File No. 38594

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

IMF BENTHAM LIMITED
BENTHAM IMF CAPITAL LIMITED

APPELLANTS
(Impleaded Parties)

- and -

CALLIDUS CAPITAL CORPORATION
INTERNATIONAL GAME TECHNOLOGY
DELOITTE S.E.N.C.R.L.
LUC CARIGNAN
FRANÇOIS VIGNEAULT
PHILIPPE MILLETTE
FRANCIS PROULX
FRANÇOIS PELLETIER

RESPONDENTS
(Appellants)

- and -

9354-9186 QUÉBEC INC. (FORMERLY BLUBERI GAMING TECHNOLOGIES INC.)
9354-9178 QUÉBEC INC. (FORMERLY BLUBERI GROUP INC.)

APPELLANTS
(Respondents)

- and -

ERNST & YOUNG INC.

INTERVENER
(Monitor)

APPELLANTS' FACTUM

(Rule 42 of the *Rules of the Supreme Court of Canada*)

M^e Neil A. Peden
Woods LLP
Suite 1700
2000 McGill College Avenue
Montréal, Québec
H3A 3H3

Tel.: 514 982-4560
Fax: 514 284-2046
npeden@woods.qc.ca

Counsel for Appellants

M^e Geneviève Cloutier
Gowling WLG (Canada) LLP
Suite 3700
1 Place Ville Marie
Montréal, Québec
H3B 3P4

Tel.: 514 392-9448
Fax: 514 876-9550
genevieve.cloutier@gowlingwlg.com

and

M^e Clifton P. Prophet
Gowling (WLG) Canada LLP
Suite 1600
1 First Canadian Place
100 King Street West
Toronto, Ontario
M5X 1G5

Tel.: 416 862-7525
Fax: 416 862-7661
clifton.prophet@gowlingwlg.com

Counsel for Respondent
Callidus Capital Corporation

M^e D. Lynne Watt
Gowling (WLG) Canada LLP
Suite 2600
160 Elgin Street
Ottawa, Ontario
K1P 1C3

Tel.: 613 786-8695
Fax: 613 788-3509
lynne.watt@gowlingwlg.com

Agent for Respondent
Callidus Capital Corporation

M^e Jocelyn Perreault
M^e Noah Zucker
M^e François Alexandre Toupin
McCarthy Tétrault LLP
Suite 2500
1000 De La Gauchetière Street West
Montréal, Québec
H3B 0A2

Tel.: 514 397-4100
Fax: 514 875-6246
jperreault@mccarthy.ca
nzucker@mccarthy.ca
fatoupin@mccarthy.ca

Counsel for Respondents
International Game Technology
Deloitte S.E.N.C.R.L.
Luc Carignan, François Vigneault,
Philippe Millette, Francis Proulx,
François Pelletier

M^e Jean-Philippe Groleau
M^e Christian Lachance
M^e Gabriel Lavery Lepage
M^e Hannah Toledano
Davies Ward Phillips & Vineberg LLP
26^{th} Floor
1501 McGill College Avenue
Montréal, Québec
H3A 3N9

Tel.: 514 841-6400
Fax: 514 866-2241
jpgroleau@dwpv.com
clachance@dwpv.com
glepage@dwpv.com
htoledano@dwpv.com

Counsel for Appellants
9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.)
9354-9178 Québec Inc. (formerly Bluberi Group Inc.)

M[e] Joseph Reynaud
Stikeman Elliott LLP
41st Floor
1155 René-Lévesque Blvd. West
Montréal, Québec
H3B 3V2

Tel.: 514 397-3019
Fax: 514 397-3222
jreynaud@stikeman.com

Counsel for Intervener
Ernst & Young Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS

PART I – OVERVIEW OF THE APPELLANTS' POSITION AND FACTS

A. Overview of the Appellants' Position

1. Access to justice is a bedrock legal principle that this Court has invoked in various contexts in dozens of judgments over the past decade. This Court has gone so far as to declare that "ensuring access to justice is the greatest challenge to the rule of law in Canada today."[1] Consistent with this principle, this Court has also acknowledged that contingency fee agreements, long frowned upon at common law, are a means of promoting access to justice for impecunious plaintiffs.[2]

2. The impecunious plaintiffs in the present appeal, referred to collectively as Bluberi, are insolvent corporations under the protection of the *Companies Creditors' Arrangement Act* (the "**CCAA**"). This appeal concerns Bluberi's attempt to fund a lawsuit, seeking damages in excess of $200 million, against its secured creditor, Callidus Capital Corporation ("**Callidus**"), and Callidus's attempt to force Bluberi to settle the lawsuit for under $2.9 million.

3. To this end, Callidus has proposed its own compromise or arrangement between Bluberi and Bluberi's unsecured creditors (the "**Callidus Plan**") pursuant to s. 4 of the CCAA. The Callidus Plan would grant Callidus full and final release of Bluberi's claims against it.

4. The majority of Bluberi's unsecured creditors hold comparatively small claims, which Callidus proposes to pay in full. Understandably, most of those creditors support the Callidus Plan. However, the Callidus Plan would pay Bluberi's largest unsecured creditor, SMT, less than 35% of its claim. SMT would bear approximately 44% of the total losses to creditors that would result from the Callidus Plan.

5. SMT opposes the Callidus Plan and supports Bluberi's efforts to pursue the litigation against Callidus. Because SMT's $2.3 million claim is more than one third of the total of all unsecured claims, the Callidus Plan cannot obtain the support of "a majority in number

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1 *Hryniak v Mauldin*, [2014] 1 SCR 87, 2014 SCC 7, para 1.

2 *Walker v Ritchie*, [2006] 2 SCR 428, 2006 SCC 45, para 12 ("***Walker***"); see also *McIntyre Estate v Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA) at para 55ff ("***McIntyre Estate***").

representing two thirds in value" of the unsecured creditors (as required by s. 6 of the CCAA) if SMT votes against it.

6. Because the Callidus Plan cannot win the support of the double majority required by law, Callidus intends to dilute the voting pool by valuing its security at zero and voting as an *unsecured* creditor. Callidus would cast what would be the deciding vote in favour of its own plan. Yet despite Callidus's intention to vote as though it is an unsecured creditor, the Callidus Plan provides that Callidus renounces all rights to a dividend, such that Callidus's sole interest in the Callidus Plan is as a defendant seeking the settlement of Bluberi's lawsuit against it.

7. In the decision at first instance, the judge of the Superior Court of Québec supervising the CCAA proceedings (the "**Supervising Judge**") expressed disapproval of Callidus's conduct in those proceedings. Unwilling to permit Callidus to vote in favour of its own plan, and aware of SMT's expressed intention to oppose it, the Supervising Judge recognized that the Callidus Plan could not meet the requirements of s. 6 of the CCAA. In an exercise of his discretion under s. 6 of the CCAA, the Supervising Judge declined to order a meeting of unsecured creditors to consider the doomed Callidus Plan.

8. In the same decision, the Supervising Judge approved the corporation's request for interim financing under the CCAA. The interim financing takes the form of a litigation funding agreement ("**LFA**") with appellant IMF Bentham Limited (referred to collectively with its subsidiary, appellant Bentham IMF Capital Limited, as "**Bentham**"), one of the world's oldest and most experienced litigation funders. Bentham has agreed to fund the lawsuit against Callidus on a non-recourse basis, i.e. Bentham will receive a return only if the litigation results in a successful judgment or a settlement.

9. It is an uncontested finding by the Supervising Judge that Callidus had expressed no interest whatsoever in proposing a plan of arrangement until the funding of Bluberi's litigation was imminent. The fact that the Callidus Plan exists at all—and that there is anything to debate before this Court—is a result of Bentham's agreement to fund the lawsuit, and its willingness to support the debtor company to this point. *But for the LFA, there would no prospect of any*

recovery for anyone. Instead, there is now the prospect of a lawsuit that could pay not only creditor claims but equity claims as well.

10. The foregoing elements form part of the balancing of interests that a supervising judge is *always* called upon to perform when considering interim financing under the CCAA—a task that a supervising judge is best placed to perform. In the absence of reviewable error, appellate courts should show deference to the supervising judge's findings.

11. However, the Québec Court of Appeal held that the LFA could not be approved as interim financing because it is not related to Bluberi's operations, and that the Supervising Judge committed a reviewable error of law in having failed to characterize the LFA (along with the litigation itself) as being a compromise or arrangement proposed between Blueberi and its unsecured creditors. The Québec Court of Appeal reached these conclusions despite the fact that the Ontario Court of Appeal upheld the use of interim financing to fund litigation under very similar circumstances in *Re Crystallex*, rejecting the argument that the litigation funding constituted a plan of arrangement.[3]

12. Litigation funding has gradually become more prevalent in Canada, and elsewhere. There are sound economic and moral arguments in favour of litigation funding, which has had to contend with concerns at common law about the medieval doctrines of champerty and maintenance. These doctrines have only recently been loosened in many jurisdictions—including Canada—as a means of promoting access to justice.[4]

13. Strictly speaking, the doctrines of champerty and maintenance are not at issue in the present instance; the court at first instance correctly determined that the doctrine of champerty is foreign to Québec civil law, and that *quota litis* (contingency) agreements are permissible.[5] It is therefore particularly troubling that the Québec Court of Appeal, reversing the decision at first instance, opined that the litigation funder's prospective share of the plaintiff's award

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3 *Crystallex (Re)*, 2012 ONCA 404 ("***Re Crystallex* (ONCA)**"), dismissing appeals from *Re Crystallex International Corporation*, 2012 ONSC 538 and from *Re Crystallex International Corporation*, 2012 ONSC 2125 ("***Re Crystallex* (ONSC)**").

