**English translation of the judgment of the Court by SOQUIJ**

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| Proposition de Fuoco | 2023 QCCA 448 |
| COURT OF APPEAL |
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| CANADA |
| PROVINCE OF QUEBEC |
| REGISTRY OF | MONTREAL |
| No.: | 500-09-029475-217 |
| (700-11-013986-130) |
|  |
| DATE: |  March 31, 2023 |
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| CORAM: | THE HONOURABLE | JULIE DUTIL, J.A.ROBERT M. MAINVILLE, J.A.STEPHEN W. HAMILTON, J.A. |
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| **IN THE MATTER OF THE PROPOSAL OF DINO FUOCO AND SUZANNE CHARETTE:**  |
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| DINO FUOCO |
| SUZANNE CHARETTE |
| APPELLANTS – Debtors-Applicants  |
| v. |
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| JACQUES MACCOMMEAU |
| LINDA BOISCLAIR |
| RESPONDENTS – Respondents |
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| and |
| RAYMOND CHABOT INC. |
| IMPLEADED PARTY – Trustee |
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| JUDGMENT |
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1. The Appellants appeal from a judgment rendered April 15, 2021, by the Superior Court (the Honourable Élise Poisson), District of Terrebonne, dismissing the Appellants' application for a declaratory judgment, with costs of $600.
2. For the reasons of Dutil, J.A., Mainville, J.A concurring, **THE COURT**:
3. **DISMISSES** the appeal, with legal costs fixed at the lump sum of $3,000.
4. For other reasons, Hamilton, J.A. would have allowed the appeal and declared that the Respondents’ claim is a provable claim and that the Appellants are released therefrom, except for an amount equivalent to the dividend the Respondents would have received as ordinary creditors under the terms of the Appellants' proposal, with the legal costs at trial and on appeal fixed at a lump sum of $2,600.

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|  | JULIE DUTIL, J.A. |
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|  | ROBERT M. MAINVILLE, J.A. |
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|  | STEPHEN W. HAMILTON, J.A. |
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| Mtre Jean-Philippe Gervais |
| COLAS MOREIRA KAZANDJIAN ZIKOVSKY |
| For the Appellants |
|  |
| Mtre Louis Turgeon-Dorion |
| Mtre Catherine Marcoux |
| MORENCY SOCIÉTÉ D’AVOCATS |
| For the Respondents |
|  |
| Date of hearing: | September 28, 2022 |

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| REASONS OF HAMILTON, J.A. |
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1. This case raises the following issue: is a claim for latent defects affecting an immovable sold before the sellers' proposal, but discovered only after their discharge, released as a result of the proposal?

**BACKGROUND**

1. The relevant facts of the case were not contested by the parties.
2. On November 9, 2009, the Respondents bought an immovable from the Appellants.
3. On March 20, 2013, the Appellants filed a proposal with the trustee Raymond Chabot inc. (hereinafter the “Trustee”) pursuant to the *Bankruptcy and Insolvency Act* (hereinafter the “*BIA*”).[[1]](#footnote-1) The Respondents were not notified of the proposal and did not file any proof of claim.
4. In the context of the proposal, the Trustee distributed a dividend of $51,728.81 to the creditors, equal to 7.20% of the proved claims. It issued its certificate of full performance on June 16, 2014, and was discharged on September 14, 2015.
5. On August 2, 2019, the Respondents filed an originating application against the Appellants before the Court of Québec, Civil Division, District of Longueuil, bearing file number 505-22-029009-190 (hereinafter the “Civil Claim”). In this application, the Respondents claimed from the Appellants an amount of $38,291.71 in damages to compensate the injury caused by the latent defects in the immovable they had purchased from the Appellants.
6. The Appellants filed an application for a declaratory judgment to recognize (1) that the Civil Claim is a “provable claim” in their proposal and (2) that they were therefore released from this obligation, (3) except for an amount equivalent to the dividend the Respondents would have received as ordinary creditors pursuant to the proposal, that is, 7.20% of the amount they could be awarded in the judgment to be rendered in the Civil Claim file. The Civil Claim was suspended until the Appellants' application for a declaratory judgment is decided.
7. On April 15, 2021, the Superior Court, District of Terrebonne (the Honourable Élise Poisson), dismissed the application for a declaratory judgment.[[2]](#footnote-2) Borrowing the logic used by the Court in *Axa Assurances inc. c. Immeuble Saratoga inc.*,[[3]](#footnote-3) where the facts were similar to those in the case at bar, the judge determined that a buyer's right of action for latent defects arises only when the defects affecting the immovable become known to the buyer.[[4]](#footnote-4) She therefore concluded that the Respondents could not have presented a claim against the Appellants when the proposal was filed because nothing at the time indicated that the immovable was affected by such defects. Accordingly, she found that the claim is not a provable claim under the proposal and the Appellants are not released therefrom.
8. That judgment is the subject of this appeal.

**ANALYSIS**

**Relevant provisions of the *BIA***

1. Section 178(2) *BIA* states the principle that the order of discharge releases the debtor from all claims provable in bankruptcy, except in those cases outlined in paragraph (1):

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| **Debts not released by order of discharge**  | **L’ordonnance de libération ne libère pas des dettes** |
| **178 (1)** An order of discharge does not release the bankrupt from | **178 (1)** Une ordonnance de libération ne libère pas le failli : |
| **(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, or any debt arising out of a recognizance or bail;  | **a)** de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d’un engagement ou d’un cautionnement en matière pénale; |
| … | … |
| **(f)** liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim; | **f)** de l’obligation visant le dividende qu’un créancier aurait eu droit de recevoir sur toute réclamation prouvable non révélée au syndic, à moins que ce créancier n’ait été averti ou n’ait eu connaissance de la faillite et n’ait omis de prendre les mesures raisonnables pour prouver sa réclamation; |
| … | … |
| **Claims released** | **Réclamations libérées** |
| **(2)** Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy. | (2) Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite. |
| [Emphasis added] | [Soulignement ajouté]  |

1. Section 121(1) *BIA* broadly defines the expression “claims provable”:

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| **Claims provable** | **Réclamations prouvables** |
| **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act. | **121 (1)** Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d’une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi. |
| [Emphasis added] | [Soulignement ajouté]  |

1. Section 121(2) *BIA* adds that a contingent or unliquidated claim may also be a provable claim:

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| **Contingent and unliquidated claims** | **Décision** |
| **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. | **(2)** La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l’article 135. |
| [Emphasis added] | [Soulignements ajoutés]  |

1. The procedure to address such a claim is set out under section 135(1.1) *BIA*:

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| **Determination of provable claims** | **Réclamations éventuelles et non liquidées** |
| **(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation. | **(1.1)** Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l’évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l’évaluation. |
| [Emphasis added] | [Soulignements ajoutés] |

1. These same provisions apply to proposals or arrangements by the debtor and are reproduced in full in a schedule to this judgment.

