SCC File No.: 38594

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

BETWEEN:

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

APPLICANTS
(Respondents)

-and-

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

RESPONDENTS
(Appellants)

-and-

ERNST & YOUNG INC., IMF BENTHAM LIMITED, BENTHAM IMF CAPITAL LIMITED and SMT HAUTES TECHNOLOGIES

INTERVENERS
(Impleaded Parties)

(Style of cause continues next page)

RESPONSE OF CALLIDUS CAPTIAL CORPORATION TO APPLICATIONS FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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AND BETWEEN:

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BENTHAM IMF CAPTIAL LIMITED

APPLICANTS
(Impeaded Parties)

-and-

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

> *Who should decide whether to pursue the claim or accept a settlement- the debtor or the creditors? This is the bare bones issue in this case.*[1]

1. In keeping with established jurisprudence, the Quebec Court of Appeal ("**QCA**") determined that creditors are entitled to decide the best course of action to recover their claims. Thus, creditors should be allowed to decide between the lawsuit proposed by the debtors (the Applicants 9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.) and 9354-9178 Québec Inc. (formerly Bluberi Group Inc.) (the "**Debtors**")), and the settlement of that lawsuit through the plan of arrangement (the "**Plan**") sponsored by Callidus Capital Corporation ("**Callidus**").

2. The QCA provided a thorough and careful set of reasons in support of its unanimous decision to overturn the judgment of the Quebec Superior Court ("**QSC**")[2] and order that the Plan be put to a vote. The QCA concluded that the QSC decision was tainted with errors in its appreciation of the facts and, more significantly, with errors of law in the application of the *Companies' Creditors Arrangement Act* ("***CCAA***").

3. The arguments and questions submitted by the Debtors suggest that the very integrity of the insolvency process is at stake. In reality, the QCA's decision rectified a decision at first instance that broke sharply from a consistent body of jurisprudence that has confirmed:

   (a) What constitutes a plan of arrangement that must be submitted to creditors for voting purposes;

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[1] *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2019 QCCA 171 ["QCA Decision"], para. 19.

[2] *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc.*, 2018 QCCS 1040 ["QSC Decision"].

(b) That a creditor has the right to sponsor a plan of arrangement and the right to vote on that plan; and

(c) That it is entirely proper under the *CCAA* to seek releases through a plan of arrangement.

4. The Debtors and the Applicants, IMF Bentham Limited and Bentham IMF Capital Limited ("**Bentham**"), collectively ("**the Applicants**") in their respective applications fail to raise any questions of national or public importance.

5. This is all the more true considering the unique factual situation in this matter. Both the Debtors and Bentham submit broad questions that gloss over the very rare set of facts at the heart of this matter.

6. They attempt to divert attention away from the real issue in the case by posing the irrelevant question as to whether the court has jurisdiction to authorize litigation funding without a vote of the creditors. The real question is whether, in light of the facts of this particular case and the established jurisprudence, the proposed litigation funding agreement ("**LFA**") is a "plan of arrangement" that requires a vote by the creditors.

7. The Debtors are under *CCAA* protection and have no business operations. They are essentially empty shells. Their only remaining asset is a litigious claim against their secured creditor, Callidus. In this specific context, the Debtors seek to finance the litigation against Callidus on the backs of creditors, without first giving those creditors an opportunity to decide whether or not they wish to finance the litigation and despite the fact that Callidus is prepared to present the creditors with a viable alternative with immediate value.

8. Contrary to what is alleged by Bentham, the QCA decision does not "jeopardize the availability of litigation funding to impecunious plaintiffs".[3] It does, however, serve as a reminder that one cannot disregard the role played by creditors in *CCAA* proceedings.

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[3] Memorandum of Argument of the Applicants, IMF Bentham Limited and Bentham IMF Capital Limited, ["Bentham's Memorandum"], para. 4.

9. Contrary to the assertions of the Debtors, the QCA decision does not threaten to upset core principles of insolvency law. The case involves well established principles of insolvency law that were appropriately applied by the QCA to an unusual set of circumstances that is unlikely to recur in the context of litigation financed by a third party under the *CCAA*.

