Unofficial English Translation of the Judgment of the Court

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| Lafond c. Anderson | | | | | 2022 QCCA 1499 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUÉBEC | | | | | |
| REGISTRY OF | | | MONTRÉAL MONTREAL | | |
| Nos.: | 500-09-029803-210 | | | | |
| (540-11-011212-216) | | | | | |
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| DATE: | November 3, 2022 | | | | |
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| CORAM: | | THE HONOURABLE | | YVES-MARIE MORISSETTE, J.A.  STEPHEN W. HAMILTON, J.A.  CHRISTINE BAUDOUIN, J.A. | |
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| DIANE LAFOND | | | | | |
| APPELLANT – Debtor | | | | | |
| v. | | | | | |
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| RENÉ ANDERSON | | | | | |
| RESPONDENT – Creditor | | | | | |
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| and | | | | | |
| LITWIN BOYADJIAN INC. | | | | | |
| IMPLEADED PARTY – Licenced Insolvency Trustee | | | | | |
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| JUDGMENT | | | | | |
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1. This is an appeal from a judgment rendered on November 25, 2021, by the Superior Court, District of Laval (the Honorable Marie-Christine Hivon).[[1]](#footnote-1) Pursuant to section 69.4 of the *Bankruptcy and Insolvency Act*[[2]](#footnote-2) (*BIA*), the judgment ordered that the stay of proceedings be lifted to allow the respondent to continue the execution of the judgment rendered in his favour.
2. For the reasons of Hamilton J.A., with which Morissette and Baudouin JJ.A. agree, **THE COURT:**
3. **ALLOWS** the appeal;
4. **REVERSES** the trial judgment;
5. **QUASHES** the order lifting the stay of proceedings rendered in favour of the appellant to allow the respondent to continue the execution of the judgment rendered in his favour in the case bearing court file number 500-22-242643-172;
6. **REFERS** the matter back to the Superior Court to rule once again on the application to lift the stay of the proceedings once the respondent has given notice to the other creditors or has shown that they are aware of his proceeding and that they waive their participation therein;
7. **THE WHOLE**, without legal costs, in view of the mixed outcome.

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|  | | YVES-MARIE MORISSETTE, J.A. |
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|  | | STEPHEN W. HAMILTON, J.A. |
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|  | | CHRISTINE BAUDOUIN, J.A. |
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| Mtre Martin P. Jutras | | |
| KAUFMAN AVOCATS | | |
| For the appellant | | |
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| Mtre Alain-Guy Tachou Sipowo | | |
| AGS AVOCATS | | |
| For the respondent | | |
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| Hearing date: | September 14, 2022 | |

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| REASONS OF HAMILTON, J.A. |
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1. This case raises a very specific bankruptcy issue: when a creditor has instituted a Paulian action before the date of the debtor’s proposal and wishes to continue that action despite the stay of proceedings, must the creditor notify the debtor’s other creditors?
2. For the following reasons, I find that this question must be answered in the affirmative.

