SCC File No. 38594

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

BETWEEN:

9354-9186 QUÉBEC INC., 9354-9178 QUÉBEC INC.

APPELLANTS

-AND-

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

RESPONDENTS

AND BETWEEN:

IMF BENTHAM LIMITED, BENTHAN IMF CAPITAL LIMITED

APPELLANTS

-AND-

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

RESPONDENTS

-AND-

ERNST & YOUNG INC.,
IMF BENTHAM LIMITED, BENTHAM IMF CAPITAL LIMITED,
INSOLVENCY INSTITUTE OF CANADA AND CANADIAN ASSOCIATION
OF INSOLVENCY AND RESTRUCTURING PROFESSIONALS

INTERVENERS

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Appellants, 9354-9178 Québec Inc. and 9354-9186 Québec Inc. (the "**Debtors**") as well as IMF Bentham Limited and Bentham IMF Capital Limited (collectively, the "**Litigation Funder**"), assert that this appeal is about access to justice. Justice for whom?

2. Should creditors of an insolvent company with no operations – including over 100 former employees – who are collectively owed over $ 6.3 million[1] and whose rights have been stayed for many years, have no say in determining how their debtors' sole remaining asset is realized upon for their ultimate benefit? Should the insolvent company's shareholder and a speculating litigation funder be permitted to impose upon those unpaid creditors a realization process that pursues uncertain recovery through protracted litigation – without consulting creditors, obtaining their approval, providing them with any payment guarantees or any upside for the risk they are being forced to take on – when there is an alternative contemplating immediate payment of all or a significant portion of those creditors' claims?

3. In the decision appealed from[2] (the "**Appeal Judgment**"), a unanimous bench of the Quebec Court of Appeal (the "**Court of Appeal**") found, *inter alia*, that the litigation funding arrangement proposed by the Debtors and the Litigation Funder in the context of these proceedings (the "**Debtors' Insolvency Proceedings**") under the *Companies' Creditors Arrangement Act* ("**CCAA**"), took away creditors' rights and thus required their consent to be implemented.

4. In arriving at that conclusion, the Court of Appeal reversed the first instance decision[3] (the "**Motions Judgment**") of the judge supervising the Debtors' Insolvency Proceedings (the "**Supervising Judge**"), which was affected with numerous reviewable errors. The Court of Appeal relied on established principles of Canadian insolvency law and correctly distinguished the

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[1] Monitor's Preliminary List of Voting Creditors as at December 14, 2017 (the "**Monitor's Claim Register**"), **Joint Record of the Respondents (hereinafter "RR"), vol 3, pp 284ff.** This amount excludes Callidus's $3,000,000 claim.

[2] *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc)*, 2019 QCCA 171.

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

decision of the Ontario Court of Appeal in *Crystallex.*[4] The Appeal Judgment is well-founded, restored the protections that must be afforded to creditors in similar circumstances and should be upheld by this Court.

5. The facts of this case are unusual. Unlike a typical debtor company seeking relief under the CCAA with a view to "*avoiding the social and economic losses resulting from liquidation*"[5], the Debtors are essentially empty shells but for one remaining asset, a litigious claim against the Respondent Callidus Capital Corporation ("**Callidus**"). Indeed, the restructuring of the business formerly operated by the Debtors (the "**Business**") was achieved through its sale as a going concern in 2016 as part of the Debtors' Insolvency Proceedings. Since that court-approved transaction, the Business has continued under new stewardship and the Debtors have no *raison d'être* other than to attempt to monetize their claim against Callidus. As there is no possibility of rehabilitation for the Debtors, the only relevant purpose of these CCAA proceedings is the equitable distribution of the Debtors' last remaining asset to their creditors ("**Creditors**").

6. It is submitted that Creditors, which play a central role in any reorganization or liquidation, are the only relevant stakeholders in the Debtors Insolvency Proceedings, given that the restructuring of the Business is complete, and the interests of Creditors must trump those of the Debtors' ultimate shareholder, Mr. Gérard Duhamel[6] (the "**Shareholder**"). Creditors' interests must also outweigh those of the Litigation Funder, who has no legal interest in the Debtors' Insolvency Proceedings and whose sole objective is to maximize the return on its investment in the contemplated litigation against Callidus (the "**Litigation Alternative**") pursuant to a litigation funding agreement[7] (the "**LFA**"). The LFA provides for the payment of a success fee to the

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[4] *Crystallex (Re)*, 2012 ONCA 404 ("***Crystallex* CA**"), denying leave to appeal from *Re Crystallex International Corporation*, 2012 ONSC 2125 ("***Crystallex SC***"), leave to appeal to this Court denied, 2012 CanLII 56139 (SCC) (collectively, "***Crystallex***").

