

SUPERIOR COURT
(Civil Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-133343-254

DATE: 2 JULY 2026

BY THE HONOURABLE BABAK BARIN, J.S.C.

**DONALD C. BERG, MARYSE BERTRAND, DHAVAL BUCH, MARCELLO CAIRA,
SHIRLEY CUNNINGHAM, SHARON DRISCOLL, CHARLES HERINGTON, LUC
JOBIN, CRAIG LEAVITT AND ANNE MARTIN-VACHON**

Plaintiffs/Cross-Defendants

v.

GILDAN ACTIVEWEAR INC.

Defendant/Cross-Applicant

**PROVISIONAL JUDGMENT ON AN APPLICATION FOR ADVANCEMENT OF
DEFENCE COSTS BY FORMER DIRECTORS***

(Section 124 of the *Canada Business Corporation Act*)

INTRODUCTION

[1] This case raises an issue that strikes at the heart of corporate governance in Canada. The indisputably pressing, provisional (or interim) issue of a promised *mandatory* commitment¹ to “advance money” for the costs, charges and expenses relating to any civil, criminal, administrative, investigative or other proceeding in which an

* A copy of this judgment has been sent for translation.

¹ In this case, there is an indemnification agreement concluded between the parties that contains a *mandatory* provision for advance of money. It will be examined at length later. Suffice it to say at this stage that the verb employed in the statute is “may”, whereas the agreement in question uses the verb “shall.”

individual, who at the corporation's request acts or acted as a director or officer, is involved because of that individual's association with the corporation, is of paramount importance to *all* (past, present and future) directors and officers² of corporations governed by the *Canada Business Corporation Act*³.

[2] This *possible* statutory corporate commitment⁴, complementary to a more significant one, the "indemnification" of the same costs, charges and expenses, is for public interest reasons legislated in section 124 CBCA. That section, in its entirety and in both *enacted* official languages, reads as follows:

Indemnification	Indemnisation
124 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.	124 (1) La société peut indemniser ses administrateurs, ses dirigeants ou leurs prédécesseurs ainsi que les autres particuliers qui, à sa demande, agissent ou ont agi en cette qualité pour une autre entité, de tous leurs frais et dépenses, y compris les sommes versées pour transiger sur un procès ou exécuter un jugement, entraînés par la tenue d'une enquête ou par des poursuites civiles, pénales, administratives ou autres dans lesquelles ils étaient impliqués à ce titre.
Advance of costs (2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).	Frais anticipés (2) La société peut avancer des fonds pour permettre à tout particulier visé au paragraphe (1) d'assumer les frais de sa participation à une procédure visée à ce paragraphe et les dépenses y afférentes et celui-ci la rembourse s'il ne satisfait pas aux conditions énoncées au paragraphe (3).
Limitation (3) A corporation may not indemnify an individual under subsection (1) unless the individual (a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to	Limites (3) La société ne peut indemniser un particulier en vertu du paragraphe (1) que si celui-ci : (a) d'une part, a agi avec intégrité et de bonne foi au mieux des intérêts de la société ou, selon le cas, de l'entité dans laquelle il occupait les

² Going forward, the reference to directors will also apply to officers.

³ R.S.C., 1985, c. C-44 (**CBCA**).

⁴ See the comments in footnote 1.

the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful. Indemnification in derivative actions (4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3). Right to indemnity (5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and (b) fulfils the conditions set out in subsection (3). Insurance (6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual	fonctions d'administrateur ou de dirigeant ou agissait en cette qualité à la demande de la société; (b) d'autre part, dans le cas de poursuites pénales ou administratives aboutissant au paiement d'une amende, avait de bonnes raisons de croire que sa conduite était conforme à la loi. Indemnisation lors d'actions indirectes (4) Avec l'approbation du tribunal, la société peut, à l'égard des actions intentées par elle ou par l'entité, ou pour son compte, en vue d'obtenir un jugement favorable, avancer à tout particulier visé au paragraphe (1) les fonds visés au paragraphe (2) ou l'indemniser des frais et dépenses entraînés par son implication dans ces actions, s'il remplit les conditions énoncées au paragraphe (3). Droit à indemnisation (5) Malgré le paragraphe (1), les particuliers visés à ce paragraphe ont droit d'être indemnisés par la société de leurs frais et dépenses entraînés par la tenue d'une enquête ou par des poursuites civiles, pénales, administratives ou autres dans lesquelles ils étaient impliqués en raison de leurs fonctions, dans la mesure où : a) d'une part, le tribunal ou toute autre autorité compétente n'a pas conclu à la commission de manquements ou à l'omission de devoirs de leur part; b) d'autre part, ils remplissent les conditions énoncées au paragraphe (3). Assurance des administrateurs ou dirigeants (6) La société peut souscrire au profit des particuliers visés au paragraphe (1) une assurance couvrant la responsabilité qu'ils encourent :
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(a) in the individual's capacity as a director or officer of the corporation; or (b) in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request. Application to court (7) A corporation, an individual or an entity referred to in subsection (1) may apply to a court for an order approving an indemnity under this section and the court may so order and make any further order that it sees fit. Notice to Director (8) An applicant under subsection (7) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel. Other notice (9) On an application under subsection (7) the court may order notice to be given to any interested person and the person is entitled to appear and be heard in person or by counsel.	a) soit pour avoir agi en qualité d'administrateur ou de dirigeant de la société; b) soit pour avoir, sur demande de la société, agi en qualité d'administrateur ou de dirigeant d'une autre entité. Demande au tribunal (7) Le tribunal peut, par ordonnance, approuver, à la demande de la société, d'un particulier ou d'une entité visé au paragraphe (1), toute indemnisation prévue au présent article, et prendre toute autre mesure qu'il estime indiquée. Avis au directeur (8) L'auteur de la demande prévue au paragraphe (7) doit en aviser le directeur; celui-ci peut comparaître en personne ou par ministère d'avocat. Autre avis (9) Sur demande présentée en vertu du paragraphe (7), le tribunal peut ordonner qu'avis soit donné à tout intéressé; celui-ci peut comparaître en personne ou par ministère d'avocat.
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[3] The *enactment*, and not merely publication, of a legislation in both English and French has important implications. It means that both versions of the bilingual statute are "official, original and authoritative expressions of the law" and neither version enjoys priority or paramountcy over the other.⁵

[4] This equal authenticity rule applies to the CBCA⁶, whose identified purposes, among others, are to revise and reform the law applicable to business corporations

⁵ Ruth Sullivan, *The Construction of Statutes*, 7th Ed., CHAPTER 5 Bilingual and Bijural Meaning, § 5.02 The Constitutional and Legislative Framework (**Sullivan**).

⁶ *R v. Dubois*, [1935] S.C.R. 378 at p. 401.

incorporated to carry on business in Canada and to advance the cause of uniformity of business corporation law in this country.⁷

[5] Any meaningful attempt to harmonise business corporation law in Canada must take into consideration both language versions of the CBCA that regulates, among other things, corporate governance, shareholder rights and business conduct for many small, medium and large businesses across the country.

[6] Corporate governance establishes the structural framework for how corporations are to be directed and controlled. At its epicenter, it regulates the fiduciary and legal duties and obligations of directors to ethically manage the business affairs of a corporation with transparency and accountability.

[7] The board of directors is the cornerstone of corporate governance. It is the critical link between management and stakeholders. Its excellence reflects well on the corporation and promotes its prosperity. Its shortcomings, negligence or demise can lead to grave harm for the moral person in question. If the board of directors performs well, it is rewarded – at times even highly rewarded. If it fails, it may attract liability.

[8] Directors' liability issues, consequently, cut to the core of the corporate governance framework. Canadian corporations are constantly on the lookout for qualified, talented and experienced individuals to sit on their boards of directors. Their competitiveness and success in many ways depend on them. As an Industry Canada discussion paper prepared more than three decades ago observed⁸:

Talented board members are essential to Canadian prosperity to permit Canadian corporations to thrive in the competitive domestic and international markets. On the other hand, there is a need for adequate corporate accountability. Inadequate accountability can lead to harm to other parties and the environment, result in a serious misallocation of resources and impact negatively on Canadian prosperity. Corporate liability, including directors' liability, is an important and effective compliance and risk-allocation mechanism.

[Underlining added]

[9] This balance between “effective compliance” and a “risk-allocation mechanism” is of cardinal importance in the corporate setting. The competitiveness of Canadian

⁷ See section 4 CBCA.

⁸ INDUSTRY CANADA, Canada Business Corporations Act, *Discussion Paper: Directors' Liability*, Ottawa, 1995 (**Discussion Paper**), Executive Summary.

corporations will be negatively affected if excessive or unmanageable liabilities cause highly-qualified directors to resign and outstanding people to refuse to serve on boards.

[10] Indemnification of, and the possibility of advancing moneys to, directors involved in corporate litigation are two key elements that can influence compliance and risk-allocation, and play an important role in improving fairness and predictability of directors' liabilities. The underlying principles, as explained by a Delaware Supreme Court, are simple and of significance for the following reasons⁹:

Indemnification encourages corporate service by capable individuals by protecting their personal financial resources from depletion by the expenses they incur during an investigation or litigation that results by reason of their service [to the corporation.] [...] Advancement provides corporate officials with immediate provisional relief from the personal out of pocket financial burden of paying significant on-going expenses inevitably involved with investigations and legal proceedings. [...] The limited and narrow focus of an advancement proceeding precludes litigation of the merits of entitlement to indemnification for defending oneself in the underlying proceedings. If it is subsequently determined that a corporate official is not entitled to indemnification, that individual will then have to repay the funds advanced.

[11] In addition to the possible protections offered by statute, indemnification and advance of money for "all costs, charges and expenses" of corporate litigation form, at times, the subject of a robust agreement – *occasionally* negotiated and often entitled "Indemnification Agreement" – between the corporation and its directors. The rights and obligations set out in these agreements and the extent of protections offered by them have in recent years resulted in complex and, at times, controversial corporate law disputes.

[12] This case is a good example.

BRIEF CONTEXT¹⁰

[13] The Defendant and Cross-Applicant, Gildan Activewear Inc., a publicly listed company incorporated under the CBCA and headquartered in Montreal, is one of the world's leading manufacturers of everyday basic apparel, including activewear, underwear, and hosiery products.

⁹ *Homestore, Inc. v. Tafeen*, 888 A.2d 204 (Del. 2005) at 211 and 214 (***Homestore VII***). See footnote 62 of the *Discussion Paper* for relevance of Delaware corporate law to the CBCA.

¹⁰ This brief summary of the facts is provided for a contextual purpose only. Given that the matters before the Superior Court are at this stage of a provisional nature only, no conclusions should be drawn from them.

[14] Gildan manufactures products for lifestyle brand companies, wholesale distributors, screen printers and embellishers that market these products under their own brands around the world. According to its own information, in 2024, Gildan generated an annual revenue of 3.27 billion United States of America (**U.S.**) dollars, and its market capitalization at the time was well over 8 billion U.S. dollars.

[15] Gildan was co-founded in 1984 by Glenn Chamandy¹¹ and his brother, who jointly ran the company until Glenn became the sole chief executive officer in 2004. In 2021, with the collaboration of Glenn himself apparently, the then Board of Directors of the company began to prepare a multi-year succession plan to put in place an orderly transition of Gildan's management following Glenn's retirement.

[16] In 2024, four decades after its inception, Gildan became entangled in a proxy contest – widely reported as one of the most expensive of its kind in Canadian and American history – that apparently cost the company and the leading dissenting proxy campaign shareholder well over 70 million U.S. dollars. The events that ensued and this case before the Superior Court follow the aftermath of that contest.

[17] The plaintiffs, Donald C. Berg, Maryse Bertrand, Dhaval Buch, Marcello Caira, Shirley Cunningham, Sharon Driscoll, Charles Herrington, Luc Jobin, Craig Leavitt and Anne Martin-Vachon, were all directors of Gildan until their resignation sometime in May of 2024.

[18] As part of their relationship with Gildan, these Former Directors all signed an Indemnification Agreement dated 13 April 2024 (**Indemnification Agreement**) containing, among others, the following provisions¹²:

INDEMNIFICATION AGREEMENT

[...]

¹¹ Use of either the first or last name of individuals is to make the text of this judgment reader friendly. No disrespect of any kind is intended.

¹² The Former Directors' "Plan d'argumentation – Demande pour avance de frais de Défense" dated 19 May 2026 (**Plan d'argumentation**) sets out a chart comparing this version of the Indemnification Agreement reviewed by the law firm of Stikeman Elliott LLP with the previous ones dated 9 February and 1 March 2024. At the hearing, Gildan made a point of referring to some of the changes in these documents, which it indicates were last minute, self-serving and apparently carried out at the request of the Former Directors.

Whatever Gildan's arguments may be in this regard, meritorious or not, the appropriate place to address them is at the trial of the indemnification issues. At this juncture, the only relevant issue is that the final governing version of the Indemnification Agreement is the one signed by the Former Directors on 13 April 2024.

WHEREAS:

- A. the Corporation wishes to have the Indemnified Party serve, or continue to serve, as a director and/or officer of the Corporation, and may request to have the Indemnified Party serve, or continue to serve, as a director and/or officer, or in a similar capacity, (collectively, a "**director or officer**") of another entity from time to time (each such other entity in respect of which the Indemnified Party serves as a director and/or officer, or in a similar capacity, at the Corporation's request is hereinafter referred to as an "**Affiliate**");
- B. the Corporation acknowledges that the Indemnified Party, acting in the capacity of a director or officer of the Corporation or an Affiliate, is required to make decisions and take actions in furtherance of the business and affairs of the Corporation or an Affiliate which could potentially expose the Indemnified Party to personal liability; and
- C. the Corporation intends that the Indemnified Party be indemnified, to the fullest extent permitted by law, in respect of the Indemnified Party's service as a director or officer of the Corporation or an Affiliate.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which each of the parties hereto (each a "**Party**" and collectively, the "**Parties**") expressly acknowledges, the Parties agree as follows:

1. Indemnification

- (a) The Corporation hereby agrees to indemnify and save harmless the Indemnified Party from and against any and all damages, losses, liabilities, costs, charges, fees and expenses (including, but not limited to, legal expenses, court fees, expenses for expert witnesses, travel and other expenses relating to attending discoveries, trials, hearing or meetings (including the costs and expenses referred to in Subsection 1(d) below), establishing a right to indemnification under this Agreement or under applicable law and any amount paid to settle any action or to satisfy any judgment) (collectively, "**Losses**"), reasonably incurred by the Indemnified Party in respect of any civil, criminal, arbitral, administrative, investigative or other proceeding ("**Proceeding**") in which the Indemnified Party is made a party or involved (including merely as a witness) by reason of being or having been a director or officer of the Corporation or an Affiliate, provided that:
 - (i) the Indemnified Party acted honestly and in good faith with a view to the best interests of the Corporation, or, as the case may be, to the best interests of such Affiliate; and

- (ii) (ii) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the Indemnified Party had reasonable grounds for believing that his or her conduct was lawful.
- (b) In addition, and without limitation to the obligations set forth in Subsection 1(a) above, the Corporation agrees:
 - (i) to indemnify the Indemnified Party (and, if requested by the Indemnified Party, advance monies to the Indemnified Party under Section 2 hereof) in respect of any Proceeding by or on behalf of the Corporation or an Affiliate to procure a judgment in its favour, to which the Indemnified Party is made a party because of the Indemnified Party's association with the Corporation or such Affiliate, against all Losses reasonably incurred by him or her in connection with such Proceeding, provided the Indemnified Party has fulfilled the conditions described in paragraphs 1(a)(i) and 1(a)(ii) above and subject to the Corporation obtaining the approval of a court if required by the *Canada Business Corporations Act* (the "**Act**") to pay such indemnification or make such advance; and
 - (ii) in the event that the approval of a court is required to permit the payment of any indemnification or advance hereunder, the Corporation agrees to make application for and exercise all reasonable efforts to obtain the court's approval of such indemnification or advance.
- (c) The intention of this Agreement is to provide the Indemnified Party indemnification to the fullest extent permitted by law and without limiting the generality of the foregoing and notwithstanding anything contained herein but subject to Section 3 hereof:
 - (i) nothing in this Agreement shall be interpreted, by implication or otherwise, in limitation of the scope of the indemnification provided in Subsections 1(a), 1(b) and Section 2 hereof; and
 - (ii) Subsections 1(a), 1(b) and Section 2 are intended to provide indemnification to the Indemnified Party to the fullest extent permitted by the Act and, in the event that such statute is amended to permit a broader scope of indemnification (including, without limitation, the deletion or limiting of one or more of the provisos to the applicability of indemnification), Subsections 1(a), 1(b) and Section 2, as applicable, shall be deemed to be amended concurrently with such amendment so as to provide such broader indemnification.

(d) Without limiting the provisions of Subsection 1(a) above, if the Indemnified Party is requested by the Corporation or required by law to attend any Proceeding before any regulatory, judicial or other authority in connection with the matters contemplated herein (including, without limitation, to serve as a witness in a Proceeding to which the Indemnified Party has not been named as a party), the Corporation shall promptly reimburse the Indemnified Party for: (i) all reasonable expenses incurred by the Indemnified Party in connection therewith; and (ii) the reasonable fees and disbursements of the Indemnified Party's own counsel.

