

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTREAL SEAT

No: 500-09-031413-255
(500-17-115424-213)

DATE: July 2, 2026

**CORAM: THE HONOURABLE MARK SCHRAGER, J.A.
PATRICK HEALY, J.A.
CHRISTIAN IMMER, J.A.**

BOULEVARD ACQUISITION CORP.
APPELLANT – Plaintiff

v.

BANK OF MONTREAL
RESPONDENT – Defendant

JUDGMENT

[1] The appellant is appealing a judgment rendered on February 6, 2025 by the Superior Court, District of Montreal (the Honourable Karen Kear-Jodoin), that dismissed the appellant's Originating Application for recovery of a sum paid under protest;

[2] For the reasons of Immer J.A. with which Schrager and Healy JJ.A. concur, **THE COURT:**

[3] **ALLOWS** the appeal, with legal costs;

[4] **SETS ASIDE** the judgment in first instance;

[5] **REPLACES** the conclusions set out at paragraphs [92] to [94] of the judgment by the following:

[92] **GRANTS** Plaintiff's Originating Application for recovery of a sum paid under protest;

[93] **CONDEMNS** Defendant Bank of Montreal to pay to Plaintiff Boulevard Acquisition Corp. the sum of \$2,434,150 plus interest at the legal rate and the additional indemnity pursuant to article 1619 of the *Civil Code of Québec* calculated as of December 29, 2020;

[94] **WITH** legal costs including expert costs.

MARK SCHRAGER, J.A.

PATRICK HEALY, J.A.

CHRISTIAN IMMER, J.A.

Me Alexandre Baril-Furino
Me Emily Martin
WOODS LLP
For the Plaintiff

Me François Grondin
Me Filipe Costa
BORDEN LADNER GERVAIS
For the Defendant

Date of hearing: May 11, 2026

 REASONS OF IMMER, J.A.

[6] The appellant, Boulevard Acquisition Corp., appeals from a judgment rendered on February 6, 2025 by the Superior Court (the Honourable Karen Kear-Jodoin), which dismissed its application to recover a \$2,434,150 payment it made under protest to the respondent.¹

[7] The scope of s. 53.16 of the now repealed *Expropriation Act*² (the “**EA**”) lies at the heart of this appeal. It read as follows:

53.16. A payment made under this Act to a creditor of the expropriated party does not constitute advance repayment for which the creditor may claim compensation.	53.16. Un versement effectué en vertu de la présente loi à un créancier de l'exproprié ne constitue pas un remboursement anticipé pour lequel ce créancier peut réclamer une indemnité.
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[8] The *Expropriation Act* was repealed in 2023³ and replaced by the *Act respecting expropriation*.⁴ The wording of s. 138 of this new statute remains, for all intents and purposes, identical to the wording of s. 53.16 *EA*.⁵

138. A payment made under this Act to a creditor of the expropriated party does not constitute advance repayment for which the creditor may claim an indemnity.	138. Un paiement effectué en vertu de la présente loi à un créancier de l'exproprié ne constitue pas un remboursement anticipé pour lequel ce créancier peut réclamer une indemnité.
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* * *

[9] Boulevard Shopping Centre (Montreal) Limited Partnership (the “**LP**”) was the owner of Le Boulevard, a shopping center located in the City of Montreal. The property was financed by the respondent under a credit agreement (the “**Credit Agreement**”⁶) entered into between, on the one hand, the respondent and, on the other hand, the LP, the LP’s general partner and the appellant (collectively the “**Borrowers**”), and the payment of the indebtedness under the Credit Agreement was secured by a deed of

¹ *Boulevard Acquisition Corp. v. Bank of Montréal*, 2025 QCCS 865 [Judgment under appeal].

² CQLR, c. E-24.

³ *Act respecting expropriation*, S.Q. 2023, c. 27, s. 200.

⁴ *Act respecting expropriation*, CRLQ, c. E-25.

⁵ There is one modification in the French version, which now refers to a “*paiement*” rather than a “*versement*”. In the English version, the word “compensation” was replaced by the word “indemnity”.

⁶ As more fully defined below in paragraph [18].

hypothec registered against the property's title (the "**Deed of Hypothec**"). The Ministère des transports du Québec (the "**MTQ**") expropriated the property. For the LP to receive the expropriation indemnity, title to the property had to be free and clear of all encumbrances, including the Deed of Hypothec granted in favour of the respondent.

[10] Although the appellant undertook to pay all the capital and interest under the Credit Agreement the respondent refused to grant a release (the parties used the French term "*mainlevée*") for the Deed of Hypothec unless the appellant also paid a termination payment resulting from the swap agreement that had been entered into in the context of the property's financing (the "**Swap Agreement**"⁷). The appellant paid the sum under protest so that the Deed of Hypothec's registration could be cancelled, and it then instituted proceedings to recover this amount. It took the view that s. 53.16 *EA* prevented the respondent, its creditor, from claiming the termination payment under the Swap Agreement.

[11] The trial judge dismissed the appellant's application. She concluded that the termination payment owing because of the expropriation did not constitute an "advance repayment for which the creditor may claim compensation" within the meaning of s. 53.16 *EA*.

[12] The appellant argues that the trial judge committed reviewable errors of law and of mixed fact and law. It advances the following three grounds of appeal:

1. Did the judge commit an error of law by failing to interpret and determine the meaning of key terms of s. 53.16 *EA*?
2. Did the judge commit a palpable and overriding error of mixed fact and law by concluding that the termination payment did not constitute "compensation" under s. 53.16 *EA*?
3. Did the judge commit a palpable and overriding error of mixed fact and law by concluding that the termination payment was unrelated to the advance repayment of the Borrowers' loan?

[13] I am of the view that the appeal should be granted. The trial judge committed reviewable errors in interpreting the disputed agreements and in applying s. 53.16 *EA*. But for these errors, she would have concluded that s. 53.16 *EA* precluded the respondent from claiming the termination payment.

⁷ As more fully defined below in paragraph [19].

[14] In addressing the grounds of appeal, I will inverse the order of grounds two and three. But first, I will briefly describe the context.

CONTEXT

[15] In 2013, the LP solicited proposals to refinance the property at a fixed rate of interest. It received 10 proposals from various lenders, including the respondent.

[16] The respondent offered financing at a floating (i.e., variable) interest rate, which was transformed into a fixed-rate term loan through an interest rate swap transaction. The appellant found this proposal to be suitable, and a commitment letter setting out the major terms of the transaction was presented by the respondent to the appellant on July 17, 2013 and signed by the latter on July 26, 2013.

