Court File No.: 38594

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

BETWEEN:

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

APPELLANTS
(Respondents)

– 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 –

ERNST & YOUNG INC.
IMF BENTHAM LIMITED
BENTHAM IMF CAPITAL LIMITED

INTERVENERS
(Impleaded Parties)

– and –

THE INSOLVENCY INSTITUTE OF CANADA AND CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

INTERVENERS

Style of Cause continues on the next page…

JOINT FACTUM OF INTERVENERS, THE INSOLVENCY INSTITUTE OF CANADA AND CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

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

AND 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.
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RESPONDENTS
(Appellants)

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

INTERVENERS
(Respondents)

– and –

ERNST & YOUNG INC.

INTERVENER
(Monitor)

– and –

THE INSOLVENCY INSTITUTE OF CANADA AND CANADIAN ASSOCIATION OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

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PART I – OVERVIEW OF THE INTERVENERS' POSITION AND FACTS

A. Overview of the Interveners' Position

1. The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals (collectively, the "**Interveners**") are concerned with the precedential implications of the decision rendered by Québec Court of Appeal on February 4, 2019 (the "**QCA Decision**"), which overturned the decision rendered by the Honourable Jean-François Michaud (the "**Trial Judge**") on March 16, 2018.

2. First, the QCA Decision fails to consider the factors prescribed by subsection 22(2) of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), or the principles underpinning the commonality of interest test when approving creditor classes under a compromise or arrangement (henceforth a "**plan**"). By design, the CCAA allows a majority of creditors supporting a plan to bind a dissenting minority of the same class, subject to the plan being sanctioned by the court. The "commonality of interest test" ensures that, to the extent possible, creditors sharing common interests and legal positions are included in a single class such that they may vote together whether to accept the proposed compromise of their claims. The test is equally intended to protect against confiscation or injustice, including by a majority whose interests are not aligned with - or even contrary to - those of the other members of the class.

3. Second, litigation financing agreements ("**LFAs**") are emerging tools used to promote access to the courts in many contexts, including in bankruptcy and insolvency matters. Lest there be a compromise of the legal rights of creditors in connection with the approval of an LFA, this Honourable Court should clarify that the QCA Decision does not create a new rule of universal application requiring creditor approval of LFAs.

4. The Interveners submit that the question before this Court is whether the LFA under consideration in this case warranted court approval *and* a creditor vote, not whether all LFAs for which approval is sought in a CCAA proceeding should be contingent on creditor approval under a plan.

B. Statement of Facts

5. The Interveners take no position on the facts.

PART II – STATEMENT OF QUESTIONS IN ISSUE

6. The Interveners address two issues :

a) Did the QCA properly consider the commonality of interest test?

No. The QCA Decision did not consider the criteria developed by case law and under subsection 22(2) of the CCAA in assessing the commonality of interest between creditors of the same class.

b) In the context of a CCAA proceeding, does a proposed LFA need to be included in a plan approved by the creditors and sanctioned by the court?

No. LFAs do not compromise creditor rights and should not automatically be included in plans. There is no need for this Court to create a new rule of universal application in dealing with the approval of LFAs.

PART III – ARGUMENT

A. The Commonality of Interest Test

7. Pursuant to section 22 of the CCAA, a debtor company may establish classes of creditors as part of its proposed plan and apply to the court for approval of such classes prior to the meeting of creditors. Section 22(2), which partially codifies existing case law by adopting the commonality of interest test, sets out a list of factors for the court to consider when determining whether the creditors' "interests or rights are sufficiently similar <u>to give them a commonality of interest</u>, taking into account:

a) the nature of the debts, liabilities or obligations giving rise to their claims;
b) the nature and rank of any security in respect of their claims;
c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; and

d) any further criteria, consistent with those set out in paragraphs (a) to (c), that are prescribed."