2. Advance of Costs and Expenses

Within five (5) business days after receiving a written request by the Indemnified Party, the Corporation shall advance monies to the Indemnified Party for the costs and expenses reasonably incurred or expected to be incurred in connection with investigating, defending or participating in (including, if applicable, on appeal), or preparing to defend, or participate in, any Proceeding contemplated by Section 1 above, with the understanding and agreement that, in the event it is ultimately determined in a final non-appealable judgment of a court of competent jurisdiction that the Indemnified Party did not fulfil the conditions described in paragraphs 1(a)(i) or 1(a)(ii) hereof, the Indemnified Party will promptly repay to the Corporation the monies so paid in advance. In connection with any request for expense advancement, the Indemnified Party shall not be required to provide any supporting documentation or information to the extent that the provision thereof to the Corporation or its counsel would compromise solicitor-client or litigation privilege of the Indemnified Party in its defence of such Proceeding. Notwithstanding the foregoing, if court approval is required by the Act to permit the Corporation to advance costs and expenses in respect of any such Proceeding, the Corporation's obligation hereunder to make all such advances shall be subject to receipt of the court's prior approval and shall be on such terms and conditions as maybe ordered by the court.

3. Exceptions to Indemnification and Advance of Costs

Notwithstanding anything contained herein, the rights of the Indemnified Party described in Sections 1 and 2 hereof shall not apply to (a) any Proceeding initiated by the Indemnified Party against the Corporation or an Affiliate except for Proceedings relating to the enforcement of this Agreement, or (b) any Proceeding initiated by the Indemnified Party against any other person or entity unless the Corporation has joined in, or given its written consent to, the initiation of such Proceeding.

4. Other Rights and Remedies

The rights of the Indemnified Party hereunder will be in addition to any other rights the Indemnified Party may have under any provision of the Act or otherwise at law

or under the articles or by-laws of the Corporation or any vote of shareholders of the Corporation or otherwise (each, an "**Other Indemnification Provision**"); provided that to the extent that if (a) the Indemnified Party otherwise would have any greater right to indemnification under any Other Indemnification Provision, the Indemnified Party will be deemed to have such greater right hereunder, and (b) any change is made to any Other Indemnification Provision which permits any greater right to indemnification than that provided under this Agreement as of the date hereof, the Indemnified Party will be deemed to have such greater right hereunder.

5. Presumption of Good Faith

- (a) In respect of any claim for indemnification pursuant to this Agreement, the Indemnified Party shall be presumed to have acted honestly and in good faith and with a view to the best interests of the Corporation or an Affiliate.
- (b) For purposes of this Agreement, the termination of any Proceeding by judgment, order, settlement (whether with or without court approval) or conviction, shall not, of itself, create any presumption that the Indemnified Party did not fulfill the conditions described in paragraphs 1(a)(i) and 1(a)(ii) hereof, unless so determined by the court or other competent authority. [...]

10. Insurance

(a) The Corporation shall purchase and maintain or cause to be purchased and maintained, while the Indemnified Party remains a director or officer of the Corporation or an Affiliate and for a minimum of six (6) years thereafter, insurance for the benefit of the Indemnified Party against any liabilities incurred by him or her in his or her capacity as a director or officer of the Corporation and/or an Affiliate, on terms at least substantially comparable (in terms of coverage and amounts) to that provided by such insurance maintained by the Corporation as at the date first above written on which this Agreement is made.

(b) Upon request, the Corporation will provide to the Indemnified Party a copy of the relevant insurance policy.

[19] On 7 March 2025, these former directors filed an action (**Originating Application**) against Gildan for an estimated amount of 18 million U.S. dollars, plus interest and indemnity, representing the value of certain Deferred Share Units (**DSU**) to which they allege they are entitled to pursuant to a 17-page (including six schedules) "Deferred Share Units Plan for the Members of the Board of Directors" initially adopted on 3 August 2004, and "effective as of the company's first quarter of fiscal 2005."

[20] According to the plaintiffs, the DSUs in question were granted to them for their service and duties as members of the Board of Directors of Gildan. The plaintiff's

Originating Application was amended on 14 November 2025 (**Amended Originating Application**).

[21] Four days later, on 18 November 2025, Gildan served and filed a 38-page Defence and Cross-Application against the plaintiffs (**Crossclaim**)¹³, requesting, among other things, that their Originating Application dated 7 March 2025 be dismissed and claiming against the plaintiffs, personally and solidarily, the sum of fifty (50) million U.S. dollars, *sauf à parfaire*, plus legal interest and indemnity for, among other reasons, their engagement in a pattern of reprehensible conduct towards the company.

[22] According to Gildan, the plaintiffs, who were the then directors of the company (**Former Directors**), took a series of decisions that were in complete disregard of the company's best interests, including for example: (i) entering into a support agreement giving the Board of Directors "representation to the only shareholder who appeared to react positively to the CEO's termination in an apparent conflict of interest, without considering Gildan's interests or corporate best practices; (ii) initiating a flawed, prejudicial, and rushed sale and privatization process that lacked commercial justification and undervalued the company; (iii) concluding a 200 million Canadian dollar credit facility that the company did not apparently need at the time; and (iv) approving a sweeping range of last-minute resolutions immediately before their ultimate resignations, spending tens of millions of Gildan's dollars solely to protect themselves and their allies from the new Board scrutiny.

¹³ At the 12th hour of a two-day hearing which focussed exclusively on Gildan's 16-page (including an Annex A) Application to Stay the Proceedings dated 15 May 2026 (**Stay Application**), and the Former Directors' Application for Advancement of Defence Costs dated 19 March 2026 (**Advance Costs Application**), despite paragraph 26 of the Superior Court's "Case Management Measures, Directives and Questions" (**Directives**) dated 9 April 2026, despite the fact that on 25 May 2026, Gildan was given the opportunity to make its views known first about what needed to be heard, why and how and that it did not say anything whatsoever about certain case-management applications that are apparently still pending and unresolved before the Court, Gildan voiced a last minute concern that without a resolution of these case-management applications, the Advance Costs Application can not proceed forward. The gist of Gildan's concern was that it is still not clear whether its Crossclaim is accepted by the plaintiffs to be part of the court record or not.

The Former Directors responded that it is indisputable that Gildan's Crossclaim forms a part of the court record, and that is why they have sought an advance of moneys pursuant to the Indemnification Agreement and section 124 CBCA, but they were not ready to admit that Gildan has filed a "proper defence" in this matter. At this stage, whether the plaintiffs' position is right or wrong, or meritorious or not, is of no consequence for the adjudication of the above-mentioned two applications. The proper defence issue and anything corollary to it, may be addressed later in the proceedings. What is a fact, and both parties concede that fact, is that without some form of claim, no request for advance of any moneys can be sought pursuant to the Indemnification Agreement or section 124 CBCA. This judgment, therefore, is being rendered on the premise that there is a significant monetary claim being advanced by the company against its former directors.

[23] In short, in Gildan's view, the plaintiffs breached their fiduciary duties by prioritizing their own personal gains and interests over those of the company, and as such, they should not be entitled to any of the amounts they are each claiming.

[24] On 23 December 2025, more than a month after Gildan served and filed its Crossclaim against the plaintiffs, pursuant to section 2 of the Indemnification Agreement, the Former Directors requested that Gildan advance them the sum of seven hundred and fifty thousand Canadian dollars (\$750,000) within five (5) business days.

[25] About 21 days later, on 13 January 2026, Gildan refused to advance any sums to the plaintiffs arguing, among other things, that the request for any such advance was "premature" and subject to the court's approval under subsection 124(4) CBCA and that, in any event, the Former Directors were "obstructing Gildan's access to its own privileged materials in the privilege litigation" before the Superior Court (Commercial Division), thereby preventing Gildan from "advancing complete submissions in response to the request for advancement".

[26] At the time, Gildan argued that "[sub]section 124(3)(a) CBCA provides that a corporation may indemnify an individual if they acted honestly and in good faith with a view to the best interests of the corporation." As such, Gildan added, the request for an advance of funds could not be decided prior to the adjudication of the privilege claim.

[27] On 19 March 2026, in response to Gildan's Crossclaim, the plaintiffs filed the Advance Costs Application pursuant to the Indemnification Agreement concluded between each of the plaintiffs and the company and section 124 of the CBCA. In that application, the plaintiffs sought the sum of 750,000 Canadian dollars in order to "make full answer" and "defend the allegations raised in Gildan's" Crossclaim.

[28] The plaintiffs are of the view that the Advance Costs Application must be heard and decided immediately and before any other issue or application pending before the Superior Court. Gildan conversely argues that that application and the Amended Originating Application as a whole ought to be suspended or stayed pending a decision by the Superior Court (Commercial Division) on the privilege issue involving the law firm of Norton Rose LLP (**Privilege Matter**).

[29] According to Gildan, there is "an undeniable connection" between this case and the Privilege Matter, since both arise from the same factual matrix and engage overlapping issues. This is how Gildan summarizes and justifies its position in that regard:

I. OVERVIEW

1. This file must be stayed pending resolution of the parallel privilege dispute in Superior Court file no 500-11-065209-252 (the "**Privilege Matter**"), including the

Application by the Plaintiffs/Cross-Defendants (the “**Former Directors**”) for Advancement of Defence Costs dated March 19, 2026 (the “**Application for advancement of costs**”), as it cannot proceed coherently or fairly until the Privilege Matter is adjudicated.

2. The Privilege Matter sits at the evidentiary core of this file. It will determine whether Gildan Activewear Inc. (“**Gildan**”) was Norton Rose’s client and, if so, order the return of its 40,000 documents currently with Norton Rose (the “**Norton Rose Documents**”). The Norton Rose Documents are directly relevant to both its defence to the DSU Claim and to its opposition to the Application for advancement of costs pursuant to section 124 of the *Canada Business Corporations Act* (“**CBCA**”).¹⁴

3. Allowing this matter to proceed before that issue is resolved would seriously prejudice Gildan and undermine the balancing function of section 124 CBCA. That provision is meant to, on the one hand, protect directors who acted honestly and in good faith with a view to the best interests of the corporation, while, on the other hand, prevent indemnification of directors who breached those duties. That balance cannot operate properly while Gildan is denied access its own documents bearing directly on the Former Directors’ conduct due to their ill-founded claim of attorney-client privilege.

4. Absent a stay, foundational principles of Quebec civil procedure and Gildan’s fundamental rights would be breached.

5. Moreover, the Court would have to decide the Application for advancement of costs on an incomplete evidentiary record, rule upon objections that are the object

¹⁴ As I indicated in the (**Directives**), in response to item 5 of its draft initial case protocol which asked whether “all parties request a stay of proceedings”, Gildan explicitly indicated “no”. In the Defendant’s Modified Notice of Case Management dated 18 November 2025, Gildan also wrote, “as is evident from its Crossclaim, Gildan does *not* rely on any privileged documents that are the subject of the application against Norton Rose” and moreover, it added that “Gildan’s Defence was not based on these documents. The very purpose of the application against Norton Rose was to obtain documents that Norton Rose was withholding from Gildan as a result of [the plaintiffs’ and certain other former directors’] unilateral and ill-founded assertion of privilege, made without notice to Gildan.

On 7 April 2026, however, Gildan argued that this case ought to be stayed entirely pending the outcome of the privilege issue before the Superior Court (Commercial Division), because it needed the documents subject to the privilege debate between the company, Gildan’s directors and the law firm of Norton Rose that is currently in possession of these documents, to properly prosecute its case. Gildan repeated the same point and offered certain unconvincing explanations with respect to it in its renewed request for an overall stay in this case on 25 May 2026. The issues raised by Gildan with respect to the Privilege Matter have since been apparently scheduled for a hearing before the Superior Court (Commercial Division).

of the Privilege Matter, creating procedural duplication, circularity, and a real risk of inconsistent rulings.

6. Subsidiarily, should the matter not be stayed, Gildan is entitled to establish, on a strong *prima facie* basis, that the Former Directors did not act in the best interests of the corporation, and accordingly sets out the procedural steps to advance the Application for advancement of costs in a manner consistent with the governing case law and the structure of the applicable statutory and contractual framework.

[Underlining is added]

[30] I disagree with Gildan and, in the pages that follow, I will explain why.

[31] Before doing so, however, I will open a parentheses to quickly address Gildan's request for an overall stay which I will – except for Gildan's submissions in regard to the interpretation and application of section 124 CBCA and its impact on Gildan's request for a stay – simply put over to a date following this judgment. I will therefore not decide that request – the Stay Application, to be precise – at this stage.

[32] I will also take this occasion to point out again that on 7 April 2026, more than a month and a half before the hearing of the Advance Costs Application, in paragraph 24 of the *Directives*, the parties were directed to : “provide the Court with any additional details or documents they deem appropriate or necessary in order to allow it to adjudicate the merits of the [Advance] Costs Application before it on the basis of the already existing record. [...] In other words, the parties must come to Court armoured with all details, information or documents that may be required to allow the Court to in a fair, simple, proportionate and economical manner address any and all issues, including the merits [...] of the [Advance] Costs Application.”

[33] I will have even more to say about this point later in the judgment.

GILDAN'S REQUEST FOR A STAY

[34] In its Stay Application, Gildan submits that article 49 of the *Quebec Code of Civil Procedure (C.C.P.)* confers upon the Superior Court an inherent power to stay proceedings where the sound administration of justice so requires. According to Gildan, that discretion must be exercised in accordance with the guiding principles of civil procedure, including proportionality, procedural fairness, and the efficient administration of justice. I have no issue with Gildan's understanding or position concerning the exercise by the Superior Court of its inherent powers.

[35] Gildan also adds that Quebec courts have recognized that a stay is warranted where parallel proceedings are closely connected, depend on overlapping factual or legal

issues, or create a risk of duplication, inefficiency, or inconsistent rulings. In certain factual situations, Gildan is also right about its observations in this regard. But this is not one of those situations.

[36] Turning to the facts of this case, Gildan submits that there is an undeniable connection between the Privilege Matter and the claims set out in the Amended Originating Application. In Gildan's view, both arise from the same factual matrix and engage overlapping issues. Gildan also adds that, more importantly, the DSU claims cannot be adjudicated fairly without first determining, in the Privilege Matter, whether or not Gildan has the right to obtain the "Norton Rose Documents".

[37] According to Gildan, the connexity that it sees is conceded by the Former Directors themselves, who in their own pleadings and correspondence apparently acknowledge that the merits of this proceeding would necessarily involve the privileged documents currently being adjudicated in the Privilege Matter and that a stay would allow the parties to resume the case on a clearer and procedurally sound footing.

[38] Gildan also submits that that same logic applies, *a fortiori*, to the Advance Costs Application. That application Gildan adds "relies [on] section 124 CBCA, which makes advancement of moneys contingent on a finding that the Former Directors acted honestly and in good faith with a view to the best interests of the corporation. The Norton Rose Documents subject to the Privilege Matter are central, Gildan argues, to the company's demonstration of a strong *prima facie* case on that issue. Requiring Gildan to fund the Former Directors' defence while they withhold the documents bearing directly on their conduct is not [only] premature, it is procedurally untenable."

[39] Gildan also submits that the Former Directors will likely rely on Justice Martin Sheehan's decision in the Privilege Matter¹⁵, in which he refused, on the particular record before him, to stay the Application for advancement of costs pending the result of the Privilege Matter. However, Gildan argues, that decision arose in a materially different procedural context, and the considerations that supported Justice Sheehan's conclusion in that context, do not apparently apply in the present case.

[40] Whether Gildan is right or wrong about the connection between the Privilege Matter and the claims set out in the Amended Originating Application, or is justified or not in holding the views it does with respect to its request for a stay pending resolution of, according to it, the parallel privilege dispute in Superior Court file number 500-11-065209-252 or the Privilege Matter that apparently arises in "a materially different procedural

¹⁵ See : *Vêtements de sport Gildan inc. c. Norton Rose Fulbright Canada*, 2026 QCCS 946 (***Vêtements de sport Gildan***).

context”, is of no import at this juncture, because there is nothing urgent about the Stay Application and there is absolutely no reason why it can not await the outcome of this judgment.

[41] Gildan is wrong, however, when it submits that allowing this matter to proceed before the Privilege Matter is resolved would seriously prejudice Gildan and undermine the balancing function of section 124 CBCA. While I will have more – much more – to say about this point in the following paragraphs, I will simply limit myself here to indicate that Gildan’s position with respect to the Advance Costs Application is predominately the result of its misreading and misapplying section 124 CBCA, and in particular, that provision’s subsections (2) and (4). I will also come back to this point.

[42] In the interim, Gildan erroneously sidesteps the governing and mandatory provisions of the Indemnification Agreement that are crucial to the proper understanding and fair adjudication of the advance of costs request by the Former Directors.

[43] Gildan’s request for a stay, other than its submissions with respect to the stay of the Advance Costs Application at this stage – which I will address as part of this judgment – therefore, is postponed to a later date to be fixed for a hearing, if necessary and justified, based on the availabilities of the parties and the approval of the Superior Court.