[5] *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60, para 70 ("***Century Services***").

[6] Appeal Judgment, para 24 and Debtors Factum, para 17. Mr. Gérard Duhamel is also the sole director of the Debtors and, according to the Québec Enterprise Register, his residential address is the same as the address of the Debtors.

[7] Litigation Funding Agreement dated February 6, 2018 **Debtors' Record (hereinafter "DR") vol 5, pp 5ff.** The Litigation Funder, the Debtors, the Shareholder, and Dentons Canada LLP as counsel for the Debtors and the Shareholder are the parties to the LFA.

Litigation Funder and of contingency fees for the lawyers representing the Debtors and the Shareholder (the "**Lawyers**"), in undisclosed amounts, before Creditors receive a dime.

7. The Creditors affected by the litigation funding scheme include the Respondents, International Gaming Technology (IGT), Deloitte s.e.n.c.r.l ("**Deloitte**"), Luc Carignan, François Vigneault, Phillipe Millette, Francis Proulx and François Pelletier, which have formed a group (the "**Creditors' Group**") to be jointly represented in the context of the Debtors' Insolvency Proceedings and the present appeal. The Creditors' Group is composed of the former auditors, trade creditors and employees of the Debtors that hold proven claims, respectively, in the amounts of at least $1,545,248, $489,371, $8,044, $7,198, $8,159, $3,274 and $3,436.[8] The Creditors' Group's position in the present appeal is also supported by other Creditors,[9] including BMM Compliance and Oaklins Canada Est Inc. (formerly FTM Synergis Capital), which hold proven claims of respectively $367,538 and $229,500, as well as nine former employees of the Debtors holding proven claims for an aggregate amount of $81,044. Callidus also supports the Creditors' Group, albeit for different reasons.

8. Callidus has offered, as an alternative to the Litigation Alternative, to make a settlement payment sufficient to repay all or a significant portion of Creditors' claims through a CCAA plan of compromise or arrangement (a "**Plan**"). An initial Plan was filed by Callidus for this purpose, which received the support of an overwhelming number of Creditors representing a majority in value of the Creditors' claims, but fell narrowly short of the two-third threshold in value required for its approval under the CCAA. The Debtors also initially sought Creditor approval for the Litigation Alternative through a Plan, which was filed but withdrawn prior to a vote. Callidus has since sought to present a new Plan with an improved offer to Creditors. The Debtors, for the benefit of the Shareholder, the Litigation Funder and the Lawyers, now seek to bypass the requirements of Creditor approval, hence avoiding the preparation and negotiation of an arrangement that would need to be supported by the required majority of Creditors.

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[8] These amounts are according to the Monitor's Claim Register, **RR, vol 3, pp 284ff**. and exclude interest. IGT filed a proof of claim for an amount of $4,877,839 which was revised by the Monitor to $1,545,248; IGT contested this revision and reserves all of its rights in this respect.

[9] Support Letters, **Creditors' Group Supplemental Record** ("**CGSR**"), **vol 1, pp 1-63**; Monitor's Claim Register, **RR, vol 3, pp 284ff**.

9. CCAA proceedings are intended to provide "*a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both*,"[10] particularly in the current context where the restructuring of the Business is complete and the only remaining objective of the Debtors' Insolvency Proceedings is to monetize the Debtors' only remaining asset and distribute the proceeds to Creditors. Nevertheless, the Debtors, which have no remaining employees, operations or other assets, have refused to even engage in negotiations with Creditors to obtain approval of their proposal. Instead, they have elected to pursue the present appeal, for the benefit of the Shareholder, the Litigation Funder and the Lawyers, under the guise of concerns for access to justice and without regard for the position of Creditors, the ultimate beneficiaries of any realization on the Retained Claims.

10. While the Creditors' Group supports the filing of the Callidus Plan and the opportunity to vote on same, its members have not, contrary to the baseless allegation of the Debtors,[11] been "*bought out by Callidus*". The members of the Creditors' Group have been, and remain unconstrained in the Debtors' Insolvency Proceedings and remain open to considering any alternative proposed by Callidus, the Debtors or the Litigation Funder that would, in each member's independent view, further their interests.

11. An essential conclusion of the Appeal Judgment is that the process for realizing on the Debtors' last remaining asset in the particular circumstances of this case is a CCAA arrangement and must be approved by Creditors prior to implementation. The comments by the Court of Appeal regarding the Litigation Funder's interest being "*akin to an equity investment*" were simply an additional contextual element supporting this conclusion and are, in any event, consistent with the prevailing principles governing the characterisation of claims in the insolvency context as well as the rule that equity interests must be subordinated to the interest of creditors. The Appeal Judgment, which served to restore essential protections to Creditors, is sound and should be upheld by this Court.

