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.)

APPELLANTS
(Respondents)

- and -

CALLIDUS CAPITAL CORPORATION

INTERNATIONAL GAME TECHNOLOGY

DELOITTE S.E.N.C.R.L.

LUC CARIGNAN

FRANÇOIS VIGNEAULT

PHILIPPE MILLETTE

FRANCIS PROULX

FRANÇOIS PELLETIER

RESPONDENTS
(Appellants)

(Style of cause continues next page)

AMENDED APPELLANTS' FACTUM

(Rules 35 and 38 of the *Rules of the Supreme Court of Canada*)

- and -

ERNST & YOUNG INC.

IMF BENTHAM LIMITED

BENTHAM IMF CAPITAL LIMITED

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INTRODUCTION

1. This appeal raises a simple question: should a creditor be allowed to use the court-supervised process under the *Companies' Creditors' Arrangement Act*, R.S.C., 1985, c. C-36 ("***CCAA***") to stifle access to justice and escape accountability for its alleged unlawful actions? Should a creditor, through a course of conduct found to lack transparency, to be dilatory and to seek the financial exhaustion of its debtor's shareholder[1], be authorized to present, sponsor and vote on a plan of arrangement whose *sole* purpose[2] is to prevent its debtor from calling it to account for abusive lending practices which caused them to require *CCAA* protection in the first place? The answer should be no.

2. The facts are straightforward. The Respondent Callidus Capital Corporation ("**Callidus**") was the main secured creditor of the Appellants (or "**Debtors**" or "**Bluberi**"). Callidus initially presented itself as the perfect partner to help the Debtors with their business. According to the latter, Callidus's true intentions lay elsewhere: it intended to use its position to drive the Debtors to insolvency in order to acquire their assets at a discount – a classic "loan to own" strategy. This alleged conduct is at the root of the Debtors' $228 million claim against Callidus (the "**Retained Claims**").

3. By the time the Debtors realized what Callidus was doing, their business was faltering. They had to seek *CCAA* protection to reorganize and to pursue the Retained Claims against Callidus. The QSC found that Callidus's only motivation throughout the proceedings was to prevent the Retained Claims from being heard.[3]

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1 Judgment of the Superior Court ("**QSC**"), 2018 QCCS 1040 (the "**QSC decision**"), at paras. 39-42, **Appellants' Record 9354-9186 Québec inc. and 9354-9178 Québec inc. (hereinafter "A.R."), vol. 1, pp. 11-12.**

2 Judgment of the Court of Appeal ("**QCA**"), 2019 QCCA 171 (the "**QCA decision**"), at para. 63: "The clear and transparent purpose of Callidus in proposing the plan is to obtain a release from the Respondents' claim against it, or, in other words, to settle the threatened lawsuit.", **A.R., vol. 1, p. 44.**

3 QSC decision, at paras. 39 and ff, **A.R., vol. 1, pp. 11 and ff.**

4. In the course of the *CCAA* process, Callidus eventually bought the Debtors' assets through a reduction of its secured debt, except for a portion of $3 million. The Debtors consented to this, on the condition that Callidus allowed the Debtors to retain one asset: the Retained Claims against Callidus. Callidus agreed.

5. However, once the Debtors took steps to get the financing needed to actually pursue that claim, Callidus reneged. It hatched a plan of arrangement that would use the *CCAA* process to get rid of the Retained Claims.

6. Under its plan, Callidus proposed to pay Bluberi's unsecured creditors less than $3 million. The *quid pro quo*? A release from the Retained Claims. That is, Callidus wanted to buy itself a release "from creditors who have no interest in the awarding of such releases"[4] for 1.3% of value of the Retained Claims. The QSC expressed reservations, but ultimately allowed Callidus to put its plan to a vote "with the understanding that, as a secured creditor, Callidus would not cast a vote" (QSC decision, at para. 45). The Debtors' creditors rejected it.

7. Callidus did not come undone. It asked the QSC for a second try – this time, with the intention to vote its $3 million secured debt as an unsecured claim with the Debtors' unsecured creditors, thus ensuring that it would overrule the concerns already expressed by the creditors and guaranteeing the plan's success. To boot, Callidus would now, under this second plan, pay the legal fees of the creditors who supported its plan (the "**Respondents Creditors Group**").

8. The QSC refused. It held that "Callidus' behavior was contrary to the "requirements of appropriateness, good faith, and due diligence" and that to allow it to put its thumb on the scale in favour of its own release would be to sanction "an improper purpose" and "amount to a substantial injustice." (QSC decision, at paras. 48 and 56). Rather, the QSC held that the Debtors, who had secured the necessary financial support to bring a lawsuit, should have their day in Court.

[4] QSC decision, at para. 44, **A.R., vol. 1, p. 12.**

9. The QCA disagreed with the supervisory judge. It held that the QSC *did not have the jurisdiction* to prevent Callidus from presenting and voting on a plan of arrangement "whose clear and transparent purpose" (QCA decision, at para. 63) was to allow Callidus to dodge any prospect of accountability for its alleged role in the Debtors' demise. By allowing the appeal, the QCA effectively removed the court's ability to intervene when its process is used to promote lawlessness in the commercial realm. The net result: rather than a court of law, it is an assembly of creditors bought out by Callidus that effectively decides the merits of the Debtors' Retained Claims against it, with Callidus holding the swing vote on this second try. "[T]he rule of law is replaced by a rule of [creditors] who decide who shall and who shall not have access to justice".[5]

10. The QCA decision is wrong. The QSC did have jurisdiction to dismiss Callidus's application. There were a number of reasons, all sufficient in and of themselves, to dismiss Callidus's application to present its second plan to an assembly of creditors.

11. First, the QSC was correct to hold that Callidus could not vote with the other creditors, and thus, that its attempt at a second kick at the can was doomed:

(a) a party related to a debtor *cannot* vote in favour of a plan of arrangement (s. 22(3) *CCAA*). Here, the Debtors' voting shares had been pledged to Callidus. Callidus could thus, upon the occurrence of an event of default, control the voting rights in the Debtors. Under the *CCAA* and the *Bankruptcy and Insolvency* Act, R.S.C., 1985, c. B-3 ("***BIA***") (ss. 22(3) *CCAA* and 4(3) *BIA)*, this clearly makes Callidus a party related to the Debtors and prevents it from voting in favour of its own plan;

(b) in any case, a creditor should generally be prohibited from voting in favour of its own plan, whether it is related to the debtor or not. It is self-evident that the creditor who presents and sponsors a plan does not want a payment from itself. It pursues an interest that differs from that of the other creditors, who seek to maximize their

5 *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230 ("***B.C.G.E.U.***"), cited in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, at para. 38; *Hryniak v. Mauldin*, 2014 SCC 7, at para. 1.

recovery. If such a creditor were allowed to vote, it would do so to further its interest *qua* sponsor, not its interest *qua* creditor. This would drown the vote of the creditors and distort their will. This is inconsistent with the *CCAA*'s structure, which protects the integrity of the vote;

(c) even if Callidus were allowed to vote on its own plan, it could not be allowed to vote in the same class as the other creditors. In order to vote in the same class, creditors must share a "commonality of interests". Callidus and the unsecured creditors have *no interest* in common because, *inter alia*, the plan treats them differently: unsecured creditors are looking for the best payout, while Callidus is looking for a release. This mandates that they vote in separate classes, resulting in the plan's inevitable failure.

12. Second, the release sought by Callidus is inherently flawed. While case law has allowed, in exceptional circumstances[6], a plan of arrangement to include releases in favour of the sponsor, the releases sanctioned by courts on a contested application have never covered civil fraud or willful misconduct. Here, the release sought by Callidus *must* include civil fraud and willful misconduct, otherwise it would serve no purpose given the nature of the Retained Claims. The supervisory judge was thus right to hold that he could never sanction such a plan as "fair and reasonable" and therefore, to dismiss the application.

13. Third, this Court was very clear in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 ("***Century Services***"): the *CCAA* confers upon courts the "broad and flexible authority" to achieve the remedial purpose of the *CCAA*; to protect the integrity of its own process; to impose adherence to "baseline considerations" such as "appropriateness, good faith, and due diligence"; to ensure that the *CCAA* process is used to avoid "the social and economic losses resulting from liquidation of an insolvent company"; and to create conditions for "a reorganization that is fair to all".[7]

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[6] *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 ("**Metcalfe**"), leave to appeal to this Court denied (CSC No. 32765).

[7] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at paras. 19, 60, 70 and 77 ("***Century Services***").

14. The supervisory judge, who had witnessed Callidus's conduct throughout the proceedings which ran from November 2015 to February 2018, found that Callidus had failed to meet the *Century Services* requirements. The QCA did not conclude that these findings of fact were tainted by a palpable or overriding error. In fact, the QCA *did not even disagree* with these findings. Rather, it held that they were *inconsequential*: "As for the judge's finding of heavy-handed behaviour and strenuous contestation of proceedings by Callidus, I fail to see how this justifies the exclusion of the Appellant's [Callidus] voting rights." (QCA decision, at para. 66). As a result, there was *no sanction* for Callidus's conduct. This is wrong. Once the QSC had come to the conclusion that Callidus had failed to meet the *Century Services* requirements, it was entirely justified in dismissing its application.