ANALYSIS

[44] The purpose of “indemnification” is to provide important financial protection by the corporation for its directors in situations where they acted or act at the corporations request as director¹⁶. Indemnification is intended to protect these individuals against exposure to legal expenses and liabilities that may be incurred by them in connection with legal proceedings based on an alleged breach of duty in their service to or on behalf of the corporation. The often commonly used contractual language that commits a corporation “to indemnify and save harmless the director from and against any and “all damages, losses, liabilities, costs, charges, fees and expenses (including, but not limited to, legal expenses, court fees, expenses for expert witnesses, travel and other expenses relating to attending discoveries, trials, hearing or meetings etc.)” also supports this point.

[45] In other words, the corporation should, as a general rule, indemnify a director, who is assumed to have acted or act in good faith at its request, unless it establishes “to the

¹⁶ *Discussion Paper*, p. 26.

satisfaction of the court”¹⁷ and on the balance of probabilities after a fair trial that the individual acted in *mala fides*.

[46] To use the words of the Supreme Court, the broad policy goals underlying the indemnity provisions under section 124 are to “allow for reimbursement for reasonable good faith [director] behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurship. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained.”¹⁸

[47] Indemnification therefore is retrospective, providing for reimbursement of “all costs, charges and expenses” after the outcome of a proceeding is determined. This enables the corporation, through the individuals making the decision to indemnify, to do so on the basis of known and tried facts. At the end, and following a trial, a director who intentionally inflicts harm on the corporation should not expect to receive assistance from the corporation for legal or other expenses.

[48] That individual should also be required to satisfy from his or her personal assets not only any adverse judgment, but also legal expenses incurred in connection with the proceeding. Any other rule could encourage socially undesirable conduct and perhaps violate tenets of public policy. It would be inappropriate to permit directors to use corporate funds to avoid personal consequences of improper conduct. There is absolutely no debate to be had about this point.

[49] Indemnification seen under this light would persuade responsible individuals to serve as directors while not being compelled to personally bear the cost of vindicating the appropriateness of their conduct in every instance in which it might be challenged. Indemnification, however, is not advancement of moneys or costs. While indemnification and advancement are closely connected, they are *not* identical. There is an important distinction between the two.

[50] Unlike indemnification, advanced moneys (or advance of costs) are contingent funds. Advancement can be conceived of as an extension of credit¹⁹, the final repayment of which is conditioned on whether a corporate official is ultimately entitled to indemnification. Since advanced funds are necessarily forwarded to a director before the outcome of any litigation is known, a director is required to, as explicitly set out in subsection 124(2) CBCA, *repay* the advanced amounts if it is ultimately determined that

¹⁷ *Blair v. Consolidated Enfield*, [1995] 4 S.C.R. 5 [**Blair**] at p. 23. See also subsection 124(4) CBCA.

¹⁸ *Blair*, pp. 39 and 40.

¹⁹ *Manitoba Securities Commission v. Crocus Investment Fund et al.*, 2007 MBCA 36, at par. 52.

he or she has not met the standard of conduct described in subsection 124(3) CBCA required for indemnification in connection with the proceeding.

[51] Advancement of moneys therefore is necessarily prospective. In essence, the legislature has made advancement a part of the statutory indemnification scheme, recognising the reality that requiring an individual to fund the costs of a litigation in which the individual is involved because of that person's association with the corporation until its conclusion and potential indemnification, would seriously impair the objective of indemnification itself.²⁰

[52] Advancement of moneys under subsection 124(2) CBCA does not require an inability to pay nor does it depend on the presence or absence of insurance. An indemnity, which is for the benefit of a designated individual can not and must not be contingent on the existence of insurance, which is for the benefit of the company and which the company can change or cancel at will.²¹

[53] Turning now to the statutory and contractual interpretation issues which are both at the heart of this case, a few brief observations are in order first. Considering the clarity of the state of the law with respect to these two issues, neither should really raise any objection or contestation.

The Law of Statutory and Contract Interpretation

[54] I will begin with statutory interpretation first, and then turn to the rules applicable to the interpretation of contracts. I will also follow this same sequence when it comes to the examination of section 124 CBCA and the relevant provisions of the Indemnification Agreement.

Statutory Interpretation

[55] Two methods of statutory interpretation converge in this case when it comes to the CBCA. On the one hand, there is the interpretation process applicable to bilingual legislation. The interpretation of bilingual statutes begins with a search for the shared meaning of the English and French versions. The Supreme Court has on a number of occasions identified a two-step approach for determining the shared meaning of English and French legislative provisions.²² It is to take place as follows:

²⁰ *Med-Chem Health Care Limited v. Misir et al.*, 2010 ONCA 380 (**Med-Chem**), par. 20. This case was decided on the basis of the provisions of the Ontario *Business Corporation Act*, R.S.O. 1990, c. B.16 (**OBCA**).

²¹ *Ibid.*, par. 27.

²² *R. v. S.A.C.*, 2008 SCC 47 (**S.A.C.**), par. 13 to 16.

[15] The first step is to determine whether there is discordance between the English and French versions of the provision and, if so, whether a shared meaning can be found. Where a provision may have different meanings, the court has to determine what kind of discrepancy is involved. There are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply: *Daoust*, at para. 27; P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 327. Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous: *Daoust*, at para. 28; Côté, at p. 327. Third, one version may have a broader meaning than the other. According to LeBel J. in *Schreiber*, at para. 56, “where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning”.

[16] At the second step, it must be determined whether the shared meaning is consistent with Parliament’s intent: *Daoust*, at para. 30. [...]

[56] The text of a bilingual statute, however, must be interpreted not only in accordance with the rules governing bilingual statutes, but also within the larger framework of the modern rule that the words of an Act of Parliament (**Act**) are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.²³

[57] In his 1974 first edition of *Construction of Statutes*, Elmer Driedger formulated this revised rule for statutory interpretation: Words in a statute are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[58] This rule became commonly known as the “modern approach to statutory interpretation.”²⁴ Following this approach, “the courts must consider and take into account all relevant and admissible indicators of legislative meaning”²⁵. One such indicator is certainly the difference, if any, between the English and French versions.

[59] In 1998, the modern approach rule was cited with approval by the Supreme Court in *Re Rizzo & Rizzo Shoes Ltd.*²⁶ In that decision, among other things, Iacobucci J. noted

²³ *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (**Khosa**) at par. 38.

²⁴ See more details in this regard in *Hele v. Attorney General of Canada*, 2020 QCCS 2406 (**Hele**).

²⁵ *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550, par. 6.

²⁶ [1998] 1 S.C.R. 27. The Supreme Court cited the 1983 second edition version of Driedger’s text. The statutory interpretation rule remained exactly the same.

that Driedger's interpretive approach correctly recognized "that statutory interpretation cannot be founded on the wording of the legislation alone."²⁷

[60] In 2005, the Supreme Court reiterated the above rule by observing that the interpretation of a statutory provision must be made according to a "textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole."²⁸ It added that "when the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role."²⁹

[61] A year later, the Supreme Court further added that "the grammatical and ordinary sense of a section is not determinative and does not constitute the end of the inquiry. The court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading."³⁰

Contractual Interpretation

[62] When it comes to contractual interpretation, the first step in interpreting a contract is to determine whether its words are clear or ambiguous. This first step "serves as a bulwark against the risk of an interpretation that deviates from the true intention of the parties and subverts the scheme of their agreement."³¹ If the words of a contract are clear, the court's role is limited to applying them to the facts before it. In short, the court must defer to a clear contract.

[63] If, on the other hand, an ambiguity is identified, the court must resolve that ambiguity. The cardinal principle in that exercise is to search for the common intention of the parties rather than adherence to the literal meaning of the words.³² In this process, the court must consider intrinsic aspects of the contract, such as the words of the clause at issue and the other clauses, in order to ensure that each of them is given a meaningful effect and that each is interpreted in light of the others.³³

²⁷ *Ibid.*, par. 21.

²⁸ *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at par. 10.

²⁹ *Ibid.*

³⁰ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140 at para. 48 as per Bastarache J. writing for the majority.

³¹ *Uniprix c. Gestion Gosselin et Bérubé inc.*, 2017 CSC 43 (*Uniprix*), par. 34.

³² *Ibid.*, par. 37, and article 1425 of the *Civil Code* of Quebec (**C.C.Q.**).

³³ See articles 1427 and 1428 C.C.Q.

[64] The interpretation of a contract also requires consideration of the nature of the contract and of the context extrinsic to it, including the factual circumstances in which it was formed, how the parties have interpreted it, and usage.

[65] It is also useful to recall the obligation of *good faith* under Quebec civil law found in articles 6 C.C.Q. – Every person is bound to exercise his, her or its civil rights in accordance with the requirements of good faith – and 1375 C.C.Q. – Parties shall conduct themselves in good faith both at the time the obligation arises and at the time it is performed or extinguished – which is of public order, and which applies to every contract as if an express clause provided for it.³⁴

[66] Through the combined effect of articles 1375 and 1434 C.C.Q., good faith performance is an implied obligation included in every contract. In essence, article 1434 C.C.Q. “sets out a mechanism of implied ‘prestations’ and article 1375 establishes one of those prestations by requiring reciprocally from the contracting parties a general attitude – even ‘a state of being’ – in the course of their contractual relationship.”³⁵

Gildan’s Contestation of the Advance Costs Application

[67] If its request for an overall stay in this matter is not granted – and at this stage, it is not as it is simply being postponed – Gildan subsidiarily submits that to adjudicate the Advance Costs Application, the Superior Court must be satisfied that the Former Directors acted honestly and in good faith with a view to the best interests of the corporation.

[68] Gildan also submits that as part of the Advance Costs Application adjudication, it has a right to establish a strong *prima facie* case that the Former Directors did not act honestly and in good faith with a view to the best interests of the corporation. Gildan argues that the conduct of the Former Directors lies at the heart of the application pending before the Superior Court.

[69] Before setting out in detail its extensive views about its so called “*right*” to establish a strong *prima facie* case in response to the Former Directors’ Advance Costs Application, Gildan observes that section 124 CBCA reflects a balance deliberately established by the legislature between (i) the protection of directors who acted in accordance with their duties, and (ii) the prohibition for corporations to indemnify directors who breached those duties. The underlining of the word indemnity in this context is obviously mine.

³⁴ *National Bank of Canada v. Soucisse*, [1981] 2 S.C.R. 339, *Houle v. Canadian National Bank*, [1990] 3 S.C.R. 122, and *Bank of Montreal v. Bail Ltée*, [1992] 2 S.C.R. 554.

³⁵ *Ponce v. Société d’investissements Rhéaume Ltée*, 2023 CSC 25, par. 70.

[70] According to Gildan, the legislative history of section 124 confirms that its purpose is to strike a deliberate balance between (i) protecting directors who act honestly and in good faith and (ii) preventing corporate funds from being used to shield improper conduct. In support of the above statements, Gildan relies on, among other things, the Dickerson Report, which it adds led to the enactment of the CBCA in 1975, and contemplated a regime in which corporations would have extensive authority to indemnify directors, subject to defined standards and judicial supervision.

[71] In its 23-page-134-paragraph-long Outline of Argument, dated 19 May 2026, (**Outline of Argument**) accompanied with a plethora of caselaw, Gildan reproduces the following passage from Dickerson Report:

Subsection (1) confers very broad powers on a corporation to indemnify a director or officer who is sued in his capacity as a director or officer by a person other than the corporation of which he is a director or officer. The only standards he must fulfil are, in a civil action, that he acted honestly and in good faith with a view to the best interests of the corporation and, in a criminal action or administrative proceeding, that he had reasonable grounds for believing that his conduct was lawful. The practical limitation upon any abuse of these powers of indemnity is the explicit provision that no indemnity can be paid until it has been approved by a court.

[Underlining and emphasis is added]

[72] Gildan adds that, “two features of this original model are critical. First, indemnification was always expressly linked to standards of honesty and good faith. Second, the regime relied on structural safeguards, including court oversight, to prevent misuse of corporate resources.”

[73] I agree with Gildan in this regard, and adopt, as mine, the observations of the Ontario Court of Appeal³⁶ that highlight the patina of section 124 CBCA’s invariant broad dual policy goals to the effect that:

[23] In interpreting the relevant provisions, I begin with the legislative rationale for permitting indemnification generally, while prohibiting it in specified circumstances. The primary purpose of indemnification is to provide assurance to those prepared to become corporate directors that they will be recompensed for any adverse consequences arising from well-intentioned entrepreneurship undertaken on the corporation’s behalf. This assurance serves to attract and to protect competent directors who will advance the interests of the corporation.

³⁶ *Bennett v. Bennett Environmental Inc.*, 94 O.R. (3d) 481 (**Bennett**).

[24] However, to encourage appropriate conduct, Parliament and the provincial legislatures also provide deterrents against misconduct. Arguably, the most effective deterrent is the consequence, including the stigma, of director prosecution and conviction. Another deterrent is the legislative prohibition against corporate indemnification for director misconduct.

[25] This tension between the competing objectives of encouraging director entrepreneurship on the one hand, and discouraging director misconduct on the other, informs the interpretation of s.124(3).

[Underlining added]

[74] While duplicative, as I have previously cited the relevant passage in *Blair*, I find it indispensable to repeat again here what the Supreme Court had to say with respect to the dual policy goals of section 124 CBCA³⁷:

Permitting [the president and director of the corporation] to be indemnified is consonant with the broad policy goals underlying indemnity provisions; these allow for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection. Indemnification is geared to encourage responsible behaviour yet still permit enough leeway to attract strong candidates to directorships and consequently foster entrepreneurship. It is for this reason that indemnification should only be denied in cases of *mala fides*. A balance must be maintained.

[Underlying added]

[75] Gildan then goes on to offer the following observations and submissions to deprive the Former Directors of any advance of funds until the company has had an opportunity to fully investigate and assess the extent of their conduct or good faith behaviour as directors.

[76] According to Gildan, subsection 124(1) establishes a corporation's right to indemnify its directors. Notwithstanding section 124(1), adds Gildan, a corporation cannot indemnify a director who failed to act honestly in good faith with a view to the best interests of the corporation. If one of the conditions of section 124(3) CBCA is not fulfilled, Gildan adds, the corporation may not indemnify.

[77] According to Gildan, subsection 124(5) CBCA defines when indemnification becomes obligatory. A director acquires a right to indemnification only once it is

³⁷ *Blair*, pp. 39 and 40. The Supreme Court's observations in *Blair* were in relation to section 136 OBCA.

established, after a trial on the merits of the case, that they committed no fault and satisfied the good faith requirement, as set out in subsection 124(3).

[78] When it comes to advance of funds, Gildan advances that subsection 124(2) CBCA identifies when a corporation can advance costs prior to the merits of the case. According to Gildan, the advancement of funds is a right of the corporation and is not mandatory. Gildan adds, that a corporation is of course entitled not to advance moneys, especially if it is of the opinion that the director breached its duty to act honestly and in good faith with a view to the best interests of the corporation.

[79] In actions commenced by corporations against the director – often, but not always, for a breach of fiduciary duty – Gildan submits that subsection 124(4) CBCA imposes a mandatory judicial authorization for advancement of funds. Gildan then adds that subsection 124(4) specifically imposes that the approval of the court is necessary for indemnification and advancement of funds. According to Gildan, subsection 124(4) CBCA further imposes that the approval of the court must only be given, including for advancement of funds, if the director has fulfilled the conditions set out in subsection (3), i.e., if the director acted honestly and in good faith with a view to the best interests of the corporation. The underlining again is mine.

[80] Gildan is also of the view that the Indemnification Agreement in this case requires court approval before any amounts may be disbursed to any director. In support of such a statement, it refers to the following paragraph in that agreement:

Notwithstanding the foregoing, if court approval is required by the Act to permit the Corporation to advance costs and expenses in respect of any such Proceeding, the Corporation's obligation hereunder to make all such advances shall be subject to receipt of the court's prior approval and shall be on such terms and conditions as may be ordered by the court.

[Underlining added]

[81] In sum, Gildan concludes, when directors are sued by the corporation that appointed them and which they serve, the court must approve both indemnification and any advance of funds to these individuals, which it can only do if it is satisfied that the directors acted honestly and in good faith with a view to promoting the best interests of the corporation. Without a fair and reasonable adversarial assessment of the directors' conduct at *both* stages, Gildan adds, "the balancing mechanism of section 124 will be skewed, and its *raison d'être* will be broken."

[82] As I indicated before, I disagree with Gildan and to explain why, I will examine each of Gildan's arguments with respect to section 124 CBCA – as it reads in *both* English and French – and the Indemnification Agreement to demonstrate how in certain regards

Gildan either misreads the subsection or contractual provision in question or it profoundly misunderstands it.

[83] As a starting point, contrary to its oral submissions at the hearing to the effect that section 124 CBCA was principally adopted to protect the corporation, in writing, Gildan correctly recognises that the purpose of “indemnification” is to provide important financial protection to directors in situations where they acted or act in this capacity, in good faith, at the corporations request. Gildan is not off the mark about this point.

[84] Before examining in detail Gildan’s other submissions about section 124 CBCA, I will pause for a moment to offer an important reminder.