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[10] *Lehndorff General Partner Ltd* (*Re),* [1993] OJ No 14 (SCJ), para 6 ("***Lehndorff***"), **Book of Authorities** ("**BOA**") **Tab 2**.
[11] Debtors Factum, para 9.

12. For the reasons that follow as well as those set out in the Factum of Callidus, the appeal should be dismissed.

B. Statement of Facts

13. As noted by the Court of Appeal, the facts stated in the Motions Judgment are generally uncontested.[12] However, the Creditors' Group is of the view that a detailed examination of the key circumstances will serve to illuminate the numerous reviewable errors committed by the Supervising Judge and the basis for their correction by the Court of Appeal.

i. The Debtors Insolvency proceedings and the restructuring of the Business

14. The Debtors' Insolvency Proceedings were commenced on November 12, 2015, before the Superior Court of Quebec (Commercial Division) in the district of Montreal (the "**Court**") and Ernst & Young Inc. was appointed as monitor (the "**Monitor**"), pursuant to an Initial Order issued in respect of the Debtors and others.[13]

15. In January 2016, the Court approved a sale solicitation process in respect of the Debtors' assets.[14] Callidus submitted a bid in the context of this process whereby it offered to credit-bid its secured claim as consideration for acquiring substantially all of the assets related to the Business[15] (the "**Callidus Offer**"). The Callidus Offer was accepted by the Debtors and the transaction arising therefrom (the "**Transaction**") was ultimately sanctioned by the Court by way of an approval and vesting order rendered on June 23, 2016.[16]

16. In its Report to the Court recommending the approval of the Transaction, the Monitor noted as follows with respect to the impact of the Callidus Offer on the Business:

> This offer will allow the sale of Bluberi's entire business and the continuance of Bluberi's operations for the benefit of their stakeholders, including, substantially all of Bluberi's current employees. Furthermore, the purchase price outlined in Callidus' credit bid is the highest and most advantageous for the Company's

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[12] Appeal Judgment, para 22.
[13] Initial Order dated November 12, 2015 (as amended, restated and extended, the "**Initial Order**"), **DR, vol 2, pp 56ff.**
[14] SISP Order dated January 28., 2016, **DR, vol 2, pp 141ff.**
[15] Callidus' Credit Bid dated March 7, 2016, **RR, vol 2, pp 192ff.**
[16] Approval and Vesting Order dated June 23, 2016, **RR, vol 1, pp 1ff.**

creditors, despite being insufficient and/or not providing for the payment of unsecured creditors.[17]

17. While the Debtors were divested of all of their assets related to the Business, their rights to sue Callidus and others (the "**Retained Claims**") were expressly excluded from the purchased assets and remained the property of the insolvency estate following the Transaction. Callidus also conserved a $3,000,000 portion of its existing secured claim against the Debtors (the "**Callidus Claim**").[18]

18. Since the approval of the Transaction in June 2016, the Business has continued under new stewardship with the majority of its operations being preserved and a number of its employees retained.

ii. The competing Plans

19. On September 11, 2017, the Debtors sought the approval of what they characterized as a "DIP Facility" to be secured by a $20,000,000 priority charge on the Debtors' remaining assets for the purpose of financing litigation on the basis of the Retained Claims[19] (the "**Initial Funding Application**"). On September 18, 2017, Callidus, filed an application[20] (the "**Initial Plan Application**") seeking to file a creditor-sponsored Plan[21] (as amended, the "**Initial Callidus Plan**") and requesting that a Creditors' meeting be held to vote on such Plan. Deloitte, a member of the Creditors' Group with a proven claim of nearly $500,000, supported the Initial Plan Application and the filing of the Initial Callidus Plan as an alternative to the Litigation Alternative, without committing to vote in favour of such Plan.[22]

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[17] Monitor's Seventh Report dated June 20, 2016, para 78. See also paras 82 and 86, **RR, vol 3, pp 97-99.**

[18] Appeal Judgment, paras 30-31.

