File No. _____

SUPREME COURT OF CANADA

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

BETWEEN:

IMF BENTHAM LIMITED
BENTHAM IMF CAPITAL LIMITED

APPLICANTS
(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.)

INTERVENERS
(Respondents)

(Style of cause continues next page)

APPLICATION FOR LEAVE TO APPEAL

(Article 40(1) of the *Supreme Court Act* and Rule 25 of the *Rules of the Supreme Court of Canada*)

APPLICANT'S FACTUM

PART I – OVERVIEW OF THE POSITION AND FACTS

1. Access to justice is a bedrock legal principle. This Court has invoked it in various contexts in dozens of judgments over the past decade, declaring that "ensuring access to justice is the greatest challenge to the rule of law in Canada today."[1]

2. This Court has already acknowledged that contingency fee agreements are a means of promoting access to justice for impecunious plaintiffs,[2] but can an insolvent corporation enter into such an agreement to fund proceedings against the creditor that allegedly caused its demise? Or can the putative defendant use its position as a creditor to compel the plaintiff to accept its offer of settlement?

3. In the present case, the court at first instance approved litigation funding as interim financing under the *Companies' Creditors Arrangement Act* ("**CCAA**"), as the Ontario Court of Appeal had done in *Re Crystallex*.[3] In the judgment under appeal, the Quebec Court of Appeal disagreed, holding that the court of first instance was required to find instead that the funding agreement and litigation constitute a plan of arrangement that must be submitted to creditors. The court below also held that the defendant—who is also the corporation's secured lender—must be allowed (i) to present a plan of arrangement to the creditors whereby the plaintiff would release the defendant from all liability, and (ii) to undervalue its security in order to join with unsecured creditors *and cast the deciding vote in favour of its own plan*. This appears to be unprecedented.

4. The Quebec Court of Appeal, citing no authority, also asserted that the contingency fee agreement is "akin to an equity investment" that would allow the litigation funder to "benefit by preference over the existing creditors". The result of this holding is to jeopardize the availability of litigation funding to impecunious plaintiffs—those who stand to benefit most from the increased access to justice that such funding provides.

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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

3 *Crystallex (Re)*, 2012 ONCA 404 ("***Re Crystallex* (CA)**"), denying leave to appeal *Re Crystallex International Corporation*, 2012 ONSC 538 and 2012 ONSC 2125

5. The decision under appeal breaks new legal ground in a manner that poses real difficulties on matters of public interest, inviting the intervention of this Court.

A. Concise Statement of Facts

i. The judgment appealed from

6. Applicants IMF Bentham Limited and Bentham IMF Capital Limited (collectively "**Bentham**") apply for leave to appeal the judgment of the Quebec Court of Appeal dated February 4, 2019.[4] The judgment appealed from reversed the March 16, 2018 judgment of the Quebec Superior Court (in this context, the "**CCAA Court**") in the CCAA proceedings relating to the respondents 9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.) and 9354-9178 Québec Inc. (formerly Bluberi Group Inc.) (collectively "**Bluberi**").[5] Bluberi has also made an application for leave to appeal.

7. In the March 16, 2018 judgment, the Honourable Jean-François Michaud, as the judge supervising the CCAA proceedings (the "**Supervising Judge**"), approved a litigation funding agreement (the "**LFA**") whereby Bentham would provide Bluberi with the funding necessary to pursue a litigious claim of over $200 million against its secured lender, the Respondent Callidus Capital Corporation ("**Callidus**"). The Supervising Judge also prevented Callidus from proposing its own plan of arrangement to Bluberi's creditors in order to settle that litigation for under $3 million.

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

   a. holds that the Supervising Judge could not approve the LFA as interim financing pursuant to section 11.2 of the CCAA, because the LFA and the proposed litigation constitute a plan of arrangement that must be approved by Bluberi's creditors;[6]

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4 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2018 QCCS 1040 (the "**Judgment at first instance**"), **Applicant's Factum (hereinafter "A.F."), pp. 7ff**

5 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2019 QCCA 171 (the "**Judgment under appeal**"), **A.F., pp. 37ff**

6 Judgment under appeal, notably paras 11, 47, and 77 and ss, **A.F., pp. 39, 46 and 53ff**

b. permits Callidus to propose its own plan of arrangement to Bluberi's creditors whereby Callidus and related parties would obtain a release of Bluberi's claims;[7]

c. permits Callidus to undervalue its security so as to vote as an unsecured creditor and to cast the deciding vote in favour of its own offer to settle the claims against it;[8]

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

e. orders costs against *Bentham* (an impleaded party), 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.[10]

ii. Facts relevant to the application for leave to appeal

9. 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. Many of these cases were insolvency-related—the initials IMF standing for "insolvency management fund".

