

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF TERREBONNE

No.: 700-17-021566-251

DATE: 6 JULY 2026

BY THE HONOURABLE AZIMUDDIN HUSSAIN, J.S.C.

ARTHUR BLUMER & ASSOCIATES INC., Trustee in Bankruptcy
Plaintiff/Trustee
v.
CAROLINA COBO VASQUEZ
Defendant
and
ANDREY MALIHIN
Mis-en-cause/Debtor
and
OFFICIER DE LA PUBLICITÉ FONCIÈRE,
Registration division of Terrebonne
Mis-en-cause
and
OKSANA SERGEEV
Petitioner

JUDGMENT
(Proceeding by creditor under s. 38 of the *Bankruptcy and Insolvency Act*)

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OVERVIEW

[1] The Court is seized with the Petitioner Oksana Sergeev's application titled *Motion to Authorize a Creditor to Act in Lieu of the Trustee*, as well as the notice of case management of the Defendant Carolina Cobo Vasquez titled *Avis de gestion de la défenderesse*.

[2] For the reasons set out below, the Court grants the Petitioner's application and dismisses the Defendant's notice of case management.

ANALYSIS

[3] The issue raised by the Petitioner's application is whether she should be authorized to continue the originating application of the Plaintiff Arthur Blumer & Associates Inc., Trustee in Bankruptcy, under section 38 of the *Bankruptcy and Insolvency Act (BIA)*.¹ The Defendant and the Mis-en-cause/Debtor Mr. Malihin contest the Petitioner's application.

[4] The issue raised by the Defendant's notice of case management is whether the lawyer of the Petitioner, Mtre. Pancer, should be disqualified from acting as her lawyer.

[5] A third issue arises by virtue of the filing of a discontinuance by the Plaintiff Trustee in Bankruptcy after the filing of the Petitioner's application.

[6] On the first issue, the Court concludes that the criteria of s. 38(1) BIA are met. The provision reads as follows:

38(1)

Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.

Lorsqu'un créancier demande au syndic d'intenter des procédures qui, à son avis, seraient à l'avantage de l'actif du failli, et que le syndic refuse ou néglige d'intenter ces procédures, le créancier peut obtenir du tribunal une ordonnance l'autorisant à intenter des procédures en son propre nom et à ses propres frais et risques, en donnant aux autres créanciers avis des procédures projetées, et selon les autres modalités que peut ordonner le tribunal.

¹ RSC 1985, c B-3.

[7] As summarized by Justice Romaine of the Court of King's Bench of Alberta, the applicant under s. 38(1) must meet four criteria:

- 1) it must be a creditor of the bankrupt estate;
- 2) it must have requested that the trustee undertake the proceeding which the applicant now seeks permission to undertake itself;
- 3) the trustee must have refused or neglected to undertake the requested proceeding; and
- 4) there is threshold merit to the proposed proceedings.²

[8] All four criteria are met in the present case. The Petitioner is a creditor of the bankrupt estate of the Mis-en-cause/Debtor, this is uncontested. The Trustee filed the originating application in the present case, but then decided that it would not be an efficient use of funds to continue it, as explained below. The next two criteria are therefore met.

[9] Finally, the fourth criterion is met since the case is already set down for hearing on the merits for 1-3 May 2028. There is therefore threshold merit to the case.

[10] No party presented any convincing ground to dismiss the application under s. 38 BIA. The Mis-en-cause/Debtor argued that the provision requires the Petitioner to take the proceeding in her own name.

[11] The argument is difficult to understand since the very essence of the Petitioner's application under s. 38 BIA is that she be able to continue the lawsuit in her own name as a plaintiff. The conclusion of her application explicitly asks for authorization "to act in lieu of the Plaintiff".

[12] The Mis-en-cause/Debtor also argues that the Petitioner can simply start a new action against the Defendant instead of continuing the present one, and therefore there is no adverse consequence to giving full effect to the discontinuance filed by the Trustee (addressed below), and letting the present case come to an end.

[13] This is an argument that is diametrically opposite to what the interests of justice and the principle of proportionality require. On 10 June 2026, Justice Poisson set down the present case for trial on 1-3 May 2028. There is no sense in requiring the parties to start over and, moreover, such an outcome is, presumably, contrary to the financial interests of the Mis-en-cause/Debtor and the Defendant since they would have to incur duplicate costs on procedural steps already completed. No one wins from the opposition to the s. 38 BIA application in the present case, and everyone loses money for the pointless procedural manoeuvring in contesting it.