[85] It is an established principle of statutory interpretation in Canada, including under Quebec law, that French and English texts of legislation are deemed to be equally authoritative with respect to the subject matter they cover, and that where there is a discrepancy between the two versions, it is the meaning which furthers the purpose of the legislation which must prevail.³⁸

[86] The equal authenticity rule has been set out in a number of constitutional and legislative texts. Section 18 of the *Constitution Act, 1982*³⁹, for example, provides that both language versions of federal and New Brunswick legislation are equally authoritative; and sections 56 and 57 provide that where English and French versions of the Constitution Acts are enacted, they will be equally authoritative.⁴⁰

[87] I will also add that in resorting to the modern statutory interpretation rule, courts must consider and take into account all relevant and admissible indicators of legislative meaning, including the requirement that the interpretation of bilingual statutes begins with a search for the shared meaning of the English and French versions.⁴¹ To use the words of Bastarache J., in the bilingual Canadian context, reading “only one version of the law” may result in peril.⁴²

³⁸ See: *R v. Collins*, [1987] 1 S.C.R. 265, *R v. Turpin*, [1989] 1 S.C.R. 1296, *Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554, and *R v. Mac*, [2002] 1 S.C.R. 856.

³⁹ Schedule B to the *Canada Act 1982, 1982, c. 11 (U.K.)*.

⁴⁰ *Sullivan*, CHAPTER 5, Bilingual and Bijural Meaning, § 5.02 The Constitutional and Legislative Framework, *supra*, footnote 5.

⁴¹ *S.A.C.*, par. 14.

⁴² *Khosa*, par. 38.

Indemnification

[88] Turning back to the bilingual interpretation of subsection 124(1) CBCA⁴³, it is clear that that subsection, in both languages, *permits* a company such as Gildan to indemnify its Former Directors against “all costs, charges and expenses” or “*tous leurs frais et dépenses*” reasonably incurred by them in respect of the Crossclaim. Gildan itself concedes this point, that the Indemnification Agreement sets out in mandatory and more directive language as follows: “The Corporation hereby agrees to indemnify [...]”

[89] In that agreement, in section 1, Gildan expressly “agrees to indemnify and save harmless” the Former Directors “from and against any and all damages, losses, liabilities, costs, charges, fees and expenses (including, but not limited to, legal expenses, court fees, expenses etc. [...]) (collectively, “**Losses**”), reasonably incurred by [these individuals] in respect of any civil, criminal, arbitral, administrative, investigative or other proceeding (“**Proceeding**”) in which [these individuals are] made a party or involved (including merely as a witness) by reason of being or having been a director of [Gildan] or an Affiliate, except that, in accordance with section 3 of the agreement, the indemnification and advance of costs and expenses provisions shall not apply to “(a) any Proceeding initiated by the [Former Directors] against [Gildan] or an Affiliate except for Proceedings relating to the enforcement of this Agreement, or (b) any Proceeding initiated by the [Former Directors] against any other person or entity unless [Gildan] has joined in, or given its written consent to, the initiation of such Proceeding.”

[90] It is important to note with respect to the specific issue of indemnification that, subject to section 3 of the Indemnification Agreement, subsections 1(c)(i) and (ii) of that agreement make it abundantly clear that the common intention of both parties, which is the cardinal principle in the exercise of any contractual interpretation, is “to provide [the Former Directors] indemnification to the fullest extent permitted by law and without limiting the generality of the foregoing and notwithstanding anything contained [in the Indemnification Agreement].”

[91] Considering that Gildan has explicitly challenged the good faith behaviour of the Former Directors⁴⁴, there is consequently no doubt – unless of course the parties resort, as they should, to the mandatory consideration provision set out in the third paragraph of

⁴³ While indemnification is not an issue in this case, examining it here is both necessary and useful for the interpretation and more complete understating of the issue of advance of costs found in subsections 124(2) and (4) CBCA.

⁴⁴ See for example, paragraphs 181 and following of the Crossclaim, under the heading: “The Former Directors’ Reprehensible Conduct”.

the first article of the C.C.P.⁴⁵— that a trial of the indemnification issues in this matter is inevitable.

[92] It is at that time, to use Gildan’s own words, “after a trial on the merits of the case” that subsection 124(5), entitled “Right to indemnity”, makes indemnification – in both languages – obligatory, if, to use the language of the statute this time around, “the individual seeking indemnity (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and (b) fulfils the conditions set out in subsection (3).”

[93] This is where and when subsection 124(3) CBCA takes on its full meaning. That subsection in both languages – “may not indemnify...unless” or “*ne peut indemniser...que*” – “sets out [in (a)], as a precondition to indemnification, that the [director] seeking such indemnification must have acted honestly and in good faith in the best interests of the corporation.

[94] Subsection 124(3)(b) CBCA adds an additional prerequisite regarding indemnification arising from criminal or regulatory penalties: the [director] must also have had reasonable grounds for believing his or her conduct was lawful.”⁴⁶

[95] As explained by the Ontario Court of Appeal in *Bennett*⁴⁷:

[27] In keeping with the contextual perspective, Parliament determined that entitlement to indemnification must be decided on the basis of the circumstances that existed at the time of the director’s (a) conduct and (b) belief. This is clear not only from the wording of s. 124(3), but also from the leading case of *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 [...], where Iacobucci J. observed, at para. 74, that the similar non-indemnification provision in the *Business Corporations Act*, R.S.O. 1990, c. B.16 allows “for reimbursement for reasonable good faith behaviour, thereby discouraging the hindsight application of perfection”.

⁴⁵ Article 1 C.C.P., under the heading, “**Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes**” reads:

1. To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process. [...]

Parties must consider private prevention and resolution processes before referring their dispute to the courts.

[Underlining added]

⁴⁶ *Bennett*, par. 26.

⁴⁷ *Ibid.*

[28] In addressing the required degree of misconduct, Iacobucci J. instructed, at para. 74, that indemnification will only be prohibited if the director acted with *mala fides*. At para. 35, he cited *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537, [...], at p. 548, for the proposition that “persons are assumed to act in good faith unless proven otherwise” and placed the onus of proving *mala fides* on the corporation opposing indemnification.

[29] Noting that this interpretation of s. 124(3)(a) is in keeping with academic commentary, Iacobucci J. quoted, at para. 74, from Jacob S. Ziegel et al., *Cases and Materials on Partnerships and Canadian Business Corporations*, 3rd ed., vol. 1 (Scarborough, Ont.: Carswell, 1994), at p. 523. There, the authors acknowledge the appropriateness of denying indemnification for “fraud or misappropriation”, but recognize that a director should not be denied indemnification if the “conduct [...] was not coloured by any opportunistic behaviour”. Opportunistic or self-seeking behaviour may be encompassed within the term *mala fides* because such behaviour exhibits a type of dishonesty that should not be countenanced by an award for indemnification.

[30] The scope of the bad faith described in *Blair* was clarified in *Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, [...]. At para. 25, Deschamps J., writing for the court and citing *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17, [...], at para. 39, accepted that bad faith can encompass recklessness in the sense that the conduct at issue is so inexplicable that it suggests an absence of good faith. Deschamps J. also noted, at para. 26, that this clarification means “no more than the admission in evidence of facts that amount to circumstantial evidence of bad faith where a victim is unable to present direct evidence of it”. Thus, inexplicable, apparently reckless, conduct may lead to the inference that the conduct was deliberate, intentional and undertaken in bad faith.

[31] Since the dispute in *Blair* involved a director's indemnification for a civil proxy dispute, it did not expressly consider the second branch of the CBCA's non-indemnification test under s.124(3)(b), which requires reasonable grounds for belief in lawful conduct.

[Underlining added]

[96] It is therefore clear that subsections 124(1), (3) and (5), altogether addressing the issue of indemnification *only*, are intimately related to one another. An identical conclusion is reached when one examines section 1(a)(i) and (ii) of the Indemnification Agreement. Under the bold heading “Indemnification”, sections 1(a)(i) and 1(c), in particular, succinctly provide that subject to section 3, “the Corporation”, Gildan, “hereby agrees to indemnify and save harmless” the Former Directors “from and against any and all damages etc.” reasonably incurred by these individuals in respect of any civil, criminal etc. proceeding, provided that the individuals in question “acted honestly and in good faith

with a view to the best interests of the Corporation, or, as the case may be, to the best interests of such Affiliate”, as defined in the preamble of the Indemnification Agreement.

[97] Such a statutory and contractual interpretation not only respects the intention of the parties, but also that of the legislature that wishes to, as correctly expressed by Gildan, strike a deliberate balance between (i) protecting directors who act honestly and in good faith and (ii) preventing corporate funds from being used to shield improper conduct.

[98] Gildan is then correct when it submits in its Outline of Argument, that “notwithstanding section 124(1) CBCA, a corporation cannot indemnify a director who failed to act honestly in good faith with a view to the best interests of the corporation. If one of the conditions of [sub]section 124(3) CBCA is not fulfilled, the corporation may not indemnify.”

[99] Such an interpretation of the statutory provisions in question, in other words, subsections 124(1), (3) and (5) CBCA also respects the state of the law and section 5 of the Indemnification Agreement, as it relates to the issue of the presumption of good faith. It is useful to recall here again that according to *Blair*, directors of corporations are, as a general rule, “assumed to act in good faith unless proven otherwise” at trial.⁴⁸

[100] Consequently, directors are not required to prove their good faith, although they may, in the context of a 124(1) indemnification application, for example, call in evidence to counter whatever evidence of bad faith the company may be adducing against them to demonstrate that what they did was not inimical to the company’s best interests.

[101] In this case, section 5 of the Indemnification Agreement also echoes the same point. That section expressly recognises that the Former Directors “shall be *presumed* to have acted honestly and in good faith and with a view to the best interests of the Corporation or an Affiliate, [...] unless [...] a court or other competent authority” determines otherwise.

[102] That section then goes on even further to stipulate that “the termination of any Proceeding by judgment, order, settlement (whether with or without court approval) or conviction, shall *not*, of itself, create any presumption that the [Former Directors] did not fulfill the conditions described in paragraphs 1(a)(i) and 1(a)(ii)” of the Indemnification Agreement.

[103] The combination of these provisions allows for the indemnification for reasonable good faith behaviour, discouraging in the process the “hindsight application of perfection” while at the same time encouraging the responsible behaviour of strong candidates who

⁴⁸ *General Motors of Canada Ltd. v. Brunet*, [1977] 2 S.C.R. 537 [**General Motors**], p. 548 and *Blair*, p. 23.

wish to serve as directors, with the ultimate result that indemnification at trial will only be denied in cases where the corporation is able to, on the balance of probabilities, demonstrate *mala fides* on the part of the person in question.

[104] To put it differently, a corporation will only be allowed to avoid the indemnification of a director under subsection 124(1) CBCA, if it is able to establish at trial that that director's fiduciary duty to "act honestly and in good faith and with a view to the best interests of the corporation" was not fulfilled. To use the words of the Supreme Court in *Blair*, indemnification therefore will "only be denied in cases of *mala fides*."⁴⁹

[105] This brings me to the application of subsection 124(2) CBCA, which addresses the issue of advance of costs that must clearly be distinguished from indemnification, because, as I indicated earlier, they are not the same thing, and because the request for which, coupled with the application of subsection 124(4) CBCA, is at the heart of this case.

Advance of costs

[106] Gildan submits that in order to adjudicate the Advance Costs Application, I must first be satisfied that the Former Directors acted honestly and in good faith with a view to the best interests of the corporation. According to Gildan, when it comes to the issue of advance of costs, subsection 124(2) identifies when a corporation can advance costs prior to the merits of the case.

[107] In Gildan's view, the advancement of any sums to the Former Directors is a *right* that belongs to the corporation and it is *not* mandatory. Gildan submits that it is entitled not to advance any moneys to its Former Directors, if it is of the view that these individuals breached their duty to act honestly and in good faith with a view to the best interests of the corporation.

[108] Gildan is mistaken, and Gildan itself, accompanied by counsel, did not commit to such a position when it initially entered into the Indemnification Agreement more than two (2) years ago.

[109] In that agreement, Gildan expressly undertook to "within five (5) business days⁵⁰ after receiving a written request" – such a request was sent to Gildan on 13 January 2026,

⁴⁹ *Blair*, p. 40.

⁵⁰ This amendment was made on 13 April 2024. Prior to this date, the section on "Advance of Costs" read, in part, as follows: "The Corporation agrees that it will advance monies to the Indemnified Party for the costs reasonably incurred in connection with investigating, defending [... etc.]. As I indicated before, any issues that relate to why and when the initial indemnification agreement dated 9 February 2024 was amended on

close to six (6) months ago – from the Former Directors to advance monies to them for the costs and expenses reasonably incurred or expected to be incurred in connection with investigating, defending or participating in (including, if applicable, on appeal), or preparing to defend, or participate in, any Proceeding as defined in the agreement, with the understanding and agreement that, in the event it is ultimately determined in a final non-appealable judgment of a court of competent jurisdiction that the Former Directors did not fulfil the conditions described in paragraphs 1(a)(i) or 1(a)(ii) of the agreement, they will promptly *repay* to the Corporation the monies so paid in advance.

[110] At the time of the conclusion of the Indemnification Agreement, the parties also unequivocally agreed that notwithstanding the foregoing, “if court approval [was] required by the [CBCA, for example] to permit Gildan to advance costs and expenses in respect of any Proceeding defined in the agreement, Gildan’s obligation to make all such advances would be subject to receipt of the court’s prior approval and would be on such terms and conditions as maybe ordered by the court. The terms of the Indemnification Agreement are limpid, and they do not require any interpretation. The Superior Court must defer to a clear contract.

[111] As for subsection 124(2) CBCA, that section allows Gildan (subject to an explicit repayment obligation – if the conditions of subsection 124(3) are not fulfilled) to pay advances of the legal costs, charges and expenses that the corporation may indemnify under s. 124(1). More importantly, subsection 124(4), under which these proceedings fall, allows the corporation to do the same (with the court’s approval), if the action is brought by or on behalf of the corporation itself and the directors are made parties to such an action by virtue of their association with the corporation.

[112] As I indicated earlier, I will address this issue in greater detail later in this judgment. In the meantime, it is important to retain that subsection 124(2) CBCA provides for advancement of the same legal costs, charges and expenses that may be indemnified by the corporation.⁵¹

[113] To use the words of the Ontario Court of Appeal⁵², in short, “the legislature [and in this case, the parties themselves have expressly] made advancement a part of the statutory [and contractual] indemnification scheme, recognizing the reality that requiring [the Former Directors] to fund [their] costs of litigation until its conclusion before being

1 March 2024 and then again 13 April 2024 must be addressed at the trial of the indemnification or repayment issues.

⁵¹ *Med-Chem*, par. 20.

⁵² *Ibid.*

provided with indemnification would seriously impair the objective of indemnification itself.”

[114] Above and beyond the provisions of the CBCA and the Indemnification Agreement, Gildan also has a good faith obligation pursuant to articles 6 and 1375 C.C.Q. to exercise its rights in accordance with such obligation and to also perform its obligations accordingly.

[115] Despite such a commitment, Gildan argues that I must first satisfy myself – at this provisional stage – that the Former Directors acted honestly and in good faith with a view to the best interests of the corporation. With respect, Gildan is wrong. Nowhere in the CBCA nor in the Indemnification Agreement is there a reference to such a requirement. To the contrary, statutory and contractual law, together, command that the Former Directors be presumed to have acted in good faith unless demonstrated by Gildan otherwise at the trial of the indemnification issues.

[116] As I indicated earlier, according to the Supreme Court in *Blair*, directors of corporations are, as a general rule, “assumed to act in good faith unless proven otherwise.”⁵³ There is a rebuttable presumption in place. These individuals are also *not* required to prove their good faith either at the indemnification or the advance of costs stage, although as Iacobucci J. puts it, they may do so, in the context of a subsection 124(1) CBCA indemnification application, by calling in evidence to counter whatever evidence of bad faith the company may be adducing against them to demonstrate that what they did or the manner in which they acted was not inimical to the company’s best interests.

[117] As subsection 124(2) CBCA makes it abundantly clear, at the trial of the indemnification issues, if the Former Directors do not “fulfill the conditions of subsection (3) – a corporation may not indemnify an individual under subsection (1) unless the individual acted honestly and in good faith with a view to the best interests of the corporation [...] or to use the French words employed in the statute, “*la société ne peut indemniser un particulier en vertu du paragraphe (1) que si celui-ci [...] a agi avec intégrité et de bonne foi au mieux des intérêts de la société [...]*” – they must repay the moneys advanced. Neither the statute (CBCA in this case) nor the Indemnification Agreement require anything else.

[118] I reiterate *again*, that as a general rule, directors of corporations are “assumed to act in good faith unless proven otherwise.”⁵⁴ The onus lies on the corporation to

⁵³ *General Motors* p. 548 and *Blair*, p. 23.

⁵⁴ *Ibid.*

demonstrate at trial that a director acted with *mala fides*. If the corporation satisfies such an onus, the individual or individuals in question will have to “repay” any moneys advanced to them and they will not be entitled to any indemnification.

[119] As explained by the Ontario Court of Appeal⁵⁵:

The imposition of the burden on the corporation best balances the promotion of strong director decision-making on the one hand, while discouraging irresponsible behaviour on the other. Finally, as a practical matter, this placement of the burden makes sense because the corporation, and not the individual director, will most likely have the advantage of unrestricted access to corporate documents relevant to the indemnification proceeding.

