File No. 38594

SUPREME COURT OF CANADA

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

BETWEEN:

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

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

FRANÇOIS PELLETIER

RESPONDENTS
(Appellants)

- and -

ERNST & YOUNG INC.

IMF BENTHAM LIMITED

BENTHAM IMF CAPITAL LIMITED

INTERVENERS
(Impleaded Parties)

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RESPONSE OF THE INTERVENER ERNST & YOUNG INC.

(Rule 27 of the *Rules of the Supreme Court of Canada*)

AND 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.
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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)

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INTERVENANT'S FACTUM

INTRODUCTION

1. The *Companies' Creditors Arrangement Act* (the "**CCAA**") governs the court-supervised process in which companies in financial distress can explore strategies to reach a compromise with their creditors, resulting in orders made by a supervisory judge that require a careful balancing of interests. As a result, there is a general reluctance by appellate courts to intervene in decisions made by supervising judges in CCAA matters.

2. Moreover, the CCAA favours an expeditious process, with interested parties rarely having the time or the resources to raise contentious areas of law to the appellate level.

3. It is no coincidence therefore that since 1933, the year in which the CCAA was implemented, the Supreme Court of Canada (the "**Court**") has rendered decisions relating to the CCAA on only 13 occasions. Of these cases, the Court has ruled almost exclusively on CCAA questions of priority, never having had the opportunity to pronounce itself on the substantive issues raised by this case, which are not only novel but of utmost importance to the Canadian insolvency practice, as confirmed by the Quebec Court of Appeal (the "**QCA**") in its substantive judgment[1] (the "**QCA decision**") and more recently, in the QCA judgment staying execution of the QCA decision.[2]

4. Ernst and Young Inc. ("**EY**" or the "**Monitor**"), a licensed insolvency trustee acting as the court-appointed monitor of Bluberi Gaming Technologies Inc. (now 9354-9186 Quebec Inc.) and Bluberi Group Inc. (now 9354-9178 Quebec Inc.) (collectively, the "**Debtors**") supports the applications for leave to appeal filed by the Debtors and IMF Bentham Limited ("**Bentham**", collectively with the Debtors, the "**Applicants**") and believes that lower courts and insolvency professionals will benefit from this Court's guidance on the issues raised by the QCA decision.

PART I – STATEMENT OF FACTS

5. The Monitor adheres to the statement of facts outlined in the Applicants' factums and wishes to add that the restructuring and liquidation of the Debtors are effectively complete, save for the realization of the Debtors' claim against Callidus Capital Corporation ("Callidus"), and that accordingly, any delays caused by this appeal have little to no effect on the various stakeholders.

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1 *Callidus Capital Corporation c. 9354-9186 Québec inc*., 2018 QCCA 632, at para. 4.

2 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)*, 2019 QCCA 766, at para. 8.

6. Moreover, the Monitor wishes to clarify one important factual error in the QCA decision. The QCA concluded that the Quebec Superior Court (the "**QSC**") had made a "juridical about face" and a "manifest error of fact and a non-judicious exercise of [its] discretion" when it approved the litigation funding agreement ("**LFA**") between the Debtors and Bentham as interim financing since it had previously ordered that the Debtors submit a similar scheme to the creditors as a part of a plan of arrangement (QCA decision, para. 78).

7. The QSC rendered no such order. Instead, on October 5, 2017[3], the QSC issued an order establishing a procedure that was to be followed, regarding the sharing of costs, in the event both Callidus and the Debtors decided to submit a plan of arrangement to a vote of the Debtors' creditors. The QSC, never ordered, nor even suggested, that the LFA was a plan of arrangement that must be submitted to a vote of the creditors, and accordingly, the first and only time that a litigation financing agreement was deemed to be a plan of arrangement is in the QCA decision.

PART II – QUESTIONS IN ISSUE

8. The QCA decision raises, *inter alia*, the following issues of national importance:

i. Can a creditor both sponsor and vote on its CCAA plan?

ii. If so, can this creditor vote in the same class as the other creditors?

iii. Does a CCAA court possess the judicial discretion to prevent a creditor from voting on a plan?

iv. Does a litigation funding agreement constitute a plan of arrangement that should be submitted to a vote of the creditors?

9. These issues are already addressed and raised in detail in the Applicants' factums, and while the Monitor does not intend to repeat these same arguments, it does wish to address certain of these issues from the perspective of the Monitor in its capacity as a court officer who may be called upon to participate in future CCAA matters.

PART III – STATEMENT OF ARGUMENT

I. THE RIGHT TO VOTE ON A CCAA PLAN

10. The Monitor agrees with the Appellants' submissions on who is permitted to vote on a CCAA plan pursuant to section 22(3) of the CCAA and wishes to add that from the Monitor's

[3] *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.)* (October 5, 2017), Montreal 500-11-049737-154 (S.C.).

perspective, allowing Callidus to vote on its own plan of arrangement would violate, if not the letter, at least the spirit of section 22(3) of the CCAA, pursuant to which a creditor who is related to the company, whether by control or financial ties, may vote against, but not for, a compromise or arrangement relating to the company.