[14] The Court now addresses the Defendant's notice of case management, which was supported by the Mis-en-cause/Debtor. At the outset, the Court notes that the Defendant did not adhere to the notification deadline set out at s. 14.3 of the Directives of the district

² 1393392 *Alberta Ltd v 2128348 Alberta Ltd*, 2024 ABKB 554 at para 25.

of Terrebonne and article 101 CCP since interlocutory applications must be notified at least three days prior to presentation. The Defendant's notice of case management was notified on Tuesday, 23 June at 4:04 p.m., yet it was made presentable on Friday, 26 June. Three days' notice was not given.

[15] In the notice of case management, the Defendant argues that Mtre. Pancer should be disqualified from acting for the Petitioner because he was ostensibly in a conflict of interest by not giving effect to the intention of the Trustee to file a discontinuance in the present case, and then acting for the Petitioner to continue the case. Mtre. Pancer acted for the Trustee when the originating application was filed.

[16] On a preliminary point as to form, the Court underlines that a notice of case management is not the appropriate vehicle to call for the disqualification of a lawyer. This requires a formal application where the title makes it clear that disqualification is being sought. An application to disqualify a lawyer is simply not a case-management issue, it is much more significant, needless to say.

[17] On the merits of the disqualification issue, as confirmed by the Trustee, whom the Court asked to be contacted during the hearing of 26 June 2026 since his role was key, his reason for wanting to discontinue since August or September 2025 was that he did not consider it to be a good use of funds to pursue the case. He gave the example of the hearing of 26 June itself as an example of costs that he wanted to avoid, hence his electronic filing of a discontinuance on the morning of 26 June.

[18] However, he confirmed multiple times during his representations, when asked, that he had absolutely no objection to the Petitioner continuing the case. He also confirmed that he would be willing to withdraw the discontinuance, if necessary, as long as he understood what the consequences would be.

[19] All this to say that the Trustee's desire to discontinue is one side of the coin, the other side of the coin being his non-objection to the Petitioner continuing the case. There is no conflict of interest on the part of Mtre. Pancer since the Trustee does not contest the Petitioner's application under s. 38 BIA.

[20] Even if it were the case that Mtre. Pancer did not promptly follow the instructions of the Trustee (a point on which the Court makes no determination), it is not clear what standing the Defendant and the Mis en cause/Debtor have to raise the issue in the first place. That is an issue between the client and his lawyer, especially since the issue is confined to the question of promptness of following instructions, as opposed to the substantive point as to whether the Petitioner should be permitted to continue the action.

[21] It gets further complicated. The lawyer for the Mis-en-cause/Debtor took it upon herself to prepare a discontinuance form and send it to the Trustee on 23 June 2026, for him to sign and file, which he did on 26 June, the day of the hearing. The form bears the

date of 23 June, but it was actually signed on the morning of 26 June given that the Trustee was out of the office. It was filed electronically by him.

[22] The filing forced the Court to seek clarification from the Trustee, hence the impromptu call placed to him during the hearing, when he confirmed the points mentioned above. The Trustee essentially confirmed that his intention behind the discontinuance was that he no longer wanted to be involved for reasons of costs, but that he had no intention to extinguish the procedural legal relationship between the parties since he accepted that the Petitioner can step into his shoes and continue the action.

[23] The exercise by the Mis-en-cause/Debtor of getting the Trustee to sign and file the discontinuance, although characterized by the latter as having been done voluntarily by him, was unusual and pointless since the Petitioner's application under s. 38 BIA was pending prior to the filing of the discontinuance.

[24] Moreover, and this relates to the point addressed above, if the Mis-en-cause/Debtor's objective was to force the Petitioner either to give up or to start a new case against the Defendant, this is disproportional and contrary to the interests of justice.

[25] Not only is it disproportional to force the Petitioner to start a new case, but it is actually against the interests of the Mis-en-cause/Debtor and the Defendant themselves since they will then have to incur the same costs that they have already incurred in the present case.