15. In short, the supervisory judge was right to hold that Callidus could not vote with the other creditors, and in any case, that he could never sanction the plan as a result of Callidus's conduct in the proceedings and of the breadth of the release it sought. It follows that Callidus's plan was doomed to fail and that the supervisory judge was justified to dismiss its application. The appeal should be allowed.

PART I – STATEMENT OF FACTS

16. The findings of fact of the supervisory judge are found at paragraphs 1 to 26 of his judgment. They are not contested.[8] They are summarized below.

17. The Debtors specialized in electronic gaming machines. Their sole shareholder and founder was Mr. Gérald Duhamel, through a family trust.

18. In August 2012, Callidus granted credit facilities of $24 million to the Debtors, ostensibly to help them evolve to a new business model. To guarantee the debt, Callidus obtained,

[8] Appellant Callidus Capital Corporation's Memorandum (QCA), May 30, 2018, at para. 6, **A.R., vol. 4, p. 127** and Response of Callidus Capital Corporation to Applications for Leave to Appeal, at para. 16 ("**Callidus Response**"), **A.R., vol. 4, p. 161.**

inter alia, a pledge (a hypothec with delivery) of the *only* voting securities to have been issued by Bluberi Gaming Technologies Inc., one of the Debtors.

19. By November 2015, more than $80 million was owed by the Debtors to Callidus, of which about half was in interest and fees. According to the Debtors, Callidus was largely responsible for its business being in a tail spin (QSC decision, at para. 60). After having reeled Bluberi in with false promises and made sure that it was too heavily invested in Callidus to seek financing alternatives, Callidus began to impose unfair and uncommercial terms on Bluberi and then effectively took control of it. It removed Mr. Duhamel from his functions, imposed its own friendly chief operations officer, created an "advisory board" (which acted as the de facto board of directors) composed of persons related to Callidus and directly controlled Bluberi's governance, finances and operations. It also deliberately, through the control of Bluberi's bank accounts, caused relationships between Bluberi and its suppliers, lawyers and brokers to degenerate, and required Bluberi to ignore certain claims. Finally, in deciding which creditors to pay and to ignore, it created the pool of creditors with which Bluberi must now contend.

20. In short, it became apparent to the Debtors that Callidus had misrepresented its intentions all along: "Bluberi management strongly believed that Callidus had deliberately consumed the equity value of the Debtors with a view to ultimately owning the business" (QSC decision, at para. 40). According to the Debtors, through predatory lending practices, Callidus was positioning itself as the only stakeholder in a position to influence their destiny, all the while eliminating their equity value, thereby furthering a carefully planned "loan to own" strategy.

21. The QSC said this about the Retained Claims: "Obviously, at this stage, it is not possible to opine on the likelihood of success of the Debtors' claim. However, the steps that they have taken so far and the extent of the arguments they have submitted, appear to be serious." (QSC decision, at para. 62).

22. Callidus's objective was clear: to nip the Retained Claims in the bud. Its first attempt came a few days before the presentation of the Debtors' application for the Initial Order:

> 7. On Saturday November 7, 2015, Callidus sent a letter to [Debtors] and Mr. Duhamel personally *notifying them that they were in default* […] under the Second Amended and Restated Loan Agreement. In light of the default and pursuant to the Deeds of Hypothec, *Callidus was now exercising the voting rights and powers as the holder of the shares* of [Bluberi]Gaming that had been pledged and delivered to Callidus.”[9]
>
> [our emphasis]

23. On November 11, 2015, the Debtors sought the protection of the Court under the *CCAA*. “This Petition was vigorously contested by Callidus” (Initial Order, at para. 4). Among other things, only four days after having argued that Bluberi was insolvent, Callidus opportunistically reversed its position in its contestation of the Debtors’ *CCAA* petition. In the Initial Order, the QSC made the following findings of fact:

> [12] Also, it appears that this letter was sent on a Saturday for strategic reasons. As an example, in that letter, Callidus writes that the Debtor “has ceased to operate in its normal course of business” and that “it has not paid its day-to-day obligations as they become due which impair its ability to perform its obligations to Callidus.” However, in its Contestation, Callidus submits that the Debtor is not insolvent. It follows that the sending of the November 7 letter was made in the context of a dispute where Callidus wanted to position itself. This would also explain the holding of the payment of the payroll by Callidus. […]
>
> [16] Callidus argues that the Petitioners are not cash flow insolvent. This submission is surprising considering the position taken by Callidus in the recent weeks. (see also QSC decision, at para. 39).

24. The QSC later found, with hindsight, that the motivation behind this blunt and unscrupulous reversal of position was clear: Callidus wanted to prevent the Debtors from pursuing the Retained Claims (QSC decision, at paras. 40-41).

25. On November 12, 2015, the QSC issued the Initial Order. However, practising a scorched earth approach to judicial proceedings, Callidus continued to impede the restructuring process at every turn. Ultimately, the secured indebtedness engineered by Callidus, including through high interest rates, penalties, “kicker” and fees, made it impossible for

[9] *Bluberi Gaming Technologies Inc./Bluberi jeux et technologies inc. (Arrangement relatif à)*, 2015 QCCS 5373 (the “**Initial Order**”).

the Debtors to formulate a plan of arrangement as a going concern. They were forced to liquidate their assets.

26. In February 2017, the Debtors’ assets were sold to Callidus for $134 million, an amount settled through a reduction of Callidus’s debt (of which the vast majority represented interest and other fees), except for a portion of $3 million. This residual debt would become instrumental to Callidus’s attempt to vote in favour of its own release (or block any alternative plan of arrangement). Of note: in order to secure the Debtors’ support for this purchase, Callidus agreed to let them retain the Retained Claims against Callidus. This agreement formed part of the QSC order approving the purchase and sale of the business.

27. On September 11, 2017, the Debtors filed their first application for the approval of an interim financing that would allow them to pursue the Retained Claims.

28. On September 18, 2017, on the eve of the hearing of the Debtors’ application, and without any notice, Callidus filed a plan of arrangement. It offered $2 million (later amended to $2.5 million) to the Debtors’ other creditors in exchange for a release of *inter alia* the Retained Claims against Callidus. The latter had never before shown any interest in the other creditors’ plight. It is not contested that its sole motivation, once more, was to block the Retained Claims (QSC decision, at para. 44, QCA decision, at para. 63).

29. On December 15, 2017, Callidus’s plan was voted down. SMT Hautes Technologies (“**SMT**”), which held 36.7% in value of the voting claims, along with some former employees of Bluberi, voted against it. The 66 2/3% threshold of section 6 *CCAA* was not met. Callidus, as a secured creditor, did not make any attempt to vote.

30. On February 6, 2018, the Debtors reapplied for approval of interim financing – this time, in the form of a litigation funding agreement (“**LFA**”) with appellant IMF Bentham Limited (“**Bentham**”), a publicly traded litigation funder with a track record of almost 20 years and a 91% success rate.[10] Bentham and Dentons LLP, then counsel to the Debtors,

[10] Debtors’ Application for the issuance of an order extending the stay of proceedings and for an order authorizing litigation funding and a litigation financing charge, February 6, 2018, at para. 61,

had both concluded that the Retained Claims warranted taking an important financial risk. The Retained Claims had increasing traction. This spelled bad news for Callidus.

31. In response, on February 12, 2018, Callidus, who had not shown any interest in filing a new plan after its initial plan was rejected, filed a motion to present a substantially identical plan, but for an increase of $250,000. The motion had the support of a group of nine creditors whose legal fees are to be paid by Callidus under the plan, namely the Respondents Creditors Group.[11] SMT announced to the QSC that it would not change its vote. The second plan was also doomed. That is, unless Callidus were allowed to vote its $3 million claim as an unsecured creditor (although it had filed its proofs of claims as a secured creditor) and thus vote with the other creditors. Allowing this would flip the result, override the concerns of the impartial creditors, and allow Callidus to grant itself a release from the Retained Claims.

32. The supervisory judge, who presided over the proceedings between November for the preceding 27 months, dismissed Callidus's application. His findings of fact, based "on affidavits and evidently, his impressions formed during the course of the *CCAA* process" (QCA decision, at para. 66), include the following:

(a) "when the *CCAA* proceedings were launched, Callidus vigorously contested the issuance of the Initial Order alleging […] that Bluberi was not […] insolvent [and] [t]his submission was in complete contradiction with the position taken by Callidus in previous communications" (para. 39);

(b) "Callidus contested the appropriateness of the *CCAA* proceedings only to prevent Bluberi from pursuing its claim in damages against it" (para. 40);

(c) "Callidus' conduct, in the course of the *CCAA* proceedings, lacked transparency" (para. 41);

Application for Leave to Appeal (hereinafter "A.L.A."), vol. II, p. 196; Exhibit P-4, at p. 11, **A.L.A., vol. IV, p. 67.**

11 QSC decision, at para. 26, **A.R., vol. 1, p. 7**. The courts below did not address the question as to whether, by paying the legal fees of the creditors who support the plan, the plan creates an unlawful distinction between them and other creditors.