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1. The context may be summarized as follows.
2. The respondent is a creditor of the appellant for an amount of $49,780.70[[3]](#footnote-3) plus interest and costs, resulting from an arbitration award rendered on July 17, 2017, by the arbitration council of the Barreau du Québec regarding the contestation of professional fees. The arbitration award was homologated by the Court of Québec on March 28, 2019,[[4]](#footnote-4) and the application for leave to appeal from that judgment after expiry of the time limit was dismissed on October 28, 2019.[[5]](#footnote-5)
3. On February 18, 2021, the respondent, who did not manage to execute his judgment in that same court file, instituted a Paulian action regarding two gifts of $30,500 made by the appellant to her children on October 2, 2020. The respondent asks the Court to declare that the two gifts cannot be set up against him and to condemn each of the children to pay him $30,500 plus interest. He also asks the Court to condemn the appellant to pay his extrajudicial fees, including the fees for a private investigator and his lawyers’ professional fees.
4. On March 29, 2021, the appellant filed a proposal under the *BIA*. The proposal specified that the appellant would pay a lump sum of $30,000 to the trustee to be distributed to her creditors. The proposal was amended the following day to increase the lump sum to $60,000.
5. On March 31, 2021, the trustee sent the respondent a notice of stay of proceedings under section 69 *BIA*.
6. On May 5, 2021, the respondent filed an application to lift the stay of proceedings so that he could continue his Paulian action. The appellant contested the application, but the trustee did not appear, despite being duly notified.
7. In the judgment under appeal, the judge found that lifting the stay was equitable and that it would not give the respondent an undue advantage over the other creditors. She ordered that the stay be lifted.
8. The appellant appeals that judgment.
9. To complete the picture, it is useful to mention that following the judgment under appeal, the appellant again amended her proposal on December 3, 2021, to increase the lump sum offered to $90,000. This amended proposal was accepted by the creditors at the creditors’ meeting on December 9, 2021, and was approved by the Court on March 14, 2022. These last facts are subsequent to the judgment under appeal and are not the subject of an application to adduce new evidence. Because they do not affect the outcome of the appeal, it is unnecessary to address them further.

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1. The appellant raises only one ground of appeal, phrased as follows:

[translation]

By allowing [the respondent] to continue the execution of his judgment and the Paulian action regarding the gifts made by [the appellant], did [the trial judge] go directly against the general scheme of the *Bankruptcy and Insolvency Act*, thereby making a palpable and overriding error?

1. The appellant essentially alleges that lifting the stay would have the effect of giving the respondent an advantage over the other creditors, because he is taking proceedings for his sole benefit, for which the trustee has priority, without complying with the procedure under section 38 *BIA*.
2. Alternatively, the appellant argues that the judge should not have lifted the stay because the Paulian action has no reasonable chance of success. She submits that the amounts she gave her children were from a lump sum obtained in the settlement of court file 500-17-105035-185, an action she brought to claim the moral damages sustained following a medical error. In the circumstances, the appellant submits that these amounts are exempt from seizure pursuant to the second paragraph of article 696 of the *Code of Civil Procedure* and are therefore not part of the property divisible among her creditors pursuant to paragraph 67(1)(b) *BIA*.
3. The respondent answers that the judge exercised her discretion under section 69.4 *BIA*. In addition, he notes that a Paulian action against the children does not concern the appellant’s assets and that the trustee did not consider it useful to do anything to repatriate this property for the body of creditors.
4. As for the appellant’s second ground, the respondent submits that this issue was not argued at trial and that it was raised for the first time on appeal. He also argues that the second paragraph of article 696 CCP does not apply in this case.

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1. The appellant invokes section 38 *BIA*, which concerns a creditor’s right to take proceedings when the trustee refuses or neglects to do so:

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| **38** **(1)** Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct. | **38 (1)** Lorsqu’un créancier demande au syndic d’intenter des procédures qui, à son avis, seraient à l’avantage de l’actif du failli, et que le syndic refuse ou néglige d’intenter ces procédures, le créancier peut obtenir du tribunal une ordonnance l’autorisant à intenter des procédures en son propre nom et à ses propres frais et risques, en donnant aux autres créanciers avis des procédures projetées, et selon les autres modalités que peut ordonner le tribunal. |
| **(2)** On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof. | **(2)** Lorsque cette ordonnance est rendue, le syndic cède et transfère au créancier tous ses droits, titres et intérêts sur les biens et droits qui font l’objet de ces procédures, y compris tout document à l’appui. |
| **(3)** Any benefit derived from a proceeding taken pursuant to subsection (1), to the extent of his claim and the costs, belongs exclusively to the creditor instituting the proceeding, and the surplus, if any, belongs to the estate. | **(3)** Tout profit provenant de procédures exercées en vertu du paragraphe (1), jusqu’à concurrence de sa réclamation et des frais, appartient exclusivement au créancier intentant ces procédures, et l’excédent, s’il en est, appartient à l’actif. |
| **(4)** Where, before an order is made under subsection (1), the trustee, with the permission of the inspectors, signifies to the court his readiness to institute the proceeding for the benefit of the creditors, the order shall fix the time within which he shall do so, and in that case the benefit derived from the proceeding, if instituted within the time so fixed, belongs to the estate. | **(4)** Lorsque, avant qu’une ordonnance soit rendue en vertu du paragraphe (1), le syndic, avec la permission des inspecteurs, déclare au tribunal qu’il est prêt à intenter les procédures au profit des créanciers, l’ordonnance doit prescrire le délai qui lui est imparti pour ce faire, et dans ce cas le profit résultant des procédures, si elles sont intentées dans le délai ainsi prescrit, appartient à l’actif. |