**The fundamental objectives of the *BIA***

1. To circumscribe the scope of these provisions, one must remember that bankruptcy is a mechanism with two main objectives: (1) to guarantee the equitable treatment of creditors[[5]](#footnote-5) and (2) to enable the financial rehabilitation of honest debtors who have simply been unlucky.[[6]](#footnote-6) It bears saying that these same objectives also underpin debtor proposals and arrangements.
2. To achieve these two objectives, a maximum number of creditors must be able to take part in the bankruptcy process and to share the proceeds from the administration of the debtor's assets. Conversely, the debtor must be discharged from a maximum number of debts. On this subject, in *AbitibiBowater*,[[7]](#footnote-7) the majority of the Supreme Court wrote:

[35] ... it is more equitable to allow as many creditors as possible to participate in the process and share in the liquidation proceeds. This makes it possible to include creditors whose claims have not yet matured when the corporate debtor files for bankruptcy, and thus avert a situation in which they would be faced with an inactive debtor that cannot satisfy a judgment. The rationale is slightly different in the context of a corporate proposal or reorganization. In such cases, the broad approach serves not only to ensure fairness between creditors, but also to allow the debtor to make as fresh a start as possible after a proposal or an arrangement is approved.

1. Because creditors with “provable claims” take part in the bankruptcy process and the “provable claims” are released by the order of discharge, both objectives are achieved by favouring a broad interpretation of the expression “provable claim”.
2. In *Schreyer*,[[8]](#footnote-8) LeBel, J., on behalf of the majority, explained that the expression “provable claim” set out under section 121 BIA must be interpreted broadly to include all debts and liabilities existing at the time of the bankruptcy or arising from obligations incurred before the day on which the debtor became bankrupt:

[26] Section 121 *BIA* contains a broad definition of a provable claim, which includes all debts and liabilities that exist at the time of the bankruptcy or that arise out of obligations incurred before the day the debtor went into bankruptcy. Thus, s. 121 provides that “[a]ll debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt” are deemed to be provable claims. According to s. 121(2), the trustee must apply s. 135 *BIA* to determine whether contingent or unliquidated claims are provable. If the debt exists and can be liquidated, if the underlying obligation exists as of the date of bankruptcy and if no exemption applies, the claim will be deemed to be provable.

[Emphasis added]

1. The objective of financially rehabilitating the debtor, on the other hand, favours a restrictive interpretation of the exceptions set out under section 178(1) *BIA*. In this regard, in *Moloney*,[[9]](#footnote-9) Gascon, J., on behalf of the majority of the Supreme Court, stated:

[79] In furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged: s. 178(1) and (2). It did so having regard to competing policy objectives. This is a delicate exercise, because the more claims that survive bankruptcy, the more difficult it becomes for a debtor to rehabilitate: …

1. As Gascon, J. indicates, the exceptions set out under section 178(1) *BIA* reflect various general policy objectives: they include fines, damages awarded for intentional bodily injury and sexual assault, alimentary support, fraud, and student and apprentice loans.
2. Because any exception to a debtor's discharge makes his or her financial rehabilitation more difficult, Gascon, J. specified that sections 178(1) and (2) of the *BIA* are exhaustive.[[10]](#footnote-10) No debts other than the ones set out under section 178(1) *BIA* can survive an order of discharge.
3. Consequently, prudence is required before finding that a claim is not a provable claim. Indeed, rejecting a claim may entail consequences that are inconsistent with the objectives of the *BIA*.
4. For one thing, if the claim is not characterized as a provable claim, the creditor cannot take part in the bankruptcy or proposal, nor can he or she receive a dividend. Rather, the creditor's claim survives the debtor's order of discharge. Depending on the circumstances, it could be unfair to the creditor, or even to the debtor and the mass of creditors. Let me explain:
* It could be unfair to the creditor in a corporate bankruptcy because he or she may presumably never be paid, even if the claim later came to be.
* It could be unfair to the debtor and the mass of creditors in a personal bankruptcy or proposal if the creditor's claim were to later come to be. In such a case, the creditor could then claim his or her entire claim and would thereby be entitled to more than the other creditors, and the debtor would have greater difficulty achieving financial rehabilitation.
1. Moreover, to allow a claim to survive discharge creates a new exception under section 178(1) *BIA*, one that was not provided for by Parliament. As Gascon, J. highlighted in *Moloney*, there cannot usually be claims that survive the order of discharge other than those set out in section 178(1) *BIA*.

***AXA Assurances***

1. The Respondents argue that the Court previously decided the issue raised in this appeal in *Axa Assurances*, in 2007:[[11]](#footnote-11)

[translation]

[27] In these circumstances, it must be concluded that Villiard's bankruptcy did not release her from the claim arising from the warranty obligation even though it was a pre-bankruptcy liability. Because it is not a provable claim, Villiard continues to be bound by the warranty of quality even after her discharge.

1. In fact, the Superior Court relied on that judgment to dismiss the Appellants' application for a declaratory judgment in this file.
2. The Appellants suggest that *Axa Assurances* should not be followed, arguing that this judgment runs counter to subsequent judgments by the Supreme Court and the courts of other provinces.
3. In *Axa Assurances*, the Court indicated that a claim will be characterized as a “provable claim” when it meets three conditions:[[12]](#footnote-12)

[translation]

[18] A review of the case law reveals that the expression “provable claim” under section 121 *BIA* requires (1) that “all the elements” supporting the claim be present before the date of bankruptcy (2) that the claim “have a serious degree of certainty and probability” and (3) that the alleged faults and the damages arising therefrom predate the bankruptcy, even if the claim is disputed.

[Emphasis added]

1. The first and third conditions of the *Axa Assurances* test address the prior existence of the claim. The second condition addresses the sufficient certainty of the claim.

**The prior existence of the claim**

1. The *Axa Assurances* test requires that [translation] “all the elements”[[13]](#footnote-13) supporting the claim, including the alleged faults and the damages arising therefrom, *predate* the bankruptcy. Because in the case at bar, the latent defects were discovered *only after* the bankruptcy, they do not meet these conditions.
2. In 2012, in *AbitibiBowater*,[[14]](#footnote-14)the Supreme Court stated its test to determine whether a claim could be characterized as a “provable claim” within the meaning of section 121 *BIA*. Thus, Deschamps, J., on behalf of the majority, wrote:[[15]](#footnote-15)

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a creditor. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Third, it must be possible to attach a monetary value to the debt, liability or obligation. I will examine each of these requirements in turn.