10. The Debtors refer at length in their memorandum to various arguments made by Callidus within the scope of its request for leave to appeal to the QCA. However, the issues of importance to the practice of insolvency raised by Callidus at the time are not the same issues upon which the Debtors and Bentham now base their requests for leave to appeal to this Court.

11. The QCA found that the QSC made significant errors of law, notably in denying Callidus the right to vote on the Plan it had proposed. Rather than applying clear legal principles established by various courts of appeal in Canada, the QSC focussed on Callidus' behaviour and the purpose it sought to achieve by filing the Plan and voting on it. However, the reasons why a creditor exercises its voting right should not be taken into consideration, except in extreme situations (i.e. *Laserworks*[4]) that have no relevance to this case. In addition, the purpose of Callidus is not "improper" as the Plan allows for a substantial recovery for the creditors, higher than what had been accepted by 92% of the creditors representing 60% of the value of the claims. This case is also unlike *Laserworks* where (i) rehabilitation of the debtor was being contemplated, contrary to this case, and (ii) the vote at stake was going against the majority of the creditors and led to the bankruptcy with likely no recovery for the creditors.

12. Moreover, the QCA found that the QSC committed an error of law in applying the reasons of the Ontario Court of Appeal in *Crystallex*[5] to refuse to submit the litigation funding agreement proposed by the Debtors and Bentham (the "**LFA**") to a vote by creditors, despite the fact that creditors in this case (as opposed to those in *Crystallex*) have a viable

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[4] *3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc.*, 1998 CanLII 2550 (NSCA) ["*Laserworks*"].

[5] *Crystallex (Re)*, 2012 ONCA 404.

alternative to the lawsuit and the LFA proposed by the Debtors, namely the Plan submitted by Callidus.

13. In so deciding, the QSC broke from the relevant case law on what constitutes a plan of arrangement and the right of a creditor to vote on a plan sponsored by it. It was this break from the established case law that raised issues of interest to the practice and hence the need for the QCA to grant leave and then to overturn the QSC decision.

14. The QCA decision merely rectified the situation and properly applied the existing case law to the particular set of facts at issue in this case. Further, the QCA decision also focussed on correcting errors made by the QSC in the fact-finding process.

15. No matters of public or national importance arise from the Applicants' challenges to the correct application of settled law or from the QCA's rectification of factual errors. As such, the Debtors' and Bentham's leave applications should be dismissed.

B. Statement of Facts

16. The relevant facts of this case are detailed in paragraphs 22 to 41 of the QCA decision and paragraphs 1 to 26 of the QSC decision.

17. Callidus further subscribes to the statement facts set out in the Memorandum of Argument of the Respondents, International Gaming Technology (IGT), Deloitte s.e.n.c.r.l., Luc Carignan, François Vigneault, Phillipe Milette, Francis Proulx et François Pelletier, who are all creditors of the Debtors and have formed a group (the "**Creditors' Group**").

18. That said, Callidus wishes to correct certain bold and misleading statements made by the Debtors in support to their leave application.

19. Firstly, the QCA did not hold "that the QSC could not take into account factors like appropriateness, good faith and broader public interest principles when deciding whether

to call a creditors' meeting."[6] To the contrary, the QCA recognized the existence of such principles but found that the QSC judge erred in concluding that Callidus sought to use the *CCAA* for an improper purpose by relying on one-sided affidavits and his own impressions, without engaging in a fact finding inquiry and without accounting for and acknowledging competing facts.[7]

20. Secondly, the creditors are not "bought out by Callidus".[8] This statement is false and is insulting to both Callidus and to the creditors. In fact, the creditors and the Creditors' Group preserved their freedom to vote, at all times, on the Plan and on any plan that may be submitted by the Debtors as they see fit.[9]

21. Moreover, given the highly litigious nature of their claim against Callidus, the Debtors cannot genuinely allege that Callidus is attempting to purchase a release from the proposed lawsuit "for a little over 1% of the value of the claim"[10], when that value could very well be nil. The QCA rightfully noted the important differences between the Debtors' and Callidus' positions as to the merits of the litigation.[11]

PART II – STATEMENT OF QUESTIONS IN ISSUE

22. The Debtors submit that the case raises four (4) questions that they purport to be of public importance:

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[6] Memorandum of Argument of the Applicants, 9354-9186 Québec Inc. (formerly Bluberi Gaming Technologies Inc.) and 9354-9178 Québec Inc. (formerly Bluberi Group Inc.) ["Debtors' Memorandum"], para.8.