[Underlining added]

[120] When s. 124 CBCA is read together with the Indemnification Agreement, the answers to the requests made by the Former Directors’ in the Advance Costs Application become clear. The CBCA permits a corporation to advance legal costs, charges and expenses that it may have to eventually indemnify. The Indemnification Agreement makes this requirement mandatory. Gildan must advance the legal costs, charges and expenses that it must later indemnify, subject only to the repayment condition in subsection 124(2) CBCA and the court’s approval required under section 124(4) CBCA to which I will now turn my attention.⁵⁶

Subsection 124(4) CBCA

[121] In actions commenced by corporations against a director, such as in this case, where the corporation is advancing a claim in the amount of 50 million U.S. dollars against its Former Directors for, among other reasons, breach of fiduciary duties, Gildan submits that subsection 124(4) CBCA imposes mandatory judicial authorization for any indemnification or any advance of costs.

[122] According to Gildan, pursuant to subsection 124(4) CBCA, approval of the court in both instances can *only* be given, if the Former Directors have fulfilled the conditions set out in subsection (3), i.e. that they acted honestly and in good faith with a view to the best interests of the corporation.

[123] While Gildan concedes that the Former Directors benefit from a presumption of good faith under both section 124 CBCA and section 5 of the Indemnification Agreement,

⁵⁵ See: *Bennett*, par. 32.

⁵⁶ See: *Med-Chem*, par. 21.

and that the burden of proof to demonstrate that the Former Directors did not act in good faith is on it, Gildan argues that the presumption in question is rebuttable, and as such, it *must* be permitted at this provisional stage to adduce strong *prima facie* evidence to rebut that presumption and prevent the individuals in question from benefitting from the funds referred to in subsection 124(2) CBCA and section 5 of the Indemnification Agreement.

[124] Gildan also vehemently argues that in order to meet the so-called strong *prima facie* burden that is according to it incumbent upon it at this stage, it must be provided with unfettered permission to adduce any evidence it deems necessary to oppose the Advance Costs Application.

[125] According to Gildan, “neither the law, the indemnification agreements, nor [...] caselaw limits the evidence a corporation may adduce to oppose an application for advancement of funds, subject only to the ordinary rules of evidence.”⁵⁷ Gildan also adds:

102. The fact that the Court conducts only a preliminary review under section 124 CBCA does not mean the evidentiary record may be summary or artificially truncated. What is summary is the Court’s assessment, not the evidence the corporation may adduce. Case law requires that the corporation be permitted to place before the Court a sufficiently robust record to support a strong *prima facie* case that the directors did not act honestly and in good faith with a view to the best interests of the corporation.⁵⁸

103. The provisional nature of advancement does not lessen the Court’s role. Even interim funding may frustrate the statutory purpose if the corporation is required to fund the defence of a director who did not act in its best interests. The possibility of reimbursement is only one side of the legislative balance; the other is the pre-trial good-conduct filter expressly imposed by Parliament.

[126] In short, Gildan is of the view that both the English and French versions of the CBCA support its understanding of and position on such a requirement, which, according to it, is in any event, confirmed by appellate caselaw from the provinces of both Ontario and British Columbia, as well as by a single judgment of the Superior Court⁵⁹ (relying on the Ontario decisions, in particular) rendered in a different case involving some of the same parties as in this case, but in a different context.

[127] I do not agree with Gildan. This is why.

⁵⁷ Outline of Argument, par. 97 and following.

⁵⁸ In support of the above statement, Gildan refers to *R. v. Canadian Broadcasting Corporation*, 2018 SCC 5, at par.17 and 18, that explains in an injunction request context, what a showing of a strong *prima facie* case entails.

⁵⁹ *Vêtements de sport Gildan inc.*, par. 49 and 79.

Subsection 124(4) Analysis

[128] I will begin with the initial observation that subsection 124(4) CBCA applies *only* to situations where an action by or on behalf of a corporation or other entity to procure a judgment in its favour is lodged against the individuals referred to in subsection 124(1), because of their association with the corporation. The French version confirms the same point.

[129] It applies: “à l’égard des actions intentées par [la société] ou par l’entité, ou pour son compte, en vue d’obtenir un jugement favorable, avancer à tout particulier visé au paragraphe (1).” The Former Directors are these individuals “le particulier visé au paragraphe (1)”, and Gildan is, as I indicated before, suing them for 50 million U.S. dollars, which presently is the equivalent of roughly 71 million Canadian dollars. To state that this is a considerable sum to claim against any individual *personally* is an understatement.

[130] Before going further, given that the application of subsection 124(4) CBCA goes to the very heart of the Advance Costs Application, I find it useful to reproduce again here the two versions of that subsection, side by side:

Indemnification in derivative action	Indemnisation lors d’actions indirectes
(4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual’s association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).	(4) Avec l’approbation du tribunal, la société peut, à l’égard des actions intentées par elle ou par l’entité, ou pour son compte, en vue d’obtenir un jugement favorable, avancer à tout particulier visé au paragraphe (1) les fonds visés au paragraphe (2) ou l’indemniser des frais et dépenses entraînés par son implication dans ces actions, s’il remplit les conditions énoncées au paragraphe (3).

[131] Three short preliminary remarks are in order with respect to this subsection.

[132] First, use of precise and unequivocal words in both languages, when read in their grammatical and ordinary sense, as well as when they are considered in the overall context of section 124 CBCA, convey the same dual objectives set out in subsections 124(1), (2), (3) and (5).

[133] The dual objectives are to: (1) encourage corporate service by capable individuals by *indemnifying* them or protecting their personal financial resources from depletion by

investigations or litigation that result by reason of that service and, (ii) as a corollary to the first, offer certain immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with such investigations and litigation by *advancing* certain moneys to them⁶⁰.

[134] Second, in the context of subsection 124(4) CBCA, both language versions require “approval”, or in French, “*l’approbation*” of a court for indemnification to the Former Directors under subsection 124(1) and advance of moneys to these same individuals under subsection 124(2). Resort to subsections 124(1), (2), (3) and (5), does not necessarily require such intervention, unless of course there are litigious issues between the company and the individuals in question.

[135] As a general observation, it is important to highlight that “the court has an important role to play in circumstances where the corporation is suing its former directors for breach of fiduciary duty and indemnity and where advancement is in issue. Such issues are difficult for both sides. The review by the court in such circumstances operates to protect both sides.”⁶¹

[136] Moreover, subsection 124(4) CBCA must be read in conjunction with subsection 118(2)(d) CBCA⁶², which imposes personal liability on directors that vote for or authorize the payment of an indemnity contrary to section 124, which necessarily also includes subsection 124(4). The legislature, however, does not say anything or refer to advance of costs, even though such a possibility is expressly provided for in subsection 124(2).

[137] If one starts with the premise that the legislature does not speak without reason, then it should not be difficult to concede that if it does not, its silence means that there is

⁶⁰ *Homestore VII*, 888 A. 2d at 211.

⁶¹ *Cytrynbaum et al. v. Look et al.*, 2012 ONSC 4578 (**Look**), par. 60, the appeal of which dismissed in *Cytrynbaum v. Look Communications*, 2013 ONCA 455 (**Cytrynbaum**) and application for leave to appeal to the Supreme Court of which was dismissed on 13 February 2014.

⁶² Subsection 118(2)(d) that I have reproduced in both English and French versions later for more discussion, reads as follows:

Directors’ liability

[...]

Further directors’ liabilities

(2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation:

[...]

(d) a payment of an indemnity contrary to section 124; [...]

[Underlining added]

no corresponding liability at the advance of costs stage, because that issue will be addressed once and for all, and fully, at the indemnification stage.

[138] I will have more to say about this point later. In the meantime, “given such liability [the one referred to in subsection 118(2)(d) CBCA], it makes sense for the court to have a supervisory function in circumstances where the corporation is suing its former directors for breach of fiduciary duty.”⁶³

[139] In short, court approval ensures that Gildan cannot arbitrarily avoid indemnity to the Former Directors, while at the same time ensuring that if they have not acted in good faith and in the best interests of the corporation, they cannot further harm the corporation.

[140] Third, and finally, based on the language of subsection 124(4) CBCA,⁶⁴ the corporation bears the onus of satisfying the court that the statutory requirements under that subsection have been met. This is an important issue, and there is a difference between indemnification and advance of costs in this regard that I will also come back to shortly.

[141] In the meantime, with respect to indemnification, that issue is in my view rather straightforward. Just like in the case of the application of subsections 124(1), (3) and (5), where there are litigious issues between the company and the individuals identified in subsection 124(1) CBCA, in other words, when and where subsection 124(4) applies, such as in this case, the onus of proof that these individuals should *not* be indemnified will be, as I indicated earlier, on the company to demonstrate at trial, on a balance of probabilities, that they acted with *mala fides*. Again, *Blair* is clear about this point.

[142] Once more, it should be recalled that the good faith of the individuals referred to in subsection 124(1) – the Former Directors here – is to be assumed, and they can not be *indemnified* unless they “acted honestly and in good faith with a view to the best interests of the corporation etc.” as set out in subsection 124(3) CBCA. If this is found not to be the case, no approval for indemnification will be granted.

⁶³ *Look*, par. 61.

⁶⁴ There is also an approval requirement in section 192(3) CBCA, which reads as follows:

Application to court for approval of arrangement

(3) Where it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act, the corporation may apply to a court for an order approving an arrangement proposed by the corporation.

[Underlining added]

[143] In this regard, there is no difference, and I would add there should be none, between subsection 124(4) CBCA indemnification and the one foreseen pursuant to subsections 124(1), (3) and (5). The mechanics will be the same even though the context is different. It is important to keep in mind that subsection 124(3) CBCA that applies to *both* situations, expressly forbids a corporation to indemnify an individual under subsection (1) unless that person acted honestly and in good faith with a view to the best interests of the corporation.

[144] In my respectful view, however, the situation, is *not* the same when it comes to the issue of advance of costs provided for in subsection 124(4) CBCA. Advance of costs is essential because whether a corporate officer is entitled to indemnification or not is a decision that *must* necessarily await the outcome of the investigation or litigation in question or the trial of the action commenced by the corporation against the officer. Advancing costs, therefore, fills the gap such that the corporation shoulders the interim costs of the litigation, as the parties in this case explicitly agreed to in the Indemnification Agreement.

[145] Given that it is assumed that a director is in good faith until demonstrated otherwise at a trial, at which point the person in question will either not be indemnified (as per section 124(3) CBCA), or if any advance of costs have been unjustifiedly paid, the person will have to repay those amounts back to the corporation (as per the explicit language in subsection 124(2) CBCA), advancing costs is sound policy.

[146] Moreover, there is no real prejudice to the corporation, especially in this case where a significant amount of DSUs are still owed to the Former Directors. These individuals who were asked to serve Gildan should not as a general rule be required to finance their own defense and adequate representation in a complex corporate case such as this one where it is expected that substantial expenses will likely be incurred during the course of the proceedings.

[147] When it comes to the advancing of costs under subsection 124(4) CBCA, therefore, there are two possible manners to read the advance of costs references in that subsection. Both readings indubitably confirm the wide discretion of the approving court. Only one in my view, however, respects the rules governing the interpretation of bilingual statutes and the larger modern analysis rule that dictates that words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the whole statute, its object, and the intention of Parliament.

[148] That reading also safeguards the *primacy* of the autonomy of the parties that is crucial for and makes it possible to implement the broader principle of achieving legal certainty in commercial transactions of the nature in play in this case.

Two ways to read subsection 124(4)

[149] One possible way to read subsection 124(4) CBCA is to conclude that by-laws and indemnity agreements cannot in any way oust section 124(4) CBCA. According to that view, that subsection, when read with the other subsections of section 124, provides that court approval is required for advance funding and that approval can only be granted if the director claiming advancement acted honestly and in good faith with a view to the best interests of the corporation as set out in subsection (3).⁶⁵

[150] Based on that reading, “court approval for advance funding may only be given when the claimant satisfies the conditions set out in subsection (3), namely that he or she acted honestly and in good faith with a view to the best interests of the corporation.”⁶⁶

[151] That view requires, based on that particular reading of subsection 124(4), “some assessment of the merits of the corporation’s allegations of bad faith as a condition for advance funding”⁶⁷, acknowledges that the individuals listed in subsection 124(1) are “entitled to the presumption of good faith, but also allows for the possibility for the corporation to lead strong *prima facie* evidence to rebut that presumption.”⁶⁸

[152] To use the words of the Ontario Court of Appeal, such a reading ensures that the individuals referred to subsection 124(1) “will ordinarily receive advance funding but leaves open the possibility that advancement will be denied when there is strong evidence of bad faith.”⁶⁹

[153] The onus to demonstrate a strong *prima facie* case of *mala fides* falls then, according to that view, on the corporation. In the meantime, of course, the individuals referred to in subsection 124(1) may have to unduly continue to pay for the costs of the litigation while the corporation is attempting to demonstrate a strong *prima facie* case against them that they want to resist.

[154] With much respect, I am of the view that this reading is flawed.

[155] The other more proportional way to read subsection 124(4) CBCA, which as I indicated earlier is, in my view, in *both* languages, more in line with the textual, contextual and purposive analysis of the provisions of section 124 as a whole and respects and promotes the importance of the primacy of the autonomy of the parties in situations such

⁶⁵ *Cytrynbaum*, par. 48.

⁶⁶ *Ibid.*, par. 51.

⁶⁷ *Ibid.* par. 55.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, par. 56.

as this one – where an action is brought by or on behalf of the corporation against the individuals referred to in subsection 124(1) – is to *not* make the strong *prima facie* demonstration of bad faith at the interim stage of advance of costs an “opening” or a possibility – at a minimum at least, not an automatic one – in every case that involves a suit between the individuals referred to in subsection 124(1) and the corporation.

[156] In this regard, beginning first with reading the French version of subsection 124(4) permits then a slightly different read of the English version that does not come across the same way if the reader begins with the English version first and then stops there with the assumption that the French version says exactly the same thing. To use the words of Bastarache J., in the context of bilingual legislation, reading “only one version of the law” may result in perils.⁷⁰

[157] In the French version, subsection 124(4) CBCA permits the corporation to, with “*l’approbation du tribunal*”, in situations where that subsection applies – such as in this case – to: (1) “*avancer*” to the individuals referred to in subsection 124(1) “*les fonds*” referred to in subsection 124(2) – which advanced moneys or “*fonds*” must be repaid or “*rembourser*” by the individuals referred to in subsection 124(1) if the conditions of subsection 124(3) are not fulfilled by those individuals, or (2) “*indemniser*” the amounts incurred by the individuals in question for their implication in cases covered by subsection 124(4), if the conditions of subsection 124(3) CBCA are fulfilled. I will not go over the indemnity issue again here, I have already indicated how I see the application of that aspect earlier in this judgment. It is crucial to highlight here, however, that it is the repayment of the moneys advanced that is subject to the conditions of 124(3) CBCA, *not* its advancing.

[158] The difference between this reading and the *other* reading referred to above is the unfettered and wide discretion it leaves open for the gatekeeper or approving judge to allow the individuals referred to in subsection 124(1) CBCA to continue to *unequivocally and continuously* benefit from the presumption of good faith – referenced in the statute, and in Quebec in the provisions of the C.C.Q., and C.C.P., in the Supreme Court’s decision in *Blair*, and in the indemnification agreements drafted by the corporation and concluded between the parties – throughout the advance of costs stage until the trial on the merits of the indemnification issue between the corporation and the individuals in question.

[159] This reading will also, in the entire discretion of the gatekeeper or approving judge, with which appellate courts should be highly reluctant to interfere for the public policy reasons of the proper and proportional administration of justice, allow the court to have

⁷⁰ *Khosa*, par. 38. See also: M. Bastarache et al., *The Law of Bilingual Interpretation* (2008), at p. 32.

the widest possibility of determining on a case by case basis what evidence or information (and in what format) may be required to carry out its so referred to “approving” task.

[160] Not all corporate cases are the same, not all corporations are the same size and not all directors, officers or other representatives of the corporation to whom subsection 124(1) CBCA applies always act the same way. The court approval requirement in subsection 124(4) CBCA does away with the one solution fits all answer which is rarely the right one in any, but even more so in a corporate, setting.

[161] It should be recalled that the CBCA provides the basic corporate governance framework for many different sized Canadian enterprises, small, medium as well as many of this country’s largest corporations. Gildan is a good example. Hundreds of thousands of companies in Canada are incorporated under this statute, and the CBCA applies to a significant number of publicly traded business corporations involved in a variety of activities. Hence, not all subsection 124(4) CBCA approval requests require the same answer.

[162] With the lodestar that good faith *must* be presumed until it can be fairly and equitably addressed at trial after a full hearing (because such a full and final determination is vital to the very *raison d’être* of such a principle, and because the good faith emperor’s robe at this stage should not be substituted with a thinner less visible one that could potentially undermine the emperor’s overall luster) and the accompanying statutory (and in many cases, contractual undertaking) duty imposed on the individuals referred to in subsection 124(1) CBCA to “repay [pursuant to subsection 124(2)] the moneys [advanced] if the [individuals in question do] not fulfill the conditions of subsection (3)”, the corporation and its directors (*both* past and present) are fairly and adequately protected alike.