8. The introduction of subsection 22(3) CCAA, which prevents creditors who are related to the debtor company from voting in favour of a plan, reversed applicable case law on the issue and aligned the CCAA with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. This amendment to the CCAA was made further to the 2003 Senate Report, which noted that the "majority rule can be abused by related parties or by parties who derive collateral benefits from the decisions of the group."[1] The Senate Report also recommended that the CCAA "[c]ourt should continue to have discretion to not approve a restructuring plan even where the plan has the support of the majority of voting creditors."[2]

9. The classification of creditors under the CCAA finds its roots in the English Court of Appeal decision of *Sovereign Life*.[3] In devising the meaning of the term "class," the Court held that a class should be comprised of creditors "whose rights are not so dissimilar as to make it impossible for them to consult together with the view to their common interest." Where, among the creditors in question, there are different facts "which may differently affect their minds and their judgment, they must be divided into different classes."[4]

10. The "commonality of interest" test in *Sovereign Life* was subsequently considered in a number of cases, including the seminal case of *Canadian Airlines*, where the Court of Queen's Bench of Alberta summarized certain principles developed by case law, notably that: (i) commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test; (ii) the interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor company prior to and under the plan, as well as on liquidation; and (iii) creditors should be able to consult together,

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[1] Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors And Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Hon Richard H Kroft), pp. 151-152 ("**Senate Report**"), **Book of Authorities of the Interveners, The Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals ("B.A.I.), Tab 3.**

[2] *Ibid*, Senate Report, pp. 151-152.

[3] *Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.) ("***Sovereign Life***"), **B.A.I. Tab 1**.

[4] *Ibid.* at 579-80.

meaning that creditors should be able to assess their legal entitlement as creditors before or after the plan in a similar manner.[5] These principles were reaffirmed by numerous courts across Canada, notably by the Ontario Court of Appeal in *Stelco*.[6]

11. While the law and its reliance on the "commonality of interest" test is well settled, classification remains by design a critically important issue under the CCAA in part because under Canadian law there is no form of cram-down rule which would authorize the court to approve a plan over the objection of a dissenting class. Accordingly, the issue is often discussed and subject to an important body of case-law.

12. The Interveners wish to refer this Court to a single precedent, *San Francisco Gifts*[7], that highlights key issues central to this matter including vote control, the difference in treatment both under the proposed plan or in the event of bankruptcy, and the lack of any prospect of meaningful consultation amongst creditors. The facts in *San Francisco Gifts* are striking. Laurier Investment Corp. ("**Laurier**") owned 100% of the debtor companies. Mr. Barry Slawsky ("**Slawsky**") owned Laurier and was the president and sole director of most of the debtor companies. Slawsky and Laurier were the only secured creditors and were also owed substantial unsecured debts. The plan treated Slawsky and Laurier as unaffected creditors. They both renounced any right to share in the global distribution offered to unsecured creditors under the plan, but wished to retain the right to vote in favour of the plan on account of their deficiency claim. The case was rendered prior to the introduction of 22(3) CCAA and was not based on the fact that Slawsky and Laurier were also shareholders.

13. In *San Francisco Gifts*, Justice Topolniski, held that unaffected creditors who will not share in the payment stipulated in the plan proposed by them, but who are given the right to vote on the plan as unsecured creditors on the basis of their deficiency claims,

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[5] *Re Canadian Airlines Corp.* (2000), 2000 CanLII 28185 (AB QB), 19 C.B.R. (4th) 12 (Alta. Q.B.), para 31 application for leave to appeal dismissed and cited in the Court of Appeal's subsequent decision, 2000 ABCA 149, 19 C.B.R. (4th) 33, para 27 ("***Canadian Airlines***").

[6] *Stelco Inc., Re*, 2005 CanLII 42247 (ON CA), paras 21- 23, 30 and 34 ("***Stelco***").

[7] *Re: San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2004 ABQB 705, leave to appeal denied 2004 ABCA 386 ("***San Francisco Gifts***").

lacked a commonality of interest with other unsecured creditors and should be placed in their own class of creditors for voting purposes:

> Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.[8]

14. The QCA Decision at paragraphs 72 to 74 omits to consider the factors prescribed by subsection 22(2) CCAA and more importantly the apparent conflict between unsecured creditors wishing to maximize their recovery with those of a plan sponsor wishing to minimize the cost of securing a release for itself under the plan.