[19] Debtors' Application for the Issuance of an Order Extending the Stay of Proceedings and Authorizing an Interim Financing, **DR, vol 3, pp 99ff.**

[20] Motion for an Order for the Convening, Holding and Conduct of a Creditors' Meeting and Extension of the Stay Period dated September 8, 2017, **RR, vol 1, pp 11ff.**

[21] Amended Plan of Compromise and Arrangement dated December 5, 2017, **RR, vol 3, pp 113ff.**

[22] Initial Plan Application, paras 3, 7, 9, **RR, vol 1, p 12.**

20. The Initial Callidus Plan provided for Callidus to make a lump sum contribution totaling $2,630,000 to be distributed to the Creditors in consideration of full and final releases in respect of the Retained Claims (the "**Callidus Releases**"). The Initial Callidus Plan guaranteed that accepted claims of the Debtors' former employees and those of less than $3,000 would be paid in full, while the other Creditors would recover an average of 31% of their respective claims.[23] The Initial Callidus Plan provided that the Callidus Claim was unaffected "*except any portion thereof valued by Callidus as an unsecured claim and in connection to which Callidus elects to vote*".[24]

21. On September 19, 2017, the Court adjourned the presentation of the Initial Funding Application and the Initial Plan Application and took note that all parties agreed that Creditors should have the opportunity to take a position on the arrangements proposed by Callidus, the Debtors or any other party.[25] At the adjourned hearing on October 5, 2017, the Debtors filed a Plan[26] (the "**Debtors' Plan**") requesting Creditor approval for the Litigation Alternative. The Debtors expressly recognized that Creditor approval was appropriate and should be obtained before the proceedings in connection with the Retained Claims are launched.[27]

22. The Debtors' Plan also provided Creditors with an incentive for accepting the obvious delays and risks associated with the Litigation Alternative in the form of interest on their proven claims, at a rate of 5% *per annum* from the date of the Initial order, as well as a "*Creditors' Premium*" (*Prime aux Créanciers*), payable in the event the net proceeds of the litigation exceeded $20,000,000.[28]

23. After authorizing the filing of the Debtors' Plan, the Court issued directions regarding the process for holding a meeting of Creditors in order to vote on the competing Plans and ordered that costs of such process be shared by the Debtors and Callidus.[29] In its reasons, the Court

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[23] Initial Callidus Plan, s. 2.2, **RR, vol 3, pp 124-125.**
[24] Initial Callidus Plan, para 3.3, **RR, vol 3, p 126.**
[25] Minutes of Hearing, September 19, 2019, **RR, vol 1, p 23.**
[26] *Plan de compromis et d'arrangement des compagnies débitrices* dated October 4, 2017, **RR, vol 3, pp 155ff.**
[27] Debtors' Plan, p 4, recital [H], **RR, vol 3, p 158.**
[28] Debtors' Plan, para 4.1 (c), Annexe "A" – Definitions, paras 28 and 48, **RR, vol 3, pp 165, 175 and 177**.
[29] Minutes of Hearing, October 5, 2017, **RR, vol 1, pp 28-29**.

explicitly recognized that the arrangements provided for in both the Debtors' Plan and the Initial Callidus Plan should be submitted for Creditor approval.[30]

iii. The Creditors' Meeting

24. On October 12, 2017, the Court issued orders establishing a claims process to determine claims against the Debtors[31] (the "**Claims Process**") and directing the holding of a meeting of Creditors, to be held on December 15, 2017 (the "**Creditors' Meeting**"), to vote on the Initial Callidus Plan and the Debtors Plan.[32] Ultimately, the Debtors elected not to comply with the funding requirements ordered by the Court and withdrew the Debtors' Plan before the Creditors' Meeting, such that only the Initial Callidus Plan was submitted for voting.[33]

25. In its report to the Court on the Initial Callidus Plan, the Monitor provided a review of its salient features, including the scope of the Callidus Releases, the proposed distributions and the expected recovery for Creditors.[34] The Monitor also confirmed that Creditors that had proved their claims in accordance with the Claims Process were entitled to vote at the Creditors' Meeting and that while the Callidus' secured claim was unaffected under the Plan, it could "*vote the portion of its claim, assessed by Callidus, to be an unsecured Claim*."[35] Ultimately, the Monitor concluded that the Initial Callidus Plan was reasonable in the circumstances and recommended its acceptance by Creditors.[36]

26. At the Creditors' Meeting held on December 15, 2017, an overwhelming majority of Creditors in number voted in favor of the Initial Callidus Plan (92 out of 100) representing a majority in value of all voting claims (59.22%).[37] The required majority of two-thirds in value was therefore narrowly missed but would have been attained were it not for the vote of one Creditor, SMT Hautes Technologies ("**SMT**"), which voted against with its claim consisting of 36.7% of