[17] To formalize the commitment letter, the parties entered into two agreements: (i) the Credit Agreement and (ii) the ISDA Master Agreement and its schedule (the “**Schedule**”) along with a confirmation (the “**Confirmation**”) (collectively the “**Swap Agreement**”). Only certain key features of these agreements will be outlined here, as they will be discussed in greater detail when analyzing the second ground of appeal.

[18] *The Credit Agreement.* As mentioned above, the Borrowers (i.e., the LP, its general partner and the appellant) and the respondent entered into the Credit Agreement whereby the respondent agreed to make three credit facilities available, including a \$45.5 million term loan (the “**Term Loan**”). The Term Loan was to be amortized over a 25-year period and matured on the tenth anniversary of the disbursement of the totality of the Term Loan in a single advance. It was to be repaid by monthly instalments of principal and interest, with interest calculated monthly at the term floating rate as defined in s. 3.1.1 of the Credit Agreement (the “**Term Floating Rate**”). However, while the Swap Agreement was in effect, interest was to be paid at the fixed rate of interest set out in the Confirmation.

[19] *The Swap Agreement.* The Swap Agreement was composed of two credit documents: (i) the ISDA Master Agreement and the Schedule attached thereto, which were dated August 28, 2013 and contained the general terms and conditions governing swaps, including early termination and the ensuing termination payment, and (ii) the Confirmation issued by the respondent on September 5, 2013, which set out the details of the payments to be made by each party. The respondent undertook to make monthly payments to the appellant at a variable interest rate applied to a monthly notional amount that was set out in a schedule to the Confirmation (the “**CAD Floating Amount**”) and was identical to the capital at the given monthly payment date under the Term Loan. In turn, the LP undertook to make monthly payments to the respondent at a fixed interest rate of 4.58% applied to the same notional amount (the “**CAD Fixed Amount**”). In practice, the CAD Floating Amount and the CAD Fixed Amount would be netted, so that only the party

who was to pay the larger aggregate amount would disburse to the other party the excess of the larger amount over the smaller amount.

[20] Payments under the Credit Agreement and the Swap Agreement were made for over seven years. Throughout the entire period, the CAD Fixed Amount was always greater than the CAD Floating Amount. Three payments were therefore debited monthly from the LP's account: capital, interest calculated at the Term Floating Rate, and the net amount owing under the Swap Agreement.

[21] On April 18, 2018, a government decree ordered the expropriation of the property. The LP disagreed with the proposed expropriation conditions, and the matter was brought before the Tribunal administratif du Québec. Eventually, the MTQ, the LP and the appellant entered into a conciliation agreement whereby an amount of \$115,000,000 was to be paid in full and final settlement by the MTQ to the LP. The disbursement of the expropriation indemnity was conditional upon the property being free and clear of all encumbrances, and therefore of the Deed of Hypothec securing the obligations under the Credit Agreement.

[22] When the time came for the MTQ to disburse the expropriation indemnity, the appellant's lawyers, who were acting as escrow agents, asked the respondent to provide payout statements for the balance of the Term Loan. The respondent not only provided the outstanding amount, but also took the position that it would have to "add the mark-to-market penalty from the swap desk, which at last verification stood at approximately \$2.4MM".

[23] The appellant's counsel responded that no penalty could be claimed by the respondent because s. 53.16 *EA* provided that "a payment made under this Act to a creditor of the expropriated party does not constitute advance repayment for which the creditor may claim compensation". The respondent maintained its position and offered instead to not terminate the Swap Agreement if other security to replace the Deed of Hypothec were offered. No agreement was entered into for such new terms and conditions, and on December 28, 2020, the respondent formally notified the appellant that a termination event (a "**Termination Event**"⁸) had occurred and designated December 29, 2020 as an early termination date (an "**Early Termination Date**"⁹). On December 29, 2020, the respondent sent a notice indicating that the termination payment was \$2,434,150.

[24] A payout letter was then signed on December 29, 2020 by the respondent and accepted that same day by the appellant. The payout letter provided that, upon receipt of a payment of \$43,089,579.26, the respondent acknowledged that all obligations under the existing credit facilities and the Confirmation were repaid in full and the Borrowers

⁸ As defined in the Swap Agreement.

⁹ As defined in the Swap Agreement.

would have no further liabilities in regards thereto, that, upon such receipt, all hypothecs guaranteeing these obligations were irrevocably discharged and released and that the respondent would execute and deliver all cancellations of registration. In its acceptance of the payout letter, the appellant stated that it was paying the termination payment under protest and without any admission for the sole purpose of obtaining the release required to liberate the expropriation funds.

[25] The appellant then instituted an action against the respondent to recover the termination payment.

[26] A five-day trial was held, during which several witnesses were heard, including two expert witnesses. In the judgment under appeal, the trial judge dismissed the appellant's application.

ANALYSIS

1. Did the judge commit an error in law by failing to interpret and determine the meaning of key terms of s. 53.16 *EA*?

[27] In part 6 of the judgment under appeal, the trial judge addressed the following question: "Should section 58 or section 53.16 of the *Expropriation Act* be given a broad and liberal interpretation?"

[28] She only partly answered this question, focusing her analysis mainly on the interpretation of s. 58 *EA*. This section, which read as follows, set out what the expropriating party was required to pay to the expropriated party by way of indemnity:

58. The indemnity shall be fixed according to the value of the property expropriated and the damage directly caused by the expropriation.

58. L'indemnité est fixée d'après la valeur du bien exproprié et du préjudice directement causé par l'expropriation.

[29] The trial judge stated that s. 58 *EA* must be given a broad and liberal interpretation. Citing an excerpt from the Court's reasons in *Hydro Québec c. Radmore*, she noted that "the jurisprudence clearly establishes that the [*EA*] is remedial in nature and is intended to ensure full compensation of an expropriated party and not to impoverish that party".¹⁰

[30] She appears to have been of the opinion that the appellant could claim damages for the termination payment under s. 58 *EA*, but noted that the appellant did not do so.¹¹ She was of the view that the appellant should have "proactively inform[ed] itself as to any

¹⁰ Judgment, para. 40, citing *Hydro Québec c. Radmore*, [1991] R.J.Q. 1852, 1991 CanLII 3072 (C.A.).

¹¹ Judgment, paras. 43-44.

amounts which may be payable”.¹² She also stated that the \$115 million indemnity that the appellant received from the expropriating party was largely sufficient to indemnify it for the termination payment.¹³

The parties’ positions

[31] The appellant argues that this reasoning contains numerous errors.

[32] The appellant submits that by suggesting that the appellant should have paid the compensation to the respondent and sought indemnification from the MTQ for damages under s. 58 *EA*, the judge fundamentally misunderstood the *EA*, by failing to grasp that s. 53.16 *EA* is to be interpreted independently of s. 58 *EA*.