(d) "Callidus allowed the Monitor and the Debtors to work [on certain matters] only to eventually adopt a different position before the Court" (para. 41);

(e) "Callidus' strategy was to exhaust Mr. Duhamel financially" (para. 41);

(f) "Callidus' opposition to [an] Application [for an extension on May 25, 2017] appears to be motivated more by its interest in delaying the [CCAA] process" (para. 42);

(g) Callidus "filed an Application to be authorized to submit its own plan" only after Bluberi secured the necessary financing to sue Callidus, and this "was the very first time that Callidus had informed the Debtors, the Monitor or the Court that it intended to file a plan" (para. 43);

(h) Callidus's first plan was allowed to be presented "with the understanding that, as a secured creditor, Callidus would not cast a vote" (para. 45); and

(i) Callidus is now trying "to exert control over the vote for the sole purpose of obtaining releases" and overturning the first vote (paras. 46 and 47);

33. In these circumstances, he found that it would be "both unfair and unreasonable" to allow Callidus to buy "releases from creditors who have no interest in the awarding of such releases" and "to exert control over the vote for the sole purpose of obtaining releases" (QSC decision, at paras. 44-47). He concluded that "Callidus' behavior was contrary to the *Century Services* requirement, that it "intends to use its vote for an improper purpose and that it should not be allowed to do so." (QSC decision, at para. 48).

34. The QCA overturned these findings. It held that "obtaining a release through a plan of arrangement even for […] plan sponsors is not improper" and that Callidus's "heavy-handed behaviour and strenuous contestation of proceedings" did not "justif[y] the exclusion of the [its] voting rights." (paras. 64 and 66).

PART II – QUESTIONS IN ISSUE

35. This appeal raises the following questions:

(a) Can Callidus vote on the plan of arrangement it sponsors?

The answer is no. First, a creditor should generally not be allowed to vote on the plan it sponsors, at least not when it pursues interests other than the maximization of its recovery. Secondly, Callidus is in any case a party related to the Debtors, which prevents it from voting in favour of its plan.

(b) If so, can Callidus, as sponsor of the plan, vote with the other creditors?

No. There must be a commonality of interests between creditors who vote in the same class. That test is not met here: the unsecured creditors want to maximize their recovery, while Callidus admits[12] – and the QSC and QCA found – that its sole interest is to get a release from the Debtors' claims.

(c) In any event, does the court have jurisdiction to prevent a creditor from presenting and voting on a plan, and if so, in what circumstances?

Yes. As this Court has confirmed in *Century Services*, the court has jurisdiction to intervene and make the order that is appropriate when the requirements of good faith are not met. This jurisdiction was used to prevent a creditor from voting on a *BIA* proposal in *Laserworks Computer Services Inc. (Re)*, 1998 NSCA 42 ("***Laserworks***"), and there is no reason why this precedent should not extend to the *CCAA*, which provides even more flexibility to the court.

(d) Does the court have jurisdiction to authorize litigation funding without a vote of the creditors? Did the QCA err in holding that the LFA and proposed litigation constitute a plan of arrangement under the *CCAA*?

[12] Callidus Response, at para. 54, **A.R., vol. 4, p. 170.**

The answer to both of these questions is yes. The QCA erred in holding that the LFA and proposed litigation constituted a plan of arrangement under the *CCAA*. Holding otherwise means that the definition of "plan of arrangement" would be altered in a way that has unwelcome and far-reaching consequences on insolvency law. The QCA was unjustified in interfering with the court's approval of the litigation funding as a form of interim financing of the Debtors.

(e) Did the QCA err in holding that a creditor could value its security at nil, and vote as an unsecured creditor in favour of its plan of arrangement?

Yes. Callidus's security should be valued at an amount that is at least equal to the value of the Debtors' principal remaining asset, namely the claim against Callidus, which logically must be worth at least the amount that Callidus is currently offering to settle it.

(f) Did the Court of Appeal err in characterizing the litigation funding agreement as an equity investment in the insolvent corporation?

Yes. The QCA erred in confusing a contingency fee arrangement, in which the amount to be paid depends on the outcome of the litigation, with an equity investment, which implies a payout that is based upon the performance of the corporation.

36. The Appellants will only address questions (a) to (c) in this factum. They adopt Bentham's submissions with respect to questions (d) to (f).

PART III – STATEMENT OF ARGUMENT

1. QUESTION 1: CAN CALLIDUS VOTE ON THE PLAN IT SPONSORS?

1.1 A creditor cannot vote on a plan it sponsors *per se*

37. Can a creditor vote on the plan it presents and funds? The question stems from section 22(3) *CCAA*, which is substantially similar to paragraph 54(3) *BIA*. The provisions respectively read as follows:

22(3) *CCAA*: A creditor who is related to the company may vote against, but not for, a compromise or arrangement relating to the company.	54(3) *BIA*: A creditor who is related to the debtor may vote against but not for the acceptance of the proposal.

38. The rationale for that rule is clear: the debtor and the creditors do not share the same interests. The debtor will generally seek the survival and continuation of its operations, whereas creditors will look to secure the greatest financial outcome for themselves, without regard to the debtor's survival. To allow a creditor who is related to the debtor to vote with other creditors on an arrangement or proposal would be unfair: the debtor would be able to upend the will of the creditors and divert the vote in favour of its own interests.

39. But what if a *creditor* presents and sponsors a plan of arrangement under the *CCAA* without the debtor's blessing? Like the creditor related to the debtor, the creditor who presents and sponsors such a plan pursues an interest which differs from that of the other creditors. That interest may be to lead the restructuring of an industry[13], to purchase the debtor's assets[14] or to secure a release from legal liability, as is the case here. In any case, it is axiomatic that a creditor does not present and sponsor such a plan in order to obtain a payment from itself.

40. It should flow logically that, for the very reasons that a creditor related to the debtor should not vote on its proposal or arrangement, a creditor should not vote on the plan of

[13] *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 ("***Canadian Airlines***").
[14] *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 ("***Canwest***").

arrangement that it presents and sponsors. The other creditors should be allowed to judge whether the plan that is presented to them is in their best interest, without having their vote diluted by interference from the creditor who presented and sponsored the plan who, like the debtor who presents a plan for its own restructuring, pursues an interest fundamentally distinct from theirs. The *CCAA*, however, is silent on this.

41. This is a blind spot in the law. Its origin seems clear. Section 54(3) *BIA* was introduced in a scheme that only allows proposals emanating from a restricted list of persons *which excludes creditors* (s. 50(1) *BIA*). Section 54(3) *BIA* was then reproduced almost *verbatim* at section 22(3) *CCAA*.[15] However, unlike under the *BIA*, some courts have authorized a *creditor* to propose an arrangement under the *CCAA*.[16] Should courts similarly extend the rationale for section 22(3) *CCAA* to prevent a *creditor* from voting on its own plan?

42. That would be the logical extension of *Red Cross* and its progeny. What is good for the goose is good for the gander. If courts have interpreted the *CCAA* so as to allow a creditor to propose a plan of arrangement, they must also interpret it so as to prevent that creditor from diluting the votes of the other creditors who are pursuing different interests. This interpretation conforms to the philosophy of insolvency law which aims to protect the integrity of the vote of creditors who share an interest in maximizing their recovery and eliminate conflicts of interest.[17]

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[15] This amendment followed a recommendation made in the report of the Standing Senate Committee on Banking, Trade and Commerce (*Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, (Ottawa: Senate of Canada, 2003), at p. 153), **Appellants' Book of authorities, tab. 6.**

[16] Although in *Canadian Red Cross Society/Société canadienne de la Croix-Rouge, Re*, 1998 CanLII 14907 (ON SC) ("***Red Cross***"), Blair J. appeared to hold that ss. 4 and 5 *CCAA* did not give the creditors "a right to put forward a Plan", it was later concluded that a creditor could put forward a plan under the CCAA as long as same was in the best interests of the debtor and its stakeholders: *Unique Broadband Systems (Re)*, 2013 ONSC 676, at para. 52.

[17] Beside ss. 22(3) *CCAA* and 54(3) *BIA*, ss. 13.3, 109(6), 116(2) and 120(1) *BIA* and s. 11.7(2) *CCAA* all work to prevent conflicts of interest.

43. The history of *CCAA* practice is replete with examples of blind spots in the law being fleshed out by the courts: “[t]he *CCAA* is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme.”[18] If it were not for judge-made law, there would have been no debtor-in-possession (DIP) financing[19], no interest stops rule in *CCAA* proceedings[20], and ironically, Callidus would not be able to seek the third-party release it covets (*Metcalfe*, at para. 43). The list goes on.[21]

44. In this case, the only rule that is consistent with the corpus of insolvency law that works to prevent conflicts of interest, and, in particular, to protect the will of creditors, is to bar a creditor who is presenting and sponsoring a plan from voting on it, as its interests for presenting the plan differ from the interests of the unsecured creditors. This would, by “*fleshing out the details of the statutory scheme*”, further the objective and remedial nature of the *CCAA* and guarantee a fair treatment of all stakeholders. To paraphrase the Ontario Court of Appeal (the “**OCA**”) in *Metcalfe*, “it is implicit in the language of the *CCAA* itself that the court has authority to” prevent a creditor from voting on the plan it sponsors; “there is no “gap-filling” to be done and no need to fall back on inherent jurisdiction” (para. 46).