[163] It is important to recall again that subsection 124(3) CBCA makes indemnification subject to the individuals having “acted honestly and in good faith with a view to the best interests of the corporation.” Attaching the repayment of funds advanced to the same prerequisite resonates and achieves precisely the same point. Indemnification or repayment determination should take place only once and in both cases *only* after a fair trial. Any other way of reading the CBCA provisions on indemnification would not only be duplicative but also harsh for the individuals it was designed to protect in the first place.

[164] Reading subsection 124(4) CBCA in this way also does away with the dilemma that corporations may face at the beginning of a litigation, when there may be insufficient basis to determine whether or not a director or former directors satisfy the specific conduct requirements of the statute. Requiring that a “strong *prima facie*” case be made out by the corporation that these individuals acted with *mala fides* at the advance of costs stage,

unduly forces a potential full-blown adjudication of those individuals' conduct at the advance of costs stage. This in my view, is neither fair, nor right.

Subsection 118 CBCA

[165] I will now turn quickly to a point that I referred to earlier in the judgment, namely the legitimate and understandable concern of certain current directors of Gildan to advance moneys to the Former Directors who may be viewed by the corporation as having acted perhaps in *mala fides* and contrary to the corporation's best interests.

[166] This issue was undoubtedly in the mind of the legislature when it was considering certain revisions to the CBCA and when it attached a potential liability to "directors of a corporation who vote for or consent to a resolution authorizing a payment of an *indemnity* contrary to section 124".

[167] More than three decades ago, in 1995, the *Discussion Paper* had highlighted the fundamental issue that needed to be addressed by indemnification provisions, which was the establishment of policies consistent with broad principles to ensure that: (1) indemnification is permitted where it will be consistent with corporate policies, and (2) indemnification is prohibited where it might protect or encourage wrongful or improper conduct.

[168] In that context:

[94] During the preliminary consultations, a number of comments were made about the lack of clarity in the CBCA regarding indemnification rules. Some of the comments were:

- it is not clear whether a corporation can finance a director's defence before it is determined by the court whether he or she is entitled to indemnification. A corporation should be allowed to assist with the defence costs of a director. But if guilty, the director should be forced to pay the costs back.
- the funding of litigation costs by the board of directors presents a certain risk for those directors. They could be jointly and severally liable to the corporation under par. 118(2)(e) of the CBCA if the money cannot be recovered from the recipient. As a result of such risk, there may be reluctance on the part of the directors to authorize funding a defendant director's or officer's litigation.

[Underlining added]

[169] The result was that subsection 118(1)(d) CBCA in both languages reads as follows:

Directors' Liability 118 [...] Further directors' liabilities (2) Directors of a corporation who vote for or consent to a resolution authorizing any of the following are jointly and severally, or solidarily, liable to restore to the corporation any amounts so distributed or paid and not otherwise recovered by the corporation: [...] (d) a payment of an indemnity contrary to section 124; [...]	Responsabilité des administrateurs 118 [...] Responsabilité supplémentaire des administrateurs (2) Sont solidairement tenus de restituer à la société les sommes en cause non encore recouvrées, les administrateurs qui ont, par vote ou acquiescement, approuvé l'adoption d'une résolution autorisant, selon le cas : [...] d) le versement d'une indemnité en violation de l'article 124; [...]
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[170] It is therefore clear that the legislature was aware of the thorny question of advancing costs to directors prior to indemnification and it decided in its wisdom and in balancing the objectives of subsections 118 and 124 CBCA to arrive at the conclusion it did. It decided to make indemnification and its direct corollary, repayment of funds, subject to a final *mala fides* demonstration at trial – nothing more, nothing less.

[171] To use the words of the Manitoba Court of Appeal⁷¹:

Viewed from the corporation's perspective, a decision to advance defence costs is an interim financing decision. [...] I agree with the following observations of Chancellor Allen of the Delaware Court of Chancery in *Advanced Mining Systems, Inc. v. Fricke*, 623 A. 2d 82 (1992) which, while in the context of statutory language closer to the present CBCA than [*The Corporations Act*, C.C.S.M. c. C225], is nevertheless applicable (at p. 84):

[...] [T]he decision to extend advancement rights should ultimately give rise to no net liability on the corporation's part. The corporation maintains the right to be repaid all sums advanced, if the individual is ultimately shown not to be entitled to indemnification. Thus the advancement decision is essentially simply a decision to advance credit.

[Underlining added]

[172] This reading of subsection 124(4) CBCA is not only in line with the reading of subsection 124(2), to which 124(4) expressly refers, but it is also in line with the overall indemnification rules spelled out in section 124 (as well the prevention provision identified in subsection 118 (2)(d) CBCA) and potentially any indemnification agreement concluded between the parties, and the overriding principle of proportionality governing all

⁷¹ *Manitoba Securities Commission v. Crocus Investment Fund et al.*, 2007 MBCA 36, at par. 52.

proceedings in Quebec (and likely in all other provinces in Canada) that must govern the conduct of the parties and the decisions of judges alike.

[173] Under the heading “Guiding Principles of Procedure”, articles 18 and 19 C.C.P. set out the following requirements⁷²:

18. Principle of proportionality / General The parties to a proceeding must observe the principle of proportionality and ensure that their actions, their pleadings, including their choice of an oral or a written defence, and the means of proof they use are proportionate, in terms of the cost and time involved, to the nature and complexity of the matter and the purpose of the application.

Judges must likewise observe the principle of proportionality in managing the proceedings they are assigned, regardless of the stage at which they intervene. They must ensure that the measures and acts they order or authorize are in keeping with the same principle, while having regard to the proper administration of justice.

19. Control of case by the parties Subject to the duty of the courts to ensure proper case management and the orderly conduct of proceedings, the parties control the course of their case insofar as they comply with the principles, objectives and rules of procedure and the prescribed time limits.

Good faith of the parties They must be careful to confine the case to what is necessary to resolve the dispute, and must refrain from acting with the intent to cause prejudice to another person or behaving in an excessive or unreasonable manner, contrary to the requirements of good faith.

[...]

[Underlining added]

[174] This reading also gives credence to and respects the principle of the *primacy* of the autonomy of the parties that is fundamental in contractual relationships. In my view, this is precisely what the Supreme Court intended when it wrote in the context of the examination and application of subsection 136(1) OBCA, which is the equivalent provision to subsection 124(1) CBCA, in *Blair*, that “since under the By-law indemnification [was] mandatory, the onus should lie on the corporation to demonstrate the director acted with *mala fides*.”

⁷² As there is no controversy with respect to what these provisions offer, I will only reproduce them in English.

[175] This said, I am fully aware that subsection 124(4) CBCA was *not* at the time of the decision of the Supreme Court in 1995, a part of the CBCA, but I am willing to, so say, go out on a limb and venture that the Supreme Court's decision as to the applicability of mandatory indemnification agreements between the corporation and the individuals referred to in subsection 124(1) CBCA would not change with the advent of or in the face of subsection 124(4).

[176] In the face of the words "may" in the statute and "shall" in the By-law, similar to in this case, where the subsections 124(1) and (2) use the word "may", while the Indemnification Agreement uses "hereby agrees to" and "shall" – the Supreme Court concluded that "it [was] the corporation that [had to] establish, to the satisfaction of the court, exactly what Blair [had done] that was inimical to its best interests."⁷³

[177] As explained in *Blair*:

[36] Section 136(1) and the [...] By-law specify three conditions that the director or officer must fulfil in order to receive indemnification for the costs of defending in litigation:

- (1) the person must have been made a party to the litigation by reason of being a director or an officer of the corporation;
- (2) the costs must have been reasonably incurred; and
- (3) the person must have acted honestly and in good faith with a view to promoting the best interests of the corporation.

[Underlining added]

[178] In my view, the same requirements (1) and (2) apply at the advance of costs stage, while in the court's wide and unfettered discretion the individuals referred to in subsection 124(1) and obviously in the indemnification agreements in question "are assumed to have acted in good faith" during the indemnification dispute resolution process until at the time of indemnification and after a fair trial the corporation proves otherwise. I believe that a proper construction of the CBCA, when examined in *both* languages, with the support of a proper construction of the contractual agreements concluded between the parties and the law related to good faith points to this same conclusion.

[179] As I indicated before, this does not mean that there will not be exceptions, and it does not mean that the "approving court" cannot in its wide and unfettered discretion, examine on a case by case basis, what additional evidence or information it may require in each case, but it does then mean that such cases would become the very rare exception and not the norm.

⁷³ *Blair*, par. 35.

[180] Seen in the above light, subsections 124(1) and 124(2) CBCA then become the minimum or floor protection that corporations may offer potential directors, thereby leaving the possibility for such a protection to be enhanced and made mandatory (such as in this case) by contractual freedom. To attract better and more qualified candidates, corporations can then go further – as they explicitly did in this case – and make indemnification and advance of costs mandatory, with certain conditions.

[181] In my view, the English version of subsection 124(4) CBCA also supports the same reading. In other words, it does not in any way tie up the *initial* advancement of costs to the possibility or the automatic possibility of raising a strong *prima facie mala fides* defence, unless in very rare and exceptional situations such a requirement is, in the entire discretion of the court, found to be necessary and warranted.

[182] Read in this light, subsection 124(4) then would allow a corporation, with court approval, to: (1) “indemnify” the individuals referred to in subsection (1), if the conditions set out in subsection 124(3) are fulfilled, or “allow for advance of moneys” to be made pursuant to (and subject to the repayment conditions found in) subsection 124(2), which at that stage, in other words, the repayment stage would coincide with the indemnification stage. Note again here, that in subsection 124(2) CBCA, repayment is tied to the requirements of subsection 124(3) CBCA.⁷⁴

[183] In my view, this is the reading that is most in line with the textual, contextual and purposive analysis of the provisions of section 124 CBCA as a whole and respects and promotes the importance of the primacy of the autonomy of the parties essential in contractual relationships. This is also the most equitable manner to preserve the overall proportionality required in such circumstances. It strikes a delicate balance between seeking the middle ground between encouraging fiduciaries to violate their trust, and discouraging them from serving at all.”⁷⁵ Such a reading would also permit the rights conferred by the CBCA to be interpreted expansively and applied to respect the broad salutary policy goal of assuring corporate directors that their corporation will absorb the risks that may result from performance of their duties.

[184] This then takes me to the particular facts of this case.

⁷⁴ As a passing note, I would add here that the drafting of subsection 124(4) CBCA was likely greatly inspired by paragraph 36 of the Supreme Court’s decision in *Blair*.

⁷⁵ Joseph F. Johnson, Jr., « *Corporate Indemnification and Liability Insurance for Directors and Officers*” (1978) 33 Bus. Law 1993, p. 1994.

Decision on the Advance Costs Application

[185] In the face of the permissive language used in subsection 124(2) CBCA, Gildan was not obliged to contractually provide for a mandatory advance of costs to the Former Directors; it could have, in the exercise of its business judgment discretion, opted for a payment on a case-by-case basis. It did not do so, and this, likely because it decided to make advancement mandatory in the Indemnification Agreement in order to attract the most qualified and capable people for corporate service and greater reward for its shareholders. Had Gildan not made advance of costs mandatory, it may not have enlisted the service of the directors it did.

[186] This is what Gildan expressly agreed to with the intention of providing the Former Directors with indemnification to the “fullest extent permitted by law”⁷⁶:

Within five (5) business days after receiving a written request [from] the [Former Directors], the Corporation shall advance monies to [them] for the costs and expenses reasonably incurred or expected to be incurred in connection with investigating, defending or participating in (including, if applicable, on appeal), or preparing to defend, or participate in, any Proceeding [as defined in the Indemnification Agreement...].

[Underlining added]

[187] The Indemnification Agreement was concluded between the parties with the understanding and *consensus ad idem* that, in the event it is ultimately determined in a final non-appealable judgment that the Former Directors did not fulfil the good faith, honesty and other conditions described in paragraphs 1(a)(i) or 1(a)(ii) of the Indemnification Agreement, the Former Directors would promptly repay to Gildan the monies so paid in advance.

[188] Notwithstanding the foregoing, the parties agreed that if court approval was required by the CBCA to permit Gildan to advance costs and expenses in respect of any such “Proceeding”, as defined in the Indemnification Agreement, Gildan’s obligation pursuant to that agreement was to make all such advances subject to the court’s prior approval and on such terms and conditions as maybe ordered by the court.

[189] In my view, where such mandatory provision exists, the proper statutory construction of section 124 CBCA requires that the rights of potential recipients of such

⁷⁶ This section of the Indemnification Agreement has been fully reproduced earlier in this judgment, and it has *not* escaped me that there is a court approval requirement set out in that agreement, which I refer to again shortly in any event. I have reproduced this excerpt here to simply demonstrate the spirit of the agreement between the parties.

advance of costs, here the Former Directors, be enforced by contract (while taking into consideration the text and spirit of the statute in question) in an equitable and proportional manner to be determined by the Superior Court in its widest and unfettered discretion.

[190] The Indemnification Agreement in this case is, at least with respect to the issue of advance of costs, which is the only issue before me at this stage, limpid. Based on the Supreme Court's decision in *Uniprix*, when the words of a contract are clear, the court's role is limited to applying them to the facts before it. The words of the Indemnification Agreement are clear here.

[191] A clear contract does not require interpretation and the Superior Court must defer to that contract. There is consequently no need at this stage for any parol evidence with respect to the Indemnification Agreement, which as I indicated earlier, is clear with respect to Gildan's mandatory advance of costs obligations.

[192] In such a case, and except for exceptional circumstances in rare situations, the scope of the advancement proceeding before the Superior Court must be limited to determining the issue of entitlement on the basis of the assumed good faith of the Former Directors and the documentary evidence available before it, until the final resolution of any good faith related issues at the merits hearing of the indemnification or repayment of advance of costs stage.

[193] On the basis of the wide discretion available to me at this provisional stage, therefore, I am of the view that the determination of Gildan's obligation to advance costs ought to be summary in nature and based on the already existing paper record before the Superior Court, especially where Gildan was first put on notice to advance such costs more than six months ago and it was given, in the *Directives*, a full opportunity on 9 April 2026⁷⁷, more than a month and a half – forty-six (46) days to be exact – to “provide the Court with any additional details or documents it deemed appropriate or necessary in order to allow it to adjudicate the merits of the Advance Costs Application [...] on the basis of the already existing record, if that is ultimately the decision the Court arrives at after it has heard the parties.”

[194] In other words, at the time, the parties were told to “come to court armoured with all details, information or documents that may be required to allow the Court to in a fair, simple, proportionate and economical manner address any and *all* issues, [...] of the [Advance] Costs Application.”

⁷⁷ See: *Directives*, par. 27.

[195] The request for the parties to come to court armoured with any documents they wished to rely upon was also made to respect the five (5) business day stipulation found in the Indemnification Agreement. This requirement to disburse funds within a short period, with the approval of the court in a subsection 124(4) CBCA context, is demonstrative of the priority attributed to the issue of advancement of funds by the corporation.

Record before the Superior Court

[196] Turning now to the issue of the information that is already available to Superior Court to decide the issue of advance of costs; thus far, Gildan has already filed a 38-page detailed Crossclaim with 244 paragraphs⁷⁸, a 14-page Stay Application with more than 100 paragraphs and close to 150 pages of exhibits, a 23-page Outline of Argument, with 134 paragraphs, and a plethora of caselaw to support its position. Gildan, therefore, previously had, and was, by way of the *Directives*⁷⁹, given an opportunity to put whatever additional information it deemed necessary before the Superior Court.

[197] In its Crossclaim, among other things, Gildan alleges:

4. THE FORMER DIRECTORS' REPREHENSIBLE CONDUCT

4.1 THE FORMER DIRECTORS' PRIMARY PURPOSE DURING THE PROXY CONTEST

181. The Former Directors' actions during the proxy contest actions were driven by a primary purpose of entrenching themselves and protecting their reputations in the face of their likely defeat at Gildan's 2024 AGM, in disregard of Gildan's best interests.

182. By seeking to entrench themselves and protect their reputations, the Former Directors exceeded their authority and adopted a *modus operandi* of reprehensible conduct in which they took effective control of the Company's management and communications, knowingly exposing Gildan to prejudice and egregious waste of resources and placing their own interests ahead of Gildan's.

183. The Former Directors' actions were, moreover, defined by fundamentally flawed judgment, the absence of any reasonable business rationale, and disproportionate measures and costs that far surpassed the core matter of the proxy contest (i.e. electing directors at the 2024 AGM).

⁷⁸ I have already referred to Gildan's concerns about the filing of its Crossclaim in this case and the Former Directors' reaction to it earlier in this judgment.

⁷⁹ See again: *Directives*, par. 27.