[33] The appellant argues that when interpreting s. 53.16 *EA*, the trial judge should have followed the modern principle of statutory interpretation, which called upon her to read s. 53.16 *EA* in its entire context and in its grammatical and ordinary sense, as well as in harmony with the scheme and the object of the *EA* as well as legislative intent. In particular, the appellant submits, the judge failed to consider that the legislature intended to protect the expropriated party and that, to this end, the creditor’s rights were deliberately limited to the reimbursement of the sums advanced, with the latter not being entitled to claim compensation for any loss of future interest revenue resulting from the prepayment. The appellant also argues that it was incumbent on the judge to read s. 53.16 *EA* in the context of the other provisions of the *EA*.

[34] The respondent replies that the judge committed no reviewable error. She properly qualified the *EA*’s object. In its view, she interpreted the grammatical and ordinary sense of s. 53.16 *EA*’s wording and the damages that could be claimed as an indemnity under s. 58 *EA*, and she considered the parliamentary debates.

Analysis

[35] The applicable appellate standard of review of the trial judge’s interpretation of the *EA* is correctness. The Court must “determine whether, on the whole, the legal rule the judge confirmed by using the modern method of interpretation properly reflects the legislature’s intent”.¹⁴

[36] The *EA*’s words must be interpreted in “their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and

¹² Judgment, para. 44.

¹³ Judgment, para. 46.

¹⁴ *Promark Electronics Inc. c. Bombardier Recreational Products Inc.*, 2024 QCCA 906, para. 15.

the intention of Parliament”.¹⁵ The Court must adopt an interpretation that is appropriate, namely one that “can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just”.¹⁶

[37] Article 952 C.C.Q. provides: “No owner may be compelled to transfer his ownership except by expropriation according to law for public utility and in return for a just and prior indemnity.” In *Lorraine (Ville) v. 2646-8926 Québec inc.*, the Supreme Court stated that “[b]ecause of the importance attached to private property in liberal democracies, the exercise of the power to expropriate is strictly regulated to ensure that property is expropriated for a legitimate public purpose and in return for a just indemnity”.¹⁷

[38] The EA, when in force, allowed for expropriation, and s. 58 EA provided that the expropriated party was entitled to an indemnity equivalent to the “value of the property expropriated and the damage directly caused by the expropriation”. For the EA to fulfill its purpose, the expropriating party’s right to expropriate was to be interpreted restrictively, while the expropriated party’s right to an indemnity was to be interpreted liberally.¹⁸

[39] When a loan is set at a fixed interest rate for a definite term, this term benefits both the borrower (the expropriated party) and the lender (the creditor).¹⁹ The borrower is protected against an increase in the rate of interest during the term, while the lender is protected against a decrease.²⁰

[40] When the borrower decides, unilaterally, to terminate the loan, compensation may be owed to the lender, among others, for its lost interest revenue.²¹ Such a loss will occur if, at the time of termination, the market interest rate is lower than the rate stipulated in the term loan. The lender, who will advance sums to one or more new borrowers at the now lower rate, will be deprived of future interest revenue equivalent to the difference between the interest it would have collected under the terminated loan for the duration of the term and the interest revenue under the new loans, and it will thus be entitled to

¹⁵ *Piekut v. Canada (National Revenue)*, 2025 SCC 13, para. 42, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21, 1998 CanLII 837, in turn quoting E. A. Driedger, *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983, p. 87.

¹⁶ *Piekut v. Canada (National Revenue)*, 2025 SCC 13, para. 49, quoting Ruth Sullivan, *The Construction of Statutes*, 7th ed. Toronto, LexisNexis, 2022, § 2.01[4].

¹⁷ *Lorraine (Ville) v. 2646-8926 Québec inc.*, 2018 SCC 35, para. 1.

¹⁸ *Hydro-Québec c. Radmore*, [1991] R.J.Q. 1852, p. 1856, 1991 CanLII 3072 (C.A.).

¹⁹ *Haroche c. Banque Toronto-Dominion*, 2026 QCCA 700, para. 55; *Option Consommateurs c. Banque Nationale du Canada*, 2008 QCCA 2128, para. 1; *Amparo Construction inc. c. Cie d’assurance Standard Life*, [1990] R.L. 196, 1990 CanLII 3480 (C.A.), para. 6.

²⁰ *Haroche c. Banque Toronto-Dominion*, 2026 QCCA 700, para. 55; *Amparo Construction inc. c. Cie d’assurance Standard Life*, [1990] R.L. 196, 1990 CanLII 3480 (C.A.), para. 7.

²¹ *Banque Toronto-Dominion c. Brunelle*, 2014 QCCA 1584, para. 49.

indemnification.²² Fixed-rate term loans generally allow the borrower to unilaterally decide to prepay the loan and terminate the loan agreement,²³ subject to a prepayment amount calculated using a predetermined formula.²⁴

[41] When an expropriation occurs, it will necessarily trigger advance repayment of any hypothecary loan that is registered against the expropriated property's title. The lender may therefore face a loss of revenue if the market rate of interest has decreased since the time the term loan was granted. Ordinarily, it will seek indemnification for this loss, either through the prepayment amount based on the predetermined formula or through a claim in damages.

[42] In 1983, the legislature chose to amend the *EA* to deal with the issue of who, among the expropriated party, the expropriating party or the creditor, would bear the cost of this lost revenue. Three options were open to the legislature: (1) The expropriated party could be required to compensate the lender for its loss, without being able to recover same from the expropriating party. The lender would therefore be compensated for its lost future interest revenue and the expropriated party would bear the cost. (2) The expropriated party could be required to compensate the lender but then be able to recover same from the expropriating party through the expropriation indemnity. In this scenario, the lender would be compensated for its lost future interest revenue and the expropriating party – the party who was expropriating for a public utility – would bear the cost. (3) Given the expropriation context, neither the expropriated party nor the expropriating party would bear the loss and the creditor would not be compensated for the lost future interest revenue.

[43] As appears from the clear wording of s. 53.16 *EA*, the legislature chose the third option and favoured the interests of the expropriated party and the expropriating party over those of the creditor, by declaring that the payment made to the borrower “does not constitute advance repayment for which the creditor may claim compensation”.

[44] Although parliamentary debates are not determinative of the legislature's intent, they may be useful to provide context and may confirm the legislature's intent as it otherwise appears from the clear wording of a statute.²⁵ The parliamentary debates held prior to the adoption of the 1983 amendment provide further insight into the legislative policy driving this amendment. Indeed, s. 53.16 *EA* was debated before the Transport

²² *Haroch c. Banque Toronto-Dominion*, 2026 QCCA 700, para. 56.