[Emphasis added]

1. This test is less restrictive than the one in *Axa Assurances* with respect to prior existence. The second condition of the *AbitibiBowater* test requires only that the “debt, liability or obligation must be incurred before the debtor becomes bankrupt”,[[16]](#footnote-16) without going so far as to require that the damages have materialized.
2. In my opinion, this way of considering the prior existence requirement complies with the language of the *BIA*. First, section 121(1) *BIA* expressly provides for the possibility of a future claim being deemed to be a provable claim on condition that the obligation was incurred before the bankruptcy. Then, sections 121(2) and 135(1.1) of the *BIA* address the possibility that a contingent or unliquidated claim may be a provable claim.
3. Furthermore, the principle that whatever happened before the bankruptcy or proposal is included in the bankruptcy or proposal, while everything that happens after is not, is in line with the fundamental objectives of the *BIA*. All the creditors that did business with the debtor before the bankruptcy or proposal are treated the same way. The debtor hands over all the assets generated by his or her activities before the bankruptcy to the trustee and, in return, is released from all the claims relating to those activities.
4. Returning to the facts of the case at bar, the proceeds of the 2009 sale of the house are included in the assets referred to in the proposal and it is appropriate that the claim arising from this sale also be included. Conversely, as of the bankruptcy or proposal, the debtor who incurs obligations is liable for them.
5. This is enough to set aside the *Axa Assurances* prior existence requirement.
6. The Respondents' Civil Claim satisfies the prior existence criterion stated by the Supreme Court in *AbitibiBowater* because the sale of the immovable took place before the proposal. As we have just seen, it is of no consequence that the damages materialized only after the proposal.

**Sufficient certainty**

1. The second condition of the *Axa Assurances* test requires that the claim [translation] “include a serious degree of certainty and probability”.[[17]](#footnote-17)
2. This criterion originated in the case law. The first judgment that refers to this notion is *Claude Resources*, from 1993, rendered by the Court of Queen's Bench for Saskatchewan.[[18]](#footnote-18)
3. The connection between this criterion and the *BIA* is tenuous. Section 121(1) *BIA* expressly provides for the possibility that a future claim could be deemed a provable claim and sections 121(2) and 135(1.1) address the possibility that a contingent or unliquidated claim could be a provable claim. The notion of “sufficient certainty” is not there and it is not necessary. The trustee can accept an uncertain claim as a provable claim and assess it accordingly.
4. In the years since *Claude Resources* was rendered, this notion of sufficient certainty has been the subject of some jurisprudential controversy, with the courts of some provinces accepting it (including this Court in *Axa Assurances*[[19]](#footnote-19)),[[20]](#footnote-20) and others rejecting it or limiting its scope.[[21]](#footnote-21) It has also been the subject of sharp criticism by some authors[[22]](#footnote-22) who pointed out, quite rightly in my view, that it was inconsistent with the fundamental objectives of insolvency law.
5. In spite of the criticisms, the Supreme Court confirmed the notion of sufficient certainty, while rewording it, in two judgments rendered after *Axa Assurances* on environmental orders, namely, *AbitibiBowater*[[23]](#footnote-23)and *Orphan Well*. [[24]](#footnote-24)
6. In *AbitibiBowater*, the Newfoundland and Labrador Minister of Environment and Conservation had ordered the debtor to carry out decontamination work. If it did not, the province could then do the work itself and claim the cost. The province maintained that these environmental orders were of a non-pecuniary nature, such that they could not be characterized as provable claims in the debtor's arrangement, whereas the debtor argued the opposite.
7. It was in this particular context that the Supreme Court developed its tripartite test to determine what debts can be characterized as “provable claims” within the meaning of section 121 *BIA*. It reworded the criterion of sufficient certainty as follows: “it must be possible to attach a monetary value to the debt, liability or obligation”.[[25]](#footnote-25) With that criterion, the Supreme Court sought to determine the probability that environmental orders, which are not stated in pecuniary terms, will be converted into pecuniary debts.
8. On behalf of the majority, Deschamps, J. specified that the aim of this condition is for contingent claims to be included in the insolvency process only if it is sufficiently certain that the event that has not yet occurred will happen:[[26]](#footnote-26)

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.

[Emphasis added]

1. In that case, based on the factual observations of the trial judge, the majority concluded that it was sufficiently certain that the province would perform the decontamination work and that it was therefore included in the definition of a creditor with a pecuniary claim.
2. The facts in *Orphan Well* were similar to those in *AbitibiBowater*. In that case, the issue was end-of-life responsibilities incumbent on the debtor with respect to oil wells. Wagner, J., on behalf of the majority, concluded that the regulatory authority could not financially benefit from the enforcement of the obligations and was therefore not a creditor within the meaning of the first condition of the *AbitibiBowater* test:[[27]](#footnote-27)

[135] ... it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. Neither the Regulator nor the Government of Alberta stands to benefit financially from the enforcement of these obligations. These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of “provable claims”.

1. This conclusion was enough to decide the appeal. However, Wagner, J., *in obiter*, continued his analysis of the sufficient certainty criterion, finding that such an analysis might be useful in the future.[[28]](#footnote-28) He specified that the third condition of the *AbitibiBowater* test was not limited to characterizing the nature of the claim as “financial” or “not financial”, as some would have it,[[29]](#footnote-29) but also included an analysis of the certainty of the claim:[[30]](#footnote-30)

[146] ... Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the Abitibi test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative.