18 *Metcalfe*, at para. 44.
19 *Re United Used Auto & Truck Parts Ltd*. (2000) 16 C.B.R. (4th) 141 (B.C.C.A.).
20 *Nortel Networks Corporation (Re).*, 2015 ONCA 681.
21 The *CCAA* did not originally contemplate the appointment of a monitor: *Re Northland Properties Ltd.*, (1988) 69 C.B.R. 266 (B.C.S.C.). It was amended in 1997 to make the appointment of a monitor mandatory. Courts have authorized the assignment of contracts despite contractual restrictions to same: *Re Playdium Entertainment Corp*., (2001) 31 CBR (4th) 302 (O.N.S.C.). This power was codified in the 2009 amendments (see s. 11.3 *CCAA*). In *Asset Engineering LP v. Forest & Marine Financial Limited Partnership*, 2009 BCCA 319, the British Columbia Court of Appeal found that, while a limited partnership is not a “debtor company” within the meaning of the *CCAA*, it can nonetheless benefit from a stay of proceedings under the *CCAA*. Courts have also authorized the sale of all or substantially all the assets of the debtor outside of a plan of arrangement (see *Re Consumers Packaging Inc.*, [2001] O.J. No. 3736, leave to appeal dismissed, [2001] O.J. No. 3908). This power was codified in the 2009 amendments (see s. 36 *CCAA*).

45. In response, Callidus submits that "Courts in Canada have already tackled this issue and have determined that a creditor is entitled to vote on a plan it sponsors."[22] That is incorrect. The cases cited by Callidus do not support its proposition. *Cantrex*[23] and *Bédard*[24] address whether a creditor can vote *against a proposal filed by the debtor*. There is not a word in these cases about whether a creditor can vote in favour of its own plan. And while *Canadian Airlines* did allow Air Canada to vote on its own plan, there was *no discussion or analysis* on this issue, let alone a consideration of the arguments raised in this appeal. Furthermore, section 22(3) *CCAA*, which Callidus admitted was critical to this issue[25], did not even exist when *Canadian Airlines* was decided.

1.2 <u>The straightforward obstacle: Callidus is a "related party"</u>

46. There is also a more direct application of section 22(3) *CCAA* in this case. A creditor "related" to the debtor is prohibited from voting on a plan.

47. The QCA found that Callidus was not "related" to the Debtors. In coming to that conclusion, the QCA rightly concluded that a creditor is related to the debtor under section 22(3) *CCAA* if they are "related persons" under section 4 *BIA*, and that two persons are related if one controls the other (see ss. 4(2) and 4(3)(c) *BIA*). However, the QCA held that *current* control of the Debtors by Callidus was required to make them "related persons" under the *CCAA*:

> [54] If Callidus had acquired voting rights attached to the shares of the Respondents then it could be maintained that Callidus was a "related person" within the meaning of Section 2(2) CCAA and Section 4 BIA so that it could vote against but not for the plan of arrangement in virtue of Section 22(3) CCAA.
>
> [55] […] *However, there is no indication that the voting control of Mr. Duhamel (or his family trust) was altered, let alone transferred to the Appellant Callidus*.
>
> [our emphasis]

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22 Callidus Response, at para. 28, **A.R., vol. 4, p. 164.**

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

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

25 Application for Leave to Appeal from a Judgment rendered under the *Companies' Creditors Arrangement Act*, at para. 25 (b), **A.L.A., vol. 1, pp. 70-71.**

48. That is a clear error. The *BIA* and, by extension, the CCAA clearly provide that a person will be deemed to control another if it "*has a right under a contract*, in equity or otherwise, *either* immediately or *in the future* and either absolutely or *contingently*, […] *to control the voting rights in an entity*" [our emphasis]. The relevant parts of sections 4(2) and 4(3)(c) *BIA* read as follows:

4(2) *BIA*: For the purposes of this Act, persons are related to each other and are related persons if they are […] (b) an entity and (i) a person who controls the entity, if it is controlled by one person, […]
4(3) c) *BIA*: (3) For the purposes of this section […] (c) a person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests; […]

49. These provisions apply squarely in this case: (i) "the shares of [Bluberi] had been pledged and delivered to Callidus"[26], (ii) Callidus's security provides that if Bluberi defaults on its loans towards Callidus, the latter may "prohibit" Mr. Duhamel from exercising "the right to vote the Investment Property [the shares], at which time [Callidus] will have the right to exercise the rights and powers related to such Investment Property including, without limitation the right to vote"[27], (iii) Callidus itself admitted to having "held a pledge (movable hypothec with delivery) on the share of Bluberi Gaming since the relationship started in 2012" and that it "would have thus been well within its rights to simply dispose

26 Initial Order, at para. 7.

27 Initial Order, at para. 10, citing s. 7.1 of the deed of hypothec and letter from Callidus dated November 7, 2015 (respectively exhibits P-8C and P-6 in support of the Application for the Issuance of an approval and vesting order and for extension of the stay of proceedings), **A.R., vol. 2, pp. 58-59.**

of the shares pursuant to the Civil code of Quebec; rather, it opted to allow Duhamel to keep his shares, *albeit minus the voting rights*" [our emphasis][28], and finally, (iv) Callidus actually tried to exercise such voting rights before the issuance of the Initial Order.[29]

50. Callidus could thus, "in the future" or "contingently", that is upon the "occurrence and continuance of an Event of Default", "control the voting rights in" the Debtors. This meets the test of section 4(3)(c) *BIA* head-on. This opinion is shared by the Honourable L. W. Houlden, the Honourable Geoffrey B. Morawetz and Dr. Janis P. Sarra in the *2019 Annotated Bankruptcy and Insolvency Act* where they wrote that "a lender who takes a pledge of shares […] of the borrowing corporation comes within the provision of s. 4(3)" (s. B§49, p. 25).

51. Furthermore, the case law on section 4(3) *BIA* holds that a person who has a right to become the controlling shareholder of an insolvent entity is deemed to be related to that entity. Gascon J., as he then was, concluded in *Boutique Euphoria inc. (Arrangement relatif à)*, 2008 QCCS 4717 that a person was related to an insolvent entity simply because it had the *right* to purchase a majority of the shares of the insolvent entity, even if that person never exercised that right:

> [35] By virtue of Section 4(3)c) of the BIA, a person who has a right under a contract, immediately or in the future, to acquire shares in a corporation or to control the voting rights of shares in a corporation is deemed to have the same position in relation to the control of the corporation as if that person owned the shares.
>
> [36] Applying these provisions to this situation, since Cirex had the right, under the MOU, to acquire 80% of the shares of EBI, Cirex and EBI were deemed to be related persons for the purposes of the *BIA* in April 2007.
>
> [references omitted]

28 Callidus's contestation of the issuance of the initial order, at paras. 110-111.
29 Initial Order, at paras. 7-12.

52. Also of note, tax authorities have come to the conclusion that a pledge of shares was sufficient to trigger subparagraph 251(5)(b)(i) of the *Income Tax Act,* R.S.C., 1985, c. 1[30] ("***ITA***"), a provision virtually identical to paragraph 4(3) (c) *BIA*:

4(3)c) *BIA*: [A] person who has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, to, or to acquire, ownership interests, however designated, in an entity, or to control the voting rights in an entity, is, except when the contract provides that the right is not exercisable until the death of an individual designated in the contract, deemed to have the same position in relation to the control of the entity as if the person owned the ownership interests[.]	251(5)(b)(i) *ITA*: [W]here at any time a person has a right under a contract, in equity or otherwise, either immediately or in the future and either absolutely or contingently, (i) to, or to acquire, shares of the capital stock of a corporation or to control the voting rights of such shares, the person shall, except where the right is not exercisable at that time because the exercise thereof is contingent on the death, bankruptcy or permanent disability of an individual, be deemed to have the same position in relation to the control of the corporation as if the person owned the shares at that time, […]

53. The QCA erred when it held that voting control must be current to find a relation. In and of itself, this fundamental error justifies that the appeal be allowed.[31]

30 See Canada Revenue Agency, CRA Views, 9033975, "Shareholder agreements and control" (March 19, 1992) and Canada Revenue Agency, CRA Views, Interpretation-external, 2015-0565741E5, "Canadian-controlled private corporation" (February 4, 2015). It is worth noting that the Alberta Court of Appeal in *Piikani Energy Corporation (Re)*, 2013 ABCA 293 said that "the jurisprudence under the ITA provides appropriate principles for determining whether two parties dealt at arm's length [in the BIA]. As a starting point, we note that the definitions of "related persons" and "arm's length" are either similar or identical in ss 4, BIA and s 251(2), ITA" (para. 21)

31 Callidus may argue that this argument was not specifically raised in the lower courts. This would be misconceived: "[t]he Court is free to consider a new issue of law on the appeal where it is able to do

2. QUESTION 2: CAN CALLIDUS VOTE IN THE SAME CLASS AS THE OTHER CREDITORS?

2.1. Commonality of interests: a strict versus a broad, purposive interpretation

54. From a policy perspective, this question is related to the question of whether a creditor who presents and sponsors a plan should vote on same: it is concerned with conflicting interests when voting on a plan. If this Court comes to the conclusion that Callidus can vote on the plan it sponsors, then it should also conclude that it cannot do so in the same class as the other creditors. In this case, that would lead to the same result: the failure of Callidus's second plan.

55. In 2009, section 22 *CCAA* codified (another) judge-made rule on the separation of creditors into classes for the purpose of the vote:

> 22 (2) For the purpose of subsection (1), creditors may be included in the same class *if their interests or rights are sufficiently similar to give them a commonality of interest* […]
>
> [our emphasis]

56. *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (C.A.) ("***Sovereign***") is often cited as the genesis of the "commonality of interest" test: "if a different state of facts exists with respect to different creditors, which may affect their minds and judgments differently, they must be separated into different classes."[32]

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so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice": *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, para. 33; see also *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69, at paras. 40-41. In this case, these criteria are clearly met.