4 See *infra*, para 63 and ss, **Bentham's Record (hereinafter "BR"), pp 44ff**.

5 See *infra*, para 61 and ss, **BR, pp 43**.

is "akin to an equity investment" that allows the funder to "benefit by preference over the existing creditors." With respect, this statement is not merely incorrect; it is a large step backward. Difficult to square with established principles of corporate and insolvency law, it is a proposition that calls into question the enforceability of contingency fee arrangements in the event of insolvency, thus restricting rather than promoting access to justice.

14. In addition to establishing an incorrect and problematic precedent with respect to plans of arrangement under the CCAA,[6] the decision of the court below has serious ramifications on the availability of litigation funding, and of interim financing more generally, in the context of CCAA proceedings. It also has potential ramifications on the availability of litigation funding in a broader context. This appeal is an opportunity for this Court to affirm fundamental principles relating to CCAA proceedings and to litigation funding, and to affirm the role of litigation funding in the promotion of access to justice.

B. <u>Statement of Facts</u>

a. The judgment appealed from

15. Bentham appeals the judgment of the Québec Court of Appeal dated February 4, 2019.[7] The judgment appealed from reversed the March 16, 2018 judgment of the Québec Superior Court (in this context, the "**CCAA Court**") in the CCAA proceedings relating to Bluberi, i.e. the appellants 9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.) and 9354-9178 Québec Inc. (formerly Bluberi Group Inc.).[8]

16. In the March 16, 2018 judgment, the Honourable Jean-François Michaud, having supervised the CCAA proceedings since November of 2015, approved the LFA whereby Bentham would provide Bluberi with the funding necessary to pursue a litigious claim of over $200 million (the "**Retained Claims**") against its secured lender, Callidus. The Supervising Judge also

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6 Discussed in the submissions by Bluberi, which Bentham adopts as its own.

7 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2018 QCCS 1040 (the "**Judgment at first instance**"), **BR, pp 1ff**.

8 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2019 QCCA 171 (the "**Judgment under appeal**"), **BR, pp 31ff**.

prevented Callidus from proposing its amended plan of arrangement to Bluberi's creditors in order to settle the Retained Claims for an amount up to $2,880,000. (The original version of the Callidus Plan, which was substantially similar except that it offered unsecured creditors up to $2,630,000, had been voted down by several creditors, the vote of the largest unsecured creditor being sufficient in itself to prevent the plan from obtaining the two-thirds support required under s. 6 of the CCAA. The largest unsecured creditor has indicated that it would vote against the amended Callidus Plan.)

17. *Inter alia*, the judgment appealed from:

i. finds that the Supervising Judge both exceeded the powers of a CCAA Court and improperly exercised his discretion;[9]

ii. holds that the Supervising Judge could not approve the LFA as interim financing pursuant to s. 11.2 of the CCAA, because the LFA is unrelated to Bluberi's business operations, and because the LFA and the proposed litigation constitute a compromise or arrangement that must be approved by Bluberi's creditors;[10]

iii. orders that, in the event the LFA forms part of a plan of arrangement presented to creditors, the respondent "Creditors Group" be given an unredacted copy thereof;[11]

iv. permits Callidus to propose its own compromise or arrangement to Bluberi's creditors whereby Callidus and related parties would obtain a release of liability from Bluberi's claims, with no exclusion for gross negligence, intentional fault or bad faith conduct;[12]

v. permits Callidus to value its security at zero and vote on the Callidus Plan as an unsecured creditor, thus enabling Callidus to cast the deciding vote in favour of its own offer to settle the claims against it;[13] and

9 Judgment under appeal, notably paras 48, 68-69, 78 and 91, **BR, pp. 40, 45, 47 and 51**.
10 *Ibid*, notably paras 11, 47, and 77 and ss, **BR, pp 33, 40 and 47ff**.
11 *Ibid*, notably paras 12, 46 and 99-100, **BR, pp 33, 39 and 53**.
12 *Ibid*, notably paras 7 and 63, **BR, pp 32 and 44**.
13 *Ibid*, notably paras 9 and 40, **BR, pp 33 and 38**.

vi. orders costs against *Bentham* (an impleaded party at the appeal stage), as well as ordering that Bentham pay half the costs of the meeting of creditors in the event that Bluberi also files a plan of arrangement.[14]

b. The Appellants' role in the present proceedings

18. In the CCAA proceedings, Callidus filed a claim in the amount of approximately $137 million, which was secured by a hypothec on all of Bluberi's property. After provoking the liquidation of Bluberi's assets, Callidus used its secured claim to make a successful "credit bid" for the assets. Notionally, Callidus paid the estate of Bluberi approximately $134 million to purchase the assets but no money changed hands: Callidus recouped the entirety of the purchase price by virtue of its hypothec over Bluberi's property. The result is that Callidus became owner of Bluberi's assets in exchange for the reduction of its secured claim to the amount of $3,000,000.

19. However, Callidus did not acquire the entirety of Bluberi's assets. Had Callidus been able to do so, the CCAA proceedings would have reached an abrupt end: after Callidus had taken all of the assets in satisfaction of its secured claim, the unsecured creditors would have been left with nothing. Rather, Bluberi successfully negotiated with Callidus to have the Retained Claims excluded from the sale of its assets to Callidus, which is what permits Bluberi to seek litigation funding in order to pursue the lawsuit. Callidus thus remains the holder of a $3,000,000 claim against Bluberi, secured by Bluberi's sole remaining asset: the cause of action against Callidus.

20. Bentham IMF Capital Limited is the Canadian arm of the publicly traded IMF Bentham Limited, one of the oldest and most experienced commercial litigation funders in the world. It is named for Jeremy Bentham, the English philosopher, jurist and social reformer who believed that the doctrines of champerty, maintenance and usury skewed the legal system in favour of the wealthy and powerful. In its 17-year history, Bentham has funded 166 cases to completion, with a success rate of 90%. Those cases have generated total recoveries of about $2.1 billion, of which claimants retained about $1.3 billion. Historically, many of the funded cases were insolvency-related; the initials IMF were a reference to "insolvency management fund."

21. IMF Bentham Limited is the litigation funder pursuant to the LFA, the purpose of which is to enable Bluberi to pursue the Retained Claims. Bentham does not stand to recover any amount

[14] Judgment under appeal, paras 17 and 38, **BR, pp 33 and 38**.

whatsoever unless a favourable judgment or settlement is obtained in the proceedings against Callidus.

22. Bentham made submissions at first instance in support of Bluberi’s motion to approve the LFA, and was impleaded on appeal by Callidus and by the co-respondents (who refer to themselves as the “Creditors Group”).

c. Facts relevant to the present proceedings

23. In the judgment at first instance, the Supervising Judge provided an accurate description of the factual context[15] and of the Callidus Plan.[16] The Supervising Judge also made numerous findings concerning the behaviour of Callidus over the course of the CCAA proceeding,[17] the actions taken by Bluberi in respect of the Retained Claims,[18] and the position of the court-appointed monitor, Ernst & Young Inc. (the “**Monitor**”), which supported the LFA.[19]

24. Notably, the Supervising Judge found [emphasis added but references omitted]: [20]

> [44] […] it is clear that Callidus’ actions were <u>solely motivated</u> by the litigation with the Debtors and Mr. Duhamel. Callidus owes nothing to the creditors and never before expressed any interest in their situation. Its offer to pay their claims, in total (ex-employees) or in part, serves only to allow it to obtain broad releases which it would otherwise not be entitled to obtain from the Debtors. In other words, Callidus is buying releases from creditors who have no interest in the awarding of such releases.

25. According to the Supervising Judge, “it is obvious that Callidus contested the appropriateness of the CCAA proceedings only to prevent Bluberi from pursuing its claim in damages against it,”[21] that Callidus’s conduct “lacked transparency,” and that “it seems that Callidus’ strategy was to exhaust [Bluberi’s founder and sole shareholder] Mr. Duhamel financially.”[22]

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15 Judgment at first instance, paras 3-23, **BR, pp 2-6**.
16 *Ibid*, paras 24-26, **BR, pp 6-7**.
17 *Ibid*, paras 39-48, 69 and 72, **BR, pp 11-13, 20 and 21**.
18 *Ibid*, paras 60-62, **BR, pp 16-18**.
19 *Ibid*, paras 64-65, **BR, pp 18-19**.
20 *Ibid*, para 44, **BR, p 12**.
21 *Ibid*, para 40, **BR, p 11**.
22 Judgment at first instance, para 41, **BR, p 12**.

26. The Supervising Judge also found [references omitted]:[23]

> [48] Callidus' behavior is contrary to the "requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising CCAA authority." In short, the Court finds that Callidus intends to use its vote for an improper purpose and that it should not be allowed to do so.

27. After reviewing the LFA, the Supervising Judge correctly noted that, because the costs of litigation are to be repaid only from the proceeds of the litigation, Bentham will receive no payment unless the Debtors are successful at trial or the matter is settled by agreement.[24] Further, if Callidus is successful in the litigation, the LFA stipulates that Bentham will pay any award of costs for which the Debtors are liable.

