

SUPERIOR COURT

(Civil Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-17-133343-254

DATE: 9 April 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

CASE MANAGEMENT MEASURES, DIRECTIVES AND QUESTIONS

(Preliminary Provision and Article 158 C.C.P.)

INTRODUCTION

[1] At any stage of a proceeding, for case management purposes, pursuant to article 158 of the *Code of Civil Procedure*, the Superior Court may, among other things, take measures to simplify or better define the issues in dispute between the parties and rule on any special requests made by them. This article, like the other provisions of the *Code*, must be applied in a fair, simple, proportionate and economical manner ensuring in the process the accessibility, quality and promptness of civil justice, and providing for the exercise of the parties' rights in a spirit of cooperation and balance.

[2] The following case management directives and questions are being issued in the spirit of the preceding guiding principles. I am now formally seized of the next case management steps in this file.

BRIEF CONTEXT

[3] The Defendant and Cross-Applicant, Gildan Activewear Inc., a publicly listed company incorporated under the *Canada Business Corporations Act*¹ and headquartered in Montreal is one of the world's leading manufacturers of everyday basic apparel, including activewear, underwear, and hosiery products. 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 U.S. dollars, and its market capitalization at the time was well over 8 billion U.S. dollars.

[4] Gildan was co-founded in 1984 by Glenn Chamandy² 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.

[5] 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.

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

[7] On 7 March 2025, these former directors filed an action (**Originating Application**) against Gildan for an estimated amount of close to 18 million U.S. dollars, plus interest and indemnity, representing the value of certain Deferred Share Units (**DSU**) to which they are allegedly 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."

[8] 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

¹ R.S.C., 1985, c. C-44 (**CBCA**).

² 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.

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

[9] Four days later, on 18 November 2025, Gildan filed a 38-page Defence and Cross-Application against the plaintiffs, 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 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.

[10] According to Gildan, the plaintiffs, who were the then directors of the company, 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.

[11] 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.

[12] On 19 March 2026, in response to Gildan's Defence and Cross-Application, the plaintiffs filed an Application for advancement of defence costs (**Costs Application**) pursuant to certain Indemnification Agreements concluded between each of the plaintiffs and the company and section 124 of the CBCA. In that application, the plaintiffs seek the sum of 750,000 Canadian dollars in order to "make full answer" and "defend the allegations raised in Gildan's cross-application".

[13] The plaintiffs are of the view that the Costs Application must be heard and decided immediately, urgently and before any other issue or application pending before the Superior Court. The company on the other hand argues that it is not ready to address such a request by the plaintiffs, and that in any event the entire matter ought to be suspended pending a decision by the Superior Court (Commercial Division) on a related narrow privilege issue involving the law firm of Norton Rose LLP and their possession of certain documents. I will come back to this last point shortly.

[14] In the interim, the parties have two other matters pending before the Superior Court (Civil Division). There are two amended or modified case management notices, one filed by the plaintiffs dated 14 November 2025 and entitled “Plaintiffs’ Amended Notice of Case-Management” (**Plaintiffs’ Notice**) and the other filed by Gildan dated 18 November 2025 and entitled “Defendant’s Modified Notice of Case Management” (**Defendant’s Notice**).

[15] In these notices, which are still both pending before the Superior Court but have by now *perhaps* been simply taken over by time, at least temporarily, the plaintiffs request, among other things, that (i) the issues in dispute between the parties be circumscribed to the DSU amounts claimed by the plaintiffs and their conversion date; (ii) that Donald Berg, the former chair of the Board of Directors of Gildan, be examined orally for two hours; (iii) that the balance of the plaintiffs be examined in writing only; and, (iv) that the scope of the examinations be limited to matters directly relevant to the plaintiffs’ Originating Application.

[16] Alternatively, the plaintiffs request that the Originating Application be stayed until 30 days after the determination by the Superior Court (Commercial Division) of the privilege issues pending before that Division and that a subsequent case management conference be convened to address the ensuing steps.

[17] It is important to emphasize that the above requests made by the plaintiffs all predate the filing of Gildan’s Defence and Cross-Application on 18 November 2025.