[32] At pp. 249-250. Cited approvingly in *Stelco Inc. (Re)*, (2005) 15 C.B.R. (5th) 307 (OCA) ("***Stelco OCA***"), at para. 21, affirming [2005] OJ No. 4814 ("***Stelco OSC***"). See also *Re San Francisco Gifts Ltd.*, 2004 ABQB 705 ("***San Francisco QB***") leave to appeal refused at 2004 ABCA 386 ("***San Francisco, CA***"), where Topolniski J. considers interests broader than specific legal interests, including "the business situation of the creditors, and the practical effect on them of a failure of the plan." (para. 12). See also *Les Oblats de Marie Immaculée du Manitoba (Re)*, 2004 MBQB 71, at

57. This statement suggests that the interests to be taken into account are not limited to *legal* interests. The same can be said of section 22(2) *CCAA*, which refers to interests *or* rights. In the present case, Callidus wants a release and the other creditors want the best monetary recovery possible. This is a prime example of a "*state of facts*" that affects creditors' "minds and judgments differently".

58. However, Callidus relies on *Stelco*, a decision rendered four years before the introduction of section 22(2) *CCAA*, to argue that only legal interests are to be considered in the determination of whether creditors should vote in the same class. In *Stelco*, the OCA approved this statement made in *Canadian Airlines*:

> […] the interests to be considered *are the legal interests that a creditor holds qua creditor* in relationship to the debtor company prior to and under the plan as well as on liquidation.[33]
>
> [our emphasis] (para. 23)

59. Callidus argues that now that it has announced that it would renounce its security for the purpose of the *CCAA* proceedings, its *legal* interest as a creditor is the same as that of the other creditors: they all have an unsecured claim against the Debtors. They should accordingly all vote together. The QCA accepted this argument without considering whether a broad, strict or purposive interpretation of the "commonality of interest" test should be followed. It held that the fact that Callidus receives a release and no dividend, whereas the other creditors receive a dividend and no release, did not justify having them vote in separate classes:

> [74] In this case, Callidus is both a creditor and a plan sponsor. Upon valuation of its security, it should vote with the ordinary creditors. The plan is a settlement of proposed litigation targeting it. In such capacity, it is only natural that it receives a release. The crossover between the two capacities is that it has renounced to participation in the dividend. *I see nothing in this state of affairs to*

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paras. 61-63. See also *Re Hawk Insurance Company Ltd*, [2001] EWCA Civ 241, **A.L.A., vol. IV, pp. 82ff.**

33 See also *SemCanada Crude Company (Re)*, 2009 ABQB 490, at para. 38. This stricter interpretation of the test is based on s. 22(2)(d) *CCAA*.

> *justify an order that Callidus exercise its voting rights in a separate and distinct class of ordinary creditors.*
>
> [our emphasis]

60. This goes against precedent. In *San Francisco CA*[34], Conrad J.A. held that in “determining commonality of interests, the court should also consider factors *like the plan’s treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of the plan*” [our emphasis]. These are not “legal interests that a creditor holds *qua* creditor in relationship to the debtor”. They are broader interests. On all accounts mentioned by Conrad J.A., Callidus and the other creditors fail to meet the commonality test:

(a) *the plan treats Callidus and the other creditors differently*: if creditors who receive cash and those who receive other benefits are divided in separate classes[35], then *a fortiori* a creditor who receives a release and no payment should not vote with creditors who receive a payment and no release;

(b) *the business situation of Callidus and the other creditors is completely different*: Callidus has controlled the operations and finances of the Debtors, bought the Debtors’ operations as a going concern, faces a $228 million lawsuit initiated by the Debtors for having led them to insolvency and is presenting and sponsoring a plan that would allow it to obtain a release from the Retained Claims. The other creditors are only looking for the best possible monetary recovery. Their business situations have nothing in common; and

(c) *The difference in the practical effect of a failure of the plan on Callidus versus the other creditors could not be starker*: Callidus would have to defend a $228 million

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34 See Conrad J.A.’s reasons at paras. 12-15. See also *Ge Canada Finance Holding Company (Re)*, 2008 NBQB 144, at paras. 67-68. This is true even in other jurisdictions. See for example *UDL Argos Engineering and Heavy Industries Ltd v. Li Oi Lin*, [2001] HKCFA 19 (“***UDL***”) (Hong Kong), **A.L.A., vol. IV, p. 189ff.**

35 *U.S. Steel Canada Inc. (Re)*, 2017 ONSC 1967, at paras. 13-14.

lawsuit based on allegations of willful misconduct, the Retained Claims, while the other creditors would benefit from the lawsuit as an avenue to recover their claims.

61. Callidus relies on two cases, *Resurgence* and *Sido*[36], to argue that *San Francisco CA* was wrongly decided and that courts should not "divide creditors into classes based on what they may derive from a plan of arrangement."[37] Neither case supports its position:

(a) *Resurgence*, which predates *San Francisco, CA*, does not hold that Air Canada's different treatment did not warrant it voting in a separate class. Rather, Wittman J.A. held that the Court of Appeal should not intervene in the first judge's exercise of discretion *to defer this question to a later time.*[38] The question thus remained unanswered; and

(b) As for *Sido*, the issue does not even appear to have been before the court. The question was whether employees, suppliers and other creditors shared the same legal interests, not whether they were treated differently.

62. The strict interpretation adopted by the QCA also leads to an illogical result: if creditors who have different "remedies available to [them] in the absence of the compromise" (s. 22(2)(c) *CCAA*), yet share an interest in obtaining the best recovery, are presumed unable to "consult together with a view to their common interest" (*Sovereign* at p. 251), then how can Callidus, whose interest is in receiving a release at the lowest possible cost, and the other creditors, whose interest is in recovering as much money as possible, enter into such consultations?

63. A broader interpretation of the notion of "interest" is also more consistent with the rest of section 22 *CCAA*. We run full circle here: why does section 22(3) *CCAA* preclude a creditor related to the debtor from voting in favour of a plan – regardless of its *legal* interest *qua* creditor – if not for the interests it shares with the debtor, as opposed to the other

36 *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403 ("***Sido***").
37 Callidus Response, at para. 47.
38 *Resurgence*, at paras. 37-39.

creditors?[39] If the *CCAA* takes into account a person's motivations to vote, then courts should not ignore them when interpreting the term "interest".

64. In other jurisdictions, appellate courts have also moved away from a strict interpretation of the commonality test. For example, the New Zealand Supreme Court (the "**NZSC**") recently adopted a broad interpretation of the commonality test in *Trends Publishing International Limited v. Advicewise People Limited*, [2018] NZSC 62 ("***Trends Publishing***"). The NZSC's analysis starts from the same original statement of the test: *Sovereign* (para. 43). The NZSC notes that a variation in the reasons of two of the justices prompted a debate:

> [44] It will be noted that Lord Esher referred to the "interests" of the policyholders whereas Bowen LJ referred to their "rights". As we will see, this has prompted some debate – albeit primarily in other jurisdictions – whether classes of creditors should be defined by reference to their interests or their rights.

65. The NZSC then embarks on a review of the case law on this matter emanating from New Zealand, the United Kingdom, Australia and Canada. It notes that Canadian jurisprudence initially invited courts to consider only the *legal* rights of the creditors in determining whether they should vote in the same class, but now provides for "segregate[ing] two sets of creditors with similar legal interests into separate classes if the plan treats them differently."[40]

66. The NZSC concludes by adopting a purposive interpretation of the commonality test, founded on the legislative policy behind plans of arrangement. It moves away from strict rules in favour of a contextual approach to classification. The NZSC holds that while creditors with different legal rights can nevertheless share a commonality of interests ("maximizing the return on their debts"), creditors with the same legal rights who pursue different interests may not:

> [66] The policy of Part 14 is that the approval of a compromise which reflects a fair business assessment by creditors should be given effect to. This is based on the working assumption that such a business assessment will reflect the

39 See also s. 109(6) *BIA*.
40 *Trends Publishing*, at para. 55, citing *Re Woodward's Ltd* (1994) 84 BCLR (2d) 206, at para. 14.

> common interest of all those who are to be bound by it. *If all creditors share a common interest in maximising the return on their debts and can be expected to vote accordingly (which will usually be the case), differences between them (whether in terms of rights or interests) will be of no practical moment*. Those advancing a proposed compromise, and the courts in dealing with any challenges to it, are entitled to take a broad approach to classification. For classification purposes, a complete identity of rights or interests is not required. This means that creditors can be classed together, where, despite differences in interests or rights, they can be expected to vote on the basis of a "class-promoting view". Differences in rights or interests which are not material to whether creditors can be expected to vote on this basis can thus be ignored.
>
> [67] But where, on the other hand, such common interest as the creditors share is, for some creditors, outweighed by other considerations, the working assumption may well be displaced. In that situation, the votes of the creditors can no longer be taken to represent the best interest of all members of the class. *Where creditors whose pre-compromise rights and interests are materially the same are treated differently under the proposed compromise, however, separate classes will almost certainly be required. Also relevant will be the benefits and drawbacks of the proposal for particular creditors or groups of creditors*. Allowance must therefore be made for the possibility that creditors might, by reason of other interests in a company (for instance as shareholders or directors), not share the same class-promoting view as other creditors.[41]
>
> [our emphasis]

67. This is also the proper interpretation of section 22(2) *CCAA*. It conforms to the remedial and flexible nature of the *CCAA*, which must be construed liberally and purposively.[42] Given the "flexibility which is [the *CCAA*'s] genius – there can be no fixed rules that must apply in all cases,"[43] including with respect to classification. Courts should have access to all the tools in their toolbox to prevent a "tyranny of the minority" (through an excessive

[41] The New Zealand Court of Appeal, for its part, noted that while "a precise test turning on legal rights could make it easier to advise on and plan for creditors compromises, and help avoid a plethora of possible classes, *the cases demonstrate the danger of such a dogmatic rights-based approach*" [our emphasis] (*Trends Publishing International Limited v. Advicewise People Limited*, [2017] NZCA 365, at para. 55, **A.L.A., vol. IV, pp. 185-188.**). Note that this debate also takes place in other jurisdictions: see *UDL Argos*, *supra* note 30, **A.L.A., vol. IV, pp. 189ff** and *First Pacific Advisors LLC v. Boart Longyear Ltd*, [2017] NSWCA 116 (Australia), **A.L.A., vol. IV, p. 81.**

[42] *Interpretation Act*, R.S.C., 1985, c. I-21, s. 12; *Metcalfe*, at para. 44.