²³ *Banque Toronto-Dominion c. Brunelle*, 2014 QCCA 1584, para. 48. In *Haroch c. Banque Toronto-Dominion*, 2026 QCCA 700, paras. 60-71, the Court concluded that the legal characterization of such clauses remains unresolved.

²⁴ See, for example, *Haroch c. Banque Toronto-Dominion*, 2026 QCCA 700, para. 58.

²⁵ *Murray-Hall v. Quebec (Attorney General)*, 2023 SCC 10, paras. 25-26; *Régie des rentes du Québec c. Canada Bread Company Ltd.*, 2011 QCCA 1518, para. 57; *Fonds d'aide aux actions collectives c. Ticketmaster Canada Ltd.*, 2026 QCCA 476, para. 57.

Commission. The then Minister of Transport explained the context that existed prior to the tabling of the proposed section and the reason why the above-mentioned third option had been chosen:²⁶

M. Clair : Certains contrats hypothécaires prévoient qu'un remboursement anticipé comporte une pénalité pécuniaire. En cas d'expropriation, nous rencontrons constamment des paiements anticipés puisque le protonotaire distribue les indemnités aux créanciers. L'exproprié n'a pas voulu cette situation. De plus, le créancier ne subit pas grand dommage en récupérant rapidement ce qui lui est dû. Cette clause pénale est de nature personnelle et il est inacceptable que, lorsque l'utilité publique est en jeu, l'exproprié ait à écoper.

[Underlining added]

[45] A heated debate ensued where opposition members argued that it was unacceptable that the contractual rights of lenders be set aside without compensation. They argued that the system should remain as before, namely that the expropriated party pay the prepayment indemnity and then seek damages from the expropriating party (the second option). The Minister stressed that this was not the course the legislature intended to follow.²⁷

M. le Président, sérieusement sur le fond, je ne vois pas que le créancier en subisse un grave préjudice. Effectivement, s'il avait placé son argent à 18% et qu'à ce moment-là, le taux en vigueur était à 6%, l'inverse peut aussi être vrai. Il me semble qu'une Loi sur l'expropriation, son objectif est de reconnaître les droits et les obligations à l'expropriant et à l'exproprié. On ne peut pas, dans la Loi sur l'expropriation, reconnaître des inconvénients et accorder des indemnités jusqu'au quatorzième voisin qui, effectivement, à cause de l'expropriation, peut subir certains inconvénients.

[Underlining added]

[46] He explained that it was not in the public interest to indemnify such losses.²⁸

[47] It would therefore not be appropriate to adopt a restrictive interpretation of s. 53.16 EA. The provision must be interpreted broadly and liberally so as not to burden the expropriated party with indemnification payments it would otherwise have to make to its creditor, nor impose on the expropriating party the obligation to indemnify the

²⁶ Quebec. National Assembly, *Journal des débats*, 32nd Leg., 4th Sess., Vol. 27, No. 108, June 14, 1983, p. B-5830 (M. Clair).

²⁷ *Id.*, p. B-5831.

²⁸ *Id.*, p. B-5833.

expropriated party for a payment made to the creditor. The legislature has unequivocally stated that the creditor must forego future interest revenue accruing until the end of the fixed-term loan when an advance payment occurs because of the expropriation.

[48] The trial judge ultimately never answered the question she posed – namely, whether s. 53.16 *EA* should be interpreted broadly and liberally.

[49] She stated:

[42] Section 58 of the Act provides that the indemnity includes not only the value of the property expropriated, but also the damage directly caused by the expropriation. The jurisprudence acknowledges that the nature of the damages claimed is subject to a liberal interpretation for which expropriated parties have received indemnity. In order to limit the amount claimed as damages, Section 53.16 provides that the third-party creditor cannot claim compensation for the advance repayment of its loan.

[Reference omitted; underlining in the original]

[50] Each of the statements contained in this paragraph, if taken in isolation, is not necessarily incorrect. However, to the extent that the trial judge intimated that s. 53.16 *EA* should be read restrictively because the expropriated party who pays compensation to its creditor can claim damages from the expropriating party under s. 58 *EA*, she erred in law.

[51] The judge concluded her analysis on the proper interpretation of ss. 58 and 53.16 *EA* by stating:

[47] The question before the court, however, is not whether BAC could have claimed the termination payment as damages under Section 58 of the Act but rather whether BMO is precluded from claiming “compensation” under Section 53.16 of the Act for the “advance repayment” of its loan.

[52] This, indeed, is the issue at the heart of the dispute. It must be addressed by taking into consideration the clear statutory language of s. 53.16 *EA*, its context and the legislature’s object and intent in allocating the losses arising under an expropriation.

[53] Before determining whether the termination payment constitutes compensation for the advance repayment to the creditor, I must first determine if there is an interrelation between the various clauses of the Swap Agreement and the Credit Agreement.

2. Did the judge commit a palpable and overriding error of mixed fact and law by concluding that the termination payment was unrelated to the advance repayment of the Borrowers' loan?

[54] The judge agreed with the respondent that the Credit Agreement and the Swap Agreement “are distinct and separate contracts, which are clear and complete and need not be interpreted”.²⁹

[55] The trial judge dismissed the appellant’s argument that the Credit Agreement and the Swap Agreement constituted a “fixed interest rate financing package” and that they should be interpreted as one agreement. She considered that they were not intrinsically linked and that one could survive without the other. She seemed to recognize that there were cross references in the two agreements³⁰ but was of the view that this did not prevent each agreement from having a “life of its own”.³¹ She held that the wording of the Credit Agreement evidenced that “notwithstanding the payment of the Credit Agreement, the Swap Agreement survives”.³² She noted that the appellant’s expert had admitted that “there is no reason for the hedge to be terminated at the same time as the asset being hedged”³³ and that both experts had acknowledged that “in exceptional circumstances, a swap can remain in place without security”.³⁴ She held that to conclude that the termination of the Credit Agreement inevitably led to the termination of the Swap Agreement “seem[ed] to involve a considerable extension of logical interpretation”.³⁵ She refused to apply the “group of contracts” theory proposed by the appellant.

[56] The trial judge referred to ss. 21.5.1 and 21.7.1 of the Credit Agreement, which read as follows:

21.5.1 This Agreement and the other Credit Documents embody the entire agreement and understanding between the Lender and the Borrowers and supersede all prior agreements and understandings between such parties relating to the subject matter hereof and thereof. Accordingly, the Credit Documents may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties. Notwithstanding the foregoing, the Swap Agreement shall constitute a separate agreement among the Partnership and the Lender and nothing in this Agreement shall supersede the terms and provisions of the Swap Agreement.