1. A similar test was applied by this Court in disciplinary proceedings.[[31]](#footnote-31) In those matters, the Court had to determine whether such proceedings were likely to result in orders to pay a fine, in which case they could then be characterized as provable claims.
2. In my view, the sufficient certainty criterion risks violating the fundamental objectives of the *BIA*. If a claim is deemed insufficiently certain, it cannot then be characterized as a provable claim. The creditor is therefore excluded from the bankruptcy or proposal and receives no dividend. This consequence is not dramatic for this creditor – there is little difference to him or her between receiving no dividend and receiving a small dividend based on a minimal assessment due to the uncertain nature of the claim.
3. However, the consequence to the debtor is potentially serious. If the claim is deemed insufficiently certain at the time of the bankruptcy or proposal, the debtor will not be released therefrom. If that claim materializes later, the debtor is fully liable therefor. This result clearly goes against the fundamental principle of the *BIA* that the debtor must be released from all the obligations incurred before the bankruptcy or proposal and must be able to start anew. It is also illogical (why would a claim survive because it is speculative?) and inconsistent with the remarks of Gascon, J. in *Moloney* to the effect that exceptions to the bankrupt's discharge are exhaustively listed under section 178(1) *BIA*. Indeed, it creates a new exception for speculative claims that is wholly unrelated to those listed under section 178(1) *BIA*.
4. In my view, it would be better to limit the application of the sufficient certainty criterion. There are two ways to do so.
5. One solution would be to limit the notion of insufficient certainty to the clearest of cases, where the trustee has a very high level of certainty that the condition will never come to pass. Care should be taken not to reject a proof of claim as insufficiently certain only to then have the condition come to pass. As Belzil, J. of the Court of Queen's Bench of Alberta said, “It would be incongruous in the extreme if a Trustee rejected a claim as being too remote and speculative only to have a Court later conclude that the claim was valid and quantifiable”.[[32]](#footnote-32) In those cases where the condition coming to pass is uncertain, it would be better to accept the proof of claim and value the debt at a minimal amount due to the high degree of uncertainty.
6. Another solution would be to limit the application of the sufficient certainty criterion to those claims concerning public duties. There are public interest reasons that could justify not releasing debtors from their environmental obligations. In *Orphan Well*, Wagner, J. clearly said so: the debtor must not be released from his or her environmental duty because, if the debtor is released, the obligation to clean the site falls on the state, that is, on taxpayers. Certainly, environmental duties are not part of the exhaustive list of exceptions to the debtor's release set out under section 178(1) *BIA*, but they are of the same nature as the exceptions set out thereunder. The only way not to release the debtor from this obligation was to conclude that it was not a provable claim within the meaning of section 121 *BIA*. The same observation applies to disciplinary proceedings.[[33]](#footnote-33)
7. The distinction between public duties and purely private duties is well known. In *AbitibiBowater*, McLachlin, J., dissenting, characterized the environmental obligations as duties to protect the public and made “[t]he distinction between regulatory obligations under the general law aimed at the protection of the public and monetary claims that can be compromised in CCAA restructuring or bankruptcy”.[[34]](#footnote-34) It is clear that the claim for latent defects is a financial claim that does not concern the protection of the public. It is not of the same nature as those exceptions set out in section 178(1) *BIA*. These exceptions concern debts for which there is a certain collective interest that justifies not releasing the debtor. Such collective interest does not exist in the context of an obligation of quality covering private property.
8. In my view, limiting the application of the sufficient certainty criterion to public duties would be a good solution. If that is the case, any claim against a debtor based on an obligation of quality for latent defects incurred before the proposal or bankruptcy should be characterized as a “provable claim” and the debtor should be released therefrom, even if the defect had not yet appeared on the date of the bankruptcy or proposal. This solution appears more consistent with the teachings of the Supreme Court that the expression “provable claims” must receive a broad interpretation due to the fundamental objective of the *BIA* to favour the debtor's financial rehabilitation. Another advantage of this approach is that it makes no distinction between the buyers based on the date the latent defect was discovered and does not create a pernicious incentive for them to “postpone” the discovery, thereby avoiding a problem caused by the sufficient certainty criterion.[[35]](#footnote-35)
9. The Supreme Court, however, adopted the criterion of sufficient certainty in *AbitibiBowater* and *Orphan Well* without adding that this criterion applies only to claims concerning public duties. It is up to the Supreme Court to establish the scope of its judgments. Furthermore, other courts (including this Court) have applied this criterion to other claims, in particular to disciplinary proceedings. The Court also applied it in *Axa Assurances*, a matter concerning latent defects. In these circumstances, it would be more cautious to leave the question open and to assume that the sufficient certainty criterion applies to the case at bar, especially because it is not necessary to decide that issue to decide this appeal.

**Point in time for assessing sufficient certainty**

1. In principle, the trustee (or, on appeal, the court) characterizes a claim as provable or not and values it as of the date of the bankruptcy or proposal when it examines the proofs of claim filed by the creditors. Sufficient certainty is therefore assessed at this moment. Indeed, if the Respondents had filed a proof of claim in the present matter at the time of the proposal in 2013, the Trustee would have had to assess the certainty based on the information available at that time. Because no defect had yet appeared at the time, the Trustee would have likely rejected the proof of claim as insufficiently certain. However, the Trustee did not have to perform this exercise because no proof of claim was filed.
2. The question therefore surfaced for the first time in the case at bar when the Respondents sued the Appellants in 2019. The claim must still be valued on the date of the proposal in 2013, but the question is whether, in valuing the claim, the Court must limit itself to the information available in 2013, or whether it can take into consideration the information available in 2019.
3. In my view, the information available in 2019 must be considered to value the Respondents' claim. Otherwise, the Court would have to conclude that the claim was too uncertain in 2013, which makes no sense. The risk of rejecting a claim as too uncertain is that the condition comes to pass. To repeat the warning of Belzil, J., “It would be incongruous in the extreme if a Trustee rejected a claim as being too remote and speculative only to have a Court later conclude that the claim was valid and quantifiable”.[[36]](#footnote-36) The case at bar is worse: we know that the condition was fulfilled in 2019. It would be inconsistent to allow the claim to survive the proposal because it was too uncertain in 2013, while knowing that it is now certain.
4. The Respondents, however, are not without recourse. Section 178(1)(*f*) *BIA* allows the creditor who did not file a proof of claim, because the creditor had no knowledge of the bankruptcy or proposal at the time, to present his or her claim even after the debtor and the trustee have been discharged. The discharged debtor must then pay the creditor the dividend to which he or she would ordinarily have been entitled had a proof of claim been filed in time.
5. This provision applies here. The Respondents did not file a proof of claim in 2013 because they had no knowledge of the Appellants' proposal or their claim against them. Pursuant to section 178(1)(*f*) *BIA*, the Respondents have therefore kept their right to the dividend they would have been entitled to receive in the Appellants' proposal as ordinary creditors.
6. This result seems fair to me. The Respondents receive the same dividend they would have received had they discovered the defect in 2013 and filed a proof of claim in due time. They must not lose all their remedies because of the late discovery of the defect, but neither must they benefit therefrom.
7. This result is available in this appeal only because of the fact that the Respondents did not know about the Appellants' proposal. It is certainly foreseeable that trustees will adapt their practices and close the door to the application of section 178(1)(*f*) *BIA* in the future by preparing an exhaustive list of potential creditors to maximize the discharge of debtors. If that happens, one can imagine that it will become rather rare for creditors not to be aware of the bankruptcy or proposal of the debtor and to be able to present their claim later (when the damage materializes) and obtain a dividend despite the debtor's discharge. In practice, this undoubtedly means that it will become rare for a creditor with a contingent claim on the date of the bankruptcy or proposal to obtain any dividend.
8. I remain of the view that the best solution to this problem would be to limit the notion of sufficient certainty to public duties. But I will leave this question for another day.
9. I would therefore allow the appeal and declare that the claim made by the Respondents is a provable claim and that the Appellants are released therefrom, except for an amount equivalent to the dividend the Respondents would have received as ordinary creditors in the Appellants' proposal, with the legal costs set at a lump sum of $600 in first instance and $2,000 on appeal.
10. Since writing my reasons, I have read the reasons of my colleague Dutil, J.A., with which my colleague Mainville, J.A. agrees, proposing to dismiss the appeal. They do not agree with my desire to limit the application of sufficient certainty to public duties. I understand them, given the case law of the Supreme Court and this Court. I agree that this question should remain open.
11. However, my conclusion is based on the fact that the courts were called upon to assess sufficient certainly only in 2019, at which point it was clear that the Respondents' claim was sufficiently certain. My colleagues do not address this question, but the effect of their judgment is to allow the claim to survive the proposal because it was too uncertain in 2013, notwithstanding the fact that it is now certain. I cannot agree with this conclusion.