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[30] Minutes of Hearing, October 5, 2017, **RR, vol 1, p 28.**
[31] Claims Procedure Order dated October 12, 2017, **RR, vol 1, pp 30ff.**
[32] Creditors Meeting Order dated October 12, 2017, **RR, vol 1, pp 73ff.**
[33] Appeal Judgment, paras 35-36, 91.
[34] Monitor's Fourteenth Report dated December 8, 2017 (the "**Monitor's Fourteenth Report**"), paras 31-32, 35-37, 40-41, **RR, vol 3, pp 186-188.**
[35] Monitor's Fourteenth Report, paras 29 and 38, **RR, vol 3, pp 186-188**.
[36] Monitor's Fourteenth Report, para 52, **RR, vol 3, p 190.**
[37] Minutes of the Creditors Meeting dated December 15, 2017, **RR, vol 1, p 121.**

the value of all voting claims. For its part, Callidus did not seek to value its security or vote the Callidus Claim at the Creditors' Meeting.[38]

iv. The Funding Application and the New Plan Application

27. On February 6, 2018, the Debtors filed a new application with a view to pursuing the Litigation Alternative[39] (as amended, the "**Funding Application**"). The Debtors sought, in particular, authorization to enter into the LFA and the constitution of a $20,000,000 super-priority charge on the Retained Claims as well as on any potential proceeds to be derived from the pursuit thereof (the "**Litigation Proceeds**"), even by a trustee in bankruptcy,[40] as security for the Debtors' obligations under the LFA (the "**Litigation Financing Charge**").

28. The version of the LFA disclosed to Creditors was redacted such that it is impossible to evaluate the contemplated allocation of the Litigation Proceeds or the impact of the Litigation Financing Charge on Creditors. It is clear from the distribution waterfall, however, that the Litigation Funder's success fees and the contingency fees of the Lawyers must be paid before there can be any recovery for Creditors.[41] The Litigation Funder also retains a discretionary right to unilaterally terminate the Litigation Alternative at any time.[42] The Debtors refused to provide the Creditors' Group and its counsel with an unredacted version of the LFA, even subject to confidentiality undertakings, and the Monitor declined to intervene to address this lack of transparency.

29. Following the filing of the Funding Application, the Creditors' Group was officially formed by certain Creditors who had voted in favour of the Initial Callidus Plan. On February 10, 2018, the Creditors' Group advised Callidus that it would support the filing of a new Plan

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[38] Appeal Judgment, paras 37, 83.

[39] Amended Application for the Issuance of an Order Extending the Stay of Proceedings and for an Order Authorizing Litigation Funding and a Litigation Financing Charge dated February 15, 2018, **DR, vol 4, pp 68ff.**

[40] The definition of "Litigation Proceeds" under the LFA includes any payments received by an "External Controller", which includes a trustee in bankruptcy of the Debtors: LFA, p 15, **DR, vol 5, p 19.**

[41] LFA, s 3.1, "Bentham Return", s 3.2, "Lawyer's Return", s 3.3 "Payment Waterfall", **DR, vol 5, pp 7-8.**

[42] LFA, Exhibit A: General Terms and Conditions, s. 10.1, **DR, vol 5, p 34.**

providing for an equal or superior distribution to Creditors and asked that the legal fees incurred by the Creditors' Group be reimbursed by Callidus, in order to allow the members of the Creditors' Group to receive at least the same recovery. The Creditors' Group did not undertake to vote in favour of any new Plan and confirmed that each of its members would assess all available alternatives individually. The Creditors' Group also suggested that the Callidus' claim be amended such that all or a portion thereof could be voted on the new Plan, without affecting the recovery of the Creditors.[43]

30. On January 24 2018, further to the filing of the Funding Application, the Court established a timetable for the filing of contestations or applications by Creditors or any other party.[44] On February 12, 2018, the Creditors' Group and Callidus each filed a contestation[45] to the Funding Application and a joint application[46] (the "**New Plan Application**") to submit a new Plan[47] (the "**Callidus Plan**") to be voted upon by the Creditors. The Callidus Plan provides for an increased contribution in the amount of $2,880,000, such that the claims of former employees and those valued at less than $3,000 would be paid in full with other Creditors recovering between 35% and 99% of their accepted claims.[48] The Callidus Plan includes the Callidus Releases, and also provides for the reimbursement of the fees of the Creditors' Group, up to $50,000 and subject to implementation of that Plan.[49]

31. On February 14, 2018, the Monitor submitted a report to the Court in which it commented on the relief sought pursuant to the Funding Application and the New Plan Application.[50] In this report, the Monitor made no formal recommendation but (a) identified what it considered to be

