applied for declaratory judgment stating that set-off could not be effected with respect to the amounts owed by the City to SM Group. The supervising judge granted the application. The Court of Appeal reached the same conclusion. The Court of Appeal found that a claim relating to fraud falling within s. 19(2)(d) of the CCAA is not an exception to the rule stated in Québec (*Agence du revenu*) v. *Kitco Metals Inc.*, 2017 QCCA 268, whereby set-off between debts arising before and after an initial order ("Pre-post Compensation" (Set-Off)) is prohibited. The Court of Appeal was also of the view that the City had not proved that s. 19(2)(d) applied to its claims.

[39] The Supreme Court of Canada dismissed the appeal noting that a claim arising from an agreement entered into under the VRP is not necessarily a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. The City had not shown that the VRP claim relates to a debt resulting from fraud within the meaning of that provision. (Emphasis Added)

[40] The first question considered by the Supreme Court was whether the VRP claim was a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA.

[41] The City argued that the VRP claim cannot be dealt with by a compromise or arrangement because it relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. The City argued that such a claim falls outside the absolute prohibition against Pre-post Compensation imposed by *Kitco*.

[42] The Supreme Court determined that the VRP claim was not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA.

[43] The reasoning of the Supreme Court starting at para. 21 is determinative of the issues before me.

[21] We must begin by determining whether the VRP claim is a claim that relates to a fraudulent debt, because this is the premise behind the City's reasoning. For the reasons that follow, we conclude that this basic premise is not correct: the VRP claim is not a claim that relates to a debt resulting from fraud pursuant to s. 19(2)(d) of the CCAA. The mere fact that a debtor company participated in the VRP is not sufficient to infer that the company defrauded a public body. In light of this conclusion, it is not necessary for us to deal with Deloitte's alternative argument that s. 19 of the CCAA is inapplicable in this case because there is no plan providing for a compromise or arrangement. (Emphasis Added)

[22] The first step in characterizing the VRP claim is to distinguish, for the purposes of the CCAA, claims that are subject to a compromise or arrangement from those that are not. Section 19(1) of the CCAA sets out the general scheme governing claims that may be dealt with by a compromise or arrangement: (Emphasis Added)

19 (1) Subject to subsection (2), the only claims that may be dealt with by a compromise or arrangement in respect of a debtor company are

(a) claims that relate to debts or liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which proceedings commenced under this Act, and

(ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or commenced proceedings under this Act with the consent of inspectors referred to in section

116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of section 2 of that Act; and

(b) claims that relate to debts or liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (a)(i) and (ii).

[23] As an exception to this scheme, s. 19(2) of the CCAA provides that certain claims may not be dealt with by a compromise or arrangement, including those that result from fraud: (Emphasis Added)

(2) A compromise or arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor in relation to that debt has voted for the acceptance of the compromise or arrangement:

....

(d) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from an equity claim; . . .

[24] The burden of proof applicable to this scheme can be determined by referring to the case law and academic commentary on s. 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”),² which is analogous in every respect to s. 19(2)(d) of the CCAA. As this Court noted in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, these two statutes “for[m] part of an integrated body of insolvency law” (para. 78; see also 9354-9186 *Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, at para. 74). (Emphasis Added)

[25] To discharge its burden of proving that its claim relates to a debt “resulting from obtaining property or services by false pretences or fraudulent misrepresentation”, a creditor must establish, on a balance of probabilities, the following four elements: (i) the debtor made a representation to the creditor; (ii) the representation was false; (iii) the debtor knew that the representation was false; (iv) the false representation was made to obtain property or a service (*Léger v. Ouellet*, 2011 QCCA 1858, at para. 30 (CanLII); *Dupuis v. Cernato Holdings Inc.*, 2019 QCCA 376, at para. 37 (CanLII); see also L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), vol. 3, at H§63; *Berger, Re*, 2010 ONSC 4376, 70 C.B.R. (5th) 225, at para. 28; J. P. Sarra, G. B. Morawetz and L. W. Houlden, *The 2020-2021 Annotated Bankruptcy And Insolvency Act* (2020), at pp. 1001 and 1006; D. Brochu, *Précis de la faillite et de l’insolvabilité* (5th ed. 2016), at pp. 502-3).