[26] Moreover, the filing of the discontinuance created a needless complication in the court record. The Petitioner was accordingly compelled to make representations at the hearing, without the benefit of research on the relevant caselaw, on how the discontinuance should not be interpreted in a way to undermine the Petitioner's application under s. 38 BIA. Subsidiarily, the Petitioner made a verbal application during the hearing to have the discontinuance struck.

[27] Article 213 CCP defines discontinuances and describes their effects as follows:

213. Discontinuance by the plaintiff of the whole of a judicial application terminates the proceeding on the notification of a notice of discontinuance to the other parties and its filing with the court office. It restores matters to their former state, and is effective immediately if it takes place before the court and in the presence of the parties. The legal costs are borne by the plaintiff, subject to an agreement	Le demandeur qui se désiste en totalité de sa demande en justice met fin à l'instance dès que l'acte de désistement est notifié aux autres parties et déposé au greffe. Le désistement remet les choses en état; il a effet immédiatement s'il est fait devant le tribunal en présence des parties. Les frais de justice sont à la charge du demandeur, sous réserve d'une entente convenue
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between the parties or a decision of the court.	entre les parties ou d'une décision du tribunal.
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[28] The Supreme Court of Canada made the following observation about discontinuances and their effect on the other parties as well as third parties:

In short, the discontinuance of a proceeding is not a unilateral act of renunciation like any other. Because it is a way of forgoing a trial, it nullifies the parties' procedural legal relationship arising from the judicial application. This explains why a defendant or intervener can contest a discontinuance that is prejudicial to it. The situation is different for a third person whose rights and interests are not affected by the parties' arguments on the merits. *Prima facie*, the extinguishment of the procedural legal relationship has no effect on that person. If prejudiced by it for any reason, the third person may apply to set aside the discontinuance.³

[29] For their part, the Court of Appeal, the Superior Court, and the Court of Québec have respectively stated the following about the effect of discontinuances on other parties or third parties:

- Toutefois, le désistement ne doit pas porter préjudice aux droits des autres parties ou des tiers, ni leur faire perdre un droit ou un avantage qu'ils possèdent. Par exemple, la demande reconventionnelle du défendeur continue (art. 172 C.p.c.) et si un des codemandeurs se désiste, l'autre peut poursuivre seul l'instance (art. 214 C.p.c.). En outre, le tribunal demeure saisi d'une demande en dommages-intérêts résultant d'une procédure jugée abusive même si le demandeur se désiste de ladite procédure.⁴
- As a result, the Court can no longer rule on the merits of the proceeding, as it no longer exists. **However, if the discontinuance is made to the prejudice of the rights and advantages which the other party acquired as a result of the law or as a result of the existence of the proceedings, the Court may intervene to preserve such rights.** For example, such would be if case if the Defendant to such a claim has filed a cross-demand or makes a claim for abuse of proceedings in relation to the proceedings which are being discontinued. Such claims will survive the discontinuance. As well, the Court may intervene to ensure that the discontinuance itself does not amount to an abuse of proceedings.⁵
- Une jurisprudence constante établit que le désistement ne peut porter atteinte aux droits des autres parties ni leur faire perdre un avantage acquis. Ce faisant, il ne saurait être permis de se désister d'un acte de procédure ayant fait naître des droits ou généré des avantages qu'une autre partie a pu valablement acquérir par l'effet de la loi ou du fait de procédures intentées.⁶

³ *MediaQMI inc v Kamel*, 2021 SCC 23 at para 70.

⁴ *Procureur général du Canada c Pénosway*, 2026 QCCA 208 at para 25 (citations omitted).

⁵ *Regan v Attorney General of Canada*, 2022 QCCS 1885 at para 9 (emphasis added, citations omitted).

⁶ *Gestion 555 Carrière inc c Ville de Gatineau*, 2026 QCCQ 1751 at para 30 (citation omitted).

[30] In light of the above, the Court concludes that it is not necessary to strike the discontinuance since the Trustee is indeed removed given his intention to no longer act as the Plaintiff and given the Petitioner's application to replace him.

[31] In this regard, the Court notes the observation made by the Court of Appeal that the caselaw is not yet clear as to whether, for non-codified scenarios, the effect of a discontinuance is inherently circumscribed such that it does not affect the rights of other parties and third parties, or whether nullity of the discontinuance must be applied for to avoid any prejudice to their rights.⁷

[32] The remedy fashioned by the Court in the present case is to issue a judicial declaration to the effect that the discontinuance terminates the Trustee's involvement, but does not terminate the proceeding since the Petitioner will act in lieu of the Trustee.