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[43] Letter from M[e] Perreault to M[e] Benoit dated February 10, 2018, **RR, vol 3, pp 237ff.**
[44] Court Order and Minutes of Hearing, January 24, 2018, **RR, vol 1, p 127.**
[45] Creditors' Group's Contestation of the Application for the issuance of an Order Extending the Stay of Proceedings and for an Order Authorizing Litigation Funding and a Litigation Financing Charge, **DR, vol 4, pp 55ff.**; Callidus's Contestation of the Application for the issuance of an Order Extending the Stay of Proceedings and for an Order Authorizing Litigation Funding and a Litigation Financing Charge, **DR, vol 3, pp 170ff.**
[46] Motion for an Order for the Convening, Holding and Conduct of a Creditors' Meeting and Extension of the Stay Period dated February 12, 2018, **DR, vol 4, pp 1ff.**
[47] Plan of Compromise and Arrangement dated February 12, 2018, **DR, vol 4, pp 16ff.**
[48] Callidus Plan, para 2.2, **DR, vol 4, pp 29-30.**
[49] Callidus Plan, paras 4.7, 5.1, **DR, vol 4, p 33.**
[50] Monitor's Fifteenth Report dated February 14, 2018 (the "**Monitor's Fifteenth Report**"), **Monitor's Book of Authorities ("MBOA"), Tab 5.**

three "*useful precedents*" to inform the Supervising Judge's assessment of the LFA and included a table summarizing certain publically available information regarding those cases;[51] (b) recognized that the funding provided for under the LFA was not structured as a financing in that the Litigation Funder's return is "*limited to the proceeds of the award*;"[52] (c) explained that the Monitor's initial support for the Funding Application, prior to the filing of the Callidus Plan, was premised on the Litigation Alternative being the only prospect that could potentially allow for meaningful recovery for Creditors;[53] and (d) noted that the Litigation Alternative would involve "*lengthy litigation proceedings pursuant to which any recovery for Creditors would be delayed*."[54]

32. The Monitor concluded in the Monitor's Fifteenth Report that a solution promoting the interests of all stakeholders should be implemented, without recommending one over another, and suggested that certain issues be determined by the Court on a preliminary basis. The Monitor also highlighted the need for clarification regarding how the costs of the Debtors' Insolvency Proceedings, including the fees and costs of the Monitor and its counsel, would be paid going forward.[55]

v. The judgments of the courts below

33. Following a one-day hearing on February 16, 2018, at which no witnesses testified, the Supervising Judge rendered the Motions Judgment, granting the Funding Application, dismissing the New Plan Application and ordering minimal additional disclosure of the terms of the LFA to Creditors.

34. The Creditors' Group respectfully submits that the Supervising Judge committed various clear errors that justified the intervention of the Court of Appeal including his determinations that:

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[51] Monitor's Fifteenth Report, paras 50-52, 81-90, **MBOA, Tab 5, pp 8-9 and 15-17.**
[52] Monitor's Fifteenth Report, para 53, **MBOA, Tab 5, p 10.**
[53] Monitor's Fifteenth Report, paras 54-55, **MBOA, Tab 5, p 10.**
[54] Monitor's Fifteenth Report, para 87, **MBOA, Tab 5, p 16.**
[55] Monitor's Fifteenth Report, paras 81, 90, **MBOA, Tab 5, pp 15 and 17.** It was confirmed at the hearing before the Supervising Judge that such fees and costs are being paid by the Litigation Funder.

(a) the LFA could be authorized without a Plan because Creditors' rights were not being taken away and the Litigation Alternative was the only path to creditor recovery (paras. 69, 72-73 and 91); and

(b) Callidus could be precluded from voting on the Callidus Plan on the purported basis that it had conducted itself in a manner that was "*contrary to the purpose of the CCAA*" and that its vote would serve an "*improper purpose*" as well as give rise to a "*substantial injustice*" (paras. 38-48 and 55-56);

35. Leave to appeal the Motions Judgment was granted on April 20, 2018[56] and the appeal on the merits was allowed on February 4, 2019.

36. In the detailed and well-supported Appeal Judgment, written by Schrager, J.A. for a unanimous bench, the Court of Appeal concluded, *inter alia*, that:

(a) the scheme contemplated in the LFA is an arrangement under the CCAA that takes away Creditor rights and must, given the circumstances, be approved by Creditors through a Plan prior to implementation (paras. 87-89 and 91); and

(b) Callidus, as a Creditor and plan sponsor, is entitled to value its security at nil and vote the Callidus Claim on the Callidus Plan in the same class as other unsecured Creditors (paras. 57 and 74-76).

37. The Court of Appeal also noted, in *obiter*, that it agreed with the Creditors' Group that the LFA was "*akin to an equity investment*" because of the contingent nature of its repayment terms.[57]

38. On May 1, 2019, the Court of Appeal granted a stay of execution of the Appeal Judgment[58] pending the decision of this Court on the applications for leave to appeal filed by the Debtors and the Litigation Funder, which were thereafter granted on August 15, 2019.[59]

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[56] *Callidus Capital Corporation c 9354-9186 Québec inc*, 2018 QCCA 632.
[57] Appeal Judgment, para 90.
[58] *Arrangement relatif à 9354-9186 Québec inc (Bluberi Gaming Technologies Inc)*, 2019 QCCA 766.
[59] *9354-9186 Québec inc, et al v Callidus Capital Corporation, et al*, 2019 CanLII 75293 (SCC).