[7] QCA Decision, para. 66-69.

[8] Debtors' Memorandum, para.7.

[9] Motion for an order for the convening, holding and conduct of a creditors' meeting and extension of the stay period, September 18, 2017, para. 4 [Tab 2A]; Letter of the Creditors' Group' counsel to Callidus' counsel, February 10, 2018, para. 9 [Tab 2B]; and Motion for an order for the convening, holding and conduct of a creditors' meeting and extension of the stay period, February 12, 2018 [Tab 2C].

[10] Debtors' Memorandum, para. 4.

[11] QCA Decision, para. 96.

a. Can a creditor vote on a *CCAA* plan it sponsors?

b. Can a creditor who sponsors a *CCAA* plan vote in the same class as the other creditors?

c. Does a *CCAA* court have jurisdiction to prevent a creditor from voting on a plan, and, if so, in what circumstances?

d. Does a *CCAA* court have jurisdiction to authorize litigation funding without a vote of the creditors?

23. In addition, Bentham submits three (3) questions that it purports to be of public importance:

a. In the context of proceedings under the *CCAA*, can litigation financing be approved as interim financing 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 QCA?

24. Callidus submits that, although phrased somewhat differently, several questions submitted by the Debtors and Bentham are the same. In fact, the proposed appeal raises the following questions, none of which are of public importance:

1) Is Callidus entitled to vote on the plan it sponsors in the same class as the other creditors?

2) Is the LFA an arrangement under the *CCAA* that requires a vote of the creditors of the Debtors?

3) Does the QCA's comment in *obiter* that the LFA is "akin to an equity investment" give rise to an issue of public importance justifying an appeal to this Court?

25. To avoid unnecessary repetition, Callidus and the Creditors' Group have elected to divide the above questions amongst themselves such that Question 1 will be addressed by Callidus herein and Questions 2 and 3 will be addressed in the memorandum of argument of the Creditors' Group. Callidus adopts the arguments made by the Creditors' Group with respect to Questions 2 and 3.

PART III – STATEMENT OF ARGUMENT

1) Callidus' Right to Vote on the Plan It Sponsors in the Same Class as the Other Creditors of the Debtors

A. Callidus' right to vote

26. The Debtors suggest that the question as to whether or not a creditor can vote on the plan it sponsors is a novel one deserving the attention of this Court.

27. They argue that the *CCAA* is skeletal in nature and that courts must use their inherent jurisdiction to prevent a creditor from voting on a plan it sponsors.[12]

28. However, this is not a novel issue. Courts in Canada have already tackled this issue and have determined that a creditor *is* entitled to vote on a plan it sponsors. While being "skeletal" (to use the word of the Applicants), the *CCAA* does include provisions pertaining to which party is not entitled to vote, and there are no provisions in the *CCAA* that preclude a creditor from voting on a plan it sponsors or from renouncing its security in order to vote as an unsecured creditor.

[12] Debtors' Memorandum, para.32.

29. The leading decision on this point is *Canadian Airlines*[13], in which the Court of Queen's Bench of Alberta allowed Air Canada, which had acquired a certain number of claims, to vote those claims in favour of a plan it had sponsored.

30. In particular, the Court stated:

> [98] The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive. […]
>
> [104] if the Plan is approved, Air Canada stands to profit in its operation. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada. (emphasis added)

31. In Québec, the QCA in *Meublerie André Viger inc. c. Wener*[14] recognized the right of a creditor, Groupe Cantrex inc., ("**Cantrex**"), to vote against a proposal filed by the debtor company under the *Bankruptcy and insolvency Act* ("***BIA***") which intended to pursue a claim in damages against Cantrex. The QCA determined that Cantrex, despite being a defendant to the claim in damages, was entitled to vote against the debtor's proposal. It is noteworthy that in that case, unlike this case, Cantrex did not offer any alternative of recovery to the debtor's creditors.