11. The QCA held that Callidus would be a related person had it acquired the voting rights attached to the shares of the Debtors (QCA decision, para. 54). The Monitor submits that what matters in establishing whether a party is "related" is not whether the party exercised the right to vote the shares in fact, but rather, whether the party had the right to do so. In the case at hand, Callidus had such a right by virtue of the security package granted to it by the Debtors, which includes, in certain circumstances, the right for Callidus to exercise the voting rights and powers as the holder of the shares of the operating company that have been pledged and delivered to Callidus,[4] thereby making it a related party.

II. CLASSIFICATION OF CREDITORS

12. The Monitor adheres to the Applicants' arguments and agrees that Callidus should vote in a distinct class, since its recovery, in the form of the release from an estimated $200-million claim differs significantly from the recovery of the remaining unsecured creditors.

III. THE DISCRETION TO PREVENT VOTING FOR AN IMPROPER PURPOSE

13. The Nova Scotia Court of Appeal has already confirmed that in the context of a proposal under the *Bankruptcy and Insolvency Act* ("**BIA**") a registrar or court has the discretion to disallow a vote of a creditor who has voted its claim for an improper purpose.[5]

14. The QCA distinguishes *Laserworks* on the premise that a judge can exercise more discretion in the context of the BIA, since defeating a CCAA plan has less dire results than a proposal. This reasoning, that an improper purpose can be tolerated if the result is not bankruptcy, finds no support in the BIA, the CCAA or the case law. Yet, the QCA decision goes further by effectively overturning *Laserworks*: "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 of cases" (QCA decision, para. 62). In doing so, the

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4 *Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc. (Arrangement relatif à)*, 2015 QCCS 5373, para. 7.

5 *3004876 Nova Scotia Ltd v. Laserworks Computer Services Inc.*, 1998 CanLII 2550 (NS CA).

QCA suggests that the Court of Appeal of Nova Scotia was incorrect in *Laserworks* and takes the first steps in judicially limiting, if not practically eliminating, any such discretion to prevent a creditor from voting on a BIA proposal or a CCAA plan. From the perspective of the Monitor, the result is an ambiguous landscape, where it is uncertain when and if judges are effectively permitted to exercise their discretion in the face of a potentially improper purpose.

IV. LITIGATION FINANCING AS A PLAN OF ARRANGEMENT

15. Litigation funding is becoming more common and will continue to arise in insolvency cases. EY is presently acting as court-appointed monitor in three insolvency cases in which litigation financing has been considered in Canada: *Bluberi* (Quebec), *Strateco* (Quebec)[6] and *Crystallex* (Ontario)[7].

16. The QCA decision is the first case in Canada that requires a debtor to submit a financing agreement for approval by the creditors through a plan of arrangement, and is in direct contrast with the Ontario Court of Appeal decision in *Crystallex*, which was followed in Strateco and confirmed that a financing agreement does not equate to a plan of arrangement, and accordingly, does not require creditor approval through a vote thereon.[8]

17. The QCA determined that *Crystallex* held no "precedential value" since the facts differed from the case at hand primarily because in *Crystallex*, the parties all agreed that arbitration should be pursued and accordingly, the only "competing interest" was "between the debtor (together with the DIP lender) and the noteholders as to who would finance litigation" (QCA decision, para. 82). Conversely, in *Bluberi*, there were "two possible and competing sources of recovery – i.e. litigation or the offer of settlement of that litigation by Callidus, the secured creditor and potential defendant in the litigation" (QCA decision, para. 82).

18. Factually, however, there were competing interests in both cases, with the only source of recovery being a litigious claim, making it from a practical perspective, almost impossible for a monitor or debtor to determine whether a particular set of facts or "competing interests" means that a party should follow the decision in *Crystallex* vs. *Bluberi*. This blurred reasoning will likely

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6 *Strateco Resources Inc./Ressources Strateco inc. (Arrangement relative à)* (October 23, 2015), Montreal 500-11-048908-152, (S.C.), J. Danielle Turcotte.

7 *Crystallex (Re)*, 2012 ONCA 404.

8 *Ibid.*, para. 93.

result in forum shopping, since a party will have to choose between submitting its litigation financing to a vote of its creditors in Quebec, versus obtaining the less costly and more efficient approval from a court in Ontario.

19. Moreover, the QCA decision creates new law, at least in Quebec, by expanding the definition of an arrangement from a "compromise of rights" to including the "process undertaken to satisfy" the creditors' claims (QCA decision, para. 85).

20. The implications of finding that an arrangement includes not only a compromise, but the process taken to obtain this compromise, are potentially far-reaching. Throughout a CCAA process, a debtor, working alongside its advisors, will take multiple actions with the goal of eventually compromising the debts of its creditors, including, for example, obtaining interim financing or implementing a going concern liquidation. According to the reasoning in the QCA decision, these everyday tactical decisions would be subject to creditor approval. The message is a chilling one reminiscent of the highly rules-based lending environment in the United States, which runs contrary to the favoured Canadian approach of judicial discretion, flexibility and innovation.

PART IV – SUBMISSIONS CONCERNING COST

21. None.

PART V – ORDER SOUGHT

22. The Monitor requests that this Court grant the Applications for leave to appeal from the decision of the QCA rendered on February 4, 2019.

Montréal, May 28, 2019

Jean Fontaine

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M[e] Joseph Reynaud
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Stikeman Elliott LLP
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Ernst & Young Inc.

PART VI –TABLE OF AUTHORITIES
