|  |  |
| --- | --- |
| Arrangement relatif à NMX Residual Assets Inc. | 2025 QCCS 1205 |

|  |  |  |  |
| --- | --- | --- | --- |
| TRADUCTION NON OFFICIELLE | | | |
| SUPERIOR COURT  (Commercial Division) | | | |
|  | | | |
| CANADA | | | |
| PROVINCE OF QUEBEC | | | |
| DISTRICT OF | | | MONTREAL |
|  | | | |
| No.: | | 500-11-057716-199 | |
|  | | 500-11-059413-217 | |
|  | | | |
| DATE: | April 2, 2025 | | |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | | |
|  | | | |
| PRESIDING: THE HONOURABLE MARTIN CASTONGUAY, J.S.C. | | | |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | | |
|  | | | |
| IN THE MATTER OF THE ARRANGEMENT IN RESPECT OF: | | | |
| 500-11-057716-199 | | | |
|  | | | |
| NMX RESIDUAL ASSETS INC.  NMX RESIDUAL LIABILITIES INC. | | | |
| Debtor companies | | | |
| v. | | | |
| PRICEWATERHOUSECOOPERS INC. | | | |
| Monitor | | | |
| and | | | |
| **MICHEL BARIL ET AL.** | | | |
| Applicants | | | |
| and | | | |
| **BRIAN SHENKER ET AL.** | | | |
| Respondents | | | |
| and | | | |
| **VICTOR CANTORE** | | | |
| Respondent | | | |
|  | | | |
| **INTACT COMPAGNIE D’ASSURANCE** | | | |
| Voluntary intervener | | | |
|  | | | |
| 500-11-059413-217 | | | |
|  | | | |
| **BRIAN SHENKER ET AL.** | | | |
| Plaintiffs | | | |
| v. | | | |
| **GUY BOURASSA ET AL.**  Defendants | | | |
|  | | | |
| Annex A: Full designation of all parties | | | |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | | |
|  | | | |
| **JUDGMENT**   * On the Directors and Officers’ reamended application to dismiss Victor Cantore’s and the Shenker Group’s judicial applications against them. * On Intact Insurance’s application for aggressive intervention. * On Victor Cantore and the Shenker Group’s application to lift the stay of proceedings with respect to their judicial application against the Directors and Officers, and for an order directing that these claims not be subject to the claims process within the framework of the *CCAA*. | | | |
| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ | | | |

# OVERVIEW

1. The context of the various applications on which the Court must rule is a restructuring pursuant to the *Companies’ Creditors Arrangement Act* (*CCAA*),[[1]](#footnote-1) undertaken by the former debtors Nemaska Lithium Inc., Nemaska Lithium Shawinigan Transformation Inc., Nemaska Lithium P1P Inc., and Nemaska Lithium Innovation Inc. (**the former debtors**).
2. The former debtors’ former directors and officers (**D&Os**) are now being sued by Victor Cantore (**Cantore**) and Brian Shenker et al. (**Shenker**)[[2]](#footnote-2) for approving and initiating the restructuring, among other things. They ask that these applications be dismissed mainly due to a release granted to them in a reverse vesting order rendered by Gouin, J. on October 15, 2020. The release reads as follows:

[41] **ORDERS** that effective upon the issuance of the Certificate, (i) the present **and former directors [and] officers** **[…] of the Debtors** (including for purpose of clarity New ParentCo, ResidualCo and AmalCo2), […] (the Persons listed […] being collectively the “**Released Parties**”) **shall be deemed to be forever** **irrevocably released and discharged from any and all present and future claims** **whatsoever** (including, without limitation, claims for contribution or indemnity), liabilities, indebtedness, demands, actions, causes of action, counterclaims, suits, damages, judgments, executions, recoupments, debts, sums of money, expenses, accounts, liens, taxes, recoveries, and obligations [duties] of any nature or kind whatsoever (whether direct or indirect, know or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, matured or unmatured or due or not yet due, in law or equity and whether based in statue or otherwise) based in whole or in part on any act or omission, transaction, offer, investment proposal, dealing, statutory declaration under the QBCA or CBCA as permitted pursuant to the terms of this Order, or other occurrences existing or taking place prior to the issuance of the Certificate or completed pursuant to the terms of this Order and/or in connection with the Transactions, **in respect of the** **Debtors or their assets**, **business or affairs**, or prior dealings with Debtors, wherever or, however, conducted or governed, the administration and/or management of the Debtors and these proceedings or the CBCA proceedings (500-11-056859-198) (collectively, the “**Released Claims”),** **which Released Claims are hereby fully, finally, irrevocably and forever waived, discharged**, **released, cancelled and barred as against the Released Parties**, and are not vested nor transferred to ResidualCo or to any other entity and are extinguished, **provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1(2) of the *CCAA*.**

[Emphasis in the original.]

1. In fact, this reverse vesting order was accompanied by another judgment rendered on the same date by Gouin, J., in which he related his reasons, particularly those for this release (collectively the **Gouin Judgment**).
2. The Court is thus seized of several applications. First are the two applications for dismissal filed by the D&Os currently being sued by Cantore and Shenker in the cases at bar.[[3]](#footnote-3) The conclusions of these applications are as follows:

**GRANT** the present Re-modified Application to Enforce a Court-ordered Release Which Forms Integral Part of the Approval and Vesting Order Dated October 15, 2020;

**DISMISS** the Shenker Claim, as defined herein;

**SUBSIDIARILY**, if it is determined that the Shenker Claim, as defined herein, as a whole should not be dismissed:

**DISMISS** the Shenker Claim, as defined herein, with respect to Steve Nadeau, Marc Dagenais and Chantal Francoeur […];

**DECLARE** that the Shenker Claim, as defined herein is limited to claims against the former directors of the Former Debtors, in the course of their duties on the board of directors of the Former Nemaska prior to the Initial Order (**Exhibit R-2**);

**DISMISS** the Cantore Claim, as defined herein;

**SUBSIDIARILY,** if it is determined that the Cantore Claim, as defined herein, as a whole should not be dismissed;

**DISMISS** the Cantore Claim, as defined herein, with respect to Steve Nadeau, Mars Dagenais and Chantal Francoeur;

**DISMISS** any portion of the Cantore Claim, as defined herein, that is not based on allegations of misrepresentations made by directors to Victor Cantore, the whole without prejudice and under reserve of the Applicants’ rights and recourses pursuant to their Modified Application to dismiss the Respondent’s originating application and his Application to appeal from the Monitor’s revision or disallowance of a claim, and the irrevocable Releases at the merits stage.

**DECLARE** that the Cantore Claim, as defined herein, is limited to claims against the former directors of the Former Debtors, in the course of their duties on the board of directors of the Former Nemaska prior to the Initial Order (Exhibit R-2);

**THE WHOLE WITH LEGAL COSTS**

1. Moreover, the D&Os’ insurer Intact Insurance (**Intact**) proposes amending an original application for voluntary intervention to make it an aggressive intervention, aiming to dismiss Cantore’s judicial application against it as a defendant pursuant to article 2501 CCQ.
2. Last are Cantore’s and Shenker’s applications to lift the stay of proceedings ordered in the context of the former debtors’ arrangement and to have their judicial applications against the D&Os declared not subject to the claims process in the context of the former debtors’ arrangement.
3. The contestations on both sides and at various stages of the file of former debtors arrangement under the *CCAA* have been unyielding and constant, as evidenced by the hearing on the applications for dismissal. That hearing was initially scheduled for August 2024 and had to be postponed due to Cantore’s contestation of the D&Os’ application to amend the application for dismissal dated August 2, 2024.
4. That contestation was heard by the undersigned on August 27, 2024, and a judgment allowing it (**Judgment on Amendment**) was rendered on September 5, 2024.
5. In the Judgment on Amendment, the Court reproduced the procedural timeline prepared to that end by the D&Os’ counsel, which mainly concerned the Cantore proceedings. This timeline and the accompanying footnote are still relevant and illustrate effectively the wide range of the Cantore contestation:[[4]](#footnote-4)

[translation]

[7] Counsel for the D&Os prepared for the Court a summary of the procedural context that, besides certain details, Cantore does not contradict. This summary reads as follows:

[4] On December 23, 2019, the former debtors commenced a restructuring under the *CCAA* (the *CCAA* Proceedings), and the Court issued an initial order (the Initial Order A-5) directing, in particular, the stay of all proceedings against the Directors and Officers.

[5] On January 29, 2020, the Court issued an order relative to the handling of the claims, which applied to all the claims against the former debtors and the Directors and Officers (the Order relative to the handling of the claims A-6) With the former debtors’ consent and at the Shenker Group and Cantore’s request, the Claims Bar Date was postponed to allow them to file their proofs of claim (C-1).