Once these elements have been proved, the creditor of a claim to which s. 19(2)(d) of the CCAA applies is in a better position than other ordinary creditors, insofar as such a claim, while not conferring secured creditor status, cannot be dealt with by a compromise or arrangement (see Houlden, Morawetz and Sarra, at H§63). This exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly (see, e.g., by analogy, *Lambert v. Macara*, 2004 CanLII 30445 (QC CA), [2004] R.J.Q. 2637 (C.A.), at para. 96; *Canada Mortgage and Housing Corp. v. Gray*, 2014 ONCA 236, 119 O.R. (3d) 710, at para. 24). (Emphasis Added)

[26] The City's burden was certainly not negligible: it had to prove that SM Group had knowingly made a false representation that led to the VRP claim. However, the City considered it sufficient for that purpose to mention that the claim existed, and did not try to prove or even allege any of these elements, presuming or assuming that the VRP claim resulted from fraudulent representations. (Emphasis Added)

[27] As a result, the content of the VRP agreement, Bill 26 and the VRP Regulation must be interpreted to determine whether the VRP claim may be dealt with by a compromise or arrangement. In this regard, and for the reasons that follow, we agree with the majority of the Court of Appeal that s. 19(2)(d) of the CCAA does not apply to the VRP claim. (Emphasis Added)

[28] First, the content of the VRP agreement itself is a complete bar to the City's argument that participation in the program in itself justifies a finding that the City's claim results from SM Group's fraudulent activities. Because this confidential agreement entered into by the parties clearly stipulates that the amount fixed in the agreement can in no way be considered to constitute an admission of liability, it cannot be presumed that the VRP claim is a claim that falls within s. 19(2)(d) of the CCAA. The onus was therefore on the City to prove, in accordance with the provisions of that statute, that SM Group had knowingly made a false representation to it in order to obtain property or a service. (Emphasis Added)

[29] In this regard, there is, moreover, a well-established principle in the case law that a court must generally make its own findings of fact in applying s. 19(2)(d) (see Houlden, Morawetz and Sarra, at H§63). This is true, for example, even where findings possibly linked to fraud have been made in a previous trial or where a default judgment or a consent to judgment might have contained such findings. It can be inferred by analogy from the case law on s. 178(1)(e) of the BIA that the courts have been particularly consistent and rigorous in assessing the evidence presented to them in this regard (see, e.g., *Terrain DEV Immobilier inc. v. Charron*, 2021 QCCA 417, at para. 2 (CanLII); *Dupuis*, at paras. 36-40; *Pelletier v. CAE Rive-Nord*, 2019 QCCA 2164, at paras. 13-19 (CanLII); *Tavan v. Rostami*, 2014 QCCA 304, at paras. 3-6 (CanLII); *Léger*, at paras. 30-40; *Guilbert v. Economical Mutual Insurance Co.*, 2020 MBQB 179, [2021] I.L.R. ¶I-6280, at paras. 20-25; *Sharma v. Sandhu*, 2019 MBQB 160, at paras. 38-45 (CanLII); *Royal Bank of Canada v. Hejna*, 2013 ONSC 1719, at paras. 90-92 (CanLII); *Berger*, at

paras. 28-35; *Re Horwitz* (1984), 52 C.B.R. (N.S.) 102 (Ont. H.C.J.), at pp. 106-7, aff'd (1985), 53 C.B.R. (N.S.) 275 (C.A.); *Agriculture Financial Services Corp. v. Zaborski*, 2009 ABQB 183, 58 C.B.R. (5th) 301, at paras. 12-18; *Szeto, Re*, 2014 BCSC 1563, 15 C.B.R. (6th) 255, at paras. 37-63; *The Toronto-Dominion Bank v. Merenick*, 2007 BCSC 1261, at paras. 30-48 (CanLII); *Johnson v. Erdman*, 2007 SKQB 223, 34 C.B.R. (5th) 108, at paras. 10-12; *Coyle (Bankrupt), Re*, 2011 NSSC 238, 304 N.S.R. (2d) 369, at paras. 53-58). (Emphasis Added)

[44] The foregoing analysis sets out the proper framework for analyzing the issue before the Court. In my view, it confirms the argument put forth by LU and is a complete answer to the submissions of both BR and US.

[45] Simply put, the exception to the general scheme established by s. 19(1) of the CCAA must be interpreted narrowly and the elements of the exception set out in s. 19(2) must be proved.