[43] *Stelco OCA*, at para. 22. See also *Metcalfe*, at para. 44.

number of classes) *and* a "tyranny of the majority" (through a narrow reading of the commonality test).[44]

68. In this case, if we apply the factors stated by Conrad J.A. in *San Francisco CA* – which are on all fours with the purposive interpretation adopted in *Trends Publishing*, Callidus and the other creditors fail to meet the commonality test on all fronts. This means that they must vote in a separate class and that Callidus's second plan would necessarily bear the same result as the first one: failure.

2.2 Commonality test: section 22(2)(c) *CCAA*

69. Even if a strict interpretation of section 22(2) *CCAA* were adopted, Callidus would still need to vote in a separate class. The strict interpretation advocated by Callidus focusses on legal rights. It so happens that Callidus has legal rights that differ from those of other creditors: it is the Debtors' only secured creditor. As such, paragraphs 22(2)(b) and (c) *CCAA* indicate that it should vote separately:

> (2) For the purpose of subsection (1), creditors may be included in the same class if their interests or rights are sufficiently similar to give them a commonality of interest, taking into account: […]
>
> (b) the nature and rank of any security in respect of their claims;
>
> (c) the remedies available to the creditors in the absence of the compromise or arrangement being sanctioned, and the extent to which the creditors would recover their claims by exercising those remedies; […]
>
> [our emphasis]

70. In the absence of an arrangement being sanctioned, the Debtors would in all likelihood become bankrupt. As a result, their unsecured creditors would be prevented from exercising any recourse against them while Callidus, a secured creditor, would not.[45] The Debtors' assets (including the Retained Claims against Callidus) would be recovered by Callidus up

44 *Stelco OSC*, at para. 15. The Hong Kong Court of Final Appeal similarly noted in *UDL* that "the risk of empowering the majority to oppress the minority" must be "balanced against the opposite risk of enabling a small minority to thwart the wishes of the majority."

45 See s. 69.3 *BIA*.

to $3 million. In the absence of a bankruptcy, the result would be the same. It follows that the remedies available to Callidus in the absence of an arrangement, and the extent to which Callidus would recover its claims, would differ substantially from other creditors.

71. Therefore, even under a strict interpretation of section 22(2) *CCAA*, Callidus should vote separately. In short, whichever course this Court decides to adopt on the substantive legal issues raised in this case, the result should be the same: the QSC was right to dismiss Callidus's application and the appeal on this issue should be allowed.

3. QUESTION 3: DOES A *CCAA* COURT HAVE JURISDICTION TO PREVENT A CREDITOR FROM VOTING ON A PLAN?

3.1 Jurisdiction to prevent an improper purpose or sanction bad faith

72. This section is only relevant if this Court concludes that Callidus (i) was not related to the Debtors under s. 22(3) *CCAA*, (ii) could vote on its own plan and (iii) could vote in the same class as the other creditors. The question then becomes: could the court nevertheless dismiss Callidus's application if it concludes that it is pursuing an improper purpose or is otherwise not abiding by the *Century Services* requirements?

73. The QCA held that it could not. While a court has jurisdiction to preclude a creditor from voting on a proposal under the *BIA*, as found in *Laserworks*, the QCA held that this discretion is not available under the *CCAA*:

> [59] Improper purpose developed as a reason for a court to exercise its jurisdiction to dismiss or stay a petition for a bankruptcy order under what is now Sections 43(7) and 43(11) *BIA*, even though the basic prerequisites (debt and act of bankruptcy) for the making of such an order are present. *The discretion arises from the statute*. Improper purpose in filing the petition is a reason to exercise the discretion; it is not the source of the existence of the discretion in law. *The exercise of discretion, which is not legally available, is an error in principle to which deference is not due by an appellate court.*
>
> […]
>
> [61] It must also be underlined that the result of a vote defeating a proposal is a deemed assignment in bankruptcy. As such, the reliance on the notion of improper purpose to deny the creditor a vote in Laserworks exhibits some

> harmony with the general scheme of bankruptcy law where improper purpose can justify the exercise of judicial discretion to dismiss or stay a petition. Indeed, case law relied on by the Nova Scotia Court of Appeal provide examples of bankruptcy petitions being denied or stayed under Sections 43(7) and 43(11) BIA because they were filed for an improper purpose. The dynamic of a vote on an arrangement under the CCAA is different in that failure to achieve the statutory majority for approval does not automatically result in bankruptcy.
>
> [our emphasis]

74. In coming to that conclusion, the QCA ignored the reasons of the Nova Scotia Court of Appeal ("**NSCA**") in *Laserworks*. The NSCA did *not* hold that its jurisdiction to preclude a creditor from pursuing an improper purpose stemmed from section 43(7) *BIA*. *It specifically held the contrary*. The NSCA held that its power to preclude a creditor from using the statutory process "*for purposes not contemplated by Parliament*" – in that case, to eliminate a competitor – stemmed from its power to supervise the *BIA* process and prevent substantial injustice:

> Section 43(7) clearly does not create the supervisory jurisdiction of the court over the bankruptcy regime; it is simply a concrete application of a discretionary power inherent in the scheme of the BIA. *Each step in the bankruptcy process, whether initiated by a creditor's petition for a receiving order or a debtor's assignment for the benefit of creditors, is supervised by court officials or the court itself*. […]
>
> The short answer to the question raised by this ground of appeal is that *motive or purpose is relevant to a court authorized to remedy substantial injustice*.[46]
>
> [our emphasis]

75. This jurisdiction has been confirmed on a number of occasions.[47] Does the court, in supervising a *CCAA* process rather than a *BIA* process, lack the inherent jurisdiction to

[46] *Laserworks*, at paras. 41 and 43.

[47] The *Laserwork* principle has been recognized in several subsequent decisions, namely *West Coast Logistics Ltd. (Re)*¸ 2017 BCSC 1503 and *Triage T.R.I.M. Ltée (Syndic de) (2003)*, 43 C.B.R. (4th) 236, including in a CCAA matter as well, namely *Blackburn Developments Ltd. (Re)*, 2011 BCSC 1671.

supervise its own process, to ensure that it is not being used "*for purposes not contemplated by Parliament*" and to prevent substantial injustices?

76. *Poser la question, c'est y répondre*. Indeed, even absent language in the *CCAA* providing a broad jurisdiction to the court, it is accepted that the court always has the jurisdiction to prevent its processes from being obstructed or abused. This has been applied in a *CCAA* context.[48] Such a conclusion is also confirmed by the jurisprudence of this Court and by the broad language of the *CCAA*.

77. First, this Court held in *Century Services* that the "key difference between the reorganization regimes under the *BIA* and the *CCAA* is that *the latter offers a more flexible mechanism with greater judicial discretion*" [our emphasis] (para. 14). So, the court should *at least* have the same jurisdiction to prevent its process from being used for an improper purpose under the *CCAA* as it does under the *BIA*. The QCA decision, in this respect, goes against the grain.

78. Second, the QCA's conclusion that Callidus could have been prevented from voting under a *BIA* proposal, but not under a *CCAA* plan of arrangement, runs directly against the policy advocated by this Court "towards harmonizing aspects of insolvency law common to the two statutory schemes [*CCAA* and *BIA*] to the extent possible" (*Century Services*, at para. 24).[49]

79. It makes no sense to have different rules under a *CCAA* plan of arrangement and a *BIA* proposal. This is particularly plain in this case: if the QCA decision were to hold true, the *BIA* would afford better protection to a debtor than the *CCAA* when determining whether a creditor can vote on a proposal or a plan of arrangement. Such an effect would, in the words of this Court in *Century Services*, "skew[…] incentives against reorganizing under the

[48] See, for example, *Boutique Euphoria inc. (Arrangement relatif à)*, 2008 QCCS 4718 at para. 64 (Gascon J. as he then was) and *MEI Computer Technology Group Inc. (Bankruptcy)* [2005] R.J.Q. 1558 at para. 21 (Gascon J. as he then was).

[49] See also *Nortel Networks Corporation (Re)*, 2015 ONCA 681, at paras. 34-36. In *Dundee Oil and Gas Limited (Re)*, 2018 ONSC 1070, at para. 14, Dunphy J. actually wrote that Century Services was *requiring* him to harmonize both statutes when possible.