[6] On or about May 1, 2020, Cantore filed with the Monitor five proofs of claim totalling over 100 million dollars (the Cantore Claims A-8), including one against the Directors and Officers, which was modified on September 14, 2020 (the Cantore D&O Claim A-8).

[7] The grounds alleged by Cantore in his affidavit in support of his proofs of claim were, on their face, almost identical against the former debtors and the Directors and Officers.

[8] In addition, Cantore specified in his affidavit that the Cantore D&O Claim A-8 was subordinate to the outcome of his submission that his alleged royalties give rise to *sui generis* real rights in the former debtors’ mine (Cantore D&O Claims A-8, Affidavit of Victor Cantore at paras. 37−38).

[9] On September 3, 2020, Cantore filed, outside the CCAA Proceedings and in contravention thereof (C-3), an application titled Real Right Application, seeking a declaration that his alleged royalties give rise to a real right in the former debtors’ mine.

[10] Cantore then amended that application four times, on September 23, 2020; April 20, 2021; July 8, 2021 (C-2); and June 6, 2022 (the RRA A-9).

[11] On October 15, 2020, at the end of a nine-day hearing (A-11 at 33) that concerned essentially Cantore’s and the Shenker Group’s contestations, the Honourable Louis J. Gouin, J. rendered a judgment (the ODI Judgment A-11) and a reverse vesting order (RVO A-10).

[12] In the RVO A-10, the Court ordered irrevocable and definitive releases in favour of the Directors and Officers (the Irrevocable Releases).

[13] The Shenker Group and Cantore’s appeals of the RVO A-10 before the Court of Appeal and, subsequently, the Supreme Court of Canada, were unsuccessful.

[14] On October 22, 2020, the Monitor issued the Initial Notice of Review (A-12) rejecting all the Cantore Claims A-8, except for the claim against one of the former debtors in the revised amount of $8,160,000.

[15] On October 29, 2020, Cantore appealed that notice before the Court, but the appeal was stayed de facto while awaiting the outcome of the RRA A-9…

[16] On April 20, 2021, Cantore filed outside the CCAA Proceedings (A-16), as he had done with his RRA A-9, an originating application against the Directors and Officers before the Superior Court of Quebec (as amended from time to time, the Cantore Lawsuit A-20).

[17] Two months later, on June 22, 2021, Cantore filed an application titled Application for Declatory Relief Related to Applicant’s lawsuit Against the Former Director and Officers, in which he asked the Court to declare that the stay of proceedings did not apply to the Cantore Lawsuit A-20 and that the Cantore O&D Claim A-8 should not be handled in the context of the *CCAA* proceedings (the Application Relative to the Stay of Proceedings A-18).

[18] On October 15, 2021, the Honourable David R. Collier, J. rendered a judgment through which he authorized the Directors and Officers’ intervention in the context of the RRA A-9 and concluded that there was a clear connection between the RRA A‑9, the Cantore Lawsuit A-20, and the Cantore Claim A-8 (C-5 at paras. 11 et seq.).

[19] On February 14, 2022, Collier, J. rendered a judgment in which he dismissed several allegations in the RRA A-9, particularly on the ground…

[20] On September 30, 2022, the Directors and Officers filed the initial application relative to the releases (A-1). The presentation of that application was stayed de facto due to the RRA A-9 and pending a judgment on that application, as Sheehan, J. stated with respect to the appeal from the dismissal of the Cantore Claims A-8.

[21] On September 11, 2023, the Honourable David R. Collier, J. rendered a judgment that entirely dismissed the RRA A-9 (the RRA Judgment A-19). In that judgment, Collier, J. reiterated the significant impact of his judgment on the Cantore D&O Claim A-8 on the Directors and Officers and concluded that…

[22] On November 6, 2023, the Directors and Officers filed the Application to dismiss the Respondent’s (Cantore) Originating Application and his Application to appeal from the Monitor’s revision or disallowance of a claim, as amended on March 21, 2024 (the Application to Dismiss the Cantore Lawsuit A-22).

[23] On February 1, 2024, four months after the RRA Judgment A-19 dated September 11, 2023, Cantore modified the Cantore Lawsuit (A-20). On March 21, 2024, in light of the substantial changes made to the Cantore Lawsuit, the Directors and Officers amended their initial application relative to the releases (A-2) and their Application to Dismiss the Cantore Lawsuit (A-22).

[24] On March 18, 2024, the Monitor issued an Amended Notice of Review, in which he completely rejected the Cantore Claims A-8 (A-21).

[25] On April 17 and 18, 2024, the parties attended a case management conference, during which the Court ordered that Cantore’s and Shenker’s Applications Relative to the Stay of Proceedings and the Directors and Officers’ Application Relative to the Releases be proceeded with first, on August 27 and 28, 2024. The Court recommended that the hearing judge coordinate with the parties to schedule another hearing on the Application to Dismiss the Cantore Lawsuit A-22, particularly to mitigate the risk of contradictory judgments (A-23).

[26] Subsequently, two judgments were rendered in the context of the *CCAA* Proceedings: one on June 12, 2024, dismissing Cantore’s contestation of the distribution of the funds held by the Monitor (A-24), and another on July 11, 2024, dismissing Cantore’s application to cancel the Monitor’s Amended Notice of Review on a *de novo* basis, among other things.

(The reader will note that certain parts of this excerpt have been omitted due to their editorial nature.)

1. The timeline of the Shenker proceedings will be addressed in the analysis of the application to dismiss his judicial application. At the outset, it should be noted that there is a strong similarity between Cantore’s and Shenker’s judicial applications against the D&Os with respect to the alleged fault or oppression committed by the D&Os in the context of the financing obtained at the time by the former debtors.
2. It is undeniable that some of the applications on both sides that are the subject of this judgment will impact each other. To ensure a certain logic, the Court will address them in the following order:
3. Intact’s application to amend the voluntary intervention;
4. The Directors and Officers’ reamended applications against Victor Cantore’s and the Shenker Group’s judicial applications, and Intact Insurance’s application for dismissal, if any;
5. Cantore’s and the Shenker Group’s applications to lift the stay of proceedings against the Directors and Officers, and to declare that those proceedings are not subject to the claims process under the *CCAA*.

## REQUEST TO AMEND INTACT INSURANCE’S VOLUNTARY INTERVENTION AND ON THE MERITS THEREOF WITH RESPECT TO CANTORE’S JUDICIAL APPLICATION

1. On November 15, 2023, Intact filed an application for voluntary intervention pursuant to articles 185 and 186 of the *Code of Civil Procedure* with respect to the Cantore proceeding against the D&Os,[[5]](#footnote-5) due to one of the remedies sought by Cantore in a contestation dated November 6, 2023, which reads as follows:

**SUBSIDIARILY**, if the Cantore Claim is dismissed with respect to any or all of Steve Nadeau, Marc Dagenais and/or the Cantore Lawsuit is stayed, DECLARE that the Mr. Cantore’s Direct Action against the Insurance Companies is not stayed and shall not be affected by the judgment of the Court on the Release Application.

1. While informed of the proceedings in this file, Intact is not a party to them, but rather was designated as a defendant in file 500-11-059764-213 (**213**).
2. In support of its voluntary intervention in this file, Intact argues that it does not want to end up in a possible *res judicata* situation that could be used against it in file 213.
3. The original application was not ruled on. Instead, on October 3, 2024, Intact made a request to amend its original proceeding to make it an aggressive intervention. Arguing the principle of proportionality and judicial economy, and insofar as the Court grants the D&Os’ present applications for dismissal, Intact seeks the immediate dismissal of Cantore’s application against it in file 213.
4. Cantore vehemently opposes the amendment.
5. The Court summarizes the essence of his arguments as follows:

* *Res judicata* through a judgment rendered by Pinsonnault, J. on April 18, 2024;
* The amendment sought does not meet the criteria for amendments;
* Intact is not an interested party under the *CCAA*;
* The release raised by the D&Os may not be set up against Cantore.