21.7.1 In the event of a conflict between this Agreement and the other Credit Documents, this Agreement shall prevail; provided however, a conflict shall not be

²⁹ Judgment, para. 69.

³⁰ *Id.*, para. 62.

³¹ *Id.*, para. 63.

³² *Id.*, para. 58.

³³ *Id.*, para. 59.

³⁴ *Id.*, para. 60.

³⁵ *Id.*, para. 68.

deemed to exist only because one document deals with a matter and another document does not. Notwithstanding the foregoing, the Swap Agreement shall constitute a separate agreement among the Partnership and the Lender and nothing in this Agreement shall supersede the terms and provisions of the Swap Agreement.

[Underlining added]

[57] She concluded her analysis as follows:

[71] BMO states that there is no ambiguity as to the terms of each distinct agreement and including the termination date of the Swap. While the Credit Agreement and the Swap Agreement may cross reference each other, they are independent and can stand alone. The parties' respective rights and obligations must be determined based on the clear terms of each agreement. The Court agrees.

The parties' positions

[58] The appellant argues that the trial judge incorrectly applied the two-step contractual interpretation framework set out by the Supreme Court of Canada in *Uniprix inc. c. Gestion Gosselin et Bérubé inc.*³⁶ It posits that in carrying out the first step, the trial judge should have noted that there was an ambiguity in ss. 21.5.1 and 21.7.1 of the Credit Agreement, and she should then have gone on to the second step so as to determine the parties' common intention. Had she done so, she would have given due regard to the evidence showing that the parties' intended to use the swap transaction to set a fixed term of interest for the duration of the Term Loan. The appellant submits that the judge failed to consider the provisions of the two agreements and the cross references and cross-default clauses they contained. She should have concluded that ss. 21.5.1 and 21.7.1 of the Credit Agreement contained ambiguities, which she should have clarified with due consideration to the civil law "group of contracts" theory. Had she done so, she would have concluded that the Credit Agreement and the Swap Agreement were, in the words of the Court in *Billards Dooly's inc. c. Entreprises Prébours ltée*, "*de[s] contrats concomitants et interdépendants, destinés à réaliser une opération globale*".³⁷

[59] The respondent replies that the appellant has not identified any reviewable error in the judgment under appeal. There was no ambiguity in the Swap Agreement, and the "group of contracts" theory could be set aside. It argues that each agreement could exist without the other, such that the Swap Agreement could have survived without the Credit Agreement. The cross-references in the agreements were not conclusive. In its view, the judge duly considered all the evidence. It was the appellant who willfully provoked the termination of the Swap Agreement.

³⁶ 2017 SCC 43.

³⁷ *Billards Dooly's inc. c. Entreprises Prébours ltée*, 2014 QCCA 842, para. 60.

Analysis

[60] Contractual interpretation, including the determination as to whether contractual clauses are ambiguous or not, gives rise to a question of mixed fact and law in respect of which courts of appeal may not intervene in the absence of a palpable and overriding error.³⁸

[61] I conclude that the trial judge made palpable and overriding errors in interpreting the agreements and disregarded their clear and unambiguous terms.

[62] I do not agree with the appellant's position that ss. 21.5.1 and 21.7.1 of the Credit Agreement are ambiguous. They express a clear principle, namely that the Swap Agreement is a separate agreement whose terms supersede those of the Credit Agreement. That said, however, these clauses have no relevance to the issues in dispute.

[63] The clear and unambiguous wording of the Swap Agreement and the Credit Agreement aims to ensure, when the two agreements are applied in tandem, that at least the following two purposes are met: (i) a fixed-term rate of interest is set for the duration of the Term Loan; and (ii) in the event of prepayment of the Term Loan, the full economic benefit of the Swap Agreement is paid to the respondent by way of a termination payment. There is no conflict between the two agreements. Rather, they are interrelated and they reflect and complement each other; both serve to ensure that the foregoing two purposes are met. But for the expropriation and s. 53.16 EA, if the Term Loan had been prepaid, the Credit Agreement and the Swap Agreement would have operated in synergy to fully secure the termination payment and ensure its payment, as I will now explain.

- ***The provisions of the Swap Agreement***

[64] When one reads the Swap Agreement (composed of the ISDA Master Agreement, the Schedule thereto and the Confirmation) as a separate agreement – as ss. 21.5.1 and 21.7.1 of the Credit Agreement require – there is no ambiguity regarding the fact that its payment terms are interlinked with the Credit Agreement and that its termination can occur because the economic benefit the respondent intends to draw from the Swap Agreement is no longer secured by the Deed of Hypothec or the Credit Agreement.

[65] Payment terms. The monthly payments to be made, namely the CAD Floating Amounts by the respondent and the CAD Fixed Amounts by the LP, are calculated on a notional amount that corresponds to the capital owing in any given month under the Term Loan. The schedule of payments under the Confirmation extends to the maturity date of the Term Loan.

[66] Early termination and termination payment clauses. Section 2(a)(i) of the ISDA Master Agreement provides that "[e]ach party will make each payment or delivery

³⁸ *Uniprix inc. v. Gestion Gosselin et Bérubé inc.*, 2017 SCC 43, para. 41.

specified in each Confirmation". Payments continue as long as "no Early Termination Date (...) has occurred or been effectively designated".³⁹

[67] Upon an Early Termination Date, a termination payment (which corresponds to an estimate of the economic benefit that the other party will forego as a result of the termination) must be paid.

[68] Section 6(c) of the ISDA Master Agreement provides that an Early Termination Date may occur when a notice to this effect is given by one of the parties:

(c) ***Effect of Designation.***

- (i) If notice designating an Early Termination Date is given under Section 6(a) or (b), the Early Termination Date will occur on the date so designated, whether or not the relevant Event of Default or Termination Event is then continuing.
- (ii) Upon the occurrence or effective designation of an Early Termination Date, no further payments or deliveries under Section 2(a)(i) or 2(e) in respect of the Terminated Transactions will be required to be made, but without prejudice to the other provisions of this Agreement. The amount, if any, payable in respect of an Early Termination Date shall be determined pursuant to Section 6(e).

[Underlining added; bold and italics in the original]

[69] Section 6(b)(i) of the ISDA Master Agreement stipulates that a notice must be given when a Termination Event occurs:

- (i) ***Notice.*** If a Termination Event occurs, an Affected Party will, promptly upon becoming aware of it, notify the other party, specifying the nature of that Termination Event and each Affected Transaction and will also give such other information about that Termination Event as the other party may reasonably require.