28. The Supervising Judge found that the success fee payable to Bentham under the LFA is reasonable considering the investment in the litigation and the associated risks,[25] the success fee being limited to a percentage of the Litigation Proceeds.[26]

29. As for the fact that Bentham is to receive security over the Retained Claims that are the subject of the lawsuit, the Supervising Judge noted that "Bentham charges no fee or interest on the amounts funded. Therefore, its risks are greater and it is reasonable that it obtains certain guarantees in exchange."[27]

30. The Supervising Judge also found that "the LFA, as a whole, will not allow Bentham to exert undue influence in the litigation," and that given its financial commitments and the amount it has invested so far, Bentham is unlikely to terminate the LFA.[28]

31. With respect to the confidentiality of the LFA, the Supervising Judge correctly held that "considering the litigation at issue is similar in nature to an oppression dispute, Callidus

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23 *Ibid*, para 44, **BR, p 12**.
24 *Ibid*, para 77, **BR, p 22**.
25 *Ibid*, para 79, **BR, p 23**.
26 *Ibid*, para 78, **BR, pp 22-23**.
27 *Ibid*, para 88, **BR, p 25**.
28 *Ibid*, para 83, **BR, p 24**.

should not know how much money Bentham is investing, what its percentage of return is or how any recovery would be apportioned."[29]

32. In the decision appealed from, the court below made several errors of fact. First, the court below was wrong to find that because litigation proceeds would be received by the debtor companies, which Mr. Duhamel controls, "there is no protection of the creditors."[30] As in any CCAA proceedings, when debtor companies retain control of their assets (as they generally do) they remain subject to the oversight of the CCAA Court and the monitor.

33. The Québec Court of Appeal is mostly correct that "after payment of Bentham and fees, the Respondents will be left to decide whether to file a plan and what to offer in such plan."[31] Whether to file a plan and what to offer is something that *every* debtor company must decide, based upon its means and what the creditors will accept. However, in the present instance, if Bluberi receives more than what is needed to pay its creditors in full the creditors would have no reason to accept anything less than full payment, and a plan would in all likelihood be moot. Bluberi would remain under the supervision of the Monitor and the Supervising Judge; creditors could vote down any attempt to compromise their rights, and ultimately could provoke a bankruptcy in which their claims would be entirely repaid.

34. The most significant error is reflected in paragraph 78 of the judgment under appeal:

> [78] […] Moreover, given the circumstances and sequence of events, I think that the judge's approval of the LFA as interim financing <u>after he had previously ordered a similar scheme to be submitted to the creditors as part of a plan</u>, constitutes a manifest error of fact and a non-judicious exercise of his discretion. It will be remembered that <u>the judge initially ordered that both the initial Callidus plan and the debtors' plan be submitted to the creditors</u> subject to the condition that each party support the meeting costs which the debtors failed to do. Following the failure of the Callidus plan to receive a vote of the statutory majority, the judge approved the LFA exercising his powers under Section 11.2 CCAA. This juridical "about face" appears, if nothing more, to be an inappropriate exercise of discretion constituting palpable error.

29 Judgment at first instance, paras 84-85, **BR, p 24-25**.
30 *Ibid*, para 94, **BR, pp 26**.
31 Judgment under appeal, para 92, **BR, p 51**.

35. Prior to the involvement of Bentham, Bluberi did announce its intention to file a plan. That plan would have been based—for obvious reasons—upon the premise of successful litigation against Callidus. At the time, Callidus had proposed the first version of the Callidus Plan. The Supervising Judge ordered, very sensibly, that a single meeting of creditors be called, with the cost supported by the proponents of the plans. As noted by the Supervising Judge, "Callidus provided the funding required while the Debtors elected not to spend their financial resources in pursuing the filing of their own plan of arrangement."[32] As a result, only the Callidus Plan was submitted to the creditors for a vote, but it failed to garner the support required by s. 6 of the CCAA. As noted by the Supervising Judge, "prior to the creditors' meeting, Callidus filed a proof of claim as a secured creditor, in an amount of $3 million. In its capacity as a secured creditor, Callidus did not cast a vote, nor did it seek to amend its proof of claim in order to attempt to cast a vote at the meeting."[33]

36. However, *the Supervising Judge had never ruled that the funding of the litigation against Callidus is an issue that must be submitted to creditors as part of a plan*. This is a critical error by the court below, which misapprehended an inexistent "juridical 'about face'" by the Supervising Judge that it construed as a manifest and palpable error of fact and an inappropriate and non-judicious exercise of his discretion.

37. After negotiating the LFA with Bentham, Bluberi then filed a motion for the approval of interim financing. That motion was granted by the Supervising Judge, giving rise to the present appeal.

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32 Judgment at first instance, para 13, **BR, pp 4**.
33 *Ibid*, para 17, **BR, pp** 5.

PART II – QUESTIONS IN ISSUE

38. Bentham submits that the following questions are in issue in the present appeal:

A. Where a *creditor* proposes a compromise or an arrangement between a debtor company and its unsecured creditors pursuant to the CCAA, is it permissible for that creditor to vote in favour of its own plan *where the creditor's sole interest in the plan is to compel the debtor company to release litigious claims against the creditor*?

For the reasons set out in Bluberi's submissions, Bentham submits that the question must be answered in the negative.

B. If the answer to the previous question is yes, can the creditor whose sole interest in the plan is to obtain releases from the debtor company vote in the same class as the unsecured creditors?

For the reasons set out in Bluberi's submissions, Bentham submits that the question must be answered in the negative.

C. Did the Supervising Judge have the authority to prevent Callidus from voting in favour of the Callidus Plan, and to decline to order a meeting of creditors to consider the Callidus Plan?

For the reasons set out in Bluberi's submissions, Bentham submits that the question must be answered in the affirmative.

D. Did the Supervising Judge have the authority to approve the LFA, and to declare a security or charge in respect of the LFA pursuant to s. 11.2 of the CCAA?

For the reasons set out hereafter, Bentham submits that the question must be answered in the affirmative.

E. Was the Supervising Judge compelled, as a matter of fact or law, to find that the LFA constitutes a "compromise or an arrangement … proposed between a debtor company and its unsecured creditors" pursuant to s. 4 of the CCAA?

For the reasons set out hereafter, Bentham submits that the question must be answered in the negative.

F. Can Callidus value the Retained Claims at zero in order to vote as an unsecured creditor, despite the fact that the Callidus Plan is an attempt by Callidus to settle those claims for almost $3 million?

For the reasons set out hereafter, Bentham submits that the question must be answered in the negative.

G. Does litigation funding make the funder an equity investor in the insolvent plaintiff, such that the litigation funder's rights should be subordinated to those of the other creditors as suggested by the Québec Court of Appeal?

For the reasons set out hereafter, Bentham submits that the question must be answered in the negative.

PART III – ARGUMENT

39. Bentham adopts the submissions of Bluberi with respect to questions A, B and C.

D. Did the Supervising Judge have the authority to approve the LFA, and to declare a security or charge in respect of the LFA pursuant to s. 11.2 of the CCAA?

a. Litigation funding via interim financing under the CCAA

40. In 2012, the Ontario Court of Appeal in *Re Crystallex* was faced with precisely the same issue as in the present instance [emphasis added but references omitted]: [34]

> [1] The primary issue in these appeals is the scope of financing the supervising judge can or should approve, without the sanction of creditors, while a company is under the protection of the Companies' Creditors Arrangement Act.

41. As in the present case, the litigation funding was contested, in part because it allegedly constituted a plan of arrangement that required a vote of the creditors.[35] Nonetheless, the interim financing was granted by the supervising judge, and the decision was upheld by the Ontario Court of Appeal.

42. *Re Crystallex* was followed by the Quebec Superior Court in *Strateco*.[36] However, the Québec Court of Appeal declared in the decision appealed from that "because the factual matrix of this case is completely different," the decision of the Ontario Court of Appeal in *Re Crystallex* "does not have any precedential value for the present case." The issue of the "differing factual matrix" will be revisited in greater detail in the next section, in the context of whether or not the LFA is a plan of arrangement. However, for present purposes Bentham notes that the purpose of the interim financing in *Re Crystallex*, as in the present case, was to fund litigation that was the debtor's only remaining asset of significance.[37]

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34 *Re Crystallex* (ONCA), *supra*, note 3, para 1.
35 *Re Crystallex* (ONSC), *supra*, note 3, para 44.
36 *Strateco Resources inc./Ressources Strateco inc. (Arrangement relatif à)*, 2015 QCCS 4671 (CanLII) ("***Strateco***").
37 *Re Crystallex* (ONCA), *supra*, note 3, paras 2-4.

43. In the decision appealed from, the Québec Court of Appeal refers to the rationale for interim financing, citing Prof. Janis Sarra [emphasis added but reference omitted]:[38]

> [77] <u>The rationale behind interim or DIP (debtor-in-possession) financing is to allow the debtor subject to the CCAA to continue operations or "keep the lights on". This rationale applies pre and post the codifying amendments of 2009 to the CCAA</u>:
>
> > The premise underlying interim financing is that it is a benefit to all stakeholders as it allows the debtor to protect going concern value while it attempts to devise a plan of compromise or arrangement acceptable to creditors.
>
> [78] <u>While the original premise of maintaining operations may have been expanded in the applications and manifestation of such financing in recent years, characterizing the LFA as interim financing in the circumstances of this case transcended the nature of such financing. There is no connection between the financing and the debtors' commercial operations.</u> […]

44. However, the sentence that precedes the text quoted in paragraph 77 above reads [emphasis added]: "Interim financing refers primarily to the working capital that the debtor corporation requires in order to keep operating during restructuring proceedings, <u>as well as to the financing to pay the costs of the workout process</u>."[39]

45. Also, the continued use of "keeping the lights on" must be put in context. Prof. Sarra goes on to note that "the reality today is that the financing is often greater than merely keeping the lights on, but as the model order attached as Appendix 5 illustrates, the 'lights on' terminology continues to be used."[40] The appendix in question concerns model <u>initial</u> orders, the explanatory notes indicating that "it is anticipated that the cap employed for the Short form of order will be the minimum amount needed for the first 30-day period to 'keep the lights on', with a more comprehensive amount being requested on the 'comeback' hearing."[41]

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38 Judgment under appeal, paras 77-78, **BR, p 47**.

39 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd edition, Toronto, Thomson Reuters, 2013 ("***Rescue!***"), p 197, **Appellants' Book of Authorities (hereinafter "ABA"), tab 5**.

40 *Rescue!*, *supra*, note 39, p 209, **ABA, tab 5**.