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| STEPHEN W. HAMILTON, J.A. |

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| REASONS OF DUTIL, J.A. |
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1. My colleague Hamilton, J.A. is of the opinion that the claim for latent defects affecting an immovable sold before the Appellants' proposal was filed but which appeared long after the debtor was discharged is a claim provable within the meaning of section 121 of the *Bankruptcy and Insolvency Act*[[37]](#footnote-37) (*BIA*) and that the appeal should be allowed. With respect, I do not share his point of view.
2. Under sections 121(1) and 135 *BIA*, the trustee must analyze the claims received and determine whether they may be characterized as “claims provable”. As my colleague Hamilton, J.A. explains, the mechanism provided for makes it possible to both guarantee the equitable treatment of creditors and the rehabilitation of honest debtors.[[38]](#footnote-38)
3. The case law on claims provable is abundant. With respect to a claim arising from the warranty for latent defects discovered after the debtor's discharge, in *Axa Assurances*,[[39]](#footnote-39) this Court specified the conditions under which it may be characterized as a claim provable:

[translation]

[18] A review of the case law reveals that the expression “provable claim” under section 121 BIA requires (1) that “all the elements” supporting the claim be present before the date of bankruptcy (2) that the claim “have a serious degree of certainty and probability” and (3) that the alleged faults and the damages arising therefrom predate the bankruptcy, even if the claim is disputed.

[19] At the time of Villiard's bankruptcy, in 1987, it would have been impossible for D'Orazio to file a claim with the trustee because he was unaware of the existence of latent defects affecting his home's fireplace.

…

[27] In these circumstances, it must be concluded that Villiard's bankruptcy did not release her from the claim arising from the warranty obligation even though it was an undertaking which predated the bankruptcy. Because it is not a claim provable, Villiard continues to be bound by the warranty of quality even after her discharge.[[40]](#footnote-40)

1. In that case, the Court therefore determined that the claim was not a claim provable because the existence of the latent defect could not have been suspected on the date of the bankruptcy.
2. Since then, the Supreme Court, in *AbitibiBowater*,reviewed the interpretation that sections 121(1) and 135(1.1) *BIA* should receive and, more particularly, the conditions to be met for a claim to be characterized as provable. Deschamps, J., for the majority, wrote:

[26] These provisions highlight three requirements that are relevant to the case at bar. First, there must be a debt, a liability or an obligation to a creditor. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Third, it must be possible to attach a monetary value to the debt, liability or obligation. I will examine each of these requirements in turn.[[41]](#footnote-41)

[Emphasis added]

1. Deschamps, J. reiterated the particular approach of the *BIA* that makes it possible to assert a claim in insolvency proceedings, even if it is dependent on an event that has not yet occurred, contrary to common law and civil law rules.[[42]](#footnote-42) She pointed out that this ensures equity between creditors and the finality of the insolvency proceeding for the debtor, who may then benefit from a fresh start.[[43]](#footnote-43)
2. In the first part of paragraph [36] of *AbitibiBowater*, Deschamps, J. referred to the criterion accepted by the courts to decide whether a contingent claim can be included in the insolvency process – that is, that the event not be too remote or speculative. She then specified how this criterion must be applied in the context of an environmental order:

[36] The criterion used by courts to determine whether a contingent claim will be included in the insolvency process is whether the event that has not yet occurred is too remote or speculative. (*Confederation Treasury Services Ltd.* *(Bankrupt)*, *Re* (1997), 96 O.A.C. 75). In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process.[[44]](#footnote-44)

[Emphasis added]

1. It clearly appears both from paragraph [26] and from paragraph [36] of *AbitibiBowater* that the principles set out in that judgment do not apply solely to environmental orders, as my colleague Hamilton, J.A. would like them to, but to all contingent claims within the meaning of section 121(1) *BIA*. In every case, the contingent claim must not be too remote or speculative for it to be included in the insolvency process. Moreover, it must be possible to attach a monetary value to it. The case law is clear in this regard.
2. In fact, a few years after *AbitibiBowater*, Wagner, C.J., in *Orphan Well Assn. v. Grand Thorton*, revisited this criterion of “sufficient certainty”. He said:

[146] Below, I will explain why the OWA’s involvement is insufficient to satisfy the “sufficient certainty” test. First, I note that any reliance the chambers judge placed on the intrinsically financial nature of the Abandonment Orders was an error. In this regard, I am in complete agreement with Martin J.A. Considering whether an order is intrinsically financial is an erroneous interpretation of the third step of the *Abitibi* test. It is too broad and would result in a provable claim being found even where the existence of a monetary claim in bankruptcy is merely speculative. Thus, in *Nortel* CA, Juriansz J.A. rightly rejected the argument that the *Abitibi* test did not require a determination that the regulator would perform the environmental work and claim reimbursement, and that it was sufficient for there to be an environmental order requiring an expenditure of funds by the bankrupt estate.[[45]](#footnote-45)

1. This criterion is therefore essential to determining whether a claim may be characterized as provable. Contrary to the conclusion drawn by my colleague Hamilton, J.A., the section of that judgment concerning the “sufficient certainty” criterion is not a mere *obiter dictum* this Court may set aside. Wagner, C.J. thought it necessary to give indications on the analysis of this criterion because they might prove useful in future cases.[[46]](#footnote-46) These are supplementary reasons that add to the preceding ones.
2. The Appellants argue that only the prior existence of the obligation pursuant to which a claim is made is relevant to determine whether it is a claim provable. In their view, the hypothetical or contingent nature of the claim should be analyzed only at the time the claim is filed. My colleague Hamilton, J.A. essentially agrees with this approach.
3. I cannot accept this argument. The assessment must be done at the time of the bankruptcy or the filing of the proposal. As the Supreme Court stated in *Schreyer*,[[47]](#footnote-47) the date of the bankruptcy is of critical importance when it is necessary to determine whether a claim may be characterized as provable within the meaning of the *BIA*. If it is liquidated as of the date of the bankruptcy, there is no doubt that it is a claim provable. However, if it is not liquidated on that date, it becomes necessary to determine whether the claim is too uncertain or hypothetical to be valued by the trustee under section 135 *BIA*. The approach proposed by the Appellants and accepted by my colleague Hamilton, J.A. calls this Supreme Court case law into question.
4. Yet, in *Thibault*, my colleague Schrager, J.A. clearly explained that it was on the date of the bankruptcy that the hypothetical nature of the claim must be valued:

[20] It has been stated that in order to come within the definition of “claim provable”, the existence of the debt must be, at the date of the bankruptcy, probable and not hypothetical, or not too remote or speculative, as Appellant submits.