[33] The Petitioner's application preceded the discontinuance, thus granting her the procedural right to have the Court adjudicate her application before there can be a deemed extinguishment of the procedural legal relationship between the parties. Concluding that the discontinuance has the effect of terminating the proceeding would result in prejudice to "the rights and advantages" of the Petitioner.⁸

[34] On a final note, the Court observes that the Petitioner asks for provisional execution of the present judgment notwithstanding appeal. There is no justification for this request and so it will not be granted.

[35] On the matter of costs, the Petitioner asks for costs to be awarded "against the Mass, including extra-judicial costs". The Court considers it fair to all of the parties for the issue of costs to be debated another day since there was inadequate time to deal with the issue at the hearing of 26 June 2026. This is especially so since the facts seemed to be in flux during the hearing. The Petitioner can seek a determination of the costs issue upon agreement with the other parties on a convenient date for hearing, which preferably should be integrated into the trial on the merits of the originating application, if time permits.

DISPOSITION

FOR THESE REASONS, THE COURT:

[36] **GRANTS** the Petitioner's application titled *Motion to Authorize a Creditor to Act in Lieu of the Trustee*, except the last conclusion regarding provisional execution notwithstanding appeal;

[37] **AUTHORIZES** the Petitioner Oksana Sergeev to act in her own name and in lieu of Arthur Blumer & Associates Inc., Trustee in Bankruptcy, in the present court file, against

⁷ *Procureur général du Canada, supra* at para 26.

⁸ *Regan, supra*.

the Defendant Carolina Cobo Vasquez, and at the Petitioner's own expense and risk, in accordance with s. 38 of the *Bankruptcy and Insolvency Act* (**BIA**);

[38] **DECLARES** that the discontinuance filed by the Trustee in Bankruptcy has the effect of removing him as the Plaintiff, but does not terminate the proceeding since the Petitioner will act in lieu of him as the Plaintiff, as of the present judgment;

[39] **ORDERS** that the name of the Trustee in Bankruptcy be replaced in the style of cause (*intitulé*) of the case by the name of the Petitioner, Oksana Sergeev, as the Plaintiff;

[40] **ORDERS** the Trustee in Bankruptcy to assign and transfer to the Petitioner all of his rights, title and interest in the subject-matter of the present proceeding, including any document in support thereof, pursuant to s. 38(2) BIA;

[41] **ORDERS** that any benefit derived from the present proceeding, to the extent of her claim and the costs, belongs exclusively to the Petitioner, and the surplus, if any, belongs to the estate, pursuant to s. 38(3) BIA;

[42] **ORDERS** the Petitioner to send a copy of the present judgment to known creditors of the Mis-en-cause/Debtor Andrey Malihin by registered mail at their last-known address, pursuant to s. 38(1) BIA;

[43] **ORDERS** that should any creditor of the Mis-en-cause/Debtor desire to take part in the present proceedings, such creditor must manifest their interest to the Petitioner's lawyers within a time-limit of fifteen (15) days following the date of delivery of the registered mail, as set out above;

[44] **DECLARES** that should any other creditor of the Mis-en-cause/Debtor become party to the present proceeding, that creditor shall be obliged to assume the associated expenses and risks on a *pro rata* basis, pursuant to their respective proven claim against the Mis-en-cause/Debtor;

[45] **DISMISSES** the Defendant's *Avis de gestion* dated 23 June 2026, with costs in favour of the Petitioner;

[46] **POSTPONES** *sine die* the determination of legal costs and extra-judicial costs claimed by the Petitioner in connection with her *Motion to Authorize a Creditor to Act in Lieu of the Trustee*.

AZIMUDDIN HUSSAIN, J.S.C.

Mtre. Robert Pancer
PHILIPS FRIEDMAN KOTLER
Lawyer for the Petitioner

Mtre. Ioana Tivis
CHOUKE LEGAL LLP
Lawyer for the Defendant

Mtre. Danielle Oiknine
OIKNINE & ASSOCIÉS
Lawyer for the Mis-en-cause/Debtor

Hearing date: 26 June 2026

Vu que le présent jugement présente un intérêt pour le public, le Tribunal a demandé qu'il soit traduit. La traduction suivra.