41 *Rescue!*, *supra*, note 39, p 803ff at p 828, **ABA, tab 5**.

46. Indeed, Professor Sarra continues:[42]

> Moreover, there is a distinction between first day interim financing orders, which really should be to "keep the lights on" and interim financing for the duration of the proceeding, which is frequently extensive and should be approved only after the monitor and the parties have had a reasonable opportunity to examine the financial disclosures and form an opinion as to the potential benefits and prejudice.
>
> As the discussion of the Ontario Court of Appeal judgment in *Crystallex* above illustrates, the notion of interim financing has been competing with notions of extended distress financing or exit financing, far beyond the original premise. In that instance, the financing approved was for a temporal period far beyond "keeping the lights on for a limited period to negotiate a plan. Another way to approach the rationale, however, is that the financing was available to keep the lights on in the sense of retaining the personnel required to take the litigation to resolution.

47. The above rationale identified by Professor Sarra in *Re Crystallex* with respect to interim financing is correct, and there is no factual basis on which to distinguish it in this case.

48. As noted by the Québec Court of Appeal, prior to 2009 there was no specific legislative basis for interim financing under the CCAA, the origins of which are explored by Professor Sarra in *Rescue!*[43] In light of the absence of explicit authority conferred by statute, it seems natural that a list of criteria would be developed by the courts to establish guidelines for this rather remarkable exercise of "inherent jurisdiction." In that context, it was also natural that the granting of DIP or debtor-in-possession financing (as it was then generally known) would typically include, as a justification, that the court was merely permitting what was necessary to "keep the lights on." The phrase appears to date to 1999 [emphasis added]:[44]

> [24] It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. […] As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

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42 *Rescue!*, *supra*, note 39, pp 209-10, **ABA, tab 5**.
43 *Rescue!*, *supra*, note 39, p 208ff, **ABA, tab 5**.
44 *Royal Oak Mines Inc.*, *Re*, 1999 CanLII 14840 (ON SC), para 24.

49. Within a decade, the CCAA had caught up what had become increasingly common practice, and interim financing was codified by s. 11.2 of the CCAA. With due respect to the Québec Court of Appeal, which asserts that "this rationale [i.e. keeping the lights on] applies pre and post the codifying amendments of 2009 to the *CCAA*," the legislature, having the benefit of case law referring to "keeping the lights on" stretching back to at least 1999, codified no such requirement [emphasis added]:

> 11.2(1) On application by a debtor company and on notice to the <u>secured</u> creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — <u>in an amount that the court considers appropriate</u> — in favour of a person specified in the order who agrees to lend to the company <u>an amount approved by the court as being required by the company</u>, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

50. Subsection 11.2(4) of the CCAA provides a list of factors which are to be *considered*:

> 11.2(4) In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.

51. Shortly after the codification, it was held in *White Birch* that "the Court need not consider all of the said criteria nor is it compelled to read an affirmative conclusion on all seven

criteria. The list is neither mandatory nor limitative.”[45] It is certainly open to a Supervising Judge to consider whether or not the requested interim financing is related to the debtor company’s commercial operations if it is deemed material under the circumstances, but that decision is part of the court’s exercise of discretion under s. 11.2 of the CCAA, a balancing of interests best performed by the Supervising Judge.

b. The applicable standard of review

52. The Court of Appeal should not intervene in the exercise of discretion by the Supervising Judge except by reason of palpable or overriding error, as was recognized in *Re Calpine*:[46]

> [15] The standard of review plays a significant, if not decisive, role in the outcome of this application for leave to appeal. The supervising judge, on the record of evidence before her, found that the GSA was “not a plan of compromise or arrangement with creditors” (Reasons, para. 51). This was a finding of fact, or at most, a finding of mixed law and fact. The applicant has identified no extricable error of law so the applicable standard is palpable or overriding error.

53. The court in *Re Calpine* also recognized the importance of deference to the judge supervising CCAA proceedings:

> [32] At the time of granting her approval, the supervising judge had been overseeing the conduct of these CCAA proceedings since their inception – some 18 months earlier. She had the benefit of the many reports of the monitor and was familiar with the record of the proceedings. Her determination of this issue is entitled to deference in the absence of legal error or palpable and overriding error of fact.

54. The same can be said of the Supervising Judge in this case, but there is little or no evidence of deference. Nor does the court below specify the applicable standard of review, stating instead that “the errors on questions of fact and mixed fact and law are palpable and overriding. The exercise of the judge’s discretion is not founded in law nor on a proper treatment of the facts so that irrespective of the standard of review applied, appellate

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45 *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 1176 (CanLII) (“***White Birch***”), para 35.

46 *Re Calpine Canada Energy Inc.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (“***Re Calpine* (ABCA)**”), para 15.

intervention is justified as I will explain in the body of these reasons."[47] With respect, the body of the court's reasons provided no such explanation to justify the substitution of its own discretion for that of the Supervising Judge.

55. The only errors identified by the court below as palpable in respect of the approval of the interim financing are (i) the Supervising Judge's supposed error in characterizing the LFA as interim financing in the circumstances of this case because "there is no connection between the financing and the debtors' commercial operations", and (ii) a supposed "juridical 'about face'" because the Supervising Judge had previously ordered that the LFA be presented to creditors as part of a plan of arrangement, which the court below characterized as a "manifest error of fact and a non-judicious exercise of discretion."[48] As discussed above, (i) there is no requirement that interim financing be connected to the debtor company's commercial operations, and (ii) the misapprehension of a "juridical 'about face'" is a palpable error by the court below.

E. <u>Was the Supervising Judge compelled, as a matter of fact or law, to find that the LFA constitutes a "compromise or an arrangement … proposed between a debtor company and its unsecured creditors" pursuant to s. 4 of the CCAA?</u>

56. In *Re Crystallex*, the principal creditors were the holders of approximately $100 million in senior unsecured notes.[49] Substantially all of the creditors opposed the interim financing proposed by the debtor.[50] The basis for the noteholders' objection is set out in the decision at first instance [emphasis added]:[51]

> [44] The noteholders take a fundamental objection to the Tenor DIP facility [i.e. the litigation funding] on the basis that it is inconsistent with the purposes of the CCAA and case law dealing with DIP loans. <u>The noteholders say that it is not interim financing but a forced restructuring plan prejudicial to them and that it should not proceed without a vote as required by the CCAA for a plan of arrangement or compromise.</u>

47 Judgment under appeal, para 48, **BR, p 40**.
48 *Ibid*, para 78, **BR, p 47**.
49 The debtor's other liabilities being approximately C$1.2 million and approximately US$8 million: *Re Crystallex* (ONSC), *supra*, note 3, para 11.
50 *Re Crystallex* (ONCA), *supra*, note 3, para 7.
51 *Re Crystallex* (ONSC), *supra,* note 3, para 44.

57. The Ontario Court of Appeal went on to find as follows [emphasis added]:[52]

> [92] The supervising judge rejected the argument that the Tenor DIP Loan was a plan of arrangement or compromise and therefore required the approval of the creditors. He held, at para. 50 of the DIP Financing Reasons:
>
>> A "plan of arrangement" or a "compromise" is not defined in the CCAA. It is, however, to be <u>an arrangement or compromise between a debtor and its creditors.</u> The Tenor DIP facility is not on its face such an arrangement or compromise between Crystallex and its creditors. Importantly the rights of the noteholders are not taken away from them by the Tenor DIP facility. The noteholders are unsecured creditors. Their rights are to sue to judgment and enforce the judgment. If not paid, they have a right to apply for a bankruptcy order under the BIA. Under the CCAA, they have the right to vote on a plan of arrangement or compromise. None of these rights are taken away by the Tenor DIP.
>
> [93] I agree. While the approval of the Tenor DIP Loan affected the Noteholders' leverage in negotiating a plan, and has made the negotiation of a plan more complex, <u>it did not compromise the terms of their indebtedness or take away any of their legal rights</u>. It is accordingly not an arrangement, and a creditor vote was not required. In this case it was within the discretion of the supervising judge to approve the Tenor DIP Loan.

58. In correctly holding that a plan of compromise requiring creditor approval necessarily involves the compromise of rights, the Ontario Court of Appeal endorsed *Re Calpine,*[53] which had been followed in several other cases.[54]

59. Moreover, all of the foregoing comments by the Ontario Court of Appeal are applicable to the present case, as are the following observations [emphasis added]:

> [82] <u>The facts of this case are unusual: there is a single "pot of gold" asset which, if realized, will provide significantly more than required to repay the creditors. The supervising judge was in the best position to balance the interests of all stakeholders.</u> I am of the view that the supervising judge's

52 *Re Crystallex* (ONCA), *supra*, note 3, paras 49-50.

53 *Re Calpine Canada Energy Inc.*, 2007 ABQB 504, 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (with detailed reasons) *Re Calpine* (ABCA), *supra*, note 46.

54 See for example *Federal Gypsum Company (Re)*, 2007 NSSC 347, para 41; *Re: Canwest Global Communications Corp.*, 2010 ONSC 4209, para 34; and, in Quebec, the decision of Gascon J. (as he then was) in *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460, para 36 and 2010 QCCS 1742, para 32.

> exercise of discretion in approving the Tenor DIP Loan was reasonable and appropriate, despite having the effect of constraining the negotiating position of the creditors.

60. As in *Re Crystallex*, the amount of the lawsuit greatly exceeds the total of Bluberi's unsecured claims. The Supervising Judge was asked to approve interim financing that would permit the debtor company to pursue this value.

61. However, as mentioned above, in the judgment under appeal, the court held [emphasis added]:[55]

> [82] In my view, the judgment of the Court of Appeal [in *Re Crystallex*] <u>does not have any precedential value</u> for the present case. The factual matrix of this case is completely different. We are faced with two possible and competing sources of creditor recovery – i.e. litigation or the offer of settlement of that litigation by Callidus, the secured creditor and potential defendant in the litigation. The only competing interests in Crystallex were as between the debtor (together with the DIP lender) and the noteholders as to who would finance the litigation.