10. Bentham is the litigation funder pursuant to the LFA, the purpose of which is to enable Bluberi to undertake legal proceedings against its secured creditor, Callidus, for over $200 million.

11. Callidus has security over all of Bluberi's property, and has already used all but $3 million of its secured claim to purchase the entirety of Bluberi's assets—with the exception of Bluberi's

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7 *Ibid.*, notably paras 7 and 63, **A.F., pp. 38 and 50**
8 *Ibid.*, notably paras 9 and 40, **A.F., pp. 39 and 44**
9 *Ibid.*, notably paras 48, 68-69, 78 and 91, **A.F., pp. 46, 51, 53 and 57**
10 *Ibid.*, paras 17 and 38, **A.F., pp. 39 and 44**

cause of action against Callidus (the "**Retained Claims**"), which Callidus agreed Bluberi would retain. Callidus now wishes to pre-empt the proceedings against it by proposing a plan of arrangement to Bluberi's other creditors whereby the creditors would cause Bluberi to grant Callidus a release from all of the corporation's claims against it (the "**Callidus Plan**").

12. The Supervising Judge provided an accurate description of the context[11] and of the Callidus Plan.[12] The Supervising Judge also made numerous findings concerning the behaviour of Callidus over the course of the CCAA proceeding,[13] the actions taken by Bluberi in respect of the Retained Claims,[14] and the position of the court-appointed monitor, Ernst & Young Inc. (the "**Monitor**"), which supported the LFA.[15]

13. The Supervising Judge found that [references omitted]: [16]

> [44] […] it is clear that Callidus' actions were solely motivated 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."

14. 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,"[17] that Callidus's conduct "lacked transparency", and that "it seems that Callidus's strategy was to exhaust Mr. Duhamel financially."[18]

15. The Supervising Judge also found that [references omitted]:[19]

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11 Judgment at first instance, paras 3-23, **A.F., pp. 8-12**
12 *Ibid.*, paras 24-26, **A.F., pp. 12-13**
13 *Ibid.*, paras 39-48, 69 and 72, **A.F., pp. 17-19, 26 and 27**
14 *Ibid.*, paras 60-62, **A.F., pp. 22-24**
15 *Ibid.*, paras 64-65, **A.F., pp. 24-25**
16 *Ibid.*, para 44, **A.F., p. 18**
17 *Ibid.*, para 40, **A.F., p. 17**
18 *Ibid.*, para 41, **A.F., p. 18**
19 *Ibid.*, para 44, **A.F., p. 18**

> [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.

16. After reviewing the LFA, the Supervising Judge correctly noted that, because the costs of litigation are to be repaid only from the "Litigation Proceeds", Bentham will receive no payment unless the Debtors are successful at trial or the matter is settled by agreement.[20] Further, if Callidus is successful in the litigation, the LFA stipulates that Bentham will pay any costs awarded against the Debtors.

17. The Supervising Judge also correctly noted that Bentham does not charge interest or fees, the Bentham Return being limited to a percentage of the Litigation Proceeds.[21] The Supervising Judge found that the Bentham Return is reasonable considering the investment in the litigation and the associated risks.[22]

18. As for the fact that Bentham is to receive security over the Retained Claims (which 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."[23]

19. The Quebec Court of Appeal is 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."[24] However, "whether to file a plan and what to offer in such plan" is a decision to be made by *every* debtor in CCAA proceedings; if no plan is accepted by the creditors, the debtor becomes bankrupt and the trustee realizes the assets for the benefit of the creditors. The Quebec Court of Appeal identified no greater risk in this case that the debtors will abscond with assets than is present in any other CCAA proceeding.