…

[26] In all cases, an inquiry should be made as to when the obligation was incurred. In this case, I believe the date was the hearing date when Respondent indicated that he was pleading guilty. However, even if that were not the precise date when the obligation was created, I believe that the long delay of the committee in rendering a decision finding Respondent guilty and then imposing the monetary sanction is relevant in determining that the fines imposed were claims provable. In this respect, the decision of the Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.* is relevant. Speaking through Justice Deschamps, the Court indicated that, in order to determine whether a claim is a claim provable, a factual inquiry is required to determine whether the conditions for the inclusion of the claim as a claim provable are met. Thus, in this case, it is facile to say that the fines had not yet been imposed on the date of the bankruptcy. The appropriate factual inquiry is whether, at the date of the bankruptcy, the conditions were met in order to affirm that a sanction would probably be imposed. In *Harton* (decided years prior to *Abitibi*) it could be said that the condition was not met. In the present case, not only was the hearing held before bankruptcy but the Respondent indicated that he would plead guilty thus making himself liable to a penalty. Once the committee would not accept his guilty plea, Respondent presented legal arguments based on the Charter, but that too occurred eight months prior to the bankruptcy. It is true that the imposition of a fine, as opposed to a purely non-monetary penalty, was discretionary. However, it is not erroneous to consider the imposition of a fine probable or at least more than hypothetical as at the date of the bankruptcy. As such, no palpable error of fact or mixed fact and law appears from the judgment of the Court of Quebec despite the judge’s inaccurate reading of Section 121(1) *BIA*.

[Emphasis added]

1. As Schrager, J.A. states, the facts of each case must be examined to determine whether the event that has not yet occurred is too remote or speculative at the time of the bankruptcy to allow the claim to be characterized as provable within the meaning of the *BIA*. If there is no error of law in the application of the principles of law, it is a question of fact or at best a mixed question. The Court can therefore intervene only where there is a palpable and overriding error, and there is none here.
2. Like the Appellants, my colleague Hamilton, J.A. argues that the entire body of case law stated above is either wrong or inapplicable and that a new reading of the law should be adopted here. With respect, that is to flout the rule of precedent, also known as *stare decisis*, whose purpose is to ensure the certainty of the law and is, in fact, one of the foundational principles of our law because it promotes predictability, reduces arbitrariness and enhances fairness by making justice more effective and economical and by discouraging the multiplication of legal proceedings.[[48]](#footnote-48) While the Supreme Court, in its judgments in *Bedford*[[49]](#footnote-49) and *Carter*, [[50]](#footnote-50) opened the door to the possibility of not following its precedents in certain exceptional circumstances – that is (1) when a new legal issue is raised, or (2) when a change in the circumstances or evidence “fundamentally shifts the parameters of the debate” – this is a high threshold, as the Supreme Court reminded us in *R. v. Comeau*, [[51]](#footnote-51) one that may apply especially when constitutional questions are at issue and the facts that gave rise to the precedent are radically different.[[52]](#footnote-52) That is clearly not the case here.
3. As for the Court's precedents, these must be followed by the Court itself, unless a subsequent judgment of the Supreme Court invalidates the reasoning of the judgment being used as precedent, unless the Court notes an error or there are compelling reasons or circumstances to depart from precedent, or unless the earlier judgment is clearly wrong.[[53]](#footnote-53) Once again, that is not the case here.
4. In the case at bar, the trial judge applied the correct legal principles established by a solid body of case law that should not be disregarded. In addition, her judgment rests on the fact that prior to the fall of 2017, that is, well after the proposal was filed in 2013 and the certificate of full performance was issued on June 16, 2014, there was no indication of the latent defects affecting the immovable.[[54]](#footnote-54) This conclusion of fact is central to the outcome of this dispute. Indeed, when the proposal was filed in 2013, or even before June 2014, it was impossible to foretell that a claim for latent defects would eventually be filed. While the Appellants’ obligation of warranty of quality existed at the time of the proposal, the debt that could have arisen therefrom was hypothetical and it was impossible to attach a monetary value to it.
5. The judge therefore did not commit any reviewable error and I am of the view that her judgment must be upheld.
6. For these reasons, I would dismiss the appeal, with legal costs set at the lump sum of $3,000.

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| JULIE DUTIL, J.A. |

SCHEDULE – *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3.