62. Respectfully, the foregoing attempt to distinguish *Re Crystallex* on the facts fails in several important respects. First, "completely different factual matrix" comes down to the single fact that "we are faced with two possible and competing sources of creditor recovery" in the present instance—the reason being that Callidus has attempted to file a plan of arrangement to compel Bluberi to accept an offer of settlement, whereas in *Re Crystallex* the government of Venezuela did not. The "offer" and the wishes of the creditors are undoubtedly factors that the court should—and did—consider in assessing the application to approve the interim financing. But it does not follow that this changes the *nature* of the litigation financing that has been requested.

63. If the point of differentiation with *Re Crystallex* is the existence of the offer of settlement by Callidus, the LFA was not a plan of arrangement up until the moment that Callidus, at the eleventh hour, declared its intention to present the Callidus Plan to the unsecured creditors. At that moment, the LFA—though unchanged—was transformed into a "compromise or an arrangement … proposed between a debtor company and its unsecured creditors" as defined in s. 4 of the CCAA. It is difficult to comprehend how this could be the case. Even more

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55 Judgment under appeal, para 82, **BR, p 48**.

puzzling, the same logic dictates that if the Callidus Plan is ever rejected by the unsecured creditors, or withdrawn, the LFA will cease to be a compromise or arrangement.

64. Bentham respectfully submits that, upon analysis, the reasoning employed in the decision appealed from is unworkable and the approach taken by the Ontario Court of Appeal in *Re Crystallex* should govern.

65. Moreover, the incongruity of giving a *creditor* effective control over whether a course of action by the debtor company is a "compromise proposed to its creditors," with all that it entails, is all the more stark in a case such as this one—where the roles are so evidently adversarial, and where the Supervising Judge has already made a finding that the creditor has acted "contrary to the requirements of appropriateness, good faith, and due diligence [that] are baseline considerations that a court should always bear in mind when exercising CCAA authority." The role of the Supervising Judge is to supervise the CCAA proceedings, which is in the interests of the sound administration of justice. The tail should not be permitted to wag the proverbial dog.

66. But if the LFA does become a compromise or arrangement, as proposed by the court below, how is this transmogrification accomplished when the LFA does not affect the creditors at all? Citing no authority, but invoking the broad interpretation appropriate to the remedial purpose of the CCAA, the court below holds that [emphasis added] "an arrangement or proposal can encompass both a compromise of creditors' claims <u>as well as</u> the process undertaken to satisfy them," the process being the litigation against Callidus and, by extension, the LFA.

67. The proposition is dubious. "The process undertaken to satisfy" creditors' claims under the CCAA often includes a sale of assets, but this does not mean that a sale of assets can only occur in the context of a compromise or arrangement.[56] To the contrary, s. 36 of the CCAA specifically provides for the approval by the CCAA court of the sale of assets outside the context of a compromise or arrangement, on broad and flexible criteria resembling those applicable to interim financing.

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56 See, for example, *Fairmont Resort Properties Ltd.*, 2012 ABQB 39, where assets were liquidated under CCAA proceedings without a plan of arrangement or formal sale process.

68. Subsection 36(1) of the CCAA provides that "a debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court." It also provides that the court may dispense with any requirement for shareholder approval, including one under federal or provincial law. The CCAA Court thus has full authority to permit the sale of some or all of the debtor's assets.[57]

69. Subsection 36(3) of the CCAA sets out factors to be considered by the CCAA Court:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

70. Courts have consistently held that ss. 36(3) CCAA gives the court broad discretion to authorize or not to authorize a sale or disposition of assets, based on any one or more of the enumerated factors, which in any event are not exhaustive.[58]

71. Thus, while the CCAA Court is to consider, among other things, "the extent to which creditors were consulted," and "the effects of the proposed sale or disposition on the creditors and other interested parties," none of those factors is determinative. *A fortiori*, it is clear that

57 Subject to the requirements of 36(6) CCAA.

58 See, for example, *White Birch*, *supra*, note 45, para 49, leave to appeal denied (with detailed reasons) 2010 QCCA 1950 (CanLII).

the CCAA does not require that the sale or disposition of the debtors' assets be put to a vote of creditors. The CCAA Court is empowered by the CCAA to take the decision in its discretion, provided that it considers, among other things, the required factors.

72. In fact, pursuant to ss. 36(2) of the CCAA, a company that applies to the court for an authorization to sell or dispose of its assets is required to give notice of the application only to the *secured* creditors who are likely to be affected by the proposed sale or disposition. This is consistent with paragraph 36(3)(d)—the extent to which other creditors are consulted being merely one of the various factors to be considered by the CCAA Court.

73. While the Québec Court of Appeal asserts that "the decision on risk acceptance should be the dominion of the creditors and not the judiciary," this position is inconsistent with paragraphs 36(3)(e) and (f), which provide that the effects of the proposed sale or disposition on the creditors, and whether the consideration to be received for the assets is "reasonable and fair, taking into account their market value," are *among the factors for the CCAA Court to consider in making its decision* to authorize or not to authorize the sale or disposition of assets.

74. The CCAA Court is generally assisted in this task by the monitor, its court-appointed representative.[59] Moreover, paragraphs 36(3)(b) and (c) *require* the CCAA Court to consider whether the monitor approved the process leading to the proposed sale or disposition, and whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy.

75. Although the Supervising Judge did not specifically refer to ss. 36(3) in the decision at first instance, it is evident from the decision that all of the factors enumerated at ss. 36(3) were indeed considered. Thus, even if the LFA is to be analogized to a disposition of the company's assets, the Supervising Judge had the power under the CCAA to authorize it.

76. The CCAA Court is certainly *at liberty* to defer to the expressed wishes of creditors when considering the sale or disposition of the company's assets if, after consideration of the required factors, the CCAA Court considers it appropriate. However, the Québec Court of

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[59] S. 11.7 of the CCAA.

Appeal errs in the decision under appeal when it asserts that the CCAA Court *must* defer to the wishes of the unsecured creditors, and that it was a reviewable error of law for the Supervising Judge not to have done so.

77. Fundamentally, on the issue of what constitutes a compromise or arrangement, the court below confuses necessity and sufficiency. It is beyond question that a compromise or arrangement under the CCAA, like a proposal under the *Bankruptcy and Insolvency Act* ("**BIA**"), is subject to few formal requirements. (In fact, that "a compromise or arrangement" actually compromise the rights of creditors against the debtor, as noted in *Re Crystallex*, is one of the very few formal requirements, and possibly the *only* one.) But even if the concept of "compromise or arrangement" is sufficiently flexible to include another given characteristic, it does not follow that everything with that characteristic must necessarily be a compromise or arrangement. To take the example given by the court below, [60] the fact that creditors may be asked to vote upon a "liquidating proposal" under the BIA does not mean that the court cannot approve a sale of assets in any other context, or that liquidation necessarily constitutes a proposal.

78. Yet after appearing to reject the holding of the Court of Appeal in *Re Crystallex* that an essential characteristic of a "compromise or arrangement" is that it compromise creditors' rights against the debtor, the court below decides that the LFA does exactly that: [61]

> [88] Sophistry aside, rather than being paid on normal contractual or commercial terms, the creditors are told to await the outcome of the prosecution of a litigious claim for the debtors to obtain cash to perhaps pay something at some future date. I think that their legal rights are "taken away" or "compromised".

79. Although the pursuit of the litigation necessarily implies the rejection of Callidus's attempted settlement, said rejection is not *caused* by the LFA; it is the consequence of the failure of the Callidus Plan. Nor is the failure of the Callidus Plan caused by the LFA; it is the consequence of the failure of the Callidus Plan to obtain a sufficient level of support from unsecured creditors.

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[60] Judgment under appeal, para 85, **BR, p 49**.

[61] *Ibid*, para 88, **BR, p 50**.

80. Fundamentally, the court below appears to treat the LFA as somehow taking an asset away from the unsecured creditors. As mentioned previously, it is an uncontested finding by the Supervising Judge that Callidus would never have presented the Callidus Plan at all were it not for the imminent prospect of the LFA being approved. Although the court below refers to there being two sources of creditor recovery, in reality there is only one: the litigation against Callidus that the LFA has made possible. The question is whether Callidus can join with those unsecured creditors (most of whom will be paid in full by Callidus) who want Bluberi to settle its lawsuit of over $200 million at a preliminary stage, for $2.88 million.

81. Respectfully, it is impossible to determine from the judgment under appeal whether the Québec Court of Appeal is of the view that a plan of arrangement necessarily involves a compromise of rights. This is a fundamental issue, with far-reaching consequences. The characteristics of a plan of arrangement are not defined in the CCAA, but this should not mean that its definition should be infinitely malleable. If the Québec Court of Appeal was correct that *Metcalfe* means that a plan of arrangement and CCAA proceedings can be about something entirely unrelated to the compromise of rights against an insolvent debtor, it is difficult to say where the line should be or might be drawn. This Court should affirm the principle that, fundamentally, a plan of arrangement is about compromising the rights of the creditors against the debtor—not compromising the rights of the debtor against the creditor proposing the plan, which is Callidus's sole purpose.

F. Can Callidus—the defendant in the proposed litigation—value its security at zero in order to vote as an unsecured creditor in favour of its own offer of settlement?

82. Callidus holds security over all of Bluberi's assets. After using the bulk of its claim to purchase virtually all of Bluberi's assets, Callidus is left with a claim of $3 million, secured only by Bluberi's rights in the litigious claim against Callidus.