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20 *Ibid.*, para 77, **A.F., p. 28**
21 *Ibid.*, para 78, **A.F., pp. 28-29**
22 *Ibid.*, para 79, **A.F., p. 29**
23 *Ibid.*, para 88, **A.F., p. 31**
24 Judgement under appeal, para 92, **A.F., p. 57**

20. The Quebec Court of Appeal thus makes a palpable error of fact when it states that because litigation proceeds are paid to the Respondents, controlled by Mr. Duhamel, that "there is no protection of the creditors."[25] As noted by the Supervising Judge, the purpose of the litigation is to generate proceeds that will be used by Bluberi to propose a plan of arrangement to its creditors, whose interests continue to be protected by the CCAA Court and the Monitor.

21. With respect to the issue of confidentiality, the Supervising Judge correctly held that "considering the litigation at issue is similar in nature to an oppression dispute, Callidus should not know how much money Bentham is investing, what its percentage of return is or how any recovery would be apportioned."[26]

22. 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.[27]

23. In fact, in light of the findings of the Supervising Judge that Callidus was only motivated to propose its plan to creditors because of the real prospect of litigation funding, it is obvious the "amount of time and money Bentham has invested so far" has so far generated value of almost $3 million, being the amount Callidus became willing to pay the creditors to avoid the litigation that Bentham has agreed to fund.

B. Issues of Public Importance

24. There are sound economic and moral arguments in favour of litigation funding, which is becoming more common in Canada, and elsewhere. Progress has been slow because courts in common law jurisdictions have had to contend with the doctrines of champerty and maintenance, which have only recently been loosened as a means of permitting access to justice.[28] The court at first instance correctly determined that the doctrine of champerty

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25 *Ibid.*, para 94, **A.F., pp. 57-58**
26 Judgment at first instance, paras 84-85, **A.F., p. 55**
27 *Ibid.*, para 83, **A.F., p. 30**
28 See *infra*, para 63 and ss, **A.F., pp. 50ff**

does not apply in Quebec civil law, and that *quota litis* (contingency) agreements are permissible.[29] However, the proposition of the Quebec Court of Appeal that the litigation funder's prospective share of the plaintiff's award is "akin to an equity investment" allowing it to "benefit by preference over the existing creditors" is a large step backward; the proposition, difficult to square with established principles of corporate and insolvency law, calls into question the enforceability of contingency fee arrangements in the event of insolvency, thus imperilling access to justice.

25. Indeed, litigation funding is increasingly used to fund lawsuits by insolvent debtors, which requires a balancing of the interests of the debtor and its creditors—and of the debtor's shareholders where there is the prospect that a successful lawsuit would repay all of the creditors in full. How is the court to balance the interests of shareholders of an insolvent corporation against the interests of creditors, where it is possible that the creditors might eventually be repaid in full?

26. The Ontario Court of Appeal decided in *Re Crystallex*[30] that the court may approve interim financing under section 11.2 of the CCAA to fund litigation by an insolvent debtor, even over the objection of "substantially all" of the creditors. In the judgment appealed from, the Quebec Court of Appeal decided precisely the opposite. Can litigation funding be approved as interim financing under the CCAA? And can interim financing—for whatever purpose—be approved over the objection of the creditors?

27. In fact, in the case at hand the litigation funding is not opposed by "substantially all" of the creditors—it is supported by Bluberi's largest unsecured creditor (whose vote is large enough to block the approval of Callidus's plan of arrangement that would release Callidus of all claims by Bluberi). Is it appropriate to permit a secured creditor to undervalue its security in order to vote in insolvency proceedings as an unsecured creditor, for the specific purpose of overriding the objection of the largest unsecured creditors and imposing its settlement offer upon the plaintiff?

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29 See *infra*, para 61 and ss, **A.F., pp. 49ff**

30 See note 3, *supra*

PART II – QUESTIONS IN ISSUE

28. In addition to the questions identified by Bluberi in its own application for leave to appeal, this appeal raises *inter alia* the following questions of public importance:

A. In the context of proceedings under the *Companies' Creditors Arrangement Act* ("**CCAA**"), can litigation financing be approved as interim financing[31] or does the funding agreement and proposed litigation constitute a plan of arrangement that must be voted on by the creditors?