15. The Trial Judge did not approve the holding of a new meeting of creditors and therefore did not need to make any findings concerning the proposed classification of creditors. In failing to consider the issue of classification and the resultant question of whether there was sufficient commonality of interest amongst creditors, the QCA Decision breaks with existing case-law without a cogent analysis of relevant precedents or policy objectives underpinning creditor classification.

16. The Interveners believe that the record before this Court is sufficient to conduct a comprehensive enquiry as to the appropriate application of subsection 22(2) of the CCAA.

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[8] *San Francisco Gifts*, *supra* at para 49 (first instance, Topolniski J.) and paras 12-14 (leave to appeal, Conrad J.).

B. LFAs are not plans of arrangement

(i) The process undertaken to satisfy creditors' claims does not constitute a plan and need not form part of a plan

17. The QCA Decision improperly relies on the Ontario Court of Appeal judgment in *Metcalfe*[9] to expand the definition of an arrangement from (1) the "compromise of creditors' claims" as against the debtor and, as the case may be, against third parties, to (2) "the compromise of creditors' claims as well as the process undertaken to satisfy them."[10] The decision in *Metcalfe* only dealt with whether third party releases could be included as part of a plan. In doing so, *Metcalfe* affirmed the principle that "it is not a necessary element of a plan that it should alter the rights existing between the debtor and its creditors"[11] for the specific purpose of including third party releases in a plan. This principle should not lend itself to the broader and unrelated notion that plans must include, for creditor approval, the means by which creditors' claims are to be satisfied.

18. To better understand the principles espoused in *Metcalfe*, it is helpful to review its factual and judicial backdrop. *Metcalfe* was decided in the context of a nationwide liquidity crisis involving asset-backed commercial paper. The proposed plan required that market participants, including Canadian banks, be released from any liability related to asset-backed commercial paper, with the exception of certain fraud claims. The question on appeal was whether the CCAA may be used to "compromise claims as between anyone other than the debtor company and its creditors."[12] To decide the issue, Blair J.A. relied heavily on *T&N*,[13] a United Kingdom decision penned by Richards J.

19. The issue in *T&N*, as in *Metcalfe*, was whether a plan could include the release of a third party. In *T&N*, the debtor's liability insurers (the "**EL Insurers**") initially denied coverage to compensate employees of the debtor company for asbestos exposure-related injuries (the "**EL Claimants**"). Further to settlement discussions, a multi-million pound

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[9] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 ("***Metcalfe***"), para 66.
[10] QCA Decision, para 85.
[11] *Ibid*, para 86.
[12] *Metcalfe*, *supra* note 9, paras 78-79.
[13] *T&N Ltd. and Others (No. 3) (Re)*, [2007] 1 All E.R. 851 ("***T&N***"), **B.A.I. Tab 2**.

fund was established against which the debtor's employees could claim. In return, the EL Insurers required a release from any further claims by the EL Claimants. In other words, the essential feature of the arrangement was the compromise of the litigation claims of the debtor's employees against the EL Insurers in exchange for the establishment of the multi-million pound fund.

20. In approving the respective plans, neither of the courts in *T&N* and *Metcalfe* expanded the definition of arrangement to include "the process undertaken to satisfy [creditors' claims]." Justice Richards only decided that the alteration of the rights existing between the debtor and the creditors was not a necessary element of an arrangement for the purpose of approving the arrangement, which did compromise creditors' rights *vis-à-vis* third parties. The rationale in approving the arrangement was that"[t]he rights of the EL Claimants against the EL Insurers […] are in no sense unconnected with T&N or the EL Claimants' rights against T&N"[14] and formed the substance of a "tripartite matter"[15] as between T&N, insurers and claimants. Under the arrangement, the EL Claimants' rights (i.e. the creditors) were compromised *vis-à-vis* the EL Insurers. Similarly, Blair J.A. only decided that third party releases in favour of financial institutions could be part of a negotiated package between creditors and debtors.