[Bold and italics in the original]

[70] A Termination Event can arise in various contexts, which are listed in s. 5(b) of the ISDA Master Agreement, and includes what is defined as an "**Additional Termination Event**" in Part 1 of the Schedule to the ISDA Master Agreement:

- (h) **Additional Termination Event** will apply. The following will constitute an Additional Termination Event:

³⁹ Section 2(a)(iii) of the ISDA Master Agreement.

(...)

- (ii) Party B [i.e., the respondent] ceases to be a lender under the Credit Agreement or is no longer entitled to the benefit of the Credit Support Documents.

[Underlining added; bold in the original]

[71] As a result of the advance repayment of the Term Loan, the respondent would cease to be a lender under the Credit Agreement. In addition, the respondent would no longer be entitled to the benefit of what are defined as “**Credit Support Documents**” in Part 4 of the Schedule to the ISDA Master Agreement:

- (f) **Credit Support Document(s)** means, with respect to Party A [i.e., the LP], the Credit Documents, the Partnership Documentation and each other document which by its terms secures, guarantees or otherwise supports Party A’s obligations hereunder (whether or not this Agreement is specifically referenced or described therein), as such document may be amended, supplemented, restated or replaced from time to time (but without giving effect to any amendments, supplements, restatements or replacements thereto, or any waivers or consents granted thereunder, not consented to by Party B [i.e., the respondent]); and, with respect to Party B, none.

[Underlining added; bold in the original]

[72] As will be seen from the analysis below, each of the Credit Agreement and the Deed of Hypothec “secures, guarantees or otherwise supports” the appellant’s obligations under the Swap Agreement, such that each is a Credit Support Document. Consequently, if the Credit Agreement is terminated or the Deed of Hypothec’s registration is cancelled, then under the clear terms of the Swap Agreement – read separately from the Credit Agreement – such termination or cancellation will constitute an Additional Termination Event under the Swap Agreement. In such circumstances, the LP must promptly send a notice that a Termination Event has occurred and may then designate the Early Termination Date, triggering the termination payment obligation.

[73] This is exactly how the sequence of events unfolded in the case at bar. When it became clear that the Term Loan would be prepaid from the expropriation indemnity and that the Deed of Hypothec would be cancelled as a result, the appellant asked for a statement of sums owing under the Term Loan. The respondent concluded that an Additional Termination Event had occurred and, on December 28, 2020, it sent a notice to that effect and designated December 29, 2020 as the Early Termination Date. The relevant excerpts of that notice read as follows:

We refer to the ISDA Master Agreement dated as of August 28, 2013 between Bank of Montreal and The Boulevard Shopping Centre (Montreal) Limited Partnership (the “**Agreement**”).

This Notice is provided to you in accordance with Section 6(b)(i) of the Agreement. Capitalized terms used in this letter and not otherwise defined herein shall have the respective meanings attributed thereto in the Agreement.

Notice is hereby given that an Additional Termination Event has occurred under the Agreement pursuant to Section 5(b)(v) and Part 1(h)(ii) of the Agreement because Bank of Montreal is no longer entitled to the benefit of the Credit Support Documents. With respect to the above Termination Event, The Boulevard Shopping Centre (Montreal) Limited Partnership is the Affected Party, and all Transactions under the Agreement are Affected Transactions.

Bank of Montreal hereby designates December 29, 2020 as the Early Termination Date in respect of all outstanding Transactions under the Agreement.

[Underlining added; bold in the original]

[74] All of this occurred according to the terms of the Swap Agreement read – I must emphasize once again – separately from the Credit Agreement.

[75] The trial judge posited that swap agreements can stay in effect even when the underlying asset that is the subject of the hedge is terminated. She stated that the termination of the Swap Agreement was not inevitable.⁴⁰ Perhaps, in theory, this could have been possible had the respondent chosen to send a notice without designating an Early Termination Date. But this would have been a very improbable course to follow, because, as will be explained in the following section dealing with the Credit Agreement, the respondent would have lost the benefit of the support provided by the Credit Agreement and the Deed of Hypothec to secure the payment of the economic benefit under the Swap Agreement.

[76] The trial judge added that that the respondent had proposed to the appellant that the Swap Agreement not be terminated.⁴¹ She did recognize, however, that this was “subject to security for the Swap facility of \$4.1 million”,⁴² other than the existing Deed of Hypothec. Indeed, on December 21, 2020, when it was clear that the Term Loan would be prepaid, the respondent’s counsel wrote that his client was “willing not to terminate the Derivative Transaction [i.e., the swap transaction], if the proper arrangements to secure the related risks [were] put in place”. He asked the appellant to confirm whether it “[wished] BMO to terminate the Derivative Transaction and to have the applicable termination payment made, or rather [preferred] to discuss with BMO of the terms and conditions under which the Derivative Transaction [could] remain in existence”. Hence, but for a new mechanism to replace the Credit Agreement, together with its appurtenant Deed of Hypothec, as security for the economic benefit of the Swap Agreement, the

⁴⁰ Judgment, para. 86.

⁴¹ *Id.*, para. 26.

⁴² *Id.*, para. 86.

respondent would terminate the Swap Agreement and claim the payment of the termination payment.

[77] This demonstrates eloquently the extent to which the Swap Agreement, on its own and separate terms, was linked to the Credit Agreement. It was inconceivable for the Swap Agreement not to be terminated, unless a new security mechanism similar to that set out in the Credit Agreement, as described below, was entered into to secure the economic benefit flowing from the Swap Agreement.

[78] In conclusion, if one relies solely on the Swap Agreement's stipulations, it is clear that the Swap Agreement is interrelated with the Credit Agreement and the Deed of Hypothec that secures it. Recognizing that the two agreements are complementary is not contrary to ss. 21.5.1 and 21.7.1 of the Credit Agreement. It fully respects the terms of the Swap Agreement as a separate agreement and does not subordinate the Swap Agreement to the Credit Agreement. It certainly is not a considerable extension of logical interpretation to recognize this interrelation. The Swap Agreement was expressly terminated because of these links and because of the fact that the Credit Agreement and the Deed of Hypothec would be terminated. In failing to recognize the interrelation, the trial judge committed a palpable and overriding error

- ***The provisions of the Credit Agreement***

[79] Given that the Swap Agreement refers to the Credit Agreement for the purposes of termination, it is appropriate to take the Credit Agreement into consideration, as long as doing so does not give rise to a conflict or inconsistency preventing the respondent from terminating the Swap Agreement and receiving a termination payment if an Additional Termination Event occurs.