39. As will be explained below, had the Supervising Judge correctly applied the law to the facts of this case, he would have authorized the filing of the Callidus Plan and required the LFA scheme to be submitted to Creditors for approval prior to authorizing the Litigation Alternative on the terms proposed in the Funding Application. The Court of Appeal properly exercised its function as a correcting court, in the face of clear reviewable errors in the Motions Judgment, and its decision should be confirmed by this Court.

PART II – QUESTIONS IN ISSUE

40. The Creditors Group has reviewed the questions in issue proposed by the Appellants and would consolidate them into five issues, articulated as follows:

(a) **Is Callidus entitled to vote on the Callidus Plan?** (Debtors Factum, questions (a) and (c) and Litigation Funder Factum, questions A and C)

Yes, for the reasons set out in the Factum of Callidus. As both of the courts below agreed, Callidus is not a "*creditor who is related to the company*" under section 22(3) CCAA. Furthermore, the Supervising Judge erred in his application of the doctrine of "*improper purpose*" and in finding that Callidus' vote on the Callidus Plan would give rise to a "*substantial injustice*".

(b) **Is Callidus entitled to vote on the Callidus Plan in the same class as other Creditors?** (Debtors Factum, question (b) and Litigation Funder Factum, question B)

Yes, for the reasons set out in the Factum of Callidus. Callidus has sufficient commonality of interest with other Creditors to vote in the same class as them on the Callidus Plan. Furthermore, Callidus' entitlement to vote in the same class as other Creditors on the Callidus Plan would not preclude the Callidus Claim from being unaffected or placed in a different class under any competing Plan filed by the Debtors or any other party.

(c) **Is the scheme contemplated in the LFA an arrangement that requires the approval of Creditors to be implemented?** (Debtors Factum, question (d) and Litigation Funder Factum, questions D and E)

Yes. The Supervising Judge erred in failing to characterize the scheme provided for in the LFA as an arrangement on the facts of this case. The funding contemplated under the LFA is not interim financing, unlike the funding authorized in *Crystallex*, which provided for materially different terms and which was approved in importantly different circumstances. The Court of Appeal was right to reverse the Supervising Judge's characterisation as his analysis was premised on incorrect factual findings and failed to account for determining relevant circumstances.

(d) **Can Callidus elect to value its security as it sees fit and vote all or part of its claim as an unsecured creditor?** (Debtors Factum, question (e) and Litigation Funder Factum, question F)

Yes, for the reasons set out in the Factum of Callidus. Like any secured creditor, Callidus may value its security and prove the balance of its claim, or surrender its security and prove its entire claim, as an unsecured creditor.

(e) **Is the Court of Appeal's observation that the Litigation Funder's interest under the LFA is "*akin to an equity investment*" well-founded?** (Debtors Factum, question (f) and Litigation Funder Factum, question G)

Yes. While this statement was not part of the *ratio decidendi* of the Appeal Judgment and provided only secondary support for characterising the LFA scheme as an arrangement, it is consistent with the principles governing the characterisation and subordination of certain claims in an insolvency context.

PART III – ARGUMENT

41. The Creditors Group adopts as its own the submissions in the Callidus Factum with respect to questions (a), (b) and (d) above (Debtors Factum, questions (a), (b), (c) and (e) and Litigation Funder Factum, questions A, B, C and F) and will address questions (c) and (e) (Debtors Factum, questions (d) and (f) and Litigation Funder Factum, questions D, E, and G).

C. Is the scheme contemplated in the LFA an arrangement that requires the approval of Creditors to be implemented? (Debtors Factum, question (d) and Litigation Funder Factum, questions D and E)

42. The first question raised by the Litigation Funder in connection with this issue relates to the Court's authority to approve the LFA and the Litigation Financing Charge under section 11.2 CCAA.[60] The second question concerns whether the Supervising Judge was compelled to find that the LFA was a "*compromise or arrangement*" requiring Creditor approval.[61]

43. In the Creditors' Group's view, the question before this Court is whether the Court of Appeal erred in reversing the Supervising Judge's decision to allow the LFA scheme to be implemented without Creditor approval in the particular circumstances of this case. It is respectfully submitted that, contrary to the Appellants' arguments, the court below committed no reviewable error in :

i. noting that the LFA transcended the notion of interim financing;

ii. deciding that *Crystallex* was distinguishable;

iii. endorsing a broad and flexible interpretation of the concept of arrangement; and

iv. reversing the Supervising Judge's erroneous characterisation of the LFA scheme.