[46] It is not sufficient to infer liability (*Montreal* para. 21). The burden of proof to establish a debt or liability and an award of damages for sexual assault is on the claimant (*Montreal*, para. 24, 25 and 28).

[47] Although the decision of the Supreme Court specifically addresses s. 19(2)(d), in my view the analytical framework applies to s. 19(2) in its entirety.

[48] In this respect, it is necessary to emphasize the wording of para. 24 of *Montreal*, which commences with the words, "The burden of proof applicable to this scheme can be determined...". The interpretation set forth by counsel to US in its factum at para. 32, which commences with the words, "The issue can be determined...", is, in my view, taken out of context.

[49] At para. 24 of *Montreal*, the Supreme Court is focusing on the determination of the burden of proof. The Supreme Court was not focusing on the determination of the issue.

[50] BR has yet to obtain any award of damages by a court in civil proceedings in respect of bodily harm intentionally inflicted, or by sexual assault.

[51] BR has put forth a claim within the meaning of s. 2(1) of the CCAA. A claim within the meaning of s. 2(1) of the CCAA has to be interpreted in accordance with s. 2 of the BIA and the term "claim provable in bankruptcy".

[52] The alleged facts giving rise to BR's claim arose 43 years ago. BR's claim is covered by the statutory definition of claim. However, that does not mean that the exception in s. 19(2)(b)(i) has been triggered. In accordance with the analysis set forth by the Supreme Court of Canada, the elements to qualify for the exception as set out in s. 19(2)(b)(i) have to be proven. This has not yet occurred.

[53] In the absence of establishing an award of damages, the s. 19(2)(b)(i) exception is not triggered. There is no basis, in my view, to accept the Moving Parties argument that section s. 19(2)(b)(i) of the CCAA provides a basis to lift the stay of proceedings and to allow the claim of BR to proceed in ordinary litigation outside the Claims Process. In my view s. 19(2)(b)(i) does not provide an “exception” to the Claims Process and does not provide a basis to lift the stay of proceedings.

[54] In the event that it is ultimately determined through the Claims Process that BR has an award of damages in respect of sexual assault, then, and only then will s. 19(2) be relevant as to how the claim can be dealt with in a plan. But at this stage, BR has only filed a proof of claim in the Claims Process and a plain reading of s. 19(2)(b)(i) makes clear that the section is not engaged by this claim as there has been no award of damages by a court in civil proceedings.

Disposition

[55] I have concluded that the claim of BR is to be determined in the CCAA Claims Process and accordingly the primary relief requested by BR is denied, as is the alternative relief to join LU as a defendant in the Action.

[56] Similarly, the request of US to lift the stay of proceedings to move under *Rule* 5.032 of the *Rules* as a crossclaim or bring a third-party claim against LU in the action is also denied. US can, however, take the necessary steps to amend its proof of claim and include claims for contribution and indemnity as against LU for the allegations of sexual abuse made by BR.

[57] Although I have determined that the claim of BR is to be determined in the CCAA Claims Process, I do have concerns with respect to the process before the Claims Officer.

[58] Paragraph 80 of the factum submitted by US sets out the basis for my concerns and reads as follows:

[80] In light of the foregoing, it can be concluded that the CCAA evaluation process does not allow for a fair and proper adjudication of [BR’s] Claim. These matters currently before the CCAA court and the civil court are related and cannot be determined independently. The Monitor and/or Claims officer cannot value the claim without addressing liability, vicarious liability and the proportionate degree of fault of the potential tortfeasors. To make such a determination, evidence beyond the scope of the CCAA proceeding is required, failing which Université du Sudbury will be prejudiced in their defence of the main claim.

[59] The claim of BR is to be determined in the Claims Process. It is, however, necessary to ensure that the process provides for a fair and proper adjudication of BR's claim and also takes into account the concerns set forth by US. It is also necessary to consider the current state of the CCAA proceedings. LU has indicated that it wishes to finalize its plan of arrangement for consideration by its creditors in the near future. These practical concerns were not fully addressed at the hearing, and for this reason, I find it necessary that the parties make further submissions as to the appropriate process to adjudicate BR's claim and the claim of US within the Claim Process. To that end, the parties are to schedule a case conference before me, as soon as possible, so that these process issues can be addressed.



Chief Justice G.B. Morawetz

Date: May 27, 2022