[80] As the following analysis will show, there is no such conflict or inconsistency between the two agreements. The Credit Agreement serves to ensure that, in all circumstances, the termination payment is secured and paid.

[81] The Credit Agreement refers repeatedly to the Swap Agreement, which it defines as follows:

Swap Agreement means that certain ISDA Master Agreement, including its Schedule, entered into as of the date hereof among the Partnership and the Lender for the purpose of entering into an interest rate swap transaction for a notional amount corresponding to the full principal amount of the Term Loan and for a term corresponding to the term of the Term Loan, including any credit support agreement related thereto, as applicable, as the same may be amended, modified, renewed or restated.

[Underlining added; bold in the original]

[82] Although s. 4.3.1(a) of the Credit Agreement provides that interest is to be paid for the Term Loan at the Term Floating Rate, s. 4.3.1(b) stipulates that while the Swap Agreement is in effect, the amount of the monthly installments of principal and interest payable shall be determined in accordance with the fixed rate determined pursuant to the Swap Agreement and the confirmation issued thereunder. These sections read as follows:

4.3 Terms of Payment.

4.3.1 The Term Loan and interest thereon shall be payable by the Borrowers to the Lender as follows:

- (a) ***Interest and Amortized Principal.*** On the first Business Day of each month (each, a “**Payment Date**”), commencing on the first Payment Date following the Initial Advance Date, until all amounts due under the Credit Documents are paid in full, the Borrowers shall pay monthly instalments of principal and interest, based on a 25-year hypothecary amortization schedule from the Initial Advance Date, with interest at the Term Floating Rate; the amount of such instalment shall be determined by the Lender on or prior to the relevant Payment Date and shall be confirmed to the Borrowers, along with the corresponding amortization schedule, by way of a notice on or before the relevant Payment Date.
- (b) ***Swap Agreement.*** The Borrowers and the Lender hereby acknowledge and agree that the Partnership and the Lender shall enter into a confirmation pursuant to the Swap Agreement to fix the rate of interest applicable to the Term Loan for the period commencing on the Initial Advance Date and expiring on the Maturity Date and that, consequently, the amount of the monthly installments of principal and interest payable by the Borrowers to the Lender pursuant to Section 4.3.1(a) shall be determined in accordance to the fixed rate so determined pursuant to the Swap Agreement and the above-mentioned confirmation, and the amortization schedule provided to the Borrowers shall reflect such rate. While the Swap Agreement remains in effect, the Borrowers shall pay equal monthly installments of principal and interest in accordance with such amortization schedule, notwithstanding the fluctuation of the Term Floating Rate. However, should the Swap Agreement no longer be in effect, for any reason whatsoever, then the Borrowers shall pay monthly installments of principal and interest in accordance with the provisions of this Agreement.

[Underlining added; bold and italics in the original]

[83] The Credit Agreement again refers to the Swap Agreement when it provides that if there is early termination of the Term Loan, the LP is responsible for all termination

payments payable to the respondent pursuant to the Swap Agreement in connection with the total or partial unwinding of the interest rate swap.

- 4.5.1 Subject to Section 17, the Term Loan may be prepaid, in whole or in part, in accordance with the following. The Borrowers may, on any Payment Date, and on not less than thirty (30) days prior written notice, which notice, once given, shall be irrevocable and binding on the Borrowers, repay the Term Loan in whole or in part, provided that any partial repayment shall be made in installments of whole multiple of one million dollars (Cdn\$1,000,000.00). In the event of prepayment of the Term Loan in whole or in part, the Partnership shall be responsible for payment, prior to or concurrently with such repayment, of all termination payments and other costs or fees payable to the Lender pursuant to the Swap Agreement in connection with the total or partial unwinding of the interest rate swap referred to in Section 4.3.1(b), the whole as provided for in the Swap Agreement. In the event of a prepayment of the Term Loan in whole, the Borrowers shall also repay all other Lender's Debt concurrently.

[Underlining added]

[84] The judge committed a palpable and overriding error when she took the view that s. 4.5.1 “clearly demonstrates that notwithstanding the payment of the Credit Agreement, the Swap Agreement survives”.⁴³ In theory, the Swap Agreement – being a hedging instrument – could continue even if the underlying asset being hedged – i.e., the Credit Agreement – were terminated, as the Swap Agreement could function based on the notional amounts set out in its schedule. However, on the face of the clear and unambiguous stipulations in the agreements, this was never the parties’ intention. The detailed agreements ensured that, at all times, the economic benefit that the respondent intended to earn from the swap was fully secured. Indeed, a \$4,1 million swap facility (the “**Swap Facility**”) had been made available in the Credit Agreement and could be drawn upon to secure the LP’s obligations under the Swap Agreement, including to secure the termination payment, as appears from ss. 2.2.2 and 5.1.1 of the Credit Agreement:

- 2.2.2 The Swap Facility shall be used to secure the Borrowers’ present and future, existing or contingent obligations pursuant to the Swap Agreement, including the obligation to make payments upon early termination thereof.
- 5.1.1 The Swap Facility shall be available for the purpose of securing the Partnership’s obligation to pay any termination payment which may be owed to the Lender pursuant to the Swap Agreement in the event of the early termination of the Swap Agreement, as well as any and all obligations to provide collateral or credit support from time to time, the whole determined in accordance with the provisions such Swap Agreement. Any such amount owed by the Partnership to the Lender, together with any and

⁴³ Judgment, para. 58.

all interest accrued thereon a [sic] the rate set forth in the Swap Agreement, shall be deemed to be a draw under the Swap Facility and shall be secured by the Security Documents and the other Credit Documents.

[Underlining added]

[85] The reimbursement of any amounts drawn on this Swap Facility would in turn be guaranteed by the Deed of Hypothec.

- **Conclusion**

[86] There was no inconsistency or conflict between the Swap Agreement and the Credit Agreement. The two were intimately related, as the parties intended. They worked in tandem to ensure that, at all times, the appellant benefitted from a fixed rate of interest and the respondent received the full economic benefit of the Swap Agreement, be it by way of monthly payments, or by way of a termination payment. Sections 21.5.1 and 21.7.1 created no ambiguity, because nothing in the Credit Agreement contradicted the Swap Agreement nor superseded its terms. The explicit terms of the Swap Agreement provided that if the respondent ceased to be a lender under the Credit Agreement or if it lost the benefit of the Credit Support Documents (i.e., in particular the Deed of Hypothec), an Additional Termination Event would occur, which could lead a party – and did indeed lead the respondent – to designate an Early Termination Date. Still under the terms of the Swap Agreement, a termination payment became owing. This termination payment was secured, through the Credit Agreement, by the mechanism of an advance on the Swap Facility, such advance being itself secured by the Deed of Hypothec, and it is this mechanism that allowed the respondent to insist on immediate payment of the termination payment before agreeing to the cancellation of the Deed of Hypothec's registration.