184. Specifically, and as will be elaborated below, the Former Directors used their control over Gildan in disregard of its interests to:

- a. Enter into a support agreement with the only shareholder who had a more positive reaction to their termination of Glenn Chamandy despite the shareholder's previously strong support for the CEO, without any consideration for Gildan and corporate best practices, ***solely to buttress their support in a proxy vote*** (section 4.2, the "**Support Agreement**");
- b. Initiate a flawed, prejudicial, and rushed sale process to privatize Gildan before the 2024 AGM, which undervalued Gildan, without any commercial justification, ***solely in an attempt to avoid a shareholder vote*** (section 4.3, "**Project Sunrise**");
- c. Conclude a \$200 million CAD credit facility despite Gildan having no need for any such financing and in full knowledge of the financial prejudice it may have caused Gildan, solely to gain support from the market (section 4.4, the "**CDPQ Financing**");
- d. Approve a sweeping range of last-minute resolutions just before their resignations, spending tens of millions of Gildan's dollars, ***solely to better protect themselves and their allies from the scrutiny of Gildan's new Board*** (section 4.5, the "**Last-Minute Resolutions**"); and
- e. Wage a proxy contest ***without proper financial control or oversight***, spending a record-setting amount of Gildan's financial resources in their efforts to instrumentalize Gildan's affairs in pursuit of their improper interests (section 4.6, the "**Former Directors' Disregard for Gildan's Resources**").

185. The Former Directors' reprehensible conduct constitutes a breach of their duties to Gildan, an unacceptable prioritisation of their own interests, a failure of their duty under Gildan's Code of Ethics to act in the Company's best interests, and is in clear violation of the purpose and essence of the DSU program, clearly nullifying their claim for compensation for their "service and their duties as members of the Board of Directors of Gildan".

[Underlining added]

[198] A review of the above and the other allegations and exhibits filed by Gildan at this stage, indubitably reveals that no matter how much more evidence, information or documents Gildan is permitted to file over and beyond what is already before the Superior Court, the highly complex and controversial issues between the parties will not become clearer or any riper for determination at this provisional stage.

[199] Nothing is perhaps more demonstrative of this fact than the commentary of Harvard Business School entitled “*Browning West and Gildan*”, that refers to some of the then current events, that Gildan expressly referred the Superior Court to during its submissions⁸⁰:

After reviewing presentations, tactics, and shareholder feedback, both [Institutional Shareholder Services Inc.] ISS and Glass Lewis recommended voting for the entire Browning West [BW] slate and voting against the entire incumbent board on May 17th, 2024, and May 20th, 2024, respectively. They recommended a full replacement of the legacy board in favor of all 8 of BW’s director candidates, which effectively involved downsizing the board from 12 to 8 members. This was the first time in over a decade that all leading proxy advisory firms - ISS, Glass Lewis, and Egan Jones - supported a full reconstitution of a board of directors at a company with a market capitalization greater than \$1 billion. [...]

The incumbent board reacted by making many changes as the annual meeting came closer. Namely, the board voted to award Tyra and the head of human resources large payouts if they lost the proxy vote. The board amended employment agreements such that a change of the board would trigger a change of control clause that effectively implied a \$16 million payout for Tyra and a large payout for the head of human resources.

On Monday May 23rd, 2024, four days before the annual meeting on Friday May 28th, the whole board of Gildan resigned and agreed to an orderly transition to BW’s slate. At the shareholder meeting, shares voted in favor of BW’s nominees ranging from 84% to 99%, and Chamandy was reappointed as CEO that afternoon. [...] The cost of the proxy battle in terms of fees paid to advisors (bankers, lawyers, etc.) amounted to almost \$70 million: Gildan spent over \$60 million in fees and Browning West spent less than \$10 million in fees.

[Underlining added]

[200] The record before the Superior Court with respect to the advance of costs requested by the Former Directors, therefore, is at this stage sufficiently complete for me to reach a discretionary and provisional decision on the issue, mindful of the interests and positions of *all* parties, and the requirements of proportionality set out in the C.C.P.

[201] The highly complex factual issues raised at this stage do not need to be in any way further expanded and they are best reserved for consideration and adjudication on a fuller record at the trial of the Indemnification Agreement issues (which will likely be at the

⁸⁰ Professors Luis M. Viceira and Joann Kong, *Browning West and Gildan (B)*, Harvard Business School (MBA Class of 2025) case study 225-101, 27 June 2025, p. 3.

same time as the trial of the Amended Originating Application issues). It goes without saying again that the trial of the repayment issues (if any) will also take place at the same time.

[202] This is so much the case that in its Outline of Argument, Gildan itself *admits* that “most of the conduct that will be the subject of [it’s] opposition is *already described* in detail in the [Crossclaim] and its supporting exhibits.” This is the best proof that the record before the Superior Court is sufficiently complete at this stage for it to reach a provisional decision with respect to the issue of advance of costs.

[203] Despite such an explicit admission, Gildan then goes on to enumerate the multitude of preliminary steps that it thinks it should be allowed to complete before a “properly structured evidentiary record”, may be constructed.

[204] According to Gildan, the following additional preliminary steps must be scheduled before the Advance Costs Application may proceed further:

124. [...]

- (a) Request for pre-undertakings in anticipation of the examination of the Former Directors’ affiant, Maryse Bertrand;
- (b) Answers to the request for pre-undertakings;
- (c) Examination on the affidavit of Maryse Bertrand;
- (d) Answers to the undertakings arising from this examination;
- (e) Filing of Gildan’s sworn statements;
- (f) Examination on affidavit of Gildan representative(s), should the Former Directors choose conduct any;
- (g) Answers to the undertakings arising from those examinations;
- (h) Filing of a joint declaration to fix a hearing.

125. This sequence sets out the preliminary steps required to adjudicate the Application for advancement of funds, having regard to the affidavit filed by the Former Directors and the evidence Gildan is entitled to adduce.

[205] Gildan insists that it “has a strict right to examine Maryse Bertrand on her affidavit” and it “has a right (based on decisions in Ontario like *Cytrynbaum* and others⁸¹) to file its

⁸¹ For example: *Lee v. Lulu Canada Inc.*, 2020 ONCA 344, par. 10. In that decision, in a wholly different context, relying on its previous decision in *Cytrynbaum*, the Ontario Court of Appeal concludes:

[7] The test on an application under s. 124 for advance funding is set out in this court’s decision in *Cytrynbaum v. Look Communications Inc.*, [...] 116 O.R. (3d) 241, leave to appeal refused, [...]. Advance funding should be denied only where the court is persuaded, on a preliminary assessment of the merits, that the corporation has made out a strong *prima facie* case of bad faith on the part of the applicant for funding. In *Cytrynbaum*, Sharpe J.A. noted

own affidavit” because such a sequence is “not merely procedural; rather, it is essential to the integrity of the adjudication process.”

[206] Gildan then adds that “proceeding on an incomplete record would require the [Superior] Court to determine conduct-based entitlement under section 124 without the evidence the statutory scheme presupposes. According to Gildan, “a meaningful determination of the [Advance Costs Application] therefore requires a properly developed record through examinations and affidavits.”

[207] I disagree with Gildan.

[208] First, I disagree with Gildan when it submits that “neither the law, nor the Indemnification Agreement, nor caselaw limits the evidence a corporation may adduce to oppose the [Advance Costs Application], subject only to the ordinary rules of evidence.” Over the course of more than sixty-five (65) pages in this judgment, I have indicated why

that the strong *prima facie* case test “is a stringent test that gives significant weight to the protection of officers and directors. It ensures that they will ordinarily receive advance funding but leaves open the possibility that advancement will be denied when there is strong evidence of bad faith”: at para. 56.

III. THE APPLICATIONS IN THE COURT BELOW

[8] The application for advance funding in this case was in respect of Lee’s defence to an action commenced by HZC Capital Inc. (“HZC”) (a CBCA company that serves as an investment vehicle for monies from China) and other plaintiffs, including Lalu (75% owned by HZC and incorporated to invest in the Canadian real estate development industry) and other related entities. The action claims breach of contract, breach of fiduciary duty and statutory duties, conspiracy, and fraud. The plaintiffs allege that they were the victims of a complex commercial fraud in relation to their investments in six real estate development projects.

[9] Lee became involved with Lalu in or around July 2015. In November 2015, he was named CEO, and in February 2016, 2505805 Ontario Inc. (“250”) (a company owned and controlled by Lee) entered into an agreement with Lalu (the “Consulting Agreement”), for the provision of the services of its principal, Lee, as CEO of Lalu. At the outset of the relationship between HZC and Lee, Lee was granted an ownership interest in what became Lalu and a seat on Lalu’s board of directors. Lee directed that the shareholding and director’s position be held by his wife, Tongfang (Cathy) Jiang. Lee was terminated as Lalu’s CEO in February 2018, and Jiang was terminated as director, although she continued to hold 25% of the shares of Lalu. Jiang and various corporations owned and controlled by Lee and Jiang are also defendants to the action, as are Domenic Di Gironimo, the former Chief Operating Officer and Acting Chief Financial Officer of Lalu, and certain corporations he owned and controlled.

[10] The application judge heard a motion in the HZC action for a Mareva injunction against various defendants to the action, including Lee, Jiang and Di Gironimo, and some of their companies. The record was voluminous, consisting of ten affidavits, transcripts from seven cross-examinations and numerous documents. The motion was dismissed, with reasons reported at *HZC Capital Inc. v. Lee et al.*, 2019 ONSC 4622. These reasons are important to this appeal, as they were relied on and informed the application judge’s subsequent decision denying advance funding of Lee’s legal costs.

[Underlining added]

there is another way to equitably resolve the provisional issues raised in the Advance Cost Application. I do not propose to either repeat or recap them again now.

[209] I will, however, at this juncture, quickly examine the *Cytrynbaum* case to highlight two points regarding the issue of advance of costs, even if the manner of reading of subsection 124(4) CBCA employed in that decision was to be applied here.

[210] It is useful to recall that in *Cytrynbaum*, the Ontario Court of Appeal was of the view that “by-laws and indemnity agreements cannot in any way oust section 124(4) CBCA, and moreover, that that subsection, when read with the other subsections of section 124, provides that court approval is required for advance funding and that approval can only be granted if the director claiming advancement acted honestly and in good faith with a view to the best interests of the corporation as set out in subsection (3)”.

[211] Whether or not one agrees with such a reading of the statute, there are two inescapable observations that cannot be omitted. First, in holding that “a higher evidentiary standard” – that of a strong *prima facie* case – was required of the corporation “to permit the court, at an interim stage, not to approve interim advancement pursuant to subsection 124(4) of the CBCA where such advancement is permitted by the corporation’s by-laws or an indemnification agreement or both”⁸², the Ontario Superior Court was exercising its broad and unfettered discretion in that case.

[212] Second, in upholding on review the Superior Court’s decision with respect to advance of costs in that case, the Ontario Court of Appeal simply confirmed that the “application judge” had *not* erred in exercising his discretion to require “some assessment of the merits of the corporation’s allegations of bad faith as a condition for advance funding”⁸³ even though in its view “a claim for advance funding [did] not require proof of irreparable harm, nor [did] it turn on the balance of convenience.”⁸⁴

[213] It is important to note that in *Look*, it was the corporation that had submitted to the application judge, among other things, “that the individual Applicants [had] acted *mala fides* and not in its best interests.”⁸⁵ The corporation had also submitted that subsection 124(4) CBCA applied to the proceedings before the court and that the corporation could only advance indemnification amounts where the court approved “the advance upon being satisfied that the individual Applicants [had] met the good faith conditions

⁸² *Look*, par. 91.

⁸³ *Cytrynbaum*, par. 55.

⁸⁴ *Ibid.*, par. 76.

⁸⁵ *Look*, par. 51.

prescribed by s. 124(3).⁸⁶ The Ontario Superior Court, therefore, was in essence simply responding to the arguments advanced by the corporation.

[214] This is why, on appeal, in reviewing the Superior Court's decision based on the particular facts before it, and considering the norms of intervention applicable to discretionary decisions of superior courts, Sharpe J. A. held:

[55] [...] I do not agree that the strong *prima facie* test eviscerates the right to advance funding. In my view, the application judge was correct in finding that s. 124(4) requires some assessment of the merits of the corporation's allegations of bad faith as a condition for advance funding. He correctly acknowledged that the appellants were entitled to the presumption of good faith as officers and directors, but also that the corporation could lead evidence to rebut that presumption. He recognized that the issues of indemnity and advance funding required a balance to be struck between providing adequate protections and incentives to attract strong candidates who foster entrepreneurialism and to encourage responsible behaviour.

[56] In my view, the strong *prima facie* case test strikes an appropriate balance between those competing considerations. It is a stringent test that gives significant weight to the protection of officers and directors. It ensures that they will ordinarily receive advance funding but leaves open the possibility that advancement will be denied when there is strong evidence of bad faith.

[57] Indeed, it seems to me that to accept the argument that advance funding should only be refused when the court is able to make a final determination of *mala fides* would be inconsistent with the very policy argument upon which the appellants rely, namely, that corporate officers and directors should not be forced to litigate the issue of *mala fides* without advance funding. The appellants cannot escape the fact that s. 124(4) legislatively imposes the requirement of court approval for advance funding. To set the standard for approval as the equivalent of a final determination would allow the corporation to force officers and directors to defend the entire case on a preliminary motion or application without advance funding.

[58] Finally, I do not agree that the application judge erred in his application of the presumption of good faith mandated by *Blair*. He gave the appellants the benefit of the presumption of good faith, as required by *Blair*, but held that Look had overcome that presumption by adducing evidence that made out a strong *prima facie* case of bad faith. *Blair* does not establish an irrebuttable presumption of good faith. Nor do I agree that by stating in *Blair*, at para. 35, that "persons are assumed to act in good faith unless proven otherwise", the Supreme Court should be taken

⁸⁶ *Ibid.*, par. 52.

to have precluded a court from making a finding of a strong *prima facie* case of bad faith when it would be inappropriate for the court to make a definitive finding.

[59] In my view, the application judge correctly refused to advance funding on the basis of the strong *prima facie* case standard.

[Underlining added]

[215] In doing so, Sharpe J. A., eloquently demonstrated that the role of an appellate court is *not* to write better first instance decisions nor unnecessarily revise factual findings of superior courts; it is to examine rather, in light of the arguments of the parties and the relevant evidence proffered, the reasons and legitimacy of the decision under appeal and then uphold it, unless an error leading to a wrong result that warrants correction is identified.⁸⁷ If such an error is detected, the decision and the decision alone must be corrected. As I have indicated on a number of occasions before, “the exercise of reviewing another decision-maker’s reasons and their legitimacy is a delicate task that requires a measured pause, deliberate caution and considerable care.”⁸⁸ In *Cytrynbaum*, Sharpe J. A. did just that.

[216] With respect, and leaving aside the different reading of the statute perspective referred to above, I do not think that the decision in *Cytrynbaum* can qualify or be hailed as “a one solution fits all response” to all requests for advance of costs put forth by the individuals referred to in subsection 124(1) CBCA.

[217] Surely, the discretion of all superior courts across the country in such matters is considerably broader than what was resorted to in the particular case of *Look*. As I indicated before, in these types of disputes, each case must turn on its own specific facts, and the superior courts across the country must be allowed to preserve their wide and unfettered discretions with respect to section 124 CBCA applications.

[218] Interestingly, the “Recommendation” offered by the 1995 *Discussion Paper*⁸⁹ sheds light on the issue of advance of costs and how it was envisaged to be applied. According to that paper, when it comes to indemnification:

[96] Several years may pass from the start of proceedings against a director until a final adjudication. In the interim, the director may have the burden of financing his or her defence. Legal expenses in complex proceedings can be staggering. If the corporation will not provide advance funding, directors may find themselves unable to finance their own defence. However, during the early stages

⁸⁷ 2002 SCC 33 [*Housen*], par. 4.

⁸⁸ *Hele*, par. 44.

⁸⁹ *Discussion Paper*, pp. 28 and 29.

of legal proceedings, neither the corporation nor the court is likely to be in a position to determine the ultimate propriety of indemnification.

[...]

[97] American legislation has provided for the payment of defence expenses in advance. For example, the Delaware General Corporation Law permits advances on receipt of a written undertaking by the director to repay the amount if it is ultimately determined (by the court) that he or she is not entitled to be indemnified by the corporation.

[...]

b) Recommendation

[101] We recommend that a new subsection be added to section 124 to permit the corporation to advance defence costs to its directors (as well as directors of a grandchild corporation) so long as the directors produce a written undertaking to repay the advance if the court determines that the general fiduciary standards are not met.

[102] In the case of a derivative action, directors have to defend themselves in the same manner as in an action by a third party. Directors should also have access to advances for defence costs. However, minority shareholders' rights have to be adequately protected. To ensure this, besides requiring a director's written undertaking to repay if the general fiduciary duties are not met, any advancement of costs would have to be approved by the court under subs. 124(2) of the CBCA. The court would examine each application and decide if the advancement of defence costs are appropriate under the circumstances. [...]

[Underlining added]

[219] This is precisely what happened in a case in British Columbia that Gildan erroneously refers to as one supporting its position. In fact, it does the contrary. In that case, the British Columbia Court of Appeal confirms an order of the British Columbia Supreme Court⁹⁰ that concludes as follows:

[82] In conclusion, the indemnity provisions in the By-laws are displaced by the [Unanimous Shareholders Agreement], where there is no obligation on the Company to make an advance payment. There is no basis to ground the application on the CBCA because the statute is permissive and does not oblige the Company to make an advance payment. The application is dismissed.

⁹⁰ *Enliven Holdings Inc. v. Qureshi*, 2020 BCSC 473.