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| **Definitions** | **Définitions** |
| **2** | **2** |
| … | … |
| Provable claim: Includes any claim or liability provable in proceedings under this Act by a creditor | Réclamation prouvable Toute réclamation ou créance pouvant être prouvée dans des procédures intentées sous l’autorité de la présente loi par un créancier.  |
| … | … |
| **Claims provable** | **Réclamations prouvables** |
| **121 (1)** All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act. | **121 (1)** Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date à laquelle il devient failli, ou auxquels il peut devenir assujetti avant sa libération, en raison d’une obligation contractée antérieurement à cette date, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi. |
| **Contingent and unliquidated claims** | **Décision** |
| **(2)** The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135. | **(2)** La question de savoir si une réclamation éventuelle ou non liquidée constitue une réclamation prouvable et, le cas échéant, son évaluation sont décidées en application de l’article 135. |
| … | … |
| **Trustee shall examine proof** | **Examen de la preuve** |
| **135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security. | **135 (1)** Le syndic examine chaque preuve de réclamation ou de garantie produite, ainsi que leurs motifs, et il peut exiger de nouveaux témoignages à l’appui. |
| **Determination of provable claims** | **Réclamations éventuelles et non liquidées** |
| **(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation. | **(1.1)** Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l’évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l’évaluation. |
| … | … |
| **Debts not released by order of discharge** | **L’ordonnance de libération ne libère pas des dettes** |
| **178 (1)** An order of discharge does not release the bankrupt from | **178 (1)** Une ordonnance de libération ne libère pas le failli : |
| **(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, or any debt arising out of a recognizance or bail; | **a)** de toute amende, pénalité, ordonnance de restitution ou toute ordonnance similaire infligée ou rendue par un tribunal, ou de toute autre dette provenant d’un engagement ou d’un cautionnement en matière pénale; |
| **(a.1)** any award of damages by a court in civil proceedings in respect of | **a.1)** de toute indemnité accordée en justice dans une affaire civile : |
| **(i)** bodily harm intentionally inflicted, or sexual assault, or | **(i)** pour des lésions corporelles causées intentionnellement ou pour agression sexuelle, |
| **(ii)** wrongful death resulting therefrom; | **(ii)** pour décès découlant de celles-ci; |
| **(b)** any debt or liability for alimony or alimentary pension; | **b)** de toute dette ou obligation pour pension alimentaire; |
| **(c)** any debt or liability arising under a judicial decision establishing affiliation or respecting support or maintenance, or under an agreement for maintenance and support of a spouse, former spouse, former common-law partner or child living apart from the bankrupt; | **c)** de toute dette ou obligation aux termes de la décision d’un tribunal en matière de filiation ou d’aliments ou aux termes d’une entente alimentaire au profit d’un époux, d’un ex-époux ou ancien conjoint de fait ou d’un enfant vivant séparé du failli; |
| **(d)** any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or administrator of the property of others; | **d)** de toute dette ou obligation résultant de la fraude, du détournement, de la concussion ou de l’abus de confiance alors qu’il agissait, dans la province de Québec, à titre de fiduciaire ou d’administrateur du bien d’autrui ou, dans les autres provinces, à titre de fiduciaire; |
| **(e)** any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability that arises from an equity claim; | **e)** de toute dette ou obligation résultant de l’obtention de biens ou de services par des faux-semblants ou la présentation erronée et frauduleuse des faits, autre qu’une dette ou obligation qui découle d’une réclamation relative à des capitaux propres; |
| **(f)** liability for the dividend that a creditor would have been entitled to receive on any provable claim not disclosed to the trustee, unless the creditor had notice or knowledge of the bankruptcy and failed to take reasonable action to prove his claim; | **f)** de l’obligation visant le dividende qu’un créancier aurait eu droit de recevoir sur toute réclamation prouvable non révélée au syndic, à moins que ce créancier n’ait été averti ou n’ait eu connaissance de la faillite et n’ait omis de prendre les mesures raisonnables pour prouver sa réclamation; |
| **(g)** any debt or obligation in respect of a loan made under the Canada Student Loans Act, the Canada Student Financial Assistance Act or any enactment of a province that provides for loans or guarantees of loans to students where the date of bankruptcy of the bankrupt occurred | **g)** de toute dette ou obligation découlant d’un prêt consenti ou garanti au titre de la Loi fédérale sur les prêts aux étudiants, de la Loi fédérale sur l’aide financière aux étudiants ou de toute loi provinciale relative aux prêts aux étudiants lorsque la faillite est survenue avant la date à laquelle le failli a cessé d’être un étudiant, à temps plein ou à temps partiel, au regard de la loi applicable, ou dans les sept ans suivant cette date; |
| **(i)** before the date on which the bankrupt ceased to be a full- or part-time student, as the case may be, under the applicable Act or enactment, or |  |
| **(ii)** within seven years after the date on which the bankrupt ceased to be a full- or part-time student; |  |
| **(g.1)** any debt or obligation in respect of a loan made under the Apprentice Loans Act where the date of bankruptcy of the bankrupt occurred | **(g.1)** de toute dette ou obligation découlant d’un prêt octroyé au titre de la Loi sur les prêts aux apprentis lorsque la faillite est survenue avant la date à laquelle le failli a cessé, au regard de cette loi, d’être un apprenti admissible, au sens de cette loi, ou dans les sept ans suivant cette date; |
| **(i)** before the date on which the bankrupt ceased, under that Act, to be an eligible apprentice within the meaning of that Act, or |  |
| **(ii)** within seven years after the date on which the bankrupt ceased to be an eligible apprentice; or |  |
| **(h)** any debt for interest owed in relation to an amount referred to in any of paragraphs (a) to (g.1). | **h)** de toute dette relative aux intérêts dus à l’égard d’une somme visée à l’un des alinéas a) à g.1). |
| **Court may order non-application of subsection (1)** | **Ordonnance de non-application du paragraphe**  |
| **(1.1)** At any time after five years after the day on which a bankrupt who has a debt referred to in paragraph (1)(g) or (g.1) ceases to be a full- or part-time student or an eligible apprentice, as the case may be, under the applicable Act or enactment, the court may, on application, order that subsection (1) does not apply to the debt if the court is satisfied that | **(1.1)** Lorsque le failli qui a une dette visée aux alinéas (1)g) ou g.1) n’est plus un étudiant à temps plein ou à temps partiel ou un apprenti admissible, selon le cas, depuis au moins cinq ans au regard de la loi applicable, le tribunal peut, sur demande, ordonner que la dette soit soustraite à l’application du paragraphe (1) s’il est convaincu que le failli a agi de bonne foi relativement à ses obligations découlant de cette dette et qu’il a et continuera à avoir des difficultés financières telles qu’il ne pourra pas acquitter celle-ci. |
| **(a)** the bankrupt has acted in good faith in connection with the bankrupt’s liabilities under the debt; and |  |
| **(b)** the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt. |  |
| **Claims released** | **Réclamations libérées** |
| **(2)** Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy. | **(2)** Une ordonnance de libération libère le failli de toutes autres réclamations prouvables en matière de faillite. |