32. The QCA came to the same conclusion in the matter of *Bédard Louis inc. c. Teac Canada Ltd.*[15], in which it again recognized the right of a creditor, subject to a litigious claim by the debtor company, to vote against a proposal filed by a debtor company under the *BIA* in order to defeat it.

33. As stated in the QCA decision, "This Court long ago decided that voting rights should not be excluded on supposed "equitable grounds". Each creditor is entitled to vote unless the

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[13] *Canadian Airlines Corp. (Re),* 2000, ABQB 442 (CanLII) ["*Canadian Airlines*"].

[14] *Meublerie André Viger inc. c. Groupe Cantrex inc.*, 1992 CanLII 2899 (QCCA) ["*Meublerie*"].

[15] *Bédard Louis inc. c. Teac Canada Ltd.,* 1991 CanLII 3533 (QCCA) ["*Bédard*"].

law specifically precludes such right. Even when the debtor is suing the creditor, such fact is not justification to exclude such creditor from a vote." [16]

34. Therefore, contrary to what is alleged by the Debtors, there is no "blind spot" in the insolvency law with respect to the right of a creditor to vote on a plan it sponsors, even when the intended purpose of such creditor is to avoid or, in the case at bar, to settle a litigious claim against it.

35. As stated in the QCA decision, "I am well aware that operating under the *CCAA* regime may open the door to the exercise of greater judicial discretion, but there is no reasonable basis in law for the judge's exercise of discretion to exclude the Callidus vote because it is seeking a release from the debtors' proposed lawsuit for alleged damages arising from the parties' commercial dealings." [17]

36. As stated by this Court in *Sun Indalex Finance*, the "courts should not use equity to do what they wish Parliament had done through legislation". [18]

37. There is also no merit to Bentham's suggestion that Callidus should not be allowed to renounce its security. To the contrary, section 127(2) of the *BIA* clearly provides for the right of a secured creditor to renounce its security and to prove its claim as an unsecured creditor. As stated by this Court in *Century Services*[19], the *CCAA* should be interpreted in harmony with the principles set out in the *BIA*.

38. The Debtors further argue that "The creditors should be allowed to judge whether the plan that is presented to them is in their best interest, without having their votes diluted by interference from the sponsor of the plan, who pursues an interest fundamentally distinct

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[16] QCA Decision, para. 68; *Meublerie*, para. 39-40; *Bédard*, para. 10.

[17] QCA Decision, para. 68.

[18] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 SCR 271, para. 82, 2013 SCC 6 (CanLII).

[19] *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 SCR 379, 2010 SCC 60 (CanLII) ["*Century Services*"]. See also *Altra Marine Product Inc., Re* 2001 CanLII 25261 (QCCS), par. 23.

from theirs". [20] This argument clearly disregards the threshold set by section 6(1) of the *CCAA*, namely a majority of creditors and two thirds (2/3) in value of voting claims, for the approval of a plan of arrangement by creditors. It also relies on the false premise that plan sponsors must forfeit their claims as creditors.

39. The purpose of section 6(1) of the *CCAA* is precisely to prevent a single creditor from dictating the result of a vote on a plan of arrangement. What effect the vote of the plan sponsor (who is also a creditor) will have clearly depends on the number of creditors and the overall value of all of the voting claims. Each case is different and must be analysed on an individual basis at the time of the plan sanction hearing.

40. The Debtors cannot simply assume that the interests of the plan sponsor are always fundamentally distinct from those of the other creditors. In fact, in the case at bar, the creditors' meeting held with respect to the plan of arrangement initially sponsored by Callidus demonstrated that 92 creditors out of 100 creditors voted in favour of the plan of arrangement and thus seemingly had interests that were aligned with those of Callidus.

41. The Debtors further argue that Callidus is a party related to the Debtors within the meaning of section 22(3) of the *CCAA*, which would preclude it from voting on the Plan.

42. This argument was dismissed by both the QSC and the QCA.

43. The QSC rightfully dismissed the argument and did not consider that Callidus is related to the Debtors within the meaning of section 22(3) of the *CCAA*. The QSC concluded that a creditor should be entitled to vote as it pleases and that section 22(3) of the *CCAA* is not intended to preclude a creditor from voting on a plan sponsored by it or anyone else.[21] The QCA agreed and rightfully concluded that there is no validity to such argument and that the term "related person" defined in section 4 of the *BIA* (to which section 2 of the *CCAA* refers) states that voting control is required.