[220] Upon review, based on the applicable deferential standard of palpable and overriding error in *Housen*, and the Supreme Court's decision in *Sattva Capital Corp. v. Moly Corp.*⁹¹ with respect to the standard of review in contractual interpretation cases, examining in that light the decision of the Chambers judge before it, the British Columbia Court of Appeal concluded⁹²:

[91] Let us consider the surrounding circumstances.

[92] First, there is the context of the provisions of the CBCA, with which both documents were intended to comply.

[93] The chambers judge observed, as have I, that the indemnity provisions of the CBCA are generally permissive. With the exception of the circumstances outlined in section 124(5), a corporation is not obliged to provide for any indemnity at all. If it does choose to indemnify directors or officers, how it does so, and on what terms, is up to the corporation. It can do so through its by-laws, or through a unanimous shareholder agreement, or by contract with the individuals involved, or on an ad hoc basis by resolution before or after the fact, to name a few alternatives. But even if not expressly stated in the terms of any indemnity provision, all such provisions are subject to the CBCA's good faith requirement and its requirement of court approval where the claim is by or on behalf of the corporation. As section 124 makes clear, and as the chambers judge recognized by reference to the *Cytrynbaum* case, the parties may not contract out of these requirements.

[94] It follows from this that the omission of a reference to, for instance, advances, or coverage for officers as opposed to directors, does not mean that they were not considered, or were intended to be included elsewhere. A narrower provision like that contained in the section 6.5 of USA, does not prevent a corporation from agreeing to indemnify an officer, or providing an advance, if it wishes to do so in any given instance. That will always be open to it in accordance with the provisions of the CBCA. What section 6.5 does do, as the appellants suggest, is set out a minimum "guaranteed" level of coverage—one that cannot be rendered ineffective by any amendment to the Articles and by-laws. But it does not necessarily follow that it was not intended to supplant the wider coverage provided by the earlier by law.

[...]

[112] This brings us back to section 20.1 of the by-laws, and the other provisions considered by the judge on this question, particularly sections 9.1 and 10.2 of the USA. They all point in the same direction. Section 20.1 of the by-laws stipulates

⁹¹ 2014 SCC 53.

⁹² 2021 BCCA 80 (*Enliven Holdings*).

that the provisions of the unanimous shareholder agreement shall prevail in the event of any conflict with the provisions of the by-laws. Section 10.2 of the USA provides that the USA constitutes the full and entire agreement between the parties with respect to its subject matter, and cancels and supersedes any “prior understandings and agreements between the Parties with respect to such subject matter...”.

[...]

[114] In these circumstances, it is by no means “plain”, as the appellants would have it, that the indemnity provisions of the USA were to provide a minimum level of protection for directors that could not be removed without the consent of the principal shareholders, but were not intended to render ineffective the indemnity and advanced provisions in the by-laws. If that were so, why include them at all? By doing so, the shareholders (who include the directors) give the directors nothing that they did not already have under the by-laws, other than the protection from revocation. As to this “protection”, section 6.5(c) of the USA does not prevent the by-laws from being rendered ineffective. Rather, it stipulates that the USA indemnity provision will not be rendered ineffective. That is consistent with an intention to reduce coverage, and does not detract from the shareholders’ ultimate power. So even that part of the provision adds nothing practical.

[115] Taken as a whole, the USA provision only subtracts; why subtract if the operation is not intended to yield a difference?

[116] In these circumstances, I can find no error in principle, extricable legal error, or palpable and overriding error of fact in the judge’s reasoning, and his conclusion is entitled to deference.

[117] It follows that the judge’s conclusion must stand: there is no obligation on Enliven to make an advance payment, and the application was properly dismissed.

[221] In my view, *Enliven Holdings* stands for the proposition that the content of the indemnity agreements are of significant importance in the relationship between the corporation and its directors, when it comes to the issue of advance of costs and indemnity.

[222] In this case, Gildan expressly agreed, within five (5) business days⁹³ after receiving a written request by the Former Directors, to pay for the costs and expenses reasonably incurred or expected to be incurred in connection with the Crossclaim, and in the event it is ultimately determined in a final non-appealable judgment that any of the Former Directors did not fulfil the conditions (including the good faith obligations) described in

⁹³ See again the comments made in footnote 50.

paragraphs 1(a)(i) or 1(a)(ii) of the Indemnification Agreement, they would promptly repay to the corporation the monies paid in advance.

[223] The fact that the Indemnification Agreement indicates that “notwithstanding the foregoing, *if* court approval is required by the CBCA to permit Gildan to advance costs and expenses in respect of the Crossclaim”, does not in any way undermine the importance of that agreement.

[224] To use the words of the British Columbia Court of Appeal, in *Enliven Holdings*, the indemnity provisions of the CBCA are generally permissive. With the exception of the circumstances outlined in section 124(5) CBCA, a corporation is not obliged to provide for any indemnity at all. If it does choose to indemnify directors, how it does so, and on what terms, is up to the corporation. It can do so through its by-laws, through a unanimous shareholder agreement, by contract with the individuals involved, or on an *ad hoc* basis by resolution before or after the fact.

[225] This is one such case, and any issues raised by Gildan and relating to the conclusion or amendments made to the Indemnification Agreement can be adequately addressed at the trial of the indemnity issues. If a former director ultimately is entitled to indemnification, costs and expenses will likely be part of that entitlement. If a former director is ultimately disentitled to indemnification, that person has undertaken to pay back all advanced costs.

[226] I disagree with Gildan when it argues that “the fact that the [Superior] Court conducts only a preliminary review under section 124 CBCA does not mean the evidentiary record may be summary or artificially truncated”. I also disagree with Gildan when it argues that “what is summary is the [Superior] Court’s assessment, not the evidence the corporation may adduce.”

[227] In my view, by its very nature, a proceeding of this kind must be summary in character because if advance “indemnification” or, to put it in the same language as the law, “advance of costs”, is to have any utility or meaning at all, the Former Directors’ entitlement to such funds must be decided summarily and expeditiously.

[228] As for Gildan’s insistence that it be allowed to, at a minimum, examine Maryse Bertrand on her sworn declarations, in my view, it can certainly do so, but as part of the indemnification or repayment of advance issues that will no doubt form part of a more complex and lengthy trial – unless of course the parties are able to resolve their issues in an amicable fashion which would be in the best interests of everyone, including the corporation and its shareholders.

[229] I have carefully examined the sworn declarations of Bertrand, and there is nothing in them at this stage that could be of any benefit for the approval or disapproval of any advance of costs. The *quasi*-totality, if not the totality, of the information set out in these declarations are publicly available and, in any event, they do not in any way impact the court's decision at this juncture.

Credit Risk

[230] This leads me to the final point in this case. There is absolutely no real net liability or credit risk for Gildan to advance costs in this case. Presently, and this is not a contested fact, there are millions of dollars owed to the Former Directors that Gildan has not paid and is still refusing to pay to them. According to the Amended Originating Application, that amount is in the range of twenty-six million Canadian dollars (\$26,000,000), and the sworn declaration of Bertrand dated 18 May 2026, confirms that none of the Former Directors have so far received any sums from Gildan's directors' and officers' liability insurers or anyone else.

[231] The totality of the sums in question, therefore, are significantly more than any amount that Gildan *may* have to indemnify the Former Directors. There is also the whole issue of Gildan withholding these amounts from the Former Directors presently, which aggravates the issue of immediate harm to them and intensifies the pressing nature of the issue of "advance of costs" before me.

[232] In my view therefore, it is imperative in these circumstances that the Superior Court step in immediately and level the playing field between Gildan and the very directors it was keen on enlisting a few years earlier through the use of indemnification agreements that date back to 9 February 2024, revised on 1 March 2024 and then revised again on 13 April 2024. To reiterate what was said earlier:

Indemnification provides financial protection by the corporation for its directors. Indemnification protects directors against exposure to legal expenses and liabilities that may be incurred by them in connection with legal proceedings based on an alleged breach of duty in their service to or on behalf of the corporation. Today, with the increased volume and cost of litigation, it would be difficult to persuade responsible persons to serve as directors if they were compelled to personally bear the cost of vindicating the appropriateness of their conduct in every instance in which it might be challenged. Thus, indemnification is permitted by s. 124 of the CBCA and provides an important protection for directors.⁹⁴

⁹⁴ *Discussion Paper*, p. 26

Quantum of Advance of Costs

[233] I am consequently of the view that the Former Directors ought to, by no later than **9 July 2026 at 5 p.m.**, be advanced the provisional sum of seven hundred and fifty thousand Canadian dollars (\$750,000) that they have requested.

[234] This amount is not only *not* unreasonable, it represents only one percent (1%) of the total sum sought against the Former Directors by Gildan, and it is also only a very small fraction, less than three percent (3%), of the total amount of the DSUs that Gildan is still withholding from these individuals.

[235] This amount is also justifiable given the allegations advanced by Gildan, the complexity of the issues announced and their significance for all concerned. The amount requested by the Former Directors is also reasonable given the language used in the Indemnification Agreement that expressly permits them to seek advance of moneys for costs and expenses “expected to be incurred.”

[236] The delay of five (5) business days granted to Gildan to pay the advance sum of seven hundred and fifty thousand Canadian dollars (\$750,000) is justifiable and corresponds to that explicitly agreed upon between the parties in the Indemnification Agreement. In this specific regard, it is not unreasonable to presume that Gildan would have already verified the administrative processing time that may be required by it to comply with its advance of costs obligations in response to a reasonable amount requested or ordered, when on 13 April 2024 it expressly agreed to such a short period.

[237] It is useful to highlight that Gildan is of the view that the Former Directors “exceeded their authority and adopted a *modus operandi* of reprehensible conduct” and that their actions were “defined by flawed judgment” and were “devoid of any reasonable business rationale”. To put it mildly, these are serious allegations that the Former Directors have a right to vigorously defend.

[238] There is absolutely no reason why the Former Directors ought to be deprived of an advance for costs at this stage to answer the serious allegations put forward against them by Gildan, especially when subsection 118(1)(d) and section 124 CBCA, as well as the Indemnification Agreement all adequately and expressly protect the company and the current directors of Gildan of any exposure to liability until such time as the Superior Court arrives at a final decision regarding the issue of indemnification or repayment.

[239] To prevent the Former Directors from such a benefit expressly included in the Indemnification Agreement and provided for by law would not only be highly prejudicial for the individuals in question who were selected by the corporation to serve its interests and whose good faith must be presumed until demonstrated otherwise at the

indemnification or repayment trial hearing, but it would also potentially affect their rights to a fair and equitable hearing before the law.

[240] In any event, given the financial resources available to Gildan in comparison to the Former Directors, any doubt with respect to any amounts to be advanced to them must be resolved in their favour. Moreover, and again, given that the Former Directors are “assumed to be in good faith” until a court determines otherwise, I do not see why they were not, or they should not be advanced any sums at this stage.

[241] It is also important to recall the very broad language used in the Indemnification Agreement, where Gildan expressly undertakes to “within five (5) business days after receiving a written request” from the Former Directors to advance monies to them for the costs and expenses reasonably incurred or expected to be incurred in connection with investigating, defending or participating in (including, if applicable, on appeal), or preparing to defend, or participate in, any Proceeding as defined in the agreement, with the understanding and agreement that, in the event it is ultimately determined in a final non-appealable judgment of a court of competent jurisdiction that the Former Directors did not fulfil the conditions described in paragraphs 1(a)(i) or 1(a)(ii) of the agreement, they will promptly *repay* to the Corporation the monies so paid in advance.

[242] Gildan, therefore, shall advance the *initial* sum of seven hundred and fifty thousand Canadian dollars (\$750,000) to the Former Directors’ lawyers who shall retain that sum in trust and draw against it with respect to the “costs, charges and expenses” relating to the defence of the Crossclaim, and any appeal proceedings that may be lodged with respect to it. Nothing in this judgment prevents the Former Directors to address a future request to the Superior Court in this regard, if appropriate.

[243] The lawyers for the Former Directors are directed to keep detailed timesheets and accounts for their services rendered that may be verified by the Superior Court at the hearing of the indemnification or repayment issues. The expected question of whether, and if so how, copies of these documents may be given to Gildan, can be examined (keeping in mind the specific agreement of the parties in this regard set out in section 2 of the Indemnification Agreement) and addressed in due course as this case progresses.

[244] Finally, given the particular circumstances of this case and the nature of the orders requested, I am of the view that the amount ordered ought to, pursuant to article 661 C.C.P., be the subject of the provisional execution of this judgment, notwithstanding any appeal that may be lodged by Gildan.

[245] Again, the Former Directors are “assumed to be in good faith” until determined otherwise by the Superior Court, and they have been awaiting the receipt of these sums for some time in order to be in a position to defend themselves. In my view, in the absence

of such funds, the bringing of an appeal in this case will no doubt “cause serious prejudice” to the Plaintiffs, who are also Cross-Defendants in this case, and who will not get the benefit of the express provisions of the Indemnification Agreement concluded between the parties. The Former Directors will continue to be forced to pay for the associated defence costs *personally*.

CONCLUSION

[246] As I indicated at the outset, this case concerns an indisputably pressing provisional issue of *promised* mandatory advance of money that must be addressed without any further delay. The statutory provisions applicable to this case, the *primacy* of the autonomy of the parties, the assumed good faith of directors until demonstrated otherwise, the public order recognition of continuous good faith dealings, and a fair, equitable and proportional administration of justice *all* imperatively command it. The overall arching issue at the end is a vital *policy* one.

[247] Gildan will certainly be disappointed with this decision, and it will undoubtedly wish to argue going forward what it already alluded to on a number of occasions before me.

[248] It will submit, among other things, that this decision: (i) does *not* follow the Ontario Court of Appeal decision in *Cytrynbaum* (and the cases that have followed it) and, my colleague Justice Martin Sheehan’s decision in the companion commercial case in this matter that followed that case in Quebec for the first time⁹⁵; (ii) provides directors in general, and the Former Directors, in particular, with an automatic right to seek and obtain advance of costs in every case to the detriment of the corporation’s rights, and (iii) will take away a corporation’s ability, or *right*, as Gildan puts it, to, from the inception, resist an unmeritorious request for advance of costs, when the director or directors of a corporation have, in the corporations sole view, acted with *mala fides*.

[249] I have already examined in detail why I read section 124 CBCA differently and why the decision in *Cytrynbaum* does *not* necessarily stand for what Gildan proposes – an automatic right to mount and present a strong *prima facie mala fides* defence in every case – and why subsection 124(4) CBCA does *not* foresee or permit an automatic right to seek and obtain advance of costs in every case.

[250] To put it more concisely, the explicit statute-required “court approval” found in subsection 124(4) CBCA, combined with an experienced “gatekeeper” who has the broadest discretion to decide “advance of cost” issues on a case by case basis, provides,

⁹⁵ *Vêtements de sport Gildan*, par. 43 and following, and in particular, par. 55. See also for additional information and details about the Privilege Matter, Justice Sheehan’s decision rendered about 3 months later in 2026 QCCS 2184.

in my view, a most satisfactory answer in all cases. It permits the preservation of the spirit and intention of the legislature, it recognizes the presumption of good faith and promotes good faith dealings between the parties, and it dissuades the necessity or expectation to demonstrate a strong *prima facie mala fides* defence in every case.

[251] Finally, it also allows the court and the parties to put in place a fair, equitable and expeditious way to go forward with the adjudication of the issue of advance of costs in every case, keeping in mind the principle of proportionality applicable to and incumbent upon the parties and the court itself.

[252] Such a broad yet tailored solution also ultimately respects the overall spirit of section 124 CBCA that provides that the issue of the indemnification and repayment of advance of costs be dealt with *once*, and after a full, fair and final trial.

[253] One final comment is in order in this case.

[254] After carefully examining the record before me consisting of a plethora of pages and pages of proceedings, caselaw, and other documents, listening to the submissions of the lawyers for the parties over the course of more than two days of hearing (including an initial case management one) and *deliberating* while at the same time hearing other cases on a busy end of the judicial year docket for more than a month, and drafting this judgment with *minimal* judicial resources, I am of the view that this judgment offers a fair, equitable and balanced outcome for everyone concerned – the Former Directors, the current directors of Gildan and the corporation itself – *all* alike. The above reasons also explain the short delay in rendering this decision.

[255] For the sake of efficacy, I will continue to remain seized of this matter to see it to the next stage, and address any issues relating to, among other things, its execution, if necessary.

FOR THESE REASONS, THE COURT:

GRANTS, *in part*, the Application by the Former Directors for the advance of defence costs dated 19 March 2026;

ORDERS the defendant, Cross-Applicant, Gildan Activewear Inc., to advance to the Plaintiffs, Cross-Defendants, by no later than **9 July 2026 at 5 p.m.**, the sum of seven hundred and fifty thousand dollars (\$750,000), to be held in trust by Langlois Lawyers LLP and used as specifically authorized and directed in this judgment; and

ORDERS the provisional execution of this judgment, notwithstanding appeal, given the nature of the issues raised, the passage of time and the serious prejudice that will no doubt be caused to the Plaintiffs, Cross-Defendants, in the face of a potential appeal.

LEGAL COSTS TO FOLLOW.

BABAK BARIN, J.S.C.

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Me Ariane-Sophie Blais
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Hearing dates: 25 May 2026 and, one-half day on, 27 May 2026