83. The Supervising Judge held that the CCAA Court has the discretion to prevent Callidus—the defendant in the proposed litigation—from voting in favour of its own offer of settlement

because it would serve an improper purpose.[62] The Québec Court of Appeal decided the opposite.[63]

84. Bentham adopts, and will not repeat, the arguments raised by Bluberi with respect to whether Callidus can vote on the Callidus Plan at all (question A), and if it can, whether it can do so in the same class as unsecured creditors (question B), and if Callidus *can* vote, whether the Supervising Judge has the authority to forbid it (question C). However, it is important to note that in order for Callidus to vote as an *unsecured* creditor, the court below would permit Callidus to value its security at zero.[64] Respectfully, this valuation is clearly erroneous. The litigious claim must be worth at least the amount that Callidus is currently offering to settle it, i.e. $2,880,000, if not more. At that value, the unsecured portion of Callidus's claim is $120,000, which—even if Callidus is permitted to vote in favour of its own settlement offer—would not be enough to tip the balance in favour of the Callidus plan. Simply put, if the lawsuit is without value, why the Callidus Plan?

G. Would the litigation funding make Bentham an equity investor in Bluberi?

a. The right to a contingency fee is not an equity investment in a corporation

85. In the judgment under appeal, the court states [emphasis added but references omitted]:

> [90] I refrain from further comment on the LFA so has not to prejudice any eventual negotiation and to be consistent with myself that in the present circumstances the LFA should be approved by the creditors and not the judiciary. However, I do add my agreement with the creditors that <u>the LFA is akin to an equity investment</u>. <u>The contingent nature of the repayment is such that Bentham is investing in the Respondents</u> because of the litigation asset and <u>it will benefit by preference over the existing creditors</u> upon any successful judgment or settlement. <u>Seen in this manner, the LFA does alter the creditors' rights by means of subordination and is a further justification for characterizing the scheme as an arrangement</u>. In this regard, it must be pointed out that in Crystallex it was <u>only the advances and interest due to the litigation lender that benefitted from a priority</u>. The success fee ranked

62 Judgment at first instance, para 32 and ss, **BR, pp 8ff**.
63 Judgment on appeal, para 58 and ss, **BR, pp 42ff**.
64 *Ibid*, para 57, **BR, p 42**.

> subsequent to the ordinary claims. That is not the case under the LFA, which provides for priority payment of Bentham for advances and success fee.

This single paragraph raises a host of issues.

86. First, in addition to a success fee, the litigation funder in *Re Crystallex* had a guaranteed rate of return in the form of 10% interest,[65] whereas there can be no return at all to Bentham without litigation proceeds.

87. Second, the funder was guaranteed a minimum return in *Re Crystallex*, because its return was secured against mining equipment owned by the debtor with a book value of US$10.1 million.[66] In the present case, the amounts payable to Bentham are secured only by the litigation proceeds—if the litigation does not succeed, Bentham is not reimbursed for the costs of litigation (and indeed is liable to pay any adverse costs ordered against the unsuccessful plaintiff). Bentham is thus more dependent on the successful outcome of the litigation than was the litigation funder in *Re Crystallex*.

88. Third, *all* interim financing permits the party providing the financing lender to "benefit by preference over the existing creditors" by law, [67] thus "alter[ing] the creditors' rights by way of subordination."

89. Fourth, the court below asserts that *the contingency fee in the LFA makes Bentham an investor in Bluberi*. This remarkable proposition—for which the Québec Court of Appeal cites no authority—would make it problematic, if not effectively impossible to fund litigation by way of contingency fee agreement where a plaintiff is, or may become, insolvent. In reaching this conclusion, the court below makes several errors.

90. To begin with, the court below errs in confusing a *quota litis* agreement, in which the plaintiff's lawyers are paid an amount that depends upon the success of the *litigation*, with an agreement to be paid based upon the performance of the *corporation*. The fact that under

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65 *Re Crystallex* (ONCA), *supra*, note 3, para 28.

66 *Re Crystallex* (ONSC), *supra*, note 3, para 12.

67 CCAA s. 11.2. There is no right to vote on interim financing, although *secured* creditors who are likely to be affected by the security or charge must be given notice.

particular circumstances the performance of the corporation is entirely dependent upon the success of litigation does not turn litigation proceeds into equity in the corporation.

91. Then, in construing the litigation proceeds as equity, the Québec Court of Appeal ignores the definitions of "Equity Claim" and "Equity Interest" in the CCAA[68] [emphasis added]:

> equity claim means a claim that is in respect of an equity interest, including a claim for, among others,
>
> (a) a dividend or similar payment,
>
> (b) a return of capital,
>
> (c) a redemption or retraction obligation,
>
> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d); (réclamation relative à des capitaux propres)
>
> equity interest means
>
> (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
>
> (b) in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt; (intérêt relatif à des capitaux propres)

92. Also, although the principle may be superficially attractive in a case such as this one, where litigation is the plaintiff's sole asset, there is no rational basis to restrict it to such cases, which would make *all* contingency fee agreements equity investments. There are doubtless many lawyers currently working on a contingency basis who would be surprised to learn that they may have become equity investors in their clients.

93. Finally, any attempt to restrict the principle to cases where litigation constitutes the plaintiff's sole asset would be unworkable in practice: consider *Re Crystallex*, where in

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68 CCAA para 2(1).

addition to a $3.4 billion litigation claim the plaintiff had no operations but equipment with a book value of US$10.1 million. Is the success fee in *Re Crystallex* an equity investment?

94. Moreover, the principle would not apply only to litigation funding. For example, on the same reasoning, an agreement whereby an investment bank in a sale process is paid a percentage of the value of the eventual transaction would also constitute an "equity investment" that must be subordinated to the claims of creditors. The reasoning of the court below thus threatens to introduce uncertainty into commercial relations far beyond the bounds of insolvency law.

b. The evolution of litigation funding in Canada

95. In light of the ramifications of the present instance on litigation funding in Canada, Bentham submits that a review of the development of case law in Canada relating to litigation funding could prove useful, this Court not having had a prior occasion to rule on the issue.

i. Champerty and maintenance

96. The historic objection to litigation funding is that it offends the common law doctrines of champerty and maintenance. The doctrines arose in the medieval period, and were considered common law crimes until 1954.[69] However, even after they were abolished as common law crimes, the doctrines of champerty and maintenance were frequently invoked against the propriety of litigation funding.[70]

97. In 2006, the Québec Court of Appeal confirmed in *Montgrain c Banque Nationale du Canada* that the doctrine of champerty is inapplicable in Québec civil law. The court provided a useful overview of the subject,[71] citing an informative article by Professor H. Patrick Glenn concerning the traditional hostility of the common law to the transfer of interests in litigious rights [emphasis added]:[72]

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69 The 1953-54 consolidation of the Criminal Code abolished all common law crimes except contempt of court; see e.g. *McIntyre Estate*, *supra*, note 2, para 25.

70 See e.g. *Houle v St. Jude Medical Inc.*, 2017 ONSC 5129 (CanLII) ("***Houle***").

71 *Montgrain c Banque Nationale du Canada*, 2006 QCCA 557, para 63.

72 H. Patrick Glenn, "*L'écho double du champart : y a-t-il des traces en droit civil québécois?*" in Mélanges Jean Pineau, Montréal, Éd. Thémis, 2003, pp 714-724.

> Il y a d'abord le caractère « fermé » des tribunaux anglais et le nombre restreint de juges qui y siégeaient, cadre très différent de celui du droit civil. S'est ainsi développée une résistance féroce à toute mesure qui aurait pu faciliter les poursuites civiles ou en augmenter le nombre, y compris leur transfert. Dès avant l'émergence de la common law il existait une résistance profonde contre toute représentation (musclée) dans la forme de l'ordalie qu'était le combat judiciaire. Il y eut ensuite l'hostilité du Moyen Âge face à l'usure (évidente aussi dans le retrait litigieux) qui militait contre tout transfert donnant lieu à un profit abusif. Il y eut enfin, en Angleterre, une pratique devenue très répandue, semble-t-il, selon laquelle la véritable partie à un litige, surtout en matière immobilière céderait son intérêt à un baron ou à un lord important moyennant l'exercice d'une influence déterminante dans l'issue du procès. La corruption flottait donc autour de ces litiges. Pour toutes ces raisons, la cession du droit litigieux, ou le pacte de quota litis, représentait non pas un déséquilibre financier à contrôler au nom de la justice, mais un mal social qu'il fallait éliminer.

98. This Court has mentioned champerty or maintenance on at least ten occasions but only twice since their abolition as common law crimes, most recently to state the following [emphasis added]:[73]

> 12 Prior to 2002, and at the time applicable to this case, contingency fee arrangements were barred in Ontario. Contingency fee arrangements had been seen as violating the rule against champerty, as it was considered undesirable for lawyers to have a pecuniary interest in the outcome of their clients' litigation. As a means of promoting access to justice, contingency fee arrangements are now permitted in Ontario, but are regulated by the Solicitors Act, R.S.O. 1990, c. S.15 (as amended by S.O. 2002, c. 24, Sch. A). See also McIntyre Estate v. Ontario (Attorney General) (2002), 61 O.R. (3d) 257 (C.A.).
>
> 13 Even before the introduction of contingency fee arrangements, lawyers still represented impecunious plaintiffs. Given the plaintiff's impecuniosity, efforts to enforce a debt for fees and disbursements against the plaintiff might prove fruitless. However, where the plaintiff successfully received a damage award, he/she would now have the means to pay counsel. In Stribbell v. Bhalla (1990), 73 O.R. (2d) 748 (H.C.J.), Osborne J. (as he then was) held it was not champertous for an impecunious plaintiff to pay his counsel fees out of his damage award. In his view, such a payment by the plaintiff was necessary to ensure access to justice and to ensure that deserving actions be prosecuted by competent counsel.