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[20] Debtors' Memorandum, para.30.

[21] QSC Decision, para. 32 and 55.

44. The Debtors contend that the pledge of their shares in favour of Callidus in order to secure their obligations under the loan meets the test in section 4(3)(c) of the *BIA*.[22] Ironically, the Debtors have consistently maintained that the pledge of the shares in favour of Callidus did not transfer voting control to Callidus.

45. As noted by the QCA, "Callidus later contended that voting control was nevertheless wrested from M. Duhamel or his family trust by the effect of the charging provisions in the deeds of hypothec and the defaults of the Respondents. However, that contention was dismissed, without appeal, by Justice Michaud in a judgment of November 8, 2015. Indeed, throughout the process up to the instant application before the Superior Court, Mr. Duhamel continued to act as the Respondents' director." [23]

46. Callidus holds no shares or voting rights over any shares of either Debtor. As stated by this Court in *Century Services*[24] and as reiterated by a number of courts across the country following that decision, proceedings under the *CCAA* should be harmonized with the principles established under the *BIA*. There is no controversy on this point; the "related person" test is the same under the *BIA* and the *CCAA*. The non-application of section 22(3) of the *CCAA* to this case is therefore not an issue of national interest.

B. Test on classification of creditors

47. The Debtors suggest that a broader interpretation of the commonality of interests test set by section 22(2) of the *CCAA* should be applied to this case in order to preclude Callidus from voting in a single class of creditors. Whereas the test set out in the *CCAA* (and in previous jurisprudence) provides for a commonality of interests in respect of claims, the Debtors suggest that the test should be broadened to divide creditors into classes based on what they may derive from a plan of arrangement.

48. This argument seeks to rewrite section 22(2) of the *CCAA* and is intended to give SMT Hautes Technologies ("**SMT**") a veto right to ensure the failure of the Plan. SMT is the

[22] Debtors' Memorandum, para. 36-37.
[23] QCA decision, para. 55.
[24] *Century Services*

creditor with the largest claim in value. It voted against the plan previously sponsored by Callidus and announced before the QSC that it would again vote against the Plan.

49. The QCA applied the existing and non-controversial jurisprudence in Canada in respect of the classification of creditors and refused to force Callidus to exercise its voting rights in a separate and distinct class of ordinary creditors.[25]

50. Based on such jurisprudence, it is well established that commonality of interests should be viewed as a non-fragmentation test. The objective is to group unsecured creditors, holding claims similar in nature, rank and with respect to the remedies available to them, not to divide them into separate classes. The commonality of interests between creditors is to be viewed bearing in mind the objectives of the *CCAA* and that courts should resist classification approaches that would jeopardize viable plans. Absent bad faith, the motivation of the creditors to vote in favour or against a plan is not relevant.[26]

51. In *Resurgence,* the Court of Appeal of Alberta confirmed the decision of the Alberta Court of Queen's Bench to allow Air Canada to vote in the same class as the other unsecured creditors. The opposing creditor argued that because Air Canada had other interests in the outcome of the Plan, it should be excluded from voting as an unsegregated unsecured creditor. Based on a thorough review of the applicable case law, both the court of first instance and the Court of Appeal of Alberta dismissed this argument.[27]

52. Moreover, in *Sido,* Justice Marie-France Bich of the QCA also refused the broader interpretation of the commonality of interest test proposed the debtor's minority shareholder (who held a litigious claim against the plan sponsor) in order to segregate

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[25] QCA Decision, para. 73 and 74. *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 ABCA 149 ["*Resurgence*"]; *Canadian Airlines,* para 103 and 104; *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relative à),* 2010 QCCA 403, para. 29 and 30 ["*Sido*"].

[26] L.W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act,* (Toronto: Carswell, 2018), para N149-150.