### *Res judicata*

1. In response, Intact argues that there is no *res judicata*. It refers to the minutes of the hearing on April 18, 2024, to support this.
2. Intact is correct. It must be noted when reading the minutes that Pinsonnault, J. did not rule on the merits of Intact’s application for dismissal, but rather on the advisability of presenting it at the same time as the D&Os’ applications for dismissal and Cantore’s and Shenker’s applications with respect to the applications to lift the stay of proceedings.
3. His judgment stated the following on this subject:

**RECOMMENDS** that the judge who shall be appointed by the Coordinating Judge of the Commercial Division to hear the Stay Applications and the Former Director’s and Officers’ Release Application (the “**Presiding Judge**”) should also hear in a second and subsequent phase, if need be, the following Applications:

* Application of the Former Directors and Officers dated March 21, 2024, entitled Modified Application to dismiss the Respondent’s [Cantore] Originating Application and his Application to appeal from the Monitor’s revision or disallowance of a claim (the “Former Directors’ and Officers’ “**Application to dismiss the Cantore Claim**”)
* Application of Intact dated November 15, 2023, entitled Intact’s Application to dismiss Victor Cantore’s Originating Application dated April 20, 2021 (“**Intact’s Application to dismiss the Cantore Claim**”)

[The Former Directors’ and Officers’ Application to dismiss the Cantore Claim and the Intact’s Application to dismiss the Cantore Claim are referred to collectively as the “**Applications to dismiss the Cantore Claim**”]

1. Moreover, Intact’s present application is exactly in line with Pinsonnault, J.’s recommendation.

### The amendment sought does not meet the criteria for amendments as set out in article 206 CCP

1. Cantore submits that it is in fact an entirely new application because Intact wants to transform its voluntary intervention into an aggressive intervention.
2. This submission must also fail. The aim of the intervention and the facts that gave rise to it are the same. The only significant change is the addition of an application for dismissal, which is merely complementary and certainly not inconsistent with the outcomes sought before the amendment.
3. It should be recalled that intervention falls under “Incidental Proceedings”, Title II, Book II of the *Code of Civil Procedure*. Already, the terminology used asks that the evolution of a court case be taken into account, as is the case here.
4. The Court concludes that the amendment sought does not contravene the rules applicable to the amendment of a proceeding.

### Intact’s lack of interest

1. Cantore argues that Intact does not have the interest required under the *CCAA* to intervene in the proceedings.
2. This argument must also fail. It should be recalled that the social scope contemplated by the Supreme Court in *Century Services Inc. v. Canada (Attorney General)*[[6]](#footnote-6) includes all interested parties. This concept far exceeds that of a company’s creditors alone.
3. The Supreme Court stated the following on the subject of interested persons in *Century Services Inc.*:[[7]](#footnote-7)

[60] Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the debtor’s business to continue, preserving the status quo while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed. In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company. In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed.

[Emphasis added; references omitted.]

1. Clearly, Intact, who insures the former debtors’ former directors and against whom Cantore seeks an enforceable conclusion, has not only the right to be heard, but may also seek the dismissal of these proceedings so that “all stakeholders are treated as advantageously and fairly as the circumstances permit”.[[8]](#footnote-8)

* **The release raised by the D&Os will not be enforceable against Cantore**

1. The Court notes that the last argument raised by Cantore, that is, that the proposed amendment does not release Intact from its obligations, concerns the merits of the case and is not, at this stage, a bar to the amendment sought by Intact.
2. The Court therefore authorizes the amendment of the voluntary intervention into an aggressive intervention and, consequently, will address that intervention in the context of the applications for dismissal.

## THE DIRECTORS AND OFFICERS’ APPLICATION TO DISMISS CANTORE’S AND SHENKER’S JUDICIAL APPLICATIONS AGAINST THEM

1. The Court will first address certain findings in the **Gouin Judgment**. It will then address the outcome of the applications for dismissal individually, first Shenker’s and then Cantore’s, since the nature of the rights they each invoke in their contestations differs.
2. The Court has already reproduced the release of the former debtors included in the reverse vesting order rendered on October 15, 2020.
3. The reasons of Gouin, J., who chose not to exclude this release from the vesting order, span 32 pages and some 133 paragraphs. Those reasons mark the conclusion of a 9-day hearing, during which both Cantore and Shenker made submissions, particularly on the release.
4. In fact, Cantore and Shenker’s contestation of the release is the subject of a section in the **Gouin Judgment**. The Court will reproduce that section in full:

**5.7 The release in favour of the directors and officers of the Debtors pursuant to the Proposed Transaction should not be authorized.**

[translation]

[100] The Orion/IQ/Pallinghurst Bid includes a general release in favour of, among others, the directors and officers of the Debtors.

[101] The Creditor Cantore, who is also a shareholder of the debtor Nemaska Lithium Inc., and the shareholder Brian Shenker have objected to the Court’s authorizing such a release at this stage, and they have asked that the debate on this subject be postponed to the day of the filing of the forthcoming plan of arrangement.

[102] Essentially, these shareholders intend to sue, among others, the directors and officers of the Debtors because of their behaviour related to certain events.

[103] This general release sought is part of the Orion/IQ/Pallinghurst Bid, and the Bidders included it for their own reasons.

[104] It is not up to the Court to order them to exclude it; the Court can only note that they indeed provided a reserve, reproduced in the draft RVO submitted to the Court, that is:

[41] …provided that nothing in this paragraph shall waive, discharge, release, cancel or bar any claim against the Directors (as this term is defined in the Initial Order) of the Debtors that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[translation]

[105] Section 5.1(2) *CCAA* states the following:

A provision for the compromise of claims against directors may not include claims that

(a) relate to contractual rights of one or more creditors; or

(b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

[translation]

[106] The Court is of the view that this reserve adequately protects the shareholders from the directors and officers of the Debtors, and the subject needs no further elaboration.

[Emphasis added; references omitted.]

1. This excerpt reveals that Gouin, J. considered, among other things, that the bidder Orion/IQ/Pallinghurst requested the inclusion of this release , and noted the impact of the potential refusal of that request on the forthcoming transaction.
2. At the outset, he stated:

[translation]

[16] The Orion/IQ/Pallinghurst bid is submitted to the Court as filed, and it is not up to the Court to tell the Bidders what terms and conditions it must include.

[17] The Court may choose to approve or refuse the Orion/IQ/Pallinghurst Bid.

1. It is interesting to note that following Cantore’s applications in this regard, the **Gouin Judgment** protected the rights Cantore claimed arising from the potential recognition of the royalties as *sui generis* real rights, because the interested parties agreed to debate the matter at a later date. Other excerpts from that judgment are relevant:

[translation]

[18] The RVO Application includes, among other things, an application to cancel the existing real rights in the Debtors’ assets.

[19] Moreover, concurrently with the RVO Application, the creditor Victor Cantore (“the **Creditor Cantore**”), one of the shareholders of the debtor Nemaska Lithium Inc., filed an application titled “Real Rights Application” (“the **Cantore Application**”) against the debtors Nemaska Lithium Inc., Nemaska Lithium Shawinigan Transformation Inc., and Nemaska Lithium Whabouchi Mine Inc. (collectively “**Nemaska**”).

…

[28] However, after several days of the RVO Application hearing, which lasted longer than expected, it was decided to postpone a decision on not only the issue of the existence of Cantore’s *sui generis* real right, if indeed he had such a right, but also the issue of the Court’s power to discharge it, with no impact on the Court’s power to discharge the other real rights charging the Debtors’ assets.

[29] The draft RVO attached to the RVO Application as exhibit 12 was then modified to temporarily carve out the Cantore Application and Cantore’s real *sui generis* right claimed therein, such that if the Court determines that this right exists and cannot be discharged, it will charge the assets at issue that are included in the Orion/IQ/Pallinghurst Bid, and the Bidders must bear the consequences thereof, if any.

1. It must be noted that the **Gouin Judgment** did not handle the contestation of the release sought in the same manner. On the contrary, it specified why that clause should be included in the reverse vesting order.
2. Moreover, throughout the case against the D&Os, various subsidiary allegations or conclusions have tried to distinguish the function of a director from that of an officer. However, the release in paragraph 41 states from the outset that the release applies to the directors and officers or, in French, the “administrateurs” and “dirigeants”. The fact that the word “officers” is omitted later in the text does not change the scope of the release. It applies to the directors and officers.
3. The Court will now address the applications for dismissal.

### Shenker

1. It should be noted that following the **Gouin Judgment**, Shenker filed various proceedings including the application for leave to appeal from that judgment and an application for authorization to institute a proceeding as a shareholder pursuant to the *Securities Act*.[[9]](#footnote-9)
2. It is appropriate, for what follows, to specify the capacity claimed by Shenker to institute his proceeding. Paragraph 10 of the initial application states:[[10]](#footnote-10)

[10] Plaintiffs were shareholders and/or beneficial owners of shares of Nemaska by virtue of the share purchases effected on the dates and at the prices set out in Exhibit P-5 and have sustained damages as a result of the complete loss of value of Nemaska shares.