1. This section allows a creditor to take in his or her own name and at his or her own expense a proceeding which in theory belongs to the trustee. The mechanism it provides is as follows: (1) the creditor must request the trustee to take the proceeding that is of interest to the creditor, (2) if the trustee refuses or neglects to take the proceeding contemplated by the creditor, the creditor may then personally take the proceeding. To do so, the creditor must (3) give notice of the contemplated proceeding to the other creditors and (4) obtain the court’s authorization.

The purpose of this mechanism is to ensure fairness among the creditors if the trustee refuses or neglects to take a proceeding that would potentially be advantageous to the body of creditors. By requiring the applicant creditor to comply with the various steps set out above, Parliament is allowing the other creditors to be informed of proceedings that might interest them and to make an informed decision as to whether they will participate in the contemplated proceeding. This is in fact what the Court of Appeal of Alberta explained in *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd*:[[6]](#footnote-6)

What then is the purpose of section 38? In my view, its primary purpose is to ensure that the bankrupt's assets are preserved for the benefit of the creditors. It provides the mechanism for creditors to proceed with an action when the trustee refuses or fails to act; thereby ensuring that assets of the bankrupt (which may otherwise go unrecovered) are available to creditors willing to finance the litigation.

The secondary purpose, relating to notice, is to make sure the section operates fairly. While it is fair that those parties willing to accept the risks and costs of litigation receive a preference in terms of recovering their losses, the right to that preference must be shared with all creditors.

1. These principles having been outlined, what is the case here?
2. The respondent instituted his Paulian action (based on articles 1631 *et seq*. CCQ) on February 18, 2021, that is, before the appellant filed her initial proposal on March 29, 2021. Because this proceeding was brought before the appellant’s proposal, it must be concluded that section 38 *BIA* was not applicable. The respondent cannot have been required to seek the trustee’s approval to institute his proceeding when there was no trustee yet involved.
3. Under the provisions of the *Civil Code*, the respondent could institute his proceeding without requesting the Court’s permission, and he could keep the product of the proceeding to the extent of his debt, subject to the rights of the prior or hypothecary creditors. The appellant’s other creditors had the right to intervene in the proceeding to share in the product. However, no one exercised this right in this case, probably because the respondent did not notify them that his Paulian action was being instituted. Although nothing in the *Civil Code* requires the respondent to give them such a notice, some nevertheless argue that a creditor who institutes a Paulian action under articles 1631 *et seq*. CCQ is required to notify the other creditors to allow them to intervene in the proceeding to protect their rights.[[7]](#footnote-7) This issue was not raised in this case, however, and the Court need not decide it.
4. The appellant filed her proposal on March 29, 2021.
5. The filing of a proposal entails the stay of proceedings under paragraph 69.1(1)(a) *BIA*:

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| **69.1 (1)** Subject to subsections (2) to (6) and sections 69.4, 69.5 and 69.6, on the filing of a proposal under subsection 62(1) in respect of an insolvent person, | **69.1 (1)** Sous réserve des paragraphes (2) à (6) et des articles 69.4, 69.5 et 69.6, entre la date du dépôt d’une proposition visant une personne insolvable et : |
| **(a)** no creditor has any remedy against the insolvent person or the insolvent person’s property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt; | **a)** soit sa faillite, soit la libération du syndic, les créanciers n’ont aucun recours contre elle ou contre ses biens et ne peuvent intenter ou continuer aucune action, exécution ou autre procédure en vue du recouvrement de réclamations prouvables en matière de faillite; |

1. The respondent’s Paulian action was filed in the context of the same proceedings in which the judgment against the appellant was rendered. Its purpose was to obtain a ruling that the gifts could not be set up against the respondent so that he could execute his judgment. This action constitutes “proceedings, for the recovery of a claim provable in bankruptcy” and is accordingly stayed by the appellant’s proposal.
2. The respondent asks that the stay be lifted and seeks permission to continue the proceedings in accordance with section 69.4 *BIA* rather than authorization to take proceedings under section 38 *BIA*. This appears to be the appropriate choice. Section 38 *BIA* applies to proceedings taken after a bankruptcy or a proposal, not to proceedings taken before and continued after.
3. Section 69.4 *BIA* reads as follows:

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| **69.4** A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied  (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or | **69.4** Tout créancier touché par l’application des articles 69 à 69.31 ou toute personne touchée par celle de l’article 69.31 peut demander au tribunal de déclarer que ces articles ne lui sont plus applicables. Le tribunal peut, avec les réserves qu’il estime indiquées, donner suite à la demande s’il est convaincu que la continuation d’application des articles en question lui causera vraisemblablement un préjudice sérieux ou encore qu’il serait, pour d’autres motifs, équitable de rendre pareille décision. |
| (b) that it is equitable on other grounds to make such a declaration |  |

1. To determine whether lifting the stay is equitable under the last part of the section, it is necessary to determine if it has the effect of giving the respondent an advantage over the other creditors.[[8]](#footnote-8) Section 69.4 *BIA* accordingly serves the same purpose as section 38 BIA, that is, to submit a creditor’s action to judicial authorization so that the Court can ensure fairness among the creditors.
2. The trustee under a proposal is entitled to take the proceedings set out in sections 95 to 101 *BIA*, which concern preferences and transfers at undervalue, unless the proposal provides otherwise:

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| **101.1 (1)**Sections 95 to 101 apply, with any modifications that the circumstances require, to a proposal made under Division I of Part III unless the proposal provides otherwise. | **101.1 (1)** Les articles 95 à 101 s’appliquent, avec les adaptations nécessaires, à la proposition faite au titre de la section I de la partie III, sauf disposition contraire de la proposition. |

1. In this case, it is interesting to note that the very first version of the proposal, which was filed on March 29, 2021, specifically provided that the trustee and the creditors could not take proceedings under sections 95 to 101 *BIA* or under articles 1631 to 1636 CCQ against the appellant or her property or against any other person. However, this clause was not reproduced in the amended version of March 30, 2021, nor in the final version of December 3, 2021.
2. Accordingly, the trustee is entitled to take proceedings under either sections 95 to 101 *BIA* or articles 1631 to 1636 CCQ[[9]](#footnote-9) to contest the gifts for the benefit of all of the creditors.[[10]](#footnote-10)
3. On the basis of these findings, it must be concluded that the continuation of the proceedings for the respondent’s sole benefit gives him an advantage over the other creditors. The appropriate mechanism to ensure that the continuation of the proceedings is equitable and does not give the respondent an advantage over the other creditors is the one provided under section 38. The trustee and the other creditors must be duly notified of the situation and must waive their rights to participate in the proceeding.
4. Let us consider this.
5. The trustee is a party to the application to obtain the lifting of the stay of proceedings and was duly notified of it. The application describes the Paulian action instituted by the respondent, a copy of which is attached to the application as exhibit C‑13. This is sufficient notice. The trustee did not appear to contest the application. He does not seem to have any intention of taking his own proceeding or of intervening in the respondent’s proceeding.
6. On the other hand, the creditors did not receive any formal notice. They are not a party to the application to lift the stay of proceedings, and they were not notified of it. They are not a party to this appeal. According to the appeal record, the only mention of the gifts that was provided to them is in the notice of proposal, in which the appellant disclosed to her creditors that she made gifts of more than $500. She described the gifts as follows:

[translation]

Gift to Sacha and Sarah Lafond from the amount received for moral damages in case No. 500-17-105035-185

1. As we can see, this is partial disclosure because the precise amounts are not specified.
2. In addition, no mention was made of the Paulian action instituted by the respondent.
3. In his report to the creditors, the trustee did not address the gifts or the possibility of contesting them. Similarly, he did not include anything on this point in his evaluation of the appellant’s assets for the purposes of the bankruptcy. He concluded that there were no assets to be realized besides the initial deposit and the monthly deposits required under the *BIA* and the shares of a corporation, which he could not evaluate.
4. Accordingly, there is nothing in the record as it stands that would allow the Court to conclude that the creditors are aware of the possibility of bringing a Paulian action or of intervening in the respondent’s proceeding.
5. In these circumstances, it would be inequitable to lift the stay of proceedings and to allow the respondent to proceed for his sole benefit.

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1. As a second ground of appeal, the appellant raises the fact that the respondent’s Paulian action has no reasonable chance of success because it concerns property of the appellant that is exempt from seizure.
2. The respondent argues that this issue was not raised at trial and that it is inappropriate for the Court to rule on it. Because the evidence in the record is incomplete, it is preferable for this ground to be dealt with by the judge hearing the case on the merits and not at a preliminary stage.

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1. I would therefore allow the appeal, reverse the trial judgment ordering that the stay of proceedings be lifted, and refer the file back to the Superior Court.
2. The respondent may submit another application to lift the stay of proceedings, but he must give notice to the other creditors or show that they are aware of his proceeding and that they waive their right to participate therein.

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| STEPHEN W. HAMILTON, J.A. |

1. *Syndic de Lafond*, 2021 QCCS 5680 [judgment under appeal]. [↑](#footnote-ref-1)
2. *Bankruptcy and Insolvency Act*, R.S.C. (1985), c. B-3. [↑](#footnote-ref-2)
3. The respondent is also a creditor for a second amount, but he did not obtain a lifting of the stay of proceedings regarding this second amount, and he did not appeal that part of the judgment. [↑](#footnote-ref-3)
4. *Anderson c. Lafond*, 2019 QCCQ 1624. [↑](#footnote-ref-4)
5. *Lafond c. Anderson*, 2019 QCCA 1999; application for revocation of judgment dismissed, 2019 QCCA 2069. [↑](#footnote-ref-5)
6. *Toyota Canada Inc. v. Imperial Richmond Holdings Ltd,* (1994), 27 C.B.R. (3d) 1 (Alta. C.A.) at paras. 14 and 15. [↑](#footnote-ref-6)
7. *Laymond c. 9066-4293 Québec Inc.*, J.E. 2004-1744 (Sup. Ct.) at para. 79; Didier Luelles & Benoît Moore, *Droit des obligations*, 3rd ed. (Montreal: Thémis, 2018) at 1807, para. 2866, n. 248. [↑](#footnote-ref-7)
8. *Thériault c. Gestion Nali*, 2010 QCCS 2898 at para. 22; *Re Advocate Mines Ltd*, (1984) 52 C.B.R. (N.S.) 277. [↑](#footnote-ref-8)
9. Subject to an argument on prescription, which is not necessary to decide. [↑](#footnote-ref-9)
10. *Perrette Inc. c. Québec (Sous-ministre du Revenu)*, [1998] R.J.Q. 1015 (C.A.) [↑](#footnote-ref-10)