[27] *Resurgence,* para. 31, 32, 36, 38-39.

unsecured creditors into separate classes on the basis of what such creditors may derive from the plan of arrangement.[28]

53. Consequently, with respect to their argument of commonality of interests, the Debtors appear to reargue their point on Callidus' right to vote. They cite a case from New Zealand[29] to highlight that "directors and shareholders", because of their interest in the debtor company, can have interests that differ from those of other creditors. In Canada, the status of directors and shareholders is set out in the legislation, which expressly states that a related party may vote against, but not for, a plan of arrangement: " A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company." [30]

C. The Court's power to prevent an improper purpose

54. Callidus has always been clear that its sole purpose in proposing the Plan is to settle the lawsuit against it. The QCA decision underlined that it was far from clear that creditors will not ultimately be better off with the Callidus settlement than with the financed litigation option.[31]

55. The QCA further noted that the settlement proposed by Callidus by way of the Plan offers full payment to employees and creditors with small claims while proposing payment between 35% to 39% to the creditors with larger claims. [32]

56. Following substantial reference to established case law[33], the QCA concluded that obtaining releases through a plan of arrangement, even for third parties and plan sponsors,

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[28] *Sido*, para. 29 and 30.

[29] Debtors' Memorandum, para. 45.

[30] Section 22(3) of the *CCAA.*

[31] QCA Decision, para. 62.

[32] QCA Decision, para. 63.

[33] *Century Services*, para. 62; *Montréal, Maine & Atlantique Canada Cie (Montréal, Maine & Atlantic Canada Co. (MMA)) (RE)*, 2014 QCCS 737 (CanLII); *Dans l'affaire de l'arrangement de Montréal, Maine & Atlantic City Canada Co./(Montréal, Maine & Atlantique Canada Cie) (Arrangement relatif à)*, 2015 QCCS 3235 (CanLII); *Canadian Red Cross Society / Société canadienne de la Croix-Rouge, Re*, 2000 CanLII 22488 (ON SC); *Metcalfe& Mansfield*

is not improper and has been recognized as an integral part of the *CCAA* arrangement landscape.[34]

57. Furthermore, the Debtors' argument clearly contradicts the existing jurisprudence on creditors' voting rights. That jurisprudence is consistent in holding that the reasons or motivations for which creditors exercise their voting rights should not be taken into consideration, except to the extent that such rights have been expressly limited by legislation[35] and in extreme situations.

58. An example of an extreme situation where the motivation of the creditor was relevant is the case of *Laserworks*[36], upon which the QSC relied to deny Callidus' right to vote on the Plan.

59. The QCA rightly distinguished *Laserworks* from the case at bar as the facts are so completely different that one cannot draw a reasonable comparison or analogy. The clear purpose of Callidus in proposing and voting on the Plan is to settle the lawsuit against it, not to put a competitor out of business, as was the case in *Laserworks*.[37]

60. The QCA did not overturn *Laserworks*, as suggested by the Debtors. Rather, it found that "Even if *Laserworks* is correctly decided as a matter of law and the discretion to preclude a creditor from voting exists despite the absence of statutory language, its application should be reserved for the clearest cases". [38]

61. Moreover, the QCA decision refers to the case of *Blackburn Developments*[39] where the British Columbia Supreme Court refused to disallow the vote of a "vulture fund" which

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Alternative Investments II Corp., (Re), 2008 ONCA 587 (CanLII) [*Metcalfe*]; *Charles-Auguste Fortier inc. (Arrangement relatif à)*, 2008 QCCS 5388 (CanLII); *Muscletech Research and Development Inc., (Re)*, 2006 CanLII 34344; *Sino-Forest Corporation (Re)*, 2012 ONSC 7050 (CanLII); *Sido*.

[34] QCA Decision, para. 64.

[35] *Meublerie*, para. 39-40; *Bédard*, para. 9.

[36] *Laserworks*.

[37] QCA Decision, para. 61.

[38] QCA Decision, para. 62.

[39] *Blackburn Developments Ltd., (Re)*, 2011 BCSC 1671 ["*Blackburn*"].

had purchased a controlling block of claims from voting to defeat a plan of arrangement with a view to the debtor's liquidation based on the principles stated in *Laserworks*, adding further that "such a result would only be appropriate in the clearest of cases". [40]

62. On this issue, the Debtors further attempt to challenge the legality and fairness of the releases sought by Callidus through the Plan. In doing so, the Debtors are confusing two important milestones leading to the implementation of a plan of arrangement under the *CCAA*: the first being the vote of the creditors on the plan and the second being the sanction hearing before the *CCAA* court.