1. Further in that initial application, with respect to the damages suffered, Shenker referred only to the total loss in value of his shares or to the potential loss of profit were it not for Nemaska’s collapse.[[11]](#footnote-11)
2. That being so, in his arguments, Shenker claimed to be a creditor under section 22.1 of the *CCAA*, which concerns equity interest claims. The *Act* defines equity interest as follows:

**22.1** [**equity interest** “**intéret relative à des capitaux propres**”] ***equity interest*** means

(a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt…

1. While the quantum of that initial application was amended, the nature of the action against the D&Os or its subject matter with respect to the rights invoked remains unchanged. The Shenker proceeding is based only on the applicants’ capacity as shareholders.
2. All the stakeholders agree that the interpretation of the release, including the reference to section 5.1(2) of the *CCAA*, is central to the amended application for dismissal. Shenker states the following at the outset of his plan of argument.[[12]](#footnote-12)

[3] Indeed, the central issue before this court is whether or not the claims advanced by the Shenker Group in its *Originating Application* filed in the Superior Court file 500-11-059413-217 ( the “**Shenker Lawsuit** **(#1)**”) (BP-14), seeking to hold the FDO personally liable for damages exceeding $16 million (the “**Shenker** **Claim**”) are released by the releases contained in paragraph 41 of he RVO (#179) (abp-1) (the “**Releases**”).

1. In his contestation of the D&Os’ applications for dismissal, Shenker argues in particular that paragraph 106 of the **Gouin Judgment** constitutes *res judicata* in his favour. He states:[[13]](#footnote-13)

[4] While the FDO are asking this Court to interpret the RVO (#179) to determine that issue, the author or the RVO has already ruled in the RVO Approval Judgment (#179) (ABP-2) that the Releases do not release the Shenker Claim:

[translation]

[106] The Court is of the view that this reserve adequately protects the shareholders from the Debtors’ directors and officers, and the subject needs no further elaboration.

1. The exception that is *res judicata* and the exception in section 5.1(2) of the *CCAA* constitutes Shenker’s main arguments. The Court will address these first, and Shenker’s subsidiary arguments second.

### The exception in section 5.1(2) *CCAA*

1. The D&Os contest this submission, specifying that section 5.1(2) cannot apply to Shenker’s claim, which is based on the damages Shenker allegedly suffered in his capacity as a shareholder, whereas section 5.1(2) applies only to creditors. Section 5.1 reads as follows.

**Claims against directors — compromise**

**5.1 (1)**A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

**Exception**

**(2)**A provision for the compromise of claims against directors may not include claims that

**(a)** relate to contractual rights of one or more creditors; or

**(b)** are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

**Powers of court**

**(3)**The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances.

**Resignation or removal of directors**

**(4)**Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

[Emphasis added.]

1. Based on this, the D&Os submit that the release granted by the **Gouin Judgment**, even though it refers to section 5.1(2), was given pursuant to the general powers under section 11 of the *CCAA*, which were recognized by the Supreme Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*[[14]](#footnote-14) as follows:

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

**General power of court**

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

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

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

[References omitted; emphasis in the original.]

1. The D&Os also argue that the directors’ misrepresentations or oppressive conduct would have had to occur during individual exchanges, which is not the case here. Moreover, the claims in question would have had to arise after the initial order, which is also not the case.
2. To that end, the D&Os refer to a judgment of the Ontario Superior Court of Justice, *Allen-Vanguard* *Corporation* (*Re*),[[15]](#footnote-15) in which Campbell, J. considered at length the scope and legislative history of section 5.1 of the *CCAA*.
3. The Court cited lengthy excerpts of the *CCAA*, grouped into two themes: the interpretation of the *Act* and the scope of the exception. With respect to interpretation, Campbell, J. wrote:

[39] It is appropriate to approach statutory interpretation with the assumption that meaning is to be accorded to each of the words used in the provision within the overall purpose of the [CCAA](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-36/latest/rsc-1985-c-c-36.html). The absence of other words can also be purposeful.

…

[48] By way of example, s. 131 (1) of the OBCA provides that directors are made personally liable for unpaid wages of the corporation’s employees to a maximum of six months. Reading through s. 5.1 (1) and (2), there is nothing in the wording that would prevent the compromise of such claims against officers or the company itself, but not as against directors. The [CCAA](https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-36/latest/rsc-1985-c-c-36.html) does not contain a definition of the word “creditor” but does of the terms “secured creditor,” “unsecured creditor” and “shareholder.” It would seem that for the purposes of the CCAA and in particular s. 5.1 (2), a creditor would include both a secured creditor and an unsecured creditor, but would not include a shareholder.

[49] Section 5.1(2) refers only to creditors and not shareholders as prospective claimants, whether in contract, tort or statutory oppression.

[51] While framed in negligence, the claims in these actions seek to involve the remedy of oppression under the OBCA to enlist the broad scope of remedy possible under that statute. However, it is only in respect of unpaid obligations of the company and other contract-type claims where the law imposes liability on the Defendant directors that invokes the exception in s. 5.1 (2). It is noteworthy that the word “negligence” does not appear in the section at all.

1. As for the scope of the exception, Cambpell, J. explained:

[69] In *Re-Liberty Oil & Gas Ltd.*, [2002 ABQB 949](https://www.canlii.org/en/ab/abqb/doc/2002/2002abqb949/2002abqb949.html), where the action did proceed, the allegation involved a personal representation, indeed a fraudulent one, by the defendant director to two individuals who happened to be shareholders. The complained acts were not those of the company (as here), but rather personal and direct as between the director and shareholder. In other words, there was the proximity that one would expect in a tort situation.

…

[74] What in my view is consistent with the decisions in the three cases mentioned and in the Québec case *Papiers Gaspésia* 2006 QCCS 1460 (CanLII) and with the interpretation of s. 5.1(2) is that the actions of the directors toward persons who may be regarded as creditors, and may in this context include a shareholder, are based on a direct relationship when a director takes on an obligation to make a payment that would otherwise be the obligation of the company and promises to do so or is obliged to do so by legislation. In most cases this will be a post-filing obligation. In other words, a promise by a director directly to a creditor stakeholder that is made following a CCAA Initial Order may attract liability to the director and should not be released.

[75] It would be inconsistent with the scheme of the CCAA to allow all claims in which shareholders claim oppression to proceed against directors for acts or omissions that they did in the name of the company prior to the Initial Order. There would be little if any incentive to directors to pursue restructuring if they were going to be so exposed. On the other hand, personal undertakings or obligations of directors made during the CCAA process should not easily be released.

[76] To permit the kind of claims as the Proposed Plaintiffs would see them would create a priority to that class of unsecured creditors that properly should belong to the creditors as a group. No leave to continue the Class action was sought before the Sanction Order was granted and even on this motion no submission was put forward for the exercise of discretion under section 5 .1 (3).

[77] None of the cases referred to in argument dealing with s. 5.1(2) squarely deals with the issue raised here – that the section was intended to be related to post-filing claims or personal undertakings of directors to creditors in connection with the proposed plan prior to filing.

…

[80] There would be little meaning left to s. 5.1 if all claims of negligence and wrongful conduct against directors for pre-filing activity could not be released and no need for the discretion provided for in s. 5.1 (3) for Court to override this compromise as not being fair or reasonable. As noted above in the passages from the Century Services case, the purpose of the CCAA and the discretion granted to the Court are to permit restructuring to work, not create new causes of action.

[Emphasis added.]

1. The Court summarizes as follows the conclusions Campbell, J. reached in *Allen‑Vanguard* on the scope of section 5.1(2):

* It applies only to creditors;
* Generally, it applies to the directors’ actions after the initial order, not those before it.

1. The D&Os adopted Cambpell, J.’s remarks. Thus, according to them, what Shenker seeks is to create a category of creditor that does not exist in the Canadian insolvency regime.[[16]](#footnote-16)
2. To Shenker’s submission that he is a creditor because he holds an equity interest claim, the D&Os respond that the Office of the Superintendent of Bankruptcy has defined that type of claim as follows:[[17]](#footnote-17)

[87] The amendment is one of several made with the intention of clarifying that equity claims are to be subordinate to other claims. Equity claims are ownership interests and, as such, should be subject to the risks of insolvency. It is possible, however, that in some restructurings it would be appropriate for the equity claimants to have a vote – for example, where they are the only creditors – and therefore judicial discretion is provided to the court to allow this to happen in the appropriate circumstances.

1. This definition does not correspond to Shenker’s claim as worded in his judicial application. The submission or characterization that Shenker makes cannot be accepted.

### *Res judicata*

1. Shenker retorts that paragraph 106 of the **Gouin Judgment** constitutes *res judicata* with respect to his claim, submitting that the judgment deliberately used the term “shareholder” as follows:[[18]](#footnote-18)

[14] This Honourable Court should dismiss the D&O Application to Dismiss (#318) (BP-4) and the D&O Contestation (#356) (BP-3) because: (**A**) they are collateral attacks on the RVO Approval Judgment (#179) (ABP-2) which has already ruled that the Releases do not release the Shenker Claim; (**B**) in any event, the releases do not release the Shenker Claim, and (C) to the extent that the Releases include the Shenker Claim, the Released would not be fair and reasonable and there can be no doubt that Justice Gouin would have carved the Shenker Claim out of the Releases under 5.1(3) CCAA had he not thought they were already carved out under 5.1(2) CCAA.