B. If the litigation funding must be approved by the creditors, can the *defendant* in the proposed litigation—who is also a secured creditor—value its security at zero in order to vote with the unsecured creditors and cast the deciding vote against the litigation funding, and in favour of the plan of arrangement it proposes in order to settle the litigation?

C. Would the litigation funding make the funder an equity investor in the insolvent corporation such that its rights should be subordinated to those of the other creditors, as asserted by the Quebec Court of Appeal?

PART III – ARGUMENT

A. Can litigation funding be approved under the CCAA as interim financing, or is it a plan of arrangement?

i. The decision in *Re Crystallex*

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

> [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.

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31 As held by the Ontario Court of Appeal in *Re Crystallex*, note 3, *supra*

30. As in the present case, the purpose of the interim financing in *Re Crystallex* was to fund litigation, which was the debtor's only asset of significance.[32] The debtor intended to use the proceeds of the litigation to submit a plan of arrangement to its creditors.

31. The principal creditors were the holders of approximately $100 million in senior unsecured notes.[33] Substantially all of the creditors opposed the interim financing proposed by the debtor.[34] The basis for noteholders' objection is set out in the decision at first instance:[35]

> [44] The noteholders take a fundamental objection to the Tenor DIP facility [i.e. the litigation funding] on the basis that it inconsistent with the purposes of the CCAA and case law dealing with DIP loans. 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.

32. The Ontario Court of Appeal went on to find as follows:[36]

> [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 an arrangement or compromise between a debtor and its creditors. 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, it did not compromise the terms of their indebtedness

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32 *Re Crystallex* (CA), para 4

33 The debtor's other liabilities being approximately C$1.2 million and approximately US$8 million: *Re Crystallex International Corporation*, 2012 ONSC 2125, para 11

34 *Re Crystallex* (CA), para 7

35 *Re Crystallex International Corporation*, 2012 ONSC 2125, para 44

36 *Re Crystallex* (CA), paras 49-50

> or take away any of their legal rights. 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.

33. All of the foregoing comments by the Ontario Court of Appeal are applicable to the present case.

ii. The judgment under appeal is irreconcilable with *Re Crystallex* and introduces uncertainty into Canadian insolvency law

34. In the judgment under appeal, the court held that [emphasis added]:[37]

> [82] In my view, the judgment of the Court of Appeal [in *Re Crystallex*] does not have any precedential value 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.

35. However, the fact that the principal creditors in *Re Crystallex* wanted to fund the litigation themselves whereas a majority of creditors[38] in this case wish to accept a settlement offer does not change the fact that the reasoning of the Ontario and Quebec courts of appeal as to what constitutes a plan of arrangement are fundamentally irreconcilable.

36. The court below, citing no authority, the court holds that [emphasis added] "an arrangement or proposal can encompass both a compromise of creditors' claims *as well as the process undertaken to satisfy them,*" making specific reference to a "liquidating proposal" under the *Bankruptcy and Insolvency Act*.[39] However, whether under that act or the CCAA, *creditors do not vote on whether or not assets should be realized, and on what terms*. There is no reason why the realization of a litigious claim should be any different.

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37 Judgment under appeal, para 82, **A.F., p. 54**

38 Although not the majority required by statute, unless Callidus is permitted to vote in favour of its own settlement offer.

39 Judgment under appeal, para 85, **A.F., p. 55**

37. In determining that a plan of compromise requiring creditor approval necessarily involves the compromise of rights, the Ontario Court of Appeal in *Re Crystallex* endorsed *Re Calpine*,[40] which had been followed in several other cases.[41]

38. By contrast, in the decision under appeal the Quebec Court of Appeal refers to a U.K. decision cited in *Re Metcalfe & Mansfield Alternative Investments II Corp.* "for the proposition that it is not a necessary element of an arrangement that it should alter the rights existing between the debtor and its creditors." [42] The emphasis is added because in the U.K. decision (as in *Metcalfe*) the arrangement still involved the compromise of the rights of the creditors in exchange for the right to participate in a fund established by a third party—whereas in the present case, the litigation funding agreement is merely non-recourse financing *without compromise of either the debtors' or the creditors' rights*.

39. Compounding the confusion, after having stated—incorrectly—that no compromise of rights is required for an arrangement, the Quebec Court of Appeal goes on to state that the litigation funding agreement compromises rights after all:[43]

> [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".