CCAA[,] undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert" (para. 47). Statute shopping in an insolvency context should be discouraged as much as possible to promote predictability and the fairness of treatment of the various stakeholders involved in an insolvency situation.

80. The case law that followed *Century Services* also avoided the pitfalls of creating a different set of rules under each statute.[50] Morawetz J. concluded in *Kitchener Frame Ltd*, 2012 ONSC 234 that if certain releases could be obtained under a plan of arrangement, the *BIA* proposal process should be read so as to allow same:

> [73] I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*. […]
>
> [78] It seems to me that these principles [this Court's principles in *Century Services*] indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.
>
> [our emphasis][51]:

81. Third, in *Laserworks*, the NSCA referred to sections 43(7), 43(11) and 187(9) *BIA* as examples of its broad jurisdiction to prevent a "substantial injustice". However, these sections are in no way more specific or broader than sections 4, 6 and 11 *CCAA* discussed

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50 See *Re Emergency Door Service Inc*. 2016 ONSC 5284 at paras. 34 and ff. and *Groupe Bikini Village inc. (proposition de)* 2015 QCCS 1317 at paras. 22 and ff. *Dundee Oil and Gas Limited* (Re), 2018 ONSC 1070 at paras. 13-14.

51 It is not surprising that the Courts should harmonize the rules under a proposal and a plan of arrangement to the extent possible given that, as noted by the ONCA in *Metcalfe*, a "compromise or arrangement under the CCAA is directly analogous to a proposal" (para. 62).

below. For example, section 4 provides the court with the required jurisdiction to dismiss Callidus's application:

> 4 Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, *the court may*, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, *order a meeting* of the creditor or class of creditors, and, if the court so determines, of the shareholders of the company, *to be summoned in such manner as the court directs.*
>
> [our emphasis]

82. It is trite law that "there is no requirement under the *CCAA* that all proposed plans of arrangement be put to meetings of creditors [and] […] Sections 4 and 5 specifically employ the word "may", giving the court discretion".[52] Courts have often refused to exercise the discretion to convene a creditors' meeting if the proposed plan was not "fair and reasonable".[53]

83. For instance, in *Target Canada Co. (Re)*, 2016 ONSC 316 ("***Target***"), Morawetz J. concluded that the proposed plan should not be presented to the creditors because "this Plan does not have even a reasonable chance of success, as it could not, in this form, be sanctioned" (para. 68). He held that the plan could never be found to be fair and reasonable as a result of the releases Target sought:

> [72] It is incumbent upon the court, in its supervisory role, to ensure that the CCAA process unfolds in a fair and transparent manner. It is in this area that this Plan falls short. *In considering whether to order a meeting of creditors to consider this Plan, the relevant question to consider is the following: Should*

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52 *Uti Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, para. 13. The first case dealing with s. 4 CCAA, namely *Re Ursel Investment Ltd.* (1990), 2 C.B.R. (3d) 260 at paras. 24,25 and 37, also made that clear. It has never been contested afterwards. See also *Federal Gypsum Company (Re)*, 2007 NSSC 384, at paras. 3-6 and *Red Cross*, at para. 31.

53 *Target Canada Co. (Re)*, 2016 ONSC 316, at paras. 68-72; *Crystallex International Corp. (Re)*, 2013 ONSC 823, at para. 9; *Doman Industries Ltd. (Re)*, 2003 BCSC 376, at para. 8. The Courts in the United States of America have also come to the same conclusion. If a plan is inherently flawed, the Courts can reject it before the confirmation hearing. See, for instance, *In re Dakota Rail, Inc.*, 104 B.R. 138, 143 (Bankr. D. Minn. 1989) and *In re FirstEnergy Solutions Corp., No.* 18-50757 (Bankr. N.D. Ohio April 4, 2019).

> *certain landlords, who hold guarantees from Target Corporation, a non-debtor, be required, through the CCAA proceedings of Target Canada, to release Target Corporation* from its guarantee in exchange for consideration in the Plan in the form of the Landlord Formula Amount? […]
>
> [79] *This is not a situation where a debtor is using the CCAA to compromise claims of creditor. Rather, this is an attempt to use the CCAA as a means to secure a release of Target Corporation from its liabilities* under the guarantees in exchange for allowing claims of Objecting Landlords in amounts calculated under the Landlord Formula Amount. The proposal of Target Canada and Target Corporation clearly contravenes the agreement memorialized and enforced in paragraph 19A. […]
>
> [86] Target Canada submits that the foregoing issues can be the subject of debate at the sanction hearing. In my view, this is not an attractive alternative. It merely postpones the inevitable result, namely the conclusion that this Plan contravenes court orders *and cannot be considered to be fair and reasonable* in its treatment of the Objecting Landlords [i.e. the release sough]. In my view, this Plan is improper (see Crystallex).
>
> [our emphasis]

84. What Morawetz J. decided in *Target* is precisely what the QSC did in the present case. It held that Callidus's attempt to "exert control over the vote for the sole purpose of obtaining releases" was "both unfair and unreasonable", that Callidus had failed to meet the Century Services requirements, that it could never sanction Callidus's plan pursuant to section 6 CCAA, and thus refused to convene the creditors' meeting (QSC decision, at paras. 47-48). This was consistent with precedent. Yet, the QCA ignored this jurisdiction.

85. The QSC also had the jurisdiction and the discretion to prevent Callidus to present its plan and vote on same pursuant to section 11 *CCAA*:

> 11 Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, *the court*, on the application of any person interested in the matter, ***may***, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, *make any order that it considers appropriate in the circumstances*.
>
> [our emphasis]

86. This provision also confirms the broad discretion conferred upon the court by the *CCAA*. As noted by this Court in *Century Services*, section 11 *CCAA* is an endorsement by

Parliament of the broad authority conferred upon courts by the jurisprudence. It allows the court to ensure that its process is used in good faith:

> [68] In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus, in *s. 11* of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, … make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.
>
> [69] The CCAA also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in **good faith** and with due diligence (CCAA, ss. 11(3), (4) and (6)).
>
> [70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [our emphasis][54].

87. That is what the QSC did in this case (QSC decision, at paras. 47-48).

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54 This is nothing new. More than 25 years ago, the Ontario Court of Appeal noted, in *Elan Corp. v. Comiskey*, (1990), 1 O.R. (3d) 289 (C.A.), that in "cases where the debtor company acts in bad faith, the court may refuse to order a meeting of creditors" (p. 313). The only difference in the present matter is that the application for a creditors' meeting was not brought by the debtor company but by a creditor, who should not be subject to a less stringent test to convene a creditors' meeting.

88. Fourth and lastly, Parliament has now enacted section 18.6 *CCAA*, which came into force on November 1, 2019. Section 18.6 *CCAA* provides that "if the court is satisfied that an interested person fails to act in good faith […] the court may make any order that it considers appropriate." This provision does not create new law: it codifies a principle long applied by the courts and confirmed in *Century Services*. In particular, it confirms that the duty to act in good faith in insolvency proceedings *extends to creditors*:

> Among other things, *the amendments clarify and confirm that in insolvency proceedings the duty of good faith applies to all parties* and the courts may require, where appropriate, creditors to disclose their real economic interests. These measures respond directly to pensioners' concerns about informational asymmetries and procedural disadvantages in insolvency proceedings.
>
> Both CAIRP [Canadian Association of Insolvency and Restructuring Professionals] and the CBIA [Canadian Bond Investors' Association] are concerned about these provisions. It was noted that the good faith requirement could lead to uncertainty and litigation and maybe even require a creditor to reduce its claim in favour of others. It was noted that disclosure of real economic interests could negatively affect the marketability of bonds or other debt, *impede creditors' rights to vote in proceedings* or even discount creditor claims.
>
> *In response, I note that a duty to act in good faith is well established in Canadian insolvency law. The BIA and CCAA already impose good faith obligations in numerous contexts*. Trustees, monitors and receivers must act in good faith. A debtor must also demonstrate good faith to extend its stay of proceedings. Moreover, the Supreme Court of Canada has ruled good faith is one of the "cornerstones of restructuring proceedings" and has recognized a common law duty of good faith in contractual relationships. *Extending, particularly to creditors, and codifying this principle, will give courts another tool to ensure fairness in insolvency negotiations*.
>
> Judicial discretion and flexibility are hallmarks of the Canadian insolvency regime. Our courts' expertise in insolvency matters is internationally recognized. This, coupled with the general strengths of the regime has been instrumental in facilitating many successful restructures.
>
> We respectfully believe this historical objective and reasoned track record does not warrant the concerns as those expressed in the weeks prior, and trust that the *courts will continue to effectively use the expanded tools at their disposal to fulfill the objectives of the insolvency regime and ensure that parties do not abuse the system*.

[our emphasis][55]

89. Hence, the QCA should have concluded that the power to dismiss a creditor's application, or to prevent a creditor from voting, because it does not meet the *Century Services* requirements exists both under the *CCAA* and the *BIA*.

3.2 **The QSC properly exercised its jurisdiction**

90. The QCA held, in *obiter*, that even if the QSC had the jurisdiction to prohibit Callidus from voting on its plan, "its application should be reserved for the clearest of cases" (para. 62). It further held that Callidus's conduct in this case – which the QSC found, *inter alia*, to be in bad faith (QSC decision, at para. 48) – did not meet this stringent test. The Debtors disagree for two main reasons.