1. What is the case here?
2. To address this issue, the Court must answer two questions.

* What is the scope of sections 5.1 and 11 of the *CCAA*?
* Does paragraph 106 of the **Gouin Judgment** meet the criteria for *res judicata* with respect to the Shenker claim due to the use of the term [translation] “shareholder”?

### *What is the scope of sections 5.1 and 11 of the* CCAA*?*

1. The exception created by section 5.1(2) must be interpreted through the prism established by the Supreme Court in *Callidus*: the “broad reading of *CCAA* authority”.[[19]](#footnote-19)
2. However, this power is limited by the *Act* itself. A general release given to the D&Os in the context of arrangement proceedings is thus subject to the dictates of section 5.1—no more, no less.
3. The Court subscribes to Campbell, J.’s interpretation in *Allen-Vanguard* as to the scope of section 5.1(2) of the *CCAA*, as does author Janis Sarra in her book *Rescue*.[[20]](#footnote-20)
4. The exception in section 5.1(2) is limited to contractual creditors only.
5. Campbell, J. established a distinction in a specific case where a shareholder is also the company’s creditor and the victim of misrepresentations by the D&Os to advance funds, goods, or services after the initial order.
6. It should be recalled that the Shenker claim is essentially based on the loss in monetary value of the shares due to actions taken well before the filing of the proceedings under the *CCAA*.
7. The D&Os are essential to the proper conduct of the process under both the *CCAA* and the *BIA*, that is, maximizing a reorganization’s chances or minimizing losses in the event of liquidation.
8. Through section 5.1(2), the legislature did not seek to equate shareholder losses with claims within the meaning of that provision.
9. In fact, this remark stems from the idea that a shareholder is not a creditor within the meaning of the Canadian legal system in matters of insolvency.
10. The discretion conferred upon the Court under section 5.1(3) of the *CCAA* allowed a potential injustice to be remedied by refusing to sanction a compromise if it is not fair in the specific circumstances, which is not the case here.
11. The Court finds that the Shenker claim cannot benefit from the exception under section 5.1(2) with Shenker as a shareholder.
12. This leads us to the second question.

### *Does paragraph 106 of the Gouin Judgment meet the criteria for* res judicata *with respect to the Shenker claim due to the use of the term [translation] “shareholder”?*

1. The applicable criteria for *res judicata* are well known. They are codified in article 2848 CCQ, which states:

**2848.** The authority of *res judicata* is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

However, a judgment deciding a class action has the authority of *res judicata* with respect to the parties and the members of the group who have not excluded themselves therefrom.

1. In addition to these criteria, authors and the case law have established that the reasons of a decision can sometimes be characterized as *res judicata*. Professor Catherine Piché, now a judge of the Superior Court, writes:[[21]](#footnote-21)

[translation]

[985] Generalities – In principle, the power of *res judicata* concerns only the conclusions of a judgment. It can, however, extend to an implicit decision or to reasons, taking into account the basis and public order of this legal presumption, which was created due to both the absolute and public order presumption of the truth of the fact acknowledged by a judgment, and the social necessity of preventing contradictory judgments. In *Laferrière v. St-Denis*, the Supreme Court of Canada stated:

[translation]

The doctrine of *res judicata* is based on a presumption *juris et de jure* and even of public policy that a fact found by a judge is true: *res judicata pro veritate habetur*. Its basis is not the party’s consent, which arises from the circumstance that he did not appeal the judgment rendered against him, but the unchallengeable truth of the fact acknowledged by the judgment, which, when it becomes final, may no longer be questioned. And this presumption of truth has been allowed in order to prevent new trials between the same parties on the same question and to make it impossible for the parties to obtain contradictory judgments.

[References omitted; emphasis added.]

1. As Professor Piché explains, *res judicata* normally appears in the conclusions of a judgment, which is clearly not the case here. On the contrary, Gouin, J. refused to vary the release sought by the bidder-buyer. Does the reason stated in paragraph 106 of the **Gouin Judgment** reach the level of an implicit decision such that it meets the presumption of *res judicata*?
2. The Court does not think so for the reasons that follow.
3. The **Gouin Judgment** is part of a series and concerns an arrangement under the *CCAA*.
4. Several judgments preceded it, including:

* Initial Order, December 23, 2019;
* Claim Procedure, January 29, 2020;
* SISP Order Approval, January 29, 2020

1. It was therefore in that specific context that the **Gouin Judgment** was rendered on October 15, 2020, approving a transaction through reverse vesting and through two judgments: one technical, establishing the various steps and contracts to complete to carry out the transaction sought, and the other, consisting of Gouin, J.’s reasons for approving the transaction. The conclusions were the following:

[translation]

[129] **GRANTS** the Debtors’ Application Seeking Leave to Enter into the Orion/IQ/Pallinghurst Transaction with Issuance of an Approval and Vesting Order and Ancillary Relief;

[130] **DISMISSES** the Creditor Cantore’s Re-Modified and Restated Contestation of Nemaska’s Approval Application;

[131] **RENDERS** the [translation] “reverse vesting” order titled “Approval and Vesting Order” attached to this judgment;

[132] **DECLARES** this judgment and the [translation] “reverse vesting” order immediately enforceable notwithstanding appeal and without the need to furnish any security;

[133] **THE WHOLE** with legal costs.

1. The conclusions of these two judgments rendered on October 15, 2020, are intimately linked.
2. It should be recalled that Gouin, J. decided to leave the proposed releases unchanged for various reasons specific to the situation at issue. In addition, he specifically dismissed the Cantore contestation, which concerned, among other things, the release in favour of the D&Os.
3. In *Arrangement relatif à Blackrock Metals Inc.*,[[22]](#footnote-22) Chief Justice Marie-Anne Paquette, outlined the following grounds that must guide the Court in granting releases in matters of arrangement in accordance with the *CCAA*:

[130] *In Harte Gold Corp*., the Court approved releases in favour of various parties that included the purchaser and its directors and officers and considered the criteria ordinarily canvassed with respect to third-party releases provided for under a plan, as articulated in *Re Lydian International Limited* and elsewhere. They are the following:

1. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
2. Whether the claim to be released was rationally connected to the purpose of the plan and necessary for it;
3. Whether the plan could succeed without the releases;
4. Whether the parties being released were contributing to the plan; and
5. Whether the release benefited the debtors as well as the creditors generally.
6. Gouin, J. conducted this exercise by considering the whole of the situation. He concluded that in the circumstances, he had to satisfy the bidder’s requests and consent to the releases sought. He stated the following:

[translation]

[115] As discussed several times above, the Court has no doubt that the Orion/IQ/Pallinghurst Bid is just and reasonable, and that it must be accepted as filed as soon as possible.

[116] For several months, the Court has noted all the efforts made by the Debtors to save their businesses. After serious steps and a rigorously implemented SISP in accordance with the SISP Order and the SISP Proceedings, the Orion/IQ/Pallinghurst Bid is the only one on the table. It allows the Debtors’ [translation] “refined” operations to resume with all the positive economic implications.

[117] To refuse it would be catastrophic!

1. All these parameters must be taken into account when reading paragraph 106 of the **Gouin Judgment**.
2. At the time of the **Gouin Judgment**, Shenker was identified in it as an impleaded party and had not yet filed his judicial application against the D&Os. It need not be stated that the subject matter of the case had yet to be determined.
3. It should also be recalled that the release was given pursuant to the general powers under section 11 of the *CCAA*, and the Supreme Court specified in *Callidus* that these powers cannot change the scope of existing legislation.
4. In these circumstances, it is clear that paragraph 106 of the Gouin Judgment constitutes a simple comment, not implicit *res judicata*,[[23]](#footnote-23) which does not change the statutory exception of section 5.1(2) of the *CCAA* such that it extends to shareholders.
5. The fact that Gouin, J. used the word [translation] “shareholder” in paragraph 106 cannot create rights that do not exist for Shenker under section 5.1(2).