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73 *Walker*, *supra*, note 2, paras 12-13; the only other case is *City of Prince Albert v Underwood McLellan & Associates Limited,* [1969] SCR 305.

99. Clearly, the historical view of litigation funding as a "social ill," as traced by Professor Glenn, has undergone a revolution.

ii. <u>Third-party funding is first approved in the class action context</u>

100. The first reported case in Canada dealing with a third-party funder is from 2009.[74] In *Metzler Investment GMBH v Gildan Activewear Inc.*[75] the plaintiff sought court approval of a costs indemnification agreement with a third-party funder in the context of class action proceedings. Acknowledging that "third-party indemnification agreements are novel in Canada," the plaintiff relied upon decisions in the U.K. and Australia which have approved such agreement for the purpose of enabling litigation that would not otherwise be pursued."[76] It is worth noting that the court explicitly rejected the defendant's argument that the agreement should be refused because the plaintiff was not impecunious:[77]

> This plaintiff is not impecunious and may well have the means to pursue litigation. However, I do not find it improper that it seeks to reduce the risks which a class proceeding exposes them to.

101. In 2011, Justice Strathy of the Ontario Superior Court of Justice confirmed in *Dugal v Manulife Financial Corporation* that an indemnification agreement can be approved in the class action context even prior to certification.[78] The next two decisions in the class action context were rendered in quick succession in 2012 by Justice Perell of the Ontario Superior

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[74] Bentham is aware of two other orders in 2009 and 2010 approving an indemnity agreement in the class action context, although the decisions are unreported and no reasons are given: See *Hobshawn v Atco Gas and Pipelines Ltd.*, Queen's Bench of Alberta, 0101-04999, May 14, 2009, **ABA, tab 1**, and *MacQueen v Sydney Steel Corp.*, Supreme Court of Nova Scotia, Hfx. No. 218010, Oct. 19, 2010, **ABA, tab 2**.

[75] 2009 CanLII 41540 (ON SC) ("***Gildan***").

[76] *Gildan*, *supra*, note 75, paras 30-32.

[77] *Gildan*, *supra*, note 75, paras 56 and 67.

[78] 2011 ONSC 1785 (CanLII) ("***Dugal***") para 33; see also supplementary reasons at 2011 ONSC 3147 (CanLII).

Court of Justice.[79] By the following year, referring to the issue of costs in class action proceedings, Justice Perell noted in *Bayens v Kinross Gold Corporation* that, "the new alternative is funding from a third party funder, and the current state of affairs in that courts in Ontario have come to accept and have approved the use of third party funders."[80]

iii. Third-party funding is approved outside Ontario

102. Also in 2013, Justice Gropper of the Supreme Court of British Columbia determined in *Stanway v Wyeth Canada Inc.* that litigation funding agreements may be approved in that province. Significantly, the court found that "the LFA is subject to privilege on matters relating to litigation strategy, litigation budget and other 'highly sensitive' aspects."[81] The court also found that the LFA, which guaranteed the funder a minimum of 150% return and had no cap on potential recovery, was reasonable and fair: "Even though the funding agreement may result in a 'windfall' recovery, there is every probability of a protracted litigation and the result is speculative."[82] The court also found that counsel's independence was not compromised by the funder's right to terminate if the representative plaintiff changed counsel or altered the strategic course of litigation, or by the funder's right to provide strategic advice.[83]

103. In 2015, Justice Roy of the Superior Court of Québec, called upon to approve a funding agreement in the context of a successful class action in *Marcotte c Banque de Montréal*, made specific mention of the role of litigation funding in promoting access to justice.[84]

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79 *Fehr v Sun Life Assurance Company of Canada*, 2012 ONSC 2715 (CanLII), and *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*, 2012 ONSC 2937 (CanLII) ("***Sino-Forest***").

80 2013 ONSC 4974 (CanLII) ("***Kinross***"), para 34, referring to both *Dugal*, *supra*, note 78, and *Sino-Forest*, *supra*, note 79; see also *Rooney v ArcelorMittal S.A.*, 2013 ONSC 7768 (CanLII). In 2018, the Superior Court of Justice applied what it calls the *Kinross* factors in approving the litigation funding agreement in the class action context: *Marriott v General Motors of Canada Company*, 2018 ONSC 2535 (CanLII).

81 2013 BCSC 1585 (CanLII) and 2014 BCSC 931 (CanLII) ("***Wyeth***"), para 1.

82 *Wyeth*, *supra*, note 81, para 18.

83 *Wyeth*, *supra*, note 81, para 19.

84 2015 QCCS 1915 (CanLII), paras 43-44 ("***Marcotte***"), followed in *Marcil c Commission scolaire de la Jonquière*, 2018 QCCS 3836 (CanLII), para 85.

104. In 2016, Justice Perell of the Ontario Superior Court of Justice reaffirmed in *Berg v Canadian Hockey League* that "contingency fee agreements and third party funding agreements are no longer categorically illegal."[85] Although he continued to express caution with respect to the potential for unfairness or interference with the administration of justice, he concluded that "if the agreements do not overreach or interfere with the lawyer and client relationship or the administration of justice, or some regulatory provision, then they are permissible and justified as a means to afford plaintiffs access to justice." [86] The court ordered that the motion be adjourned, although in a parallel claim in the province of Alberta, the Court of Queen's Bench approved the financing and indemnity agreement on an *ex parte* basis.[87]

105. Also in 2016, the Court of Queen's Bench of New Brunswick, relying upon the requirements set out in the class action context in *Kinross* and *Dugal*, approved the litigation funding agreement, which "is not an example of the torts of champerty or maintenance, neither of which is an issue in this case."[88] The court ordered that the motion proceed with notice to the defendants, but without providing a copy of the agreement, which was sealed.[89]

106. Also in 2016, Justice Popescul of the Queen's Bench for Saskatchewan, citing *Hayes* for the requirements a representative plaintiff must satisfy in the class action context, approved a litigation funding agreement in *Schneider v Royal Crown Gold Reserve Inc.*[90] The court noted that "it is not known whether such an agreement has ever been approved in Saskatchewan given that such approval applications can be made without notice to the defendants and are often subject to a confidentiality order."[91] The court concluded [emphasis added]:

> [11] I have considered whether the plaintiff ought to have given notice of this application to the defendants and the third parties. I have concluded that such notice is not necessary and that the application was properly made on a without notice basis. <u>Neither the defendants nor the third parties have any legal interest in this motion. The existence of the LFA has no bearing,</u>

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85 2016 ONSC 4466 (CanLII) ("***Berg***") para 5.

86 *Berg*, *supra*, note 85, para 5.

87 *Walter v Western Hockey League*, Court of Queen's Bench of Alberta, 1410-11912, April 11, 2016, **ABA, tab 4**.

88 *Hayes v The City of Saint John et al.*, 2016 NBQB 125 (CanLII) ("***Hayes***").

89 *Hayes*, *supra*, note 88, para 2.

90 2016 SKQB 278 (CanLII) ("***Schneider***").

91 *Schneider*, *supra*, note 90, para 7.

> substantively or procedurally on the defendants or the third parties. From whose pocket an adverse cost award is paid is of no consequence to the defendants and the third parties.

iv. Third-party funding increases in importance

107. *Houle v St. Jude Medical Inc.*[92] marks a further stage in the evolution of Canadian jurisprudence relating to third-party litigation funding in class actions. Whereas previous cases considered litigation funding for disbursements and adverse costs orders alone, in *Houle*, the Ontario Superior Court provided guidance on a Litigation Funding Agreement where Bentham agreed to pay a portion of lawyers' fees as the case progresses, in addition to agreed disbursements and any court-ordered costs. Justice Perell conducts a review of the case law as it has developed in Ontario, including notably his own decisions in *Sino-Forest*, *Kinross*, and *Berg*. Citing those cases, all of which were rendered in the class action context, Perell J. arrived at a list of six factors to consider, many of which appear to be applicable specifically to the class action context.[93] The court concluded that most of the factors were met, except that (i) the issue of overcompensation could not be determined in advance, and (ii) Bentham should be permitted to terminate the LFA only upon court approval (contrary to what had been decided in British Columbia in *Wyeth*, *supra*.). The decision was appealed on those points to the Ontario Divisional Court. Although the appeal was denied, several aspects of the decision bear mentioning.

108. With respect to the "necessity" criterion that Justice Perell had based upon his earlier rulings stretching back to *Kinross*, the Divisional Court acknowledged that the matter was not yet settled, even in the class action context [emphasis added]:[94]

> [30] The appellants take exception to Justice Perell considering as a factor in the approval balance the necessity of third-party funding. Justice Perell called this the "paramount factor." Ms. Waddell submits that given the acceptance of class proceedings over the past 20 years, the only thing that should have to be said to show that third-party funding is necessary in a proposed class action is that counsel will not fund an indemnity for adverse costs rulings as they have said in this case. Anything more, she argues, risks an incursion into the lawyer client relationship and threatens to require disclosure of privileged

92 *Houle, supra*, note 70.
93 *Houle*, *supra*, note 70, para 71ff.
94 *Houle v St. Jude Medical Inc.*, 2018 ONSC 6352 (CanLII), paras 34-35 ("***Houle (Div. Ct.)***").

> information.
>
> [31] Justice Perell was satisfied that this was a case in which third-party funding was necessary to provide access to justice, so there is really no need for this court to consider the matter further especially since the danger highlighted by counsel for the appellants did not occur. No disclosure of privileged information was required by Perell J. or formed any part of his assessment of the applicable test generally. The appeal is from the order rather than the reasons. In keeping with the cautious and incremental development of the common law, the question of whether the necessity element is paramount or should be relaxed will have to await a case in which the issue factors directly into the outcome.