91. First, and paraphrasing Kasirer J.A. (as he then was) in *Béton Brunet*[56], "the judge weighed the relevant factors and decided, based on the evidence before him and his knowledge of the file as *CCAA* supervising judge" (para. 27), that "Callidus' behavior is contrary to the "requirements of appropriateness, good faith, and due diligence" (QSC decision, at para. 48). In particular, he held that throughout the proceedings, Callidus had "lacked transparency", taken contradictory positions to serve its goals, intentionally delayed the proceedings and attempted "to exhaust Mr. Duhamel financially", the whole for one purpose: to prevent the Debtors from getting access to justice (QSC decision, at paras. 39-45). He found that in these circumstances, it would be "both unfair and unreasonable" to allow Callidus to buy "releases from creditors who have no interest in the awarding of such releases" and "to exert control over the vote for the sole purpose of obtaining releases" (QSC decision, at paras. 44-47).

92. Given these *findings of fact* (see also *supra*, para. 32), the supervisory judge's conclusion that Callidus had failed to meet the *Century Services* requirements could only be overturned

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[55] Proceedings of the Standing Senate Committee on Banking, Trade and Commerce, No. 58. (May 29, 2019) at 58:16 - 58:17 (Mark Schaan, Director General, Marketplace Framework Policy Branch, Innovation, Science and Economic Development Canada).

[56] *Bridging Finance Inc. c. Béton Brunet 2001 inc.*, 2017 QCCA 138 ("***Béton Brunet***").

if it was found that he had made a palpable and overriding error (QCA decision, at para. 48).[57] Although the QCA referred to that exacting standard of review, its reasons demonstrate that it merely substituted its own findings of fact and discretion to those of the supervisory judge, without pointing to any specific error in his reasons, let alone a palpable and overriding one.

93. To begin with, the QCA did not even find that the QSC had erred in concluding that Callidus had not met the *Century Services* requirements. Rather, the QCA concluded that this finding was irrelevant to the issue at hand: "As for the judge's *finding of heavy-handed behaviour and strenuous contestation* of proceedings by Callidus, I fail to see how this justifies the exclusion of the Appellant's voting rights." [our emphasis] (para. 66). Two comments are warranted:

(a) "heavy-handed behaviour" and "strenuous contestation" can, in any given case, be found to fall short of the *Century Services* requirements. The QSC found that it did in this case. The QCA did not articulate how this conclusion was a palpable and overriding error;

(b) more importantly, the supervisory judge also found that Callidus had "lacked transparency" with the court and had used the Court's process to "exhaust Mr. Duhamel financially". The QCA does not mention these findings which are the very definition of behaviour that does not meet the requirements of appropriateness, good faith and due diligence.

94. Perhaps in order to justify its intervention, the QCA averred that the process followed by the supervisory judge was not a "fact-finding inquiry" (para. 66). This implied that his decision was not subject to the same degree of deference. This is an error. The law is well settled: the fact that evidence was not presented to the supervisory judge *viva voce* does not

57 See also *Trilogy Energy LP v. SemCAMS ULC*, 2009 ABCA 275, at para. 13.

make the process any less of a fact-finding inquiry, nor does it transform his findings into anything less than findings of fact or make them subject to a lower standard of review.[58]

95. The QCA also disapproved of the supervisory judge relying on his “impressions formed during the course of the CCAA process” to come to his conclusion that Callidus had not met the *Century Services* requirements (para. 66). This is also wrong. It is *precisely* the supervisory judge’s domain, and even his responsibility, to rely on the evidence (whether by affidavit or *viva voce*) and on his impressions formed during the course of the *CCAA* process when exercising his discretion.[59]

96. In short, it was well within the supervisory judge’s discretion to dismiss Callidus’s application once he had found that it was not acting in conformity with the *Century Services* requirements, a finding of fact that was not overruled by the QCA. As Kasirer J.A. (as he then was) recently held: “this is a matter that falls within the discretionary authority of the judge who, given his on-going supervision, is best placed to make a fair order” (*Béton Brunet*, at para. 28).

97. Secondly, and regardless of Callidus’s conduct during the *CCAA* proceedings, the QSC was right to conclude that Callidus’s plan was not “fair and reasonable” and should not be put to a vote. In particular, the QSC found that the plan’s “clear and transparent purpose [which] is to obtain a release from [inter alia] the Respondents’ claim against it” (QCA decision at para. 63), was improper in the circumstances.

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58 *Housen v. Nikolaisen*, [2002] 2 SCR 235, 2002 SCC 33, at paras. 24-25; *FL Receivables Trust 2002-A v. Cobrand Foods Ltd*., 2007 ONCA 425, at paras. 45-46; *IFP Technologies (Canada) Inc. v EnCana Midstream and Marketing*, 2017 ABCA 157, at paras. 72-73 and paras. 289-292 (dissent), leave to appeal to this Court denied (SCC No. 37712).

59 *Béton Brunet*, at paras. 27-31; *Re Edgewater Casino Inc*., 2009 BCCA 40 at para. 20; *North American Tungsten Corporation Ltd. v. Global Tungsten and Powders Corp*., 2015 BCCA 390, at paras. 9-10; *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, at para. 42 (“***Resurgence***”); *Pacific National Lease Holding Corporation*, 15 CBR (3d) 265, at paras. 30-32.

98. Courts have generally been wary of sanctioning plans that include third-party releases: "third party releases should be the exception and should not be requested or granted as a matter of course."[60] This is not surprising.

99. The purpose of insolvency law is to "allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors" or alternatively, "the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules" (*Century Services*, at para. 12; see also paras. 59 and 70). The goal is to avoid a liquidation process which "destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment."[61]

100. This can be achieved by granting third party releases, but only in exceptional circumstances. *Metcalfe* provides such an example. The case concerned the proceedings related to the Asset Backed Commercial Paper liquidity crisis. The plan, which was needed "to restore confidence in the financial system in Canada" (para. 118), included third-party releases. The OCA held that in order to be in "keeping with [the] scheme and purpose" of the *CCAA* (para. 69), "there must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan" (para. 70).[62] The OCA held that in the particular circumstances of this case, "the claims to be released are rationally related to the purpose of the Plan," which was no less than ensuring "the financial viability of the Canadian ABCP market itself" (para. 53). This aligned with the "remedial purpose of the CCAA" (para. 50).

101. In the instant case, there is no attempt to preserve a going concern, nor any orderly liquidation of the Debtors' assets. The Debtors' only significant asset is a claim against Callidus for having destroyed the shareholders' investment. It follows that in stark contrast

60 *Canwest*, at para. 29 ("***Canwest***").

61 *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, 4 C.B.R. (3d) 311 (B.C.C.A.), at p. 318, cited in *Metcalfe*, at para. 50.

62 See also *Re Sino-Forest Corporation*, 2012 ONSC 7050 at para. 22, leave to appeal denied, 2013 ONCA 456.

with the *Metcalfe* decision, the release sought by Callidus is not connected to a broader restructuring that otherwise achieves the remedial purpose of the *CCAA*. Rather, the release *is* the "sole", "clear and transparent purpose" of the plan of arrangement concocted by Callidus (QSC decision, at para. 47; QCA decision, at para. 63). The QSC made no error in concluding that Callidus's plan did not conform with the "scheme and purpose" of the *CCAA*, or in other words, that it pursued an "improper purpose".

102. But there is more. Callidus is asking for something much broader than the releases that have been accepted by Canadian courts. To our knowledge, third party releases obtained in the context of contested plans of arrangement have always included an exception for "fraud, gross negligence or willful misconduct" (*Canwest*, at para. 30). Morawetz J. even stated recently that the law would not permit releases that "apply to liability for criminal, fraudulent or other willful misconduct" (*Target*, at paras. 44-45). This is consistent with the terms of several provisions of the *CCAA* which *specifically* exclude gross negligence and willful misconduct from the protection of the *CCAA* (see sections 11.51(4) and 11.8(3) *CCAA*). Even in the exceptional circumstances of the *Metcalfe* decision, the judge refused to grant a release as wide as the release sought by Callidus and the plan ultimately provided a carve out for certain types of fraud.

103. Here, the release sought by Callidus *must* include "fraudulent or other willful misconduct", otherwise it would serve no purpose *because the Retained Claims are based on precisely such allegations*. To our knowledge, Callidus's plan would therefore, if sanctioned, be the *first contested plan of arrangement to contain a release of such breadth.*[63] Considering the findings of facts of the supervisory judge, another case would doubtless be more deserving of this accolade.

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63 All other sanctioned plans of arrangement incorporating third party releases comprised exclusions for fraud, gross negligence or wilful misconduct: see, *inter alia*, *Canwest*, at para. 30. That the release sought herein is not "fair and reasonable" is also consistent with ss. 11.51(4) and 11.8(3) *CCAA*.

PART IV – SUBMISSIONS CONCERNING COSTS

104. The Appellants seek costs against the Respondents.

PART V – ORDER SOUGHT

105. The Appellants request that this Court allow the appeals from the decision of the QCA rendered on February 4, 2019, and reinstate the decision of the QSC rendered on March 16, 2018.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

106. Pursuant to the QSC decision, the non-redacted version of the LFA is to be kept by the court confidentially under seal and not released until a further order of the court. There is no other sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation or restriction on public access to information in the file that could have an impact on this Court's reasons in the appeal.

Montréal, November 1st, 2019

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PART VII – TABLE OF AUTHORITIES

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

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

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

Doctrine and other documents