### Subsidiary conclusions

1. Shenker also submits that the release does not discharge the D&Os because they remain liable due to their wrongful and oppressive conduct toward the shareholders. In fact, Shenker has developed an argument of civil fault by using the terminology of section 5.1(2) of the *CCAA*.[[24]](#footnote-24)
2. What is the case here?
3. In light of Shenker’s civil approach, it is appropriate to recall the criteria for applications for dismissal. *Bohémier c. Barreau du Québec*, rendered by the Court of Appeal, is still topical. A relevant excerpt follows:[[25]](#footnote-25)

[translation]

[17] In paragraph 66 of the impugned judgment, the trial judge correctly listed the legal principles underpinning the inadmissibility of a proceeding under section 165(4) *CCP*:

[translation]

[66] The legal principles regarding inadmissibility are the following:

* + The allegations in the originating application are assumed to be true, including the exhibits filed in support thereof;
  + Only the facts alleged must be assumed to be true, not their characterization by the plaintiff;
  + The Court need not decide the likelihood of the plaintiff’s success nor the merits of the facts alleged. It is up to the judge on the merits to decide whether the facts alleged have been proved after hearing the evidence and arguments;
  + The Court must find the action admissible if the allegations in the originating application could give rise to the conclusions sought;
  + The purpose of an application for dismissal is not to adjudicate the parties’ legal arguments before a trial is held. Its sole purpose is to determine whether the conditions of the proceeding are supported by the facts alleged, which requires not only an explicit, but also an implicit, examination of the right invoked;
  + An application for dismissal cannot be dismissed on the pretext that it raises complex issues;
  + When considering a dismissal, caution is required. Where there is uncertainty, litigation should not be ended at an early stage;
  + In case of doubt, the plaintiff must be given an opportunity to be heard on the merits.

1. The facts alleged by Shenker in his judicial application span from 2011 to 2018 and concern primarily the financing of the ore extraction and transformation project planned at the time.
2. He characterizes these facts as misrepresentations in the context of the financing of the project, which misrepresentations were made in 2018 and early 2019, and concerned mainly cost overruns that had affected the project and its financing.
3. In his judicial application, Shenker outlines the genesis of the project and its financing from 2011 until 2019, describing press releases, additional feasibility studies, etc.[[26]](#footnote-26)
4. Shenker then says:[[27]](#footnote-27)

[47] As at May 14, 2018, Nemaska failed to disclose any information to the market suggesting that the amount of financing necessary to bring the Project into commercial operation, including the estimate of costs of the Project included in the Final Report (Exhibit P-18) and referred to in subsequent public disclosures, had changed and was no longer an accurate estimate, moreover, through its misleading disclosures, Nemaska created the impression that the estimate was still to be considered accurate as at May 14, 2018.

1. In reality, this is the only fact alleged that could have supported Shenker’s theory on the matter, but, as the Court of Appeal teaches, the Court cannot consider this characterization by Shenker at this stage.
2. This theory on the matter is then developed with various allegations that start as follows:

As will be demonstrated at trial, including through evidence to be obtained through discovery…[[28]](#footnote-28)

1. The following expression is also used:

The defendants knew or should have known…

1. Last, Shenker concludes that the D&Os are liable as follows:

[130] Plaintiff’s prejudice was directly caused by Defendants’ negligent, grossly negligent and/or fraudulent misrepresentations and omissions.

1. In his judicial application, Shenker submits numerous facts concerning the project, press releases, feasibility studies, etc., but the facts alleged to hold the D&Os liable are based only on conjectures such as “knew or should have known”.
2. Even worse, Shenker admits at this stage of the proceedings, and several times, that there is no evidence in the file as constituted that makes the D&Os liable, as he intends to substantiate this evidence during future examinations or the trial on the merits.
3. The Court must rule on the application to dismiss the file as constituted at the time it is heard.
4. The Court can only note that this judicial application is based on one massive wild goose chase.
5. The release granted to the D&Os provides the following as to its extent:

…based in whole or in part or any act or omission, transaction, offer, investment proposal, dealing, statutory declaration under the QBCA or CBCA.

1. The alleged acts clearly fall within this part of the release.
2. The release was granted to the D&Os and was crystallized by the Monitor’s related certificate. The release was contested before Gouin, J., who granted it nevertheless.
3. Geneviève Marcotte, J.A. refused the leave to appeal from that order on November 11, 2020, stating:[[29]](#footnote-29)

[16] After reviewing the Monitor’s report and uncontradicted testimony, the CCAA judge dismissed the Cantore objections and concluded that the Nemaska entitled had acted in good faith and with the required diligence, and that the approval of the RVO was the best possible outcome in light of the alternatives, being: (i) the realization of the rights held by secured creditors (ii) the suspension of the restructuring process to attempt a previously been thoroughly canvassed and had led to a single acceptable bid, or (iii) the bankruptcy of the debtor companies.

[17] He underlined the catastrophical impact of these alternatives on all stakeholders being the employees, creditors, suppliers, the Cree community and local economies.

1. Leave to appeal from the judgment of the Court of Appeal before the Supreme Court was refused.
2. The Court notes that the release was granted pursuant to the powers under section 11 of the *CCAA*, does not contravene the requirements of that *Act*, and applies to the Shenker claim.
3. The Court notes that the exception in section 5.1(2) does not apply to the Shenker claim and that paragraph 106 of the **Gouin Judgment** does not have the power of *res judicata* in the circumstances. Moreover, the facts alleged with respect to a civil fault, even taken as true, do not support setting aside the release. The D&Os’ application to dismiss Shenker’s application should therefore be granted.

### Cantore

1. The Court will now address the O&Ds’ application for dismissal and that of Intact, whose intervention the Court allowed to be amended as a result.[[30]](#footnote-30)
2. The Court will first address the O&Ds’ application for dismissal, as Intact’s position is dependent on the Court’s ruling on that application.
3. The D&Os’ application to dismiss Cantore’s proposed action for damages against them is based on the release granted in the **Gouin Judgment**.
4. The following are Cantore’s submissions.
5. It should be noted that Cantore adopts Shenker’s submissions. He states the following in his plan of argument:

[1] Mr. Cantore adopts and relies on (without repeating), mutatis mutandis, the arguments submitted by the Shenker Group, other than those arguments supporting exclusively the grounds asserted by the Shenker Group in paras. 22- 30 (related to equity claims) of their Stay Application, the whole to the extent they are not inconsistent with the submissions set out herein.

1. It is appropriate to identify Cantore’s capacity in his proceedings in the same way that Shenker’s was identified.
2. The D&Os submit that, contrary to Shenker, Cantore must be characterized as a creditor, in particular due to his royalties claim.
3. Cantore, however, appears ambiguous as to his capacity as a shareholder. He describes his situation as follows:[[31]](#footnote-31)

[39] While the foregoing passage refers to “les actionnaires’, it is clear from the RVO Judgment that this reference includes Mr. Cantore, who, is said in paragraph 101 to also be a shareholder. It was Mr. Cantore and Shenker Group that opposed the Release during the RVO hearing, and it was very clear that Mr. Cantore’s claim was in respect of his NSR Royalty, not his shareholding.

1. That being so, if Cantore decides he is a shareholder, the Court’s remarks on the scope of the section 5.1(2) exception and *res judicata* remain and must apply to Cantore’s situation.
2. If Cantore is a creditor, in particular with respect to the royalties he claims, the Court’s remarks on the temporality of the submissions made against him are also relevant.
3. The Court will proceed with Cantore, the creditor.
4. Cantore filed various proofs of claim in the context of the arrangement in accordance with the *CCAA*, one of which involved the D&Os.
5. In support of that claim for some $83,348,688,[[32]](#footnote-32) Cantore signed an affidavit detailing the royalties agreement dated September 17, 2009, and signed by Nemaska through its president, Guy Bourassa (the **Agreement**).
6. In the same affidavit, which, incidentally, is the same for Cantore’s other proofs of claim under the *CCAA*, Cantore details the subsequent agreements entered into with Nemaska.[[33]](#footnote-33)
7. The agreement is three pages long and is completed by two other agreements dated June 11, 2010, and March 29, 2018, respectively.[[34]](#footnote-34)
8. Again according to his affidavit,[[35]](#footnote-35) on February 28, 2020, a few months after the initial order under the *CCAA*, the former debtors’ counsel informed him that the Agreement on the royalties had been resiliated.
9. The Agreement included several milestones, such as those regarding exploration work on the property and:

[translation]

Vii Independent pre-feasibility study $300,000 and 300,000 shares.

Viii Independent feasibility study confirming the feasibility of starting production on the property $500,000 and 500,000 shares

1. As seen in the timeline of Cantore’s proceedings, it was on April 20, 2021, that he filed his judicial application against the former debtors’ D&Os,[[36]](#footnote-36) which was then amended, the last amendment occurring on February 4, 2024.
2. Cantore’s application gives an account of the parties’ dealings and appears from the table of contents. The Agreement dated September 17, 2009, and what followed are addressed in 13 paragraphs.
3. In fact, at no point does Cantore allege that the D&Os misled him as to the Agreement and the subsequent amendments thereof.
4. Indeed, like Shenker, he focused on the 2018-2019 financing and the feasibility studies, which, incidentally, were already included in his own royalties agreement. These are related under the following headings:

**G** Nemaska concludes a C$1.1 billion project financing package for the project (page 19).

**H** The 2018 Project Financing Package was based on the budget and schedule set out in the 2018 Feasibility Study (page 23).