21. *T&N* and *Metcalfe* (1) confirm that arrangements encompass the compromise of creditors' legal rights yet (2) do not expand the definition of "arrangement" to include "processes to satisfy creditors' rights" that would otherwise not require creditor approval. Accordingly, the QCA Decision incorrectly relies on *Metcalfe* as expanding the definition of plans.

22. The CCAA includes any number of provisions designed to facilitate restructurings and, ultimately, the satisfaction of creditors' claims, including interim financing and sales of assets, none of which require creditor approval. The risk in expanding the meaning of "arrangement" to include the process undertaken to satisfy creditor claims is the unavoidable conflict with those existing statutory tools. While the CCAA does not define

[14] *Ibid*, para 51.
[15] *Ibid*, para 52.

"compromise or arrangement", it is the Interveners' view that the compromise of creditors' rights should remain the central tenet and focus of any plan, while leaving the CCAA courts with the tools and discretion necessary to approve other processes by which claims may otherwise be satisfied (including deferral of the issue to the creditors as part of a plan, if appropriate).[16]

(ii) LFAs do not compromise creditors' legal rights such that, absent a competing plan, there is no need for a creditor vote

23. LFAs do not, as a matter of law, compromise creditors' rights. An LFA is nothing more than a financing vehicle for a specific purpose, i.e. the pursuit of litigation, which does not result in the compromise of creditors' rights vis à vis the debtor. LFAs may have an impact on the eventual recovery by creditors, whether under a plan or otherwise, but the CCAA and the relevant authorities are clear that an impact on recovery alone is insufficient to constitute a compromise of rights. Material prejudice to creditors and the extent of creditor consultation are only listed as factors that a CCAA court can consider under sections 11.2(4)(f) and 36(3)(e) CCAA without warranting a creditor vote. The Court of Queen's Bench of Alberta in *Re Calpine* explained that transactions leading up to a settlement "chang[e] the financial landscape of the CCAA debtor to some extent" without necessarily confiscating the rights of the affected creditors.[17] Accordingly, there is no valid reason to create a new rule of universal application requiring LFAs to be included in plans.

24. LFAs cannot however be considered in a vacuum. The Interveners submit that a CCAA judge may be well advised in appropriate circumstances to order that an LFA be integrated as part of a plan subject to a creditor vote. This determination should be made based on the specific facts of each case, including all options available to creditors, and in furtherance of the objectives of the CCAA. As a matter of principle, the CCAA court should not allow a debtor or a third party sponsor to confiscate the creditors' right to decide whether or not, and to what extent, to compromise their rights as part of a plan where a

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[16] See for example in *Calpine Canada Energy Ltd., Re*, 2007 ABQB 504, paras 12, 51 and 55, leave to appeal dismissed, 2007 ABCA 266 ("***Re Calpine***"), where the locus of analysis is whether there was a compromise of the rights of creditors.

[17] *Ibid*, para 62. See also, *Air Canada (Re)*, 2004 CanLII 11700 (ON SC), para 9.

potentially viable plan exist. More specifically, if creditors are faced with either a financing scheme to potentially maximize the assets available to creditors or a viable plan, then a vote should be ordained to deal with said plan.

25. This view is reconcilable with the Ontario Court of Appeal's decision in *Re Crystallex*[18], wherein the Court determined that the LFA in question was not a plan of arrangement. In that case, there was no competing plan such that the creditors (and the Court) were faced with the mutually exclusive choice between an LFA or an arrangement. Had that been the case, the Court may well have determined that a vote by creditors would have been appropriate. The creditors would have then had the opportunity to vote whether to accept the proposed arrangement or to permit the debtor company to accept financing to litigate its claim with the hopes of enhancing recovery for creditors.