3. Did the judge commit a palpable and overriding error of mixed fact and law by concluding that the termination payment did not constitute “compensation” under s. 53.16 EA?

[87] Having established, in response to the first ground of appeal, that s. 53.16 EA must be given a broad and liberal interpretation, and having found, in response to the second ground of appeal, that the two agreements were interlinked and that prepayment of the Term Loan, which resulted in the respondent losing the benefit of the Credit Support Documents, triggered the termination payment under the Swap Agreement, it must now be decided whether the termination payment made in this context constituted “compensation for an advance payment”.

[88] The judge was of the opinion that the notion of “advance repayment” is foreign to a swap agreement, since neither party to such a transaction actually lends money; hence, there is nothing to repay.

[89] She further seemed to conclude that the termination payment did not constitute compensation with the meaning of s. 53.16 *EA*.

The parties' positions

[90] The appellant argues that the method for calculating the termination payment – namely, the Market Quotation – indicates that the termination payment constituted compensation. The respondent replies that the appellant has identified no palpable and overriding error in the judge's conclusion that the termination payment was neither a penalty nor compensation. The termination payment was made to get out of a deal that was disadvantageous to the appellant. It was not a penalty.

Analysis

[91] Two questions must be answered to decide whether s. 53.16 *EA* applies to the termination payment: (i) did the termination payment constitute compensation within the meaning of that provision and, (ii) if so, did it relate to an advance repayment?

[92] Section 6(e) of the ISDA Master Agreement deals with various payments measures and methods to calculate the payment owing upon an Early Termination Date. The respondent calculated the termination payment using the Market Quotation payment measure, which is defined as follows in the ISDA Master Agreement:

“Market Quotation” means, with respect to one or more Terminated Transactions and a party making the determination, an amount determined on the basis of quotations from Reference Market-makers. Each quotation will be for an amount, if any, that would be paid to such party (expressed as a negative number) or by such party (expressed as a positive number) in consideration of an agreement between such party (taking into account any existing Credit Support Document with respect to the obligations of such party) and the quoting Reference Market-maker to enter into a transaction (the “Replacement Transaction”) that would have the effect of preserving for such party the economic equivalent of any payment or delivery (whether the underlying obligation was absolute or contingent and assuming the satisfaction of each applicable condition precedent) by the parties under Section 2(a)(i) in respect of such Terminated Transaction or group of Terminated Transactions that would, but for the occurrence of the relevant Early Termination Date, have been required after that date. (...) If more than three quotations are provided, the Market Quotation will be the arithmetic mean of the quotations, without regard to the quotations having the highest and lowest values. If exactly three such quotations are provided, the Market Quotation will be the quotation remaining after disregarding the highest and lowest quotations. For this purpose, if more than one quotation has the same highest value or lowest value, then one of such quotations shall be disregarded. If fewer than three quotations

are provided, it will be deemed that the Market Quotation in respect of such Terminated Transaction or group of Terminated Transactions cannot be determined.

[Bold and italics in the original]

[93] Section 6(e)(iv) states what purpose the termination payment measured using the Market Quotation is meant to serve:

(iv) ***Pre-Estimate***. The parties agree that if Market Quotation applies an amount recoverable under this Section 6(e) is a reasonable pre-estimate of loss and not a penalty. Such amount is payable for the loss of bargain and the loss of protection against future risks and except as otherwise provided in this Agreement neither party will be entitled to recover any additional damages as a consequence of such losses.

[Underlining added; bold and italics in the original]

[94] Despite the qualification that the Market Quotation measure constitutes a pre-estimate of loss, the trial judge was nevertheless of the view that the early termination payment did not constitute compensation within the meaning of the EA. She explained her reasoning as follows:

[90] A termination payment cannot be considered either a penalty or compensation. It corresponds to the swap market value that could have been paid by any of the two parties depending on the status of the market. Had the current interest rates at the time of the unwinding of the Swap been higher than the original fixed rate then BAC would have benefited by the termination amount.

[95] This explanation is incorrect on its very face. Damages serve to compensate for the amount of a loss, as set out in art. 1611 C.C.Q.

1611. The damages due to the creditor compensate for the amount of the loss he has sustained and the profit of which he has been deprived.

1611. Les dommages-intérêts dus au créancier compensent la perte qu'il subit et le gain dont il est privé.

Future injury which is certain and assessable is taken into account in awarding damages.

On tient compte, pour les déterminer, du préjudice futur lorsqu'il est certain et qu'il est susceptible d'être évalué.

[96] By providing a measure to pre-estimate the loss, the parties were determining, in advance, how damages were to be calculated. The last sentence of s. 6(e)(iv) reproduced

hereinabove specifies that “neither party will be entitled to recover any additional damages as a consequence of such losses”. Damages necessarily entail compensation.

[97] Having concluded that the termination payment constituted compensation, there remains the question of whether it was compensation for an advance repayment.

[98] It is true that, technically, no amounts are repaid under the Swap Agreement. The termination of the Swap Agreement generates a loss, which is pre-estimated by applying the Market Quotation measure. However, it is the prepayment of the Term Loan which, under s. 4.5.1. of the Credit Agreement, makes the Borrowers liable for the payment of this termination payment under the Swap Agreement “prior to or concurrently with” the repayment of the Term Loan. As a result of this stipulation, the Credit Agreement incorporates the obligation to pay the termination payment into the amounts payable in the event of the advance repayment of the Term Loan.

[99] In any given scenario but an expropriation scenario, this mechanism, which tied the Swap Agreement termination payment to the early repayment of the Term Loan, secured the payment of the lender’s economic benefit. However, in expropriation matters, it is the legislature’s clear intent that the expropriated party must not be held to indemnify or compensate the creditor for the latter’s loss relating to an advance repayment and that, consequently, the creditor will not be compensated for such loss. Being mindful of the legislature’s intent, and giving full effect to that intent, one must conclude that since the respondent deliberately tied the termination payment to the advance repayment and made it a condition *sine qua non* of any repayment, the termination payment constituted compensation for an advance repayment.

* * *

[100] For all of the foregoing reasons, I propose that the appeal be granted, that the judgment under appeal be set aside, and that the respondent be condemned to pay to the appellant \$2,434,150, plus interest at the legal rate and the additional indemnity calculated as of December 29, 2020, with legal costs in favour of the appellant both in first instance and on appeal, including its expert costs.

CHRISTIAN IMMER, J.A.