1. Stream Financing of US $150 million (page 23).
2. Equity Financings totalling C $454 million (page 24).
3. Secured Bonds of US $350 million (page 25).

**I** The Directors and Officers personally benefit from the conclusion of the 2018 Project Financing Package (page 27).

**J** The 2018 Project Financing Package did not fully fund the Project (page 29).

1. The Court notes that Cantore’s allegations reveal the following facts:

* The financing planned was based on a feasibility study conducted in 2018;
* Through their directors, the former debtors kept the investors informed of their financing steps through various media releases;
* The D&Os benefited from options on the former debtors’ shares and a cash bonus upon completion of the financing.

1. The Court notes that, like Shenker, Cantore overuses the expressions “knew or should have known” and “as will be demonstrated at trial, including through evidence to be obtained through discovery”.
2. The Court also notes that the D&Os rightly point out that Cantore’s allegations were subsequent to his royalties agreement. They state the following in their plan of argument[[37]](#footnote-37):

[translation]

[128] As drafted, the allegations relative to the First Cause of Action call for the following implacable remarks:

* 1. All the misrepresentations alleged in relation to the First Cause of Action are subsequent to the 2009 Agreement P-3 and the agreement dated March 29, 2018, which is alleged in paragraphs 79 to 85 of the Cantore Application R-22A (the **Letter of Understanding P-20**, C35), as these misrepresentations were allegedly made starting on May 14, 2018 (**Cantore Application R-22A**, C13 at **para. 104**). **Therefore, Cantore cannot objectively have relied on these alleged misrepresentations when he entered into the 2009 Agreement P-3 or the Letter of Understanding P-20.** Moreover, Cantore does not allege that he entered into any other transaction based on the alleged misrepresentations during that period.
  2. Out of all these misrepresentations alleged by Cantore in relation to the First Cause of action, **none of them was made directly to him personally as a creditor** of the Former Debtors. The nonexistence of such allegations is not at all surprising. Indeed, it must not be forgotten that Cantore was also a shareholder of the Former Nemaska (**RRA Judgment R-38A**, C22 at **para. 6**), a status that is highly regulated by securities legislation in matters of disclosure of information to insider parties, in a context where, moreover, he admits that he oversaw investor relations from 2009 to November 2019 (**Cantore Application R-22A**, C13 at **para. 4**).

[129] The second cause of action based on the Directors and Officers’ alleged conduct in connection with the 2018 Project Financing (the **Second Cause of Action**) results broadly from the amendments Cantore made to his Cantore Application R-22A on February 1, 2024. The Cantore claim R-20 is silent on this Second Cause of Action.

[130] According to Cantore, had it not been for the oppressive or wrongful implementation of the 2018 Project Financing, the Former Debtors would have obtained other financing sufficient to complete the Project, which would have enabled him to collect his Royalties. In other words, Cantore admits that financing was necessary to complete the project, but he expresses the opinion or speculates that, according to him, such unidentified financing could have been obtained without implementing the 2018 Project Financing. It is based on that opinion, speculation, and inference that Cantore claims over $86 million from each of the Directors and Officers.

[Emphasis in the original.]

1. They argue that the exception in section 5.1(2) *CCAA* cannot apply in Cantore’s case for the following fundamental reasons:

* The representations would have had to be made directly to the creditor complaining of them, which is not the case here;
* The misrepresentations or wrongful or oppressive conduct would have had to occur after the initial order;
* Cantore’s allegations about the inadequacy of the original financing are not substantiated by sufficient facts;
* Cantore’s claim that another source of financing was available is only a hypothesis.

1. The D&Os are correct: Cantore’s claim concerns essentially the royalties confirmed in the 2009 Agreement, which contained several milestones spread out over time that, once reached, awarded Cantore an amount of money and a share subscription with the former debtors.
2. On this last point, Cantore now faults the D&Os for receiving a bonus upon completion of the financing, but this practice, unlike his own Agreement, seems to be common in the mining industry.
3. In short, Cantore’s theory is ultimately built around the idea that the financing was insufficient because the D&Os committed a fault, either within the meaning of the exception set out in section 5.1(2) of the *CCAA* or within the meaning of a civil fault. However, without factual allegations identifying one or more specific faults or specific allegations as to viable alternative financing that was wrongfully ruled out by the D&Os, the proceeding against them must be dismissed.
4. Clearly, Cantore, recognized as an ordinary creditor after his proceeding to have the royalties characterized as a real right was dismissed in a final judgment, is clearly making a last-ditch attempt to hold the D&Os liable for the former debtors’ collapse.
5. Without specific factual allegations supporting a fault or misrepresentations by the D&Os with respect to the Agreement, or reprehensible conduct in the financing obtained when it is clear that it was carried out before the initial order, section 5.1(2) of the *CCAA* cannot apply in his case. The release was therefore validly granted.
6. As for the civil fault raised by Cantore, the Court refers to what has already been decided on this aspect of the Shenker claim, as Shenker’s and Cantore’s judicial applications are very similar in their theory on the matter and both lack specific factual allegations that could trigger the D&Os’ liability.

### Intact’s application for dismissal

1. Through its aggressive intervention, Intact seeks the outright dismissal of Cantore’s judicial application against it in file 213 to avoid the possibility of what it characterizes as *res judicata* due to the following argument presented by Cantore in his contestation of the applications for dismissal.

[28] Accordingly, if the Court determines that Applicants are entitled to any of the relief sought in the Release Application as concerns Objecting Party, or that the Cantore Lawsuit is stayed against the Director and officers, which is denied, Objecting Party respectfully submits that the Court should properly declare, de bene esse, that the Direct Action against the Insuance Companies is not stayed and shall not be affected by the judgment of the Court on the Release Application.

1. It is therefore due to Cantore’s application in this file that Intact asks, for the sake of proportionality, that the Court rule on this issue.
2. Cantore had the opportunity to contest Intact’s application in a written submission.[[38]](#footnote-38)
3. The Court has already addressed some of Cantore’s arguments on the merits, such as Intact’s lack of interest in the *CCAA* proceedings. It need not revisit them.
4. Indeed, Cantore’s main argument is built around article 2501 of the CCQ, which provides that an insurer’s direct liability is not extinguished simply because of the insured’s bankruptcy.
5. Intact argues, however, that two conditions must be met to give effect to article 2501: the insured must be liable for the loss and that loss must be covered by the insurance policy. Intact relies on the Court of Appeal’s judgment in *Souscripteurs du Lloyd’s c. SNC Lavalin inc.*,[[39]](#footnote-39) in particular the following excerpt:

[translation]

[44] Those proceedings were therefore instituted under article 2501 CCQ, which, to be granted, require that the third person establish (i) the insured’s liability and (ii) the insurance contract covering that liability. The origin of the duty to indemnify is the insurance policy, which, logically, must apply to the risk that materializes at the injured third party’s expense. By the same logic, [translation] “the insurer is therefore also justified in raising in its defence the reasons, if any, for which it should not cover the claim”, which, subject to the clarification provided by article 2501 CCQ, includes the insurer’s faculty to set up against the injured third person any grounds it could have invoked against the insured. Let us now cite the following provision:

|  |  |
| --- | --- |
| **2502** **The insurer may set up against the injured third person any grounds he could have invoked against the insured at the time of the loss, but not grounds pertaining to facts that occurred after the loss; the insurer has a recursory action against the insured with respect to facts that occurred after the loss.** | **2502 L’assureur peut opposer au tiers lésé les moyens qu’il aurait pu faire valoir contre l’assuré au jour du sinistre, mais il ne peut opposer ceux qui sont relatifs à des faits survenus postérieurement au sinistre; l’assureur dispose, quant à ceux-ci, d’une action récursoire contre l’assuré.** |

On this subject, it must be noted that according to Professor Didier Lluelles, where a submitted and reported (or declared) claim policy is at issue, the insurer may set up against the injured third person the lack of claim and notice to the insurer despite article 2502 CCQ, because that article implies that the claim is first covered by the insurance policy. Nothing of the sort was set up against them here.

[References omitted.]

1. Intact is correct. It goes without saying that if the Court orders the dismissal of Cantore’s judicial application against the D&Os, the first condition that could trigger Intact’s direct liability is not met. Indeed, not only have the D&Os established the existence of a release in their favour, but Cantore’s judicial application also does not argue any facts establishing the D&Os’ civil fault in the context of the former debtors’ financing in 2018-2019.
2. The Court will therefore grant Intact’s application in file 213.