(iii) Protecting protean financing structures under CCAA

26. The CCAA does not specifically deal with LFAs and there is no need for this Court to create a new rule of universal application in dealing with the approval of LFAs. The CCAA already provides specific rules dealing with the sale of assets outside of the ordinary course of business and interim financing, both of which will have application in most, if not all, cases involving possible court approval of LFAs.

27. In the Interveners' respectful submissions, this Honourable Court should, as it has previously espoused, protect the flexibility of the CCAA courts in governing their proceedings. In *Century*, Justice Deschamps, in reviewing the history of the CCAA, affirmed that the CCAA was designed to offer "a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations."[19] Justice Deschamps also observed that "CCAA courts have been called upon to innovate [and] have been asked to sanction measures for which there is no explicit authority in the CCAA."[20] In

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[18] 2012 ONCA 404 ("***Re Crystallex***").
[19] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ("***Century***"), para 14.
[20] *Ibid*, para 61.

Indalex, Justice LeBel, though dissenting, reaffirmed that a CCAA court may, in principle, "fill in gaps in the law when this is necessary in order to grant justice to the parties."[21]

28. LFAs are but one example of the types of agreements a debtor company might seek to enter into during the course of its restructuring under the CCAA. Such idiosyncrasies and complexities, which underlay most reorganizations, warrant flexibility and innovation which, in turn, require that CCAA courts be equipped with "a good deal of power and flexibility."[22] Creating a new rule for each such issue, such as mandating that all LFAs be considered plans of arrangement, would run counter to the expressed objective and interpretation of the CCAA and unduly stifle the role of CCAA courts and their ability to effectively oversee the restructuring process.

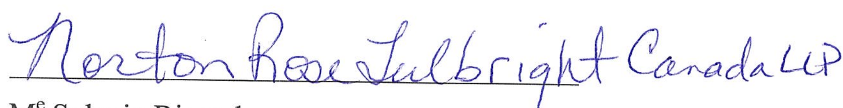
PART IV – SUBMISSIONS CONCERNING COSTS

29. The Interveners seek no costs on this appeal and ask that no costs be awarded against them.

PART V – ORDERS SOUGHT

30. The Interveners seek no Order from this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 6th day of January, 2020



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[21] *Indalex Ltd., Re*, 2013 SCC 6 ("**Indalex**"), para 278.
[22] *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, 1995 CanLII 2575 (BC CA), [1995] 10 W.W.R. 714, para 26.

PART VI – TABLE OF AUTHORITIES

No.	Authority	Paragraph(s)
Jurisprudence		
1.	*Air Canada (Re)*, 2004 CanLII 11700	23
2.	*Calpine Canada Energy Ltd., Re*, 2007 ABQB 504	22, 23
3.	*Calpine Canada Energy Ltd., Re*, 2007 ABCA 266	22
4.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.	27
5.	*Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587	17, 18, 19, 20, 21
6.	*Pacific National Lease Holding Corp. v. Sun Life Trust Co.*, 1995 CanLII 2575 (BC CA)	28
7.	*Re Canadian Airlines Corp. (2000)*, 2000 CanLII 28185 (AB QB)	10
8.	*Re Crystallex*, 2012 ONCA 404	25
9.	*Re: San Francisco Gifts Ltd. (Companies' Creditors Arrangement Act)*, 2004 ABQB 705	12, 13
10.	*San Francisco Gifts Ltd. v. Oxford Properties Group Inc.*, 2004 ABCA 386	12, 13
11.	*Sovereign Life Assurance Co. v. Dodd*, [1892] 2 Q.B. 573 (Eng. C.A.)	9, 10
12.	*Stelco Inc., Re*, 2005 CanLII 42247 (ON CA)	10
13.	*Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6	27
14.	*T&N Ltd. and Others (No. 3) (Re)*, [2007] 1 All E.R. 851	18, 19, 20, 21
Parliamentary Papers		
15.	Senate, Standing Senate Committee on Banking, Trade and Commerce, *Debtors And Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003) (Chair: Hon Richard H Kroft)	8