[18] On its part, in the Defendant’s Notice dated the same day as its Defence and Cross-Application, Gildan requests that the Plaintiffs’ Notice be dismissed and that the Court establish a case protocol as filed in draft form by the company as an exhibit to its notice.

[19] I will open a parentheses here to highlight an important point. Interestingly, in response to item 5, of its draft case protocol which asks whether “all parties request a stay of proceedings”, Gildan explicitly indicates “no”. In the Defendant’s Notice, Gildan also writes, “as is evident from its Defence, Gildan does *not* rely on any privileged documents that are the subject of the application against Norton Rose” and moreover, it adds that “Gildan’s Defence is not based on these documents. The very purpose of the application against Norton Rose is to obtain documents that Norton Rose is 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.”

[20] Astonishingly, before me on 7 April 2026, the date that was fixed by Justice Suzanne Courchesne on 20 November 2025 for the hearing of the two case management notices, Gildan argues that this case ought to be stayed entirely pending the outcome of

the privilege issue before the Superior Court (Commercial Division), because it needs 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.

[21] In response, as surprisingly, the plaintiffs argue that this case should now *not* be stayed, and that the Costs Application ought to be heard as soon as possible.

[22] Turning now quickly to the third matter pending before the Superior Court, but this time the Commercial Division, in that matter Gildan appears to be asking the Court to determine whether the former directors – the plaintiffs in this matter and six other past directors – of that company or Gildan itself hold or may assert privilege over certain documents.

[23] Given that my colleague, Justice Martin Sheehan is already seized of that matter and has already issued a 19-page decision dated 23 March 2026, providing the parties with a roadmap to proceed with that action, I will not make any other comments about that case, save to say that based on the penultimate paragraph of that decision, Gildan, represented by McCarthy Tétrault, Norton Rose, represented by Me Jean-Charles René of that same firm, and the *mise en cause* in that case, the 16 former directors of Gildan represented by Torys LLP, were to file a timetable to address the issue of advance of costs requested by the former directors in that case by 10 April 2026.

[24] Apparently that timetable has now been presented to Justice Sheehan and he is to hear the narrow issue before him sometime in the Fall of 2026.

DIRECTIONS AND QUESTIONS

[25] This brings me to the issue of the adjudication of the Costs Application with respect to which Gildan was not, during the case management hearing of 7 April 2026, in a position to formulate any views or position.

[26] As indicated at the closure of that hearing, the parties are being convened to a case management hearing on **25 May 2026 at 9:00 a.m.** to address, among other things, *all* issues relating to the Costs Application, including the possibility or advisability of hearing it at this juncture, the necessity or not of addressing the issues raised in the Plaintiffs' Notice and the Defendant's Notice, the appropriateness or advisability of hearing any other preliminary applications that the parties have either filed or may wish to file prior to or after the Application, and finally, any already determined or to be determined additional steps that the parties think may be required before the Costs Application is adjudicated.

[27] The parties are also 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 Costs Application before it on the basis of the already existing record, if that is ultimately the decision that the Court arrives at after it has heard the parties on May 25th. 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 (if appropriate) of the Costs Application.

[28] To that end, the parties are directed to provide the Court with their respective positions, submissions of no longer than 25 pages each (in both printed and electronic format) and authorities and caselaw (bound in an indexed volume) by no later than **19 May 2026 at 12 p.m.** They are also to arrange for the exchange of their respective submissions and supporting documentation among them.

[29] Finally, the parties are requested to comprehensively address the following non-exhaustive list of questions. In doing so, they must under no circumstance at this stage read anything into or from the Court's questions set out below. These questions are being sent to the parties in no particular order of significance and in order to simply allow them to, with the convenience of time, reflect on some of the issues and questions that the Court is already grappling with or will have to deliberate on as part of its decision making process in the advancing of the Costs Application and otherwise:

- 1) Must the plaintiffs' Costs Application proceed before any other application or proceeding before the Superior Court? If so, why, if not, why not? The parties are requested to address and brief in their submissions all of their procedural and substantive reasons.
- 2) What, if anything, is the significance of the decision of Justice Martin Sheehan dated 23 March 2026 on the plaintiffs' Costs Application? What are the parties' positions regarding that decision.
- 3) What exactly is the true nature and form of the plaintiffs' Costs Application? In other words, is it a *provisional* request or a merit-based one? At least at first blush, Gildan appears to consider that the Costs Application encapsulates a certain degree of merits? It is not necessary in this regard for the parties to distinguish the obvious between a request for a provisional injunction and a request for advance on costs in a CBCA setting.
- 4) If the Costs Application is of a provisional nature, why can it not be heard on the basis of the already available information in the record?