40. The current state of affairs is that courts in Ontario are bound by the decision of the Ontario Court of Appeal in *Re Crystallex*, such that interim funding in the province of Ontario is not a plan of arrangement and can be approved by the CCAA Court over the objection of creditors, whereas courts in Quebec are bound by the decision under appeal,

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40 *Re Calpine Canada Energy Inc.*, 2007 ABQB 504, 35 C.B.R. (5th) 1 (Alta. Q.B.), leave to appeal denied (with detailed reasons) 2007 ABCA 266, 35 C.B.R. (5th) 27

41 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

42 *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 ("**Metcalfe**")

43 Judgment under appeal, para 88, **A.F., p. 56**

such that litigation funding and the proposed litigation is a plan of arrangement requiring creditor approval. Note that the reasoning in the decision under appeal would also apply to a "liquidating CCAA", because, according to the Quebec Court of Appeal, a plan of arrangement "can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them."

41. Respectfully, this Court should intervene to resolve the dichotomy between provinces as to (i) what does or does not constitute a plan of arrangement under the CCAA, a federal statute, and (ii) how contingency fees are to be dealt with in insolvency.

iii. The applicable standard of review

42. In any event, the Court of Appeal should not intervene except by reason of palpable or overriding error, as was recognized in *Re Calpine*:[44]

> [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.

43. 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.

44. The same can be said in this case, but the court below shows no deference whatsoever to the Supervising Judge. Nor does the court below specify the applicable standard of review,

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[44] *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABCA 266, para 15

stating 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 intervention is justified as I will explain in the body of these reasons."[45] With respect, the explanation did not justify the substitution by the court of below of its own discretion for that of the Supervising Judge.

45. The 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."[46]

46. On the second point, the court below was clearly in error: *there was no "about face" because the Supervising Judge never made such an order*. After Bluberi filed an earlier motion for interim financing, Callidus proposed its first first plan of arrangement. Rather than present its motion, Bluberi prepared its own plan of arrangement. Faced with two competing plans, the Supervising Judge ruled that, both plans would be put to the creditors, with the creditors' meeting paid for by both parties. However, Bluberi's plan was never presented, and Callidus's plan was voted down.

47. As for the requirement of a connection between interim financing and commercial operations, the holding of the Quebec Court of Appeal would appear to preclude not just all litigation funding, but interim financing granted in the context of a sale process or winding down of operations.[47] It would be most unfortunate if interim financing was to become unavailable under those circumstances in the province of Quebec as a result of the judgment under appeal.

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45 Judgment under appeal, para 48, **A.F., p. 46**

46 *Ibid.*, para 78, **A.F., p. 53**

47 See for example *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, para 15 and 2015 QCCS 306, paras 92 and 133; see also *Endurance Energy Ltd (Re)*, 2016 ABQB 324

B. Can Callidus—the defendant in the proposed litigation—value its security at zero in order to vote in favour of its own offer of settlement?

48. 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.

49. 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.[48] The Quebec Court of Appeal decided the opposite.[49]

50. Bentham will not repeat the arguments raised by Bluberi in its own application for leave to appeal, but it is important to note that the court below *would permit Callidus to value its security at zero in order to vote as an unsecured creditor*.[50] This valuation is inexplicable. The litigious claim cannot be worth less than the amount that Callidus is currently offering to settle it, i.e. $2,880,000. At that value, the unsecured portion of Callidus's claim is $120,000, which—even assuming that it is permissible for Callidus to vote on its own settlement offer—would not be enough to tip the balance in favour of the Callidus plan. Moreover, if the lawsuit is without value, why the Callidus Plan?

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

51. 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 the LFA is akin to an equity investment. The contingent nature of the repayment is such that Bentham is investing in the Respondents because of the litigation asset and it will benefit by preference over the existing creditors upon any successful judgment or settlement. Seen in this manner, the LFA does alter

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48 Judgment at first instance, para 32 and ss, **A.F., pp. 14ff**

49 Judgment on appeal, para 58 and ss, **A.F., pp. 48ff**

50 Judgment on appeal, para 57, **A.F., p. 48**

> the creditors' rights by means of subordination and is a further justification for characterizing the scheme as an arrangement. In this regard, it must be pointed out that in Crystallex it was only the advances and interest due to the litigation lender that benefitted from a priority. The success fee ranked 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.