## CANTORE’S AND SHENKER’S APPLICATIONS TO LIFT THE STAY OF PROCEEDINGS WITH RESPECT TO THE D&Os AND TO DECLARE THAT THOSE PROCEEDINGS ARE NOT SUBJECT TO THE CLAIMS PROCESS UNDER THE *CCAA*

1. In view of the Court’s conclusions on the applications for dismissal, the Court need not formally address Cantore’s and Shenker’s applications, but will make certain remarks.
2. In short, had the dismissal not been granted, Cantore and Shenker asked to no longer be subject to the claims process in place and therefore dependent on *CCAA* case law.
3. This case law is important because its cornerstone is the fair treatment of all interested persons, and the heart of the claims concerns the D&Os’ decisions, which, according to Cantore and Shenker, precipitated the former debtors’ collapse and led to the *CCAA* proceedings.
4. By definition, every arrangement under the *CCAA* is unique for the interested parties concerned.
5. The case at bar is the perfect example of this due to the nature of Cantore’s and Shenker’s applications.
6. While all Superior Court judges have jurisdiction in *CCAA* matters, transferring the file to the Civil Division would not constitute a fair administration of justice, as the next judge would have to familiarize him- or herself with the whole of the case to rule on it.
7. In the context of such applications, it is paramount to let the supervising judge, as is the case in *CCAA* matters, consider the whole of a situation, as Gouin, J. did.
8. Removing that supervision at this stage would defeat the cardinal rule established by the Supreme Court in *CCAA* matters, that is, to ensure the fair treatment of all interested persons.

# FOR THESE REASONS, THE COURT:

**GRANTS** the application to declare enforceable the release in favour of the former debtors’ Directors and Officers, which was granted in a reverse vesting judgment rendered on October 15, 2020, by the Honourable Louis J. Gouin.

1. **DISMISSES** the contestations of Victor Cantore and Brian Shenker et al.
2. **DISMISSES** Victor Cantore’s judicial application against the former debtors’ Directors and Officers.
3. **DISMISSES** Victor Cantore’s judicial application against Intact Insurance in file 500-11-059764-213.
4. **DISMISSES** the judicial application of Brian Shenker et al. against the former debtors’ Directors and Officers.
5. **DECLARES** moot Victor Cantore’s and Brian Shenker’s applications to lift the stay of proceedings against them in the context of the former debtors’ arrangement and to have their applications declared no longer subject to the claims process for that arrangement.
6. **THE WHOLE** with legal costs.

|  |  |  |
| --- | --- | --- |
|  | | |
|  | | \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_MARTIN CASTONGUAY, j.S.c. |
| Mtre Alain Tardif  Mtre Miguel Bourbonnais | | |
| Mtre Gabriel Faure  **McCarthy Tétrault LLP** | | |
| Counsel for the former directors and officers (excluding Guy Bourassa) | | |
|  | | |
| Mtre Michèle Bédard  **Casavant Bédard** | | |
| Counsel for Guy Bourassa | | |
|  | | |
| Mtre C. Jean Fontaine | | |
| **Stikeman Elliott LLP** | | |
| Counsel for the Monitor | | |
|  | | |
| Mtre Dimitri Maniatis | | |
| **Accent Legal Inc.** | | |
| Counsel for Victor Cantore | | |
|  | | |
| Mtre Sylvain Vauclair | | |
| Mtre Laurent Crépeau | | |
| **Woods LLP** | | |
| Counsel for Brian Shenker et al. | | |
|  | | |
| Mtre Prachi Shah | | |
| **Clyde & Cie Canada s.e.n.c.r.l.** | | |
| Counsel for Intact Insurance | | |
|  | | |
| Hearing dates: | November 6 and 7, 2024 | |
|  | Written submissions December 20, 2024, and January 15, 2025 | |

**ANNEXE A**

|  |  |
| --- | --- |
| 500-11-057716-199  500-11-059413-217 | |
| NMX Residual Assets inc.  NMX Residual Liabilities inc. | **Debtor Companies** |
| and |  |
| PricewaterhouseCoopers inc. | **Monitor** |
| and |  |
| Michel Baril,  Robert Beaulieu,  François Biron,  Guy Bourassa  Paul-Henri Couture,  Marc Dagenais  Chantal Francoeur  Patrick Godin  Vanessa Laplante  René Lessard  Jacques Mallette  Shigeki Miwa  Steve Nadeau  Luc Séguin | **Applicants** |
| and |  |
| Brian Shenker  Brian Shenker, in his capacity as trustee of the Freedom 57 Trust  The Shenker Family Foundation  Sam Skye Community Foundation  Randee Fagen  Natan Glaich  Victor Cantore | **Respondents** |
| and |  |
| Intact Compagnie D’Assurance | **Voluntary Intervener** |

1. R.S.C. 1985, c. C-36. [↑](#footnote-ref-1)
2. The use of the parties’ last names aims to improve readability and should not be interpreted as discourteous toward the parties. [↑](#footnote-ref-2)
3. These files will be designated herein as the Cantore Claim and the Shenker Claim. [↑](#footnote-ref-3)
4. 2024 QCCS 3323. [↑](#footnote-ref-4)
5. In file500-11-057716-199. [↑](#footnote-ref-5)
6. [2010] 3 S.C.R. 379. [↑](#footnote-ref-6)
7. *Supra* note 6 at para. 60. [↑](#footnote-ref-7)
8. *Supra* note 6 at para. 70. [↑](#footnote-ref-8)
9. Exhibit R-19, dated September 14, 2021, and the proceeding against the D&Os dated January 2021. [↑](#footnote-ref-9)
10. R-19 proceeding against the D&Os dated January 15, 2021. [↑](#footnote-ref-10)
11. *Supra* note 10 at 27, paras. 128−131. [↑](#footnote-ref-11)
12. Shenker’s plan of argument dated November 1, 2024, at para. 3. [↑](#footnote-ref-12)
13. *Supra* note 12 at para. 4. [↑](#footnote-ref-13)
14. 2020 CSC 10. [↑](#footnote-ref-14)
15. 2011 ONSC 5017. [↑](#footnote-ref-15)
16. *Companies’ Creditors Arrangement Act*, R.S.C., c. C-36 and *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. [↑](#footnote-ref-16)
17. Excerpt from Canada, Industry Canada, Office of the Superintendent of Bankruptcy, Bill C-12: Clause by Clause Analysis. [↑](#footnote-ref-17)
18. *Supra* note 12, Shenker’s plan of argument dated November 1, at para. 14. [↑](#footnote-ref-18)
19. *Supra* note 14 at para. 67. [↑](#footnote-ref-19)
20. *Rescue! The Companies’ Creditors Arrangement Act*, 2nd ed. (Carswell, 2013) at 318−319. [↑](#footnote-ref-20)
21. Catherine Piché, *La preuve civile*, 6th ed. (2020), EYB 2020 PRC98. [↑](#footnote-ref-21)
22. 2022 QCCS 2828. [↑](#footnote-ref-22)
23. *Gowling Lafleur Henderson, s.e.n.c.r.l., srl c. Lixo Investments Ltd.*, 2015 QCCA 513 at paras. 20–21. [↑](#footnote-ref-23)
24. *Supra* note 12 at paras. 39–42. [↑](#footnote-ref-24)
25. 2012 QCCA 308. [↑](#footnote-ref-25)
26. Exhibit R-19 at paras. 13−46 of the originating application. [↑](#footnote-ref-26)
27. *Supra* note 26 at para. 47. [↑](#footnote-ref-27)
28. The Court counted this sentence at least 10 times. [↑](#footnote-ref-28)
29. 2020 QCCA 1488. [↑](#footnote-ref-29)
30. During the hearing, Intact Insurance made arguments both on its application for amendment and on the merits. The Court allowed Cantore to make written arguments on the merits of that application. [↑](#footnote-ref-30)
31. Cantore’s plan of argument dated November 6 and 7, 2024. [↑](#footnote-ref-31)
32. Changed to $86,298,627 on September 14, 2020. [↑](#footnote-ref-32)
33. Exhibit R-20, affidavit dated May 1, 2020, at paras. 15−25. [↑](#footnote-ref-33)
34. Exhibits P-2 and P-4 in support of Cantore’s affidavit for his proof of claim under the *CCAA*. [↑](#footnote-ref-34)
35. *Supra* note 32 at para. 26. [↑](#footnote-ref-35)
36. Exhibit R-22. That application was 63 pages and 324 paragraphs long. [↑](#footnote-ref-36)
37. Applicants plan of argument dated November 1, 2024 at para. 128 – 230. [↑](#footnote-ref-37)
38. Post-Hearing submission, Cantore’s written submission received on December 20, 2024. [↑](#footnote-ref-38)
39. 2021 QCCA 833. [↑](#footnote-ref-39)