- 5) How and based on what standard must that Application be heard? For example, is the Application akin to a provisional injunction such that, at this stage, the examining Court must only require and be satisfied with a *prima facie* proof, or is the burden of proof higher, for example, a strong *prima facie* case? Why and on what basis?
- 6) Who has the burden of proof with respect to the Costs Application?
- 7) What is the significance of the Indemnification Agreements? Who drafted them, and for what purpose? Is this information not available from the face of and a review of the contents of the agreements themselves?
- 8) What is the significance of, in particular, sections 1(b)(i), 1(c), 2, 3, 4 and 5 of the Indemnification Agreements? Why does section 2, under the heading “Advance of Costs and Expenses” in its last sentence refer to “Notwithstanding the foregoing, if court approval is required by the Act to permit the Corporation to advance costs and expenses [...]”?
- 9) Why does section 5 of the Indemnification Agreements refer to the “Presumption of Good faith”? Is that the same presumption that is found in the *Civil Code*?
- 10) What is the legislative history of section 124 of the CBCA? When was it adopted and why? If any parliamentary adoption or other debates are available, please provide them to the Court.
- 11) What is the purpose or *raison d'être* of section 124 of the CBCA?
- 12) What doctrine or scholarly commentaries are there available with respect to this section? What case law is there available on section 124 and, in particular, subsections 124 (2) and (4) of the CBCA? Are there any relevant and comparable international sources available on the subject?
- 13) What, if any, is the difference between a request for “indemnification” versus a request for “advance of costs” as found in subsections (1) and (2) of section 124 CBCA? Is it possible that an advance of costs is *only* of a provisional nature, whereas indemnification refers to the merits of what is envisaged or covered in section 124 of the CBCA?
- 14) What is the significance of the second full sentence in subsection 124 (2) of the CBCA? That sentence reads: The individual – in other words, the former director or officer of the corporation for example – shall repay the moneys [advanced] if the individual does not fulfill the conditions of subsection (3)?

- 15) If the CBCA in subsection 124 (2) provides for an explicit repayment obligation of any moneys advanced, and if the individual (referred to in subsection 1) does not fulfill the indemnification requirements set out in subsection 4 as part of the “indemnification” analysis required in due course by the Court, is there still another verification required at the advance of costs adjudication stage? Does a double analysis in this regard not in a way equate to obtaining “two kicks at the can” with respect to the same issue?
- 16) Does the correct, purposeful and “preferred approach” in statutory interpretation not require that subsection 124(4) be read in the context of subsections (1), (2) and (3)? If so, does the requirement of Court approval found in subsection (4) then not apply only to the indemnification of any amounts requested by an individual?
- 17) If that is not the case, then would subsections (2) and (4) of section 124 not run into direct conflict with one another?
- 18) What if anything is the significance of subsection 124(5) in the overall scheme of section 124 of the CBCA?
- 19) How should the Court determine the quantum of any advance on costs? And on what basis?

[30] For the immediate convenience of the parties and the Court itself, the relevant parts of section 124 of the CBCA are reproduced below:

Indemnification

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.

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).

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 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).

[...]

[31] A copy of these directives and questions must be sent by the parties to the lawyers involved in Superior Court file number 500-11-065209-252. The court room for the full day hearing on 25 May 2026 at 9:00 a.m. will be provided to the parties in due course. All

documents in response to the questions raised above should be delivered directly to my office. If the parties wish to have anything captured on the *plumitif*, however, they must file it directly with the *Greffe civil*.

BABAK BARIN, J.S.C.

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Hearing date: 7 April 2026