1. *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3. [↑](#footnote-ref-1)
2. *Fuoco c.* *Maccomeau*, Terrebonne Sup. Ct., 700-11-013986-130, April 15, 2021 (Élise Poisson, J.S.C.). [↑](#footnote-ref-2)
3. *Axa Assurance inc.* c. *Immeuble Saratoga inc.*, 2007 QCCA 1807. [↑](#footnote-ref-3)
4. *Fuoco c.* *Maccomeau*, Terrebonne Sup. Ct., 700-11-013986-130, April 15, 2021 (Élise Poisson, J.S.C.) at para. 26. [↑](#footnote-ref-4)
5. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 32; *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para.  35. [↑](#footnote-ref-5)
6. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 32; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 at para. 7. [↑](#footnote-ref-6)
7. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para.  35. [↑](#footnote-ref-7)
8. *Schreyer v. Schreyer*, 2011 SCC 35 at para. 26. [↑](#footnote-ref-8)
9. *Alberta (Attorney General) v. Moloney*, [2015] 3 S.C.R. 327 at para. 79. [↑](#footnote-ref-9)
10. *Ibid*. [↑](#footnote-ref-10)
11. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807 at para. 27. [↑](#footnote-ref-11)
12. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807 at para. 18. [↑](#footnote-ref-12)
13. *Ibid*. [↑](#footnote-ref-13)
14. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67. [↑](#footnote-ref-14)
15. *Id.* at para. 26. [↑](#footnote-ref-15)
16. *Ibid*. [↑](#footnote-ref-16)
17. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807 at para. 18. [↑](#footnote-ref-17)
18. *Claude Resources Inc. (Bankrupt), Re*, [1993] CarswellSask 26 (QB). [↑](#footnote-ref-18)
19. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807. [↑](#footnote-ref-19)
20. See also *Lotfi c. Québec (Procureur général),* [2003] RJQ 141 (Sup. Ct.) at para. 111, aff'd in *Lofti c. Québec (Procureur général)*, 2005 QCCA 980 without addressing that aspect; *Wiebe,* *Re*,1995 CanLII 7367 (ON SC) at para. 7; *E.R.I. Engine Rebuilders Inc. v. MacEachern*, 2011 PECA 2 (P.E.I. C.A.). [↑](#footnote-ref-20)
21. *Confederation Treasury Services Ltd. (Bankrupt), Re (1997)*, 1997 CanLII 3544 (ON CA); SemCanada *Crude Co., Re*, 2012 ABQB 495 (Alta. Q.B.); appeal refused *RMP Energy Inc. v. SemCAMS ULC*, 2012 ABCA 312; additional reasons 2013 CarswellAlta 240; *Experienced Equipment Sales & Rentals Inc. (Re)*, 2011 ABQB 641 at para. 25. [↑](#footnote-ref-21)
22. See, *inter alia*, Scott Bomhof, “Case Comment: *Ontario New Home Warranty Program v. Jiordan Homes Ltd.”* (1999), 10 C.B.R. (4th) 5; Roderick J. Wood and David J. Bryan, “Creeping statutory obsolescence in Bankruptcy Law”, I.I.C. Journal, art. Vol. 3-1: “Unfortunately, by failing to directly deal with the matter of disclaimer and leaving the matter to implication, the bankruptcy legislation did not make clear this legislative objective and opened the road for the misinterpretation of the provision. The provision was never intended to exclude contingent liabilities from the definition of a provable claim. It was merely included to ensure that claims that arose following the bankruptcy as a result of a disclaimer of the contract by the trustee were to be included.” [↑](#footnote-ref-22)
23. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67. [↑](#footnote-ref-23)
24. *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5. [↑](#footnote-ref-24)
25. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para.  26. [↑](#footnote-ref-25)
26. *Id.* at para. 36. [↑](#footnote-ref-26)
27. *Orphan Well Association v. Grant Thornton Ltd*., 2019 SCC 5 at para. 135. [↑](#footnote-ref-27)
28. *Id.* at para. 137. [↑](#footnote-ref-28)
29. *Id.* at para. 121. [↑](#footnote-ref-29)
30. *Id.* at para. 146. [↑](#footnote-ref-30)
31. *Chambre de la sécurité financière c. Harton*, 2008 QCCA 269 at para. 50; *Chambre de la sécurité financière c.* *Thibault*, 2016 QCCA 169. [↑](#footnote-ref-31)
32. *Experienced Equipment Sales & Rentals Inc. (Re)*, 2011 ABQB 641 at para. 25. [↑](#footnote-ref-32)
33. In this regard, see section 178(1)(*a*) *BIA*. [↑](#footnote-ref-33)
34. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para.  74; quoting *Lamford Forest Products Ltd. (Re)* (1991), 86 D.L.R. (4th) 534; *Shirley Re*, (1995), 129 D.L.R. (4th) 105 at 109; *Husky Oil Operations Ltd. v. Ministre du Revenu national*, [1995] 3 S.C.R. 453 at para. 146. [↑](#footnote-ref-34)
35. This issue was in fact raised by some authors in the scholarly commentary after *AbitibiBowater* was rendered. Author Anna J. Lund wrote that the third condition in *AbitibiBowater* had generally created pernicious incentives for debtors as well as for creditors, regulators and governments alike; see Anna J. Lund, “Lousy dentists, bad drivers, and abandoned oil wells: a new approach to reconciling provincial regulatory regimes and federal insolvency law” (2017), 80 Sask. L. Rev 157–188 at paras. 21 and 25. This issue was also raised by the lower courts; to this end, see *Bibombe c. Thornicroft*, 2022 QCCS 499 at paras. 16 to 18. [↑](#footnote-ref-35)
36. *Experienced Equipment Sales & Rentals Inc. (Re)*, 2011 ABQB 641 at para. 25. [↑](#footnote-ref-36)
37. *Bankruptcy and Insolvency Act*, R.S.C. (1985) c. B-3. [↑](#footnote-ref-37)
38. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 32, [2015] 3 S.C.R. 327 at para. 32; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 at para. 7. [↑](#footnote-ref-38)
39. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807 at para. 33. [↑](#footnote-ref-39)
40. *AXA Assurances inc. c. Immeubles Saratoga inc*., 2007 QCCA 1807 at paras. 18–19 and 27. [↑](#footnote-ref-40)
41. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para.  26, [2012] 3 S.C.R. 443 at para. 26. [↑](#footnote-ref-41)
42. *Newfoundland and Labrador v. AbitibiBowater Inc*., 2012 SCC 67 at para. 34, [2012] 3 S.C.R. 443 at para. 34. [↑](#footnote-ref-42)
43. *Id.* at para. 35 [↑](#footnote-ref-43)
44. *Id.* at para.36. [↑](#footnote-ref-44)
45. *Orphan Well Association v. Grant Thornton Ltd.*, [2019] 1 S.C.R. 150 at para. 146. [↑](#footnote-ref-45)
46. *Id.* at para. 137. [↑](#footnote-ref-46)
47. *Schreyer v. Schreyer*, 2011 SCC 35 at para. 27, [2011] 2 S.C.R. 605 at para. 27. [↑](#footnote-ref-47)
48. *R. c. Lapointe*, 2021 QCCA 360 at para. 30. [↑](#footnote-ref-48)
49. *Canada* (*Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at para. 42. [↑](#footnote-ref-49)
50. *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 at para. 44. [↑](#footnote-ref-50)
51. *R. v. Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342 at paras. 34–35. [↑](#footnote-ref-51)
52. *R. c. Lapointe*, 2021 QCCA 360 at para. 36. [↑](#footnote-ref-52)
53. *Id.* at para. 69 and the case law cited therein. [↑](#footnote-ref-53)
54. Judgment under appealat para. 24. [↑](#footnote-ref-54)