52. This single paragraph raises a host of issues. First, in addition to a success fee, the lender in *Re Crystallex* had a guaranteed rate of return in the form of 10% interest,[51] whereas there can be no Bentham Return at all without litigation proceeds; second, whereas the debtor in *Re Crystallex* owned mining equipment with a book value of US$10.1 million,[52] the Bentham Return is secured only by the Litigation Proceeds. Bentham is thus more dependent on the successful outcome of the litigation than was the lender in *Re Crystallex*.

53. Third, *all* interim financing permits the lender to "benefit by preference over the existing creditors" by law, [53] thus "alter[ing] the creditors' rights by way of subordination."

54. Fourth, the court below asserts that *the contingency fee in the LFA makes Bentham an investor in Bluberi*. This remarkable proposition—for which the Quebec 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.

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

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51 *Re Crystallex* (CA), para 28

52 *Re Crystallex International Corporation*, 2012 ONSC 2125, para 12

53 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.

56. Second, in construing the litigation proceeds as equity, the Quebec Court of Appeal ignores the definitions of "Equity Claim" and "Equity Interest" in the CCAA[54] [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)

57. Third, 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.

58. Fourth, 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 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 or not?

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[54] CCAA para 2(1)

59. 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.

60. It is respectfully submitted that courts in other provinces are unlikely to follow the judgment appealed from, raising the possibility of a schism between the provinces in corporate and insolvency law, matters of federal jurisdiction. It is therefore opportune for this Court to clarify these issues.

D. The doctrines of champerty and maintenance

61. The common law doctrines of champerty and maintenance arose in the medieval period and were common law crimes until 1954.[55]

62. The Quebec Court of Appeal confirmed in *Montgrain c. Banque Nationale du Canada* that the doctrine of champerty is inapplicable in Quebec civil law, providing a useful overview,[56] and citing an informative article by Professor H. Patrick Glenn concerning the hostility of the common law to the transfer of interests in litigious rights:[57]

> 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

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55 The 1953-54 consolidation of the Criminal Code abolished all common law crimes except contempt of court; see e.g. *McIntyre Estate v. Ontario (Attorney General)*, O.R. (3d) 257, 2002 CanLII 45046 (ON CA), para 25

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

57 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

> 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.

63. 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:[58]

> 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.

64. There are sound policy reasons, both moral and economic, in favour of litigation funding.

65. 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 shareholders who might otherwise go unpaid—which is exactly what is alleged by Bluberi in the present case.

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[58] *Walker v. Ritchie*, [2006] 2 SCR 428, 2006 SCC 45, paras 12-13; the only other case is *City of Prince Albert v. Underwood McLellan & Associates Limited*, [1969] SCR 305

66. 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. Abuse of the less powerful by the more powerful is the opposite of justice, and is exactly what is alleged by Bluberi in the present case.

67. These are arguments that would have been familiar to Jeremy Bentham some two centuries ago.[59] It is ironic that just as the common laws courts are, at long last, removing impediments to litigation funding, the Quebec Court of Appeal—despite having recognized that the doctrines of champerty and maintenance were never part of the civil law—is going in the other direction.

PART IV – SUBMISSIONS AS TO COSTS

68. At first instance, the CCAA Court made an award of costs in favour of Bluberi. 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.[60]

69. Bentham requests that the costs of this application follow the suit, in which Bentham will request an order of costs against the Respondents.

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[59] See notably J. Bentham, The Works of Jeremy Bentham (ed. Bowring) (1843) (William Tait, Edinburgh) Volume 3, Part 1, A Defence of Usury, Letter XII¸ Maintenance and Champerty

[60] Judgment under appeal, para 106, **A.F., p. 60**

PART V – ORDER SOUGHT

70. Bentham requests that the court grant its application for leave to appeal from the judgment of the Quebec Court of Appeal dated February 4, 2019.

Montréal, April 4, 2019

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PART VI –TABLE OF AUTHORITIES

Jurisprudence **Paragraph(s)**

Jurisprudence ***(cont'd)***

Doctrine