63. The *CCAA* is clear that, despite a vote of the required majority of creditors in favour of a plan, the fairness and the appropriateness of such plan will be scrutinized by the *CCAA* court at the sanction hearing.

2) The LFA is an Arrangement Under the *CCAA* and Must be Submitted to the Vote of the Creditors of the Debtors

64. As noted above, Callidus adopts the arguments made by the Creditors' Group in its memorandum with respect to this question. That said, it wishes to highlight the following.

65. As noted in the QCA decision, the QSC initially recognized that the financed litigation option proposed by the Debtors was a plan of arrangement within the meaning of section 4 of the *CCAA*. Thus, it should be submitted to creditors for a vote.

66. The QSC ordered the Debtors to file a plan of arrangement and established the applicable parameters. The Debtors filed a plan of arrangement in order to seek the vote of their creditors on the prosecution of the lawsuit, the LFA and the super-priority charge, only to withdraw that plan prior to a vote.

67. The QSC, relying upon the decision of the Court of Appeal of Ontario in *Crystallex*, dismissed Callidus' request for the convening, conduct and holding of a creditors' meeting.

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[40] *Blackburn*, para. 62.

68. The QCA disagreed with the QSC and rightfully distinguished *Crystallex* from the case at bar. In *Crystallex*, the only way for the creditors to receive a substantial recovery of their claim was through litigation[41], whereas, in the case at bar, the Plan provides for an immediate and significant distribution to creditors. In other words, in *Crystallex*, no creditor (or any other party) had submitted a plan of arrangement as a viable alternative to the litigation option proposed by Crystallex for which the financing was required.

69. In addition, the QCA found that the QSC erred in relying on *Crystallex* without taking into consideration the fact that, in *Crystallex*, the prior charge granted to the interim lender over the rights of unsecured creditors was limited to the amounts it actually advanced, plus interest. All other amounts that the lender could recover from the litigation proceeds were subject to the full repayment of all the pre-filing unsecured claims.[42]

70. In the case at bar, to approve the LFA and the creation of a $20 million litigation financing charge without consulting with creditors and without seeking their vote runs counter to the very essence of sections 4 and 5 of the *CCAA*.

71. The fact that the QCA corrected an error by the QSC in the application of *Cystallex* to the facts in this particular case does not create an issue of public importance. It is merely an issue of error correction.

72. Because of the particular circumstances of the case at bar, both the decision of the Ontario Court of Appeal in *Crystallex* and the QCA decision can very well coexist.

3) The QCA's Comment in *Obiter* that the LFA is "akin to an equity investment" does not Give Rise to an Issue of Public Importance Justifying an Appeal to this Court

73. As noted above, Callidus adopts the arguments made by the Creditors' Group in its memorandum with respect to this question. Bentham appears to be using an *obiter*

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[41] QCA Decision, para. 82.

[42] *Re Crystallex International Corporation*, 2012 ONSC 2125, par. 23; *CCAA* Financing Order (April 16, 2012) Toronto, CV-11-9532-00CL (Ont. S.C.J.), paras. 13 and 17.

comment by the QCA in an attempt to formulate a question that it believes might be of interest to this Court.

74. Further, this question is irrelevant to the case at bar given the $20 million litigation financing charge in favour of Bentham under the LFA, which would negate any subordination. As such, this question is of no importance even to this case, let alone to the country.

PART IV – SUBMISSION ON COSTS

75. Callidus seeks costs against the Applicants.

PART V – ORDER SOUGHT

76. The Respondent Callidus requests an Order dismissing both the application for leave to appeal filed by the Debtors and the application for leave to appeal filed by Bentham, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at City of Montréal, Province of Québec this 29th day of May, 2019.

Per: Geneviève Cloutier as Agent
Geneviève Cloutier
Clifton P. Prophet

Counsel for the Respondent Callidus Capital Corporation

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