109. With respect to the right to terminate the agreement, the Divisional Court stated [emphasis added]:[95]

> [50] By removing the two clauses that allow Bentham to withdraw funding on its own re- assessment of risk and adding a court approval process, Perell J. was satisfied that the funder would be protected from the risks it needed to be protected against and the administration of justice would be protected from the champertous fear of officious intermeddling. Striking this balance is a difficult and sensitive exercise. Absent an error in principle or an exercise of his discretion that was clearly wrong, this court owes deference to the motion judge's conclusions on these issues.

110. In *David v Loblaw*, the Ontario Superior Court of Justice approved a litigation funding pursuant to which Bentham pay disbursements incurred by class counsel, and any court ordered costs on behalf of the Plaintiffs, up to prescribed maximums, and provide security for costs of one or more defendants, in the form of an undertaking, if required by the court to do so. The court noted that "several important features are present in the Agreement, which add fairness to the class."[96] The Defendants objected that they were not in a position to assess the strength of Bentham's undertaking to pay costs because they had only seen a redacted version of the Agreement, but the court, having had the opportunity to review the unredacted version of the Agreement, was satisfied that Bentham's obligation to fund the litigation was sufficient to cover any likely costs award,[97] and the agreement was approved.

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95 *Houle (Div. Ct.), supra,* note 94, para 50.

96 *David v Loblaw*, 2018 ONSC 6469 (CanLII) ("***Loblaw***"), para 14.

97 *Loblaw, supra,* note 96, para 19; the same was done in *JB & M Walker Ltd. / 1523428 Ontario Inc. v TDL Group,* 2019 ONSC 999 (CanLII).

v. <u>Third-party funding is approved outside the class action context</u>

111. The first instances were *Re Crystallex* and *Strateco*, which have already been dealt with.

112. In 2015, Justice McEwen of the Ontario Court of Justice, considered third-party litigation funding of civil litigation outside the context of class action (and insolvency) proceedings; it was a condition of the LFA that it be approved by the court. The court observed: [98]

> [8] Third party litigation funding is relatively new in Ontario. Typically, such agreements have arisen in class proceedings. Counsel could not locate any cases in which third party funding has been extended to the context of commercial litigation. This being said, I see no reason why such funding would be inappropriate in the field of commercial litigation. With that said, in examining any proposed third party litigation funding, the statutory and common law prohibition on champerty and maintenance Province of Ontario (sic) must be considered.

113. Citing *McIntyre Estate*, Justice McEwen declined to approve the agreement on grounds of champerty, although the agreement was ultimately approved after having been amended.[99] Importantly, there is no indication whatsoever in *Schenk* that financial necessity is a criterion applicable to third party funding of litigation outside the class action context.

114. The next case involving litigation funding outside the context of class action proceedings, *Seedling Life Science Ventures LLC v Pfizer Canada Inc.*,[100] is instructive. The Federal Court was asked to approve the LFA out of concern for a finding that the agreement might later be ruled champertous. The Federal Court noted that the request "seem[s] to draw … inspiration from the Ontario Superior Court of Justice's practice and procedure in approving funding agreements in the context of class proceedings, as very recently adapted in one instance in the context of private commercial litigation," viz. *Schenk*.

115. The court proceeded to review the principles of champerty and maintenance before remarking that [emphasis added] "it is easy to see, <u>in the context of a class proceeding,</u> why the

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98 *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215 (CanLII).

99 *Seedling Life Science Ventures LLC v Pfizer Canada Inc.*, Federal Court, T-608-17, July 17, 2017, **ABA, tab 3**.

100 2017 FC 826 (CanLII).

preservation of the class members’ interests and the protection of the court from abuses of its process by unscrupulous funders would require the court’s prior approval of LFAs,” but:

> [16] The underlying proceeding, however, is not a class proceeding. There is no requirement in the Federal Courts Rules for the disclosure or the approval of counsel’s fee structure or funding in any litigation other than class proceedings. There is no class whose interests might be affected by the terms of the LFA. Nor would the court’s plenary jurisdiction to control its own process and guard against abuses of its process be triggered in the circumstances: The legal, procedural and policy imperatives underlying the practice or requirement developed in Ontario and other provinces of submitting LFAs to prior court approval in class proceedings do not exist in the context of private litigation. There is no legal or logical basis to extend the requirement of pre-approval outside of class proceedings. […]
>
> [18] To the extent the doctrine of champerty and maintenance remains relevant in Canadian common law, even as means of protecting the courts and vulnerable litigants against abuses, its purpose is not and was never intended to be achieved by conferring on the courts the discretion to inquire into and approve or disapprove of a plaintiff’s funding arrangements as a condition precedent to instituting or pursuing litigation. It simply operates and achieves its purpose by rendering agreements tainted by maintenance and champerty unenforceable. […]
>
> [22] In the case before me, the action has been instituted and is proposed to be pursued by Seedlings itself, the original holder of the rights asserted. *The manner in which Seedlings chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant* (*McEwing v Canada (Attorney General)*, 2013 FC 525 (CanLII) at para 108 to 115). See also *Standal v British Columbia Forest Products Ltd.*, (1981) 57 CPR (2d) 243 and the cases cited therein, to the effect that unless a plaintiff has to rely on a champertous agreement to establish its title, the mere existence of a champertous agreement or maintenance is not a defence to the action and does not disqualify the plaintiff from pursuing an action otherwise properly vested in it.
>
> [23] The Defendant has no legitimate interest in enquiring into the reasonability, legality or validity of Seedlings’ financial arrangements, its counsel’s fee structure or the manner in which Seedlings chooses to allocate the risks and potential returns of the litigation, because they do not affect or determine the validity of the rights asserted by Seedlings in this action (*McIntyre Estate*, 2001, above).

116. The foregoing observations by the Federal Court are important, because although the Supervising Judge certainly has a role to play when litigation funding is proposed in the context of CCAA proceedings (as will be discussed at greater length below), *the defendant does not*.

117. In a prior ruling in the same case, the Federal Court was called upon to rule upon the confidentiality of the litigation funding agreement. The court noted that the defendant's argument that privilege does not attach to the LFA rests entirely on the decision of Justice Perell in *Fehr*, and "expressly circumscribed to the context in which they were rendered: that of class proceedings." The court continued [emphasis added]:

> As mentioned, this analysis does not apply in the circumstances of the present case. This is not a class proceeding and the motivation and ability of the Plaintiff to pursue the litigation to its conclusion on behalf of a class is irrelevant. Further, <u>the basis on which I find that privilege arises in respect of the redacted portions of the LFA is not that it discloses counsel's opinion as to the merits of the action or a pre-established litigation plan, but that it discloses the details of the third-party funding commitment and of the temporal variables of the indemnity provisions</u>. That conclusion is plain from reading the unredacted copy of the LFA that was provided to me pursuant to a confidentiality order.
>
> <u>The privileged information here is the same type of information that Justice Perell considered would provide a defendant with a tactical advantage in how the litigation would be prosecuted or settled, and the very essence of what the litigation privilege is designed to protect</u>. […]
>
> I note that the British Colombia Supreme Court, in *Stanway v Wyeth Canada Inc.*, 2013 BCSC 1585 at para 43, recognized that <u>portions of an LFA dealing with litigation budget, strategy and trial stamina are entitled, even in class proceedings, to be kept confidential</u>. A similar result was reached in *Schneider v Royal Crown Gold Reserve Inc.*, 2016 SKQB 278 and in *Schenk v Valeant Pharmaceuticals International Inc.*, 2015 ONSC 3215, the only reported case brought to my attention where an LFA was considered in a private litigation.

118. As recognized by the growing body of case law in Canada, there are sound policy reasons, both moral and economic, in favour of litigation funding. Economically, a litigious right is the plaintiff's asset, and the common pledge of its creditors. However, an unrealized asset has no value. Litigation funding thus makes markets more efficient by preventing assets from

going unrealized. This can result in the repayment of creditors and even shareholders who might otherwise go unpaid.

119. Morally speaking, parties with fewer means should not have fewer—or less enforceable—rights. Conversely, parties should not escape the consequences of their misdeeds for economic reasons; to abet the abuse of the less powerful by the more powerful is the opposite of justice.

PART IV – SUBMISSIONS CONCERNING COSTS

120. At first instance, Bentham had argued in support of Bluberi's motion, in which it had an obvious interest, but Bentham was not strictly speaking a party to the motion. Bentham did not take a position with respect to the motion presented by Callidus and the other respondents (the self-styled "Creditors' Group") for the holding of a meeting of creditors, which motion was dismissed by the CCAA Court. The CCAA Court disposed of both motions in the same judgment, making an award of costs in favour of Bluberi.

121. On appeal, Bentham was named by Callidus and the members of the Creditors' Group as an impleaded party, and participated as such, responding in particular to specific allegations made against Bentham. In the judgment under appeal, the court below—without having heard any submissions on the subject—ordered costs solely against Bentham, apparently out of concern to avoid imposing any costs on either the creditors or the Monitor.[101]

122. Under the circumstances, Bentham requests an award of costs against the Respondents.

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[101] Judgment under appeal, para 106, **BR, p 54**.

PART V – ORDERS SOUGHT

123. Bentham requests that the Court:

(i) grant the appeal;

(ii) overturn the judgment of the Québec Court of Appeal dated February 4, 2019;

(iii) restore the judgment at first instance dated March 16, 2018;

PART VI – SUBMISSIONS ON CASE SENSITIVITY

124. N/A

Montréal, November 1st, 2019

Me Neil Peden

Me Neil A. Peden
Woods LLP
Counsel for the Appellants
IMF Bentham Limited, and
Bentham IMF Capital Limited

PART VII – TABLE OF AUTHORITIES

<u>Jurisprudence</u> ***(cont'd)*** **<u>Paragraph(s)</u>**