44. As such, this appeal should be dismissed.

i. The LFA is not structured as interim financing

45. The Litigation Funder takes exception with the Court of Appeal's comment that the rationale behind interim financing is to "*keep the lights on*" and argues that there is no requirement that funding authorized under section 11.2 CCAA be connected to the debtor company's commercial operations.[62] Contrary to these submissions, the Court of Appeal correctly described the rationale behind interim financing and determined that the funding under the LFA should not have been authorized as such.

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[60] Litigation Funder Factum, paras 40ff.
[61] Litigation Funder Factum, paras 56ff.
[62] Litigation Funder Factum, paras 43ff, 55.

46. In support of its comments regarding the underlying purpose of interim financing, the Court of Appeal cited recent appellate case law as well as Professor Janis Sarra, a leading scholar in CCAA matters.[63] This Court has also recognized that even prior to its codification, super priority interim financing could be authorized on the basis of the CCAA court's inherent jurisdiction "*when necessary for the continuation of the debtor's business during the reorganization.*"[64] Furthermore, commentators on the amendments that included section 11.2 CCAA described the "*Rationale*" of interim financing as allowing an insolvent business "*to continue to operate while it attempts to restructure its debts."*[65]

47. There is thus nothing controversial or erroneous about any of the Court of Appeal's comments regarding the well-established purpose of interim financing. In any event, the court below recognized that "*the original premise of maintaining operations may have been expanded in the applications and manifestation of such financing in recent years*"[66] but correctly determined that "*characterizing the LFA as interim financing in the circumstances of this case transcended the nature of such financing*."[67]

48. Interim financing is meant to further the CCAA's objective of preserving going concern value and avoiding the unfavorable social and economic consequences of liquidation.[68] In accordance with that purpose, CCAA priming charges should be limited to only what is necessary

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[63] Appeal Judgment, para 77 citing *Industrial Properties Regina Limited v Copper Sands Land Corp*, 2018 SKCA 36, para 37 ("***Industrial Properties***"); and Janis Sarra, *Rescue!, The Companies' Creditors Arrangement Act*, 2nd Edition, Carswell, 2013, p 197 ("**Sarra**"), **Litigation Funder Book of Authorities (LFBOA), Tab 5.**

[64] *Century Services*, para 62.

[65] See Industry Canada, Corporate and Insolvency Law Policy Directorate, *Clause by Clause Briefing Book: An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* (Ottawa: Industry Canada, 2005), online: <https://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00908.html>.

[66] Appeal Judgment, para 78 citing Sarra, p 210, which is also cited by the Litigation Funder at paragraph 46 of its Factum.

[67] Appeal Judgment, para 78 [emphasis added].

[68] See *Canada v Canada North Group Inc*, 2019 ABCA 314, paras 47-48, 50 ("***Canada North***"); *Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6, paras 58-59 ("***Sun Indalex***").

for the contemplated restructuring.[69] A supervising judge is required to consider these remedial objectives when authorizing interim financing.[70]

49. Given that the restructuring of the Business had already been completed though the Transaction in 2016, the Supervising judge erred in granting the Litigation Financing Charge, which serves the interests of the Shareholder and the Litigation Funder at the expenses of the only remaining relevant stakeholders, namely Creditors.[71] Indeed, the effect of the Litigation Financing Charge is to deprive Creditors of their entitlement to the Litigation Proceeds (including any settlement proceeds and even in a bankruptcy context), for the purpose of not only repaying the funds advanced by the Litigation Funder but also paying the success fees of the latter and the contingency fees of the Lawyers.

50. As will be explained below, the absence of a connection between the proposed litigation funding and the Debtors' non-existent commercial operations was one of the various circumstantial elements properly considered by the Court of Appeal in determining that the LFA scheme is an arrangement. Moreover, the terms of the LFA funding scheme reveal that the financing proposed by the Litigation Funder is not in the nature of interim financing at all nor does it even bear the characteristics of debt.

51. The Supervising Judge never even referred to the notion of interim financing or canvased any of the criteria provided for at section 11.2(4) CCAA, unlike the motions judge in *Crystallex*, who had correctly held that those factors cannot be ignored whenever a court grants a super priority charge to secure an interim facility.[72] In circumstances where Creditors opposed the Funding Application, the Supervising Judge erred in failing to consider relevant factors under 11.2(4) CCAA.[73]

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[69] *Canada North*, para 57; *Mecachrome International inc (Plan de transaction ou arrangement de)*, 2009 QCCS 1575, paras 29-30.
[70] *Cliffs Over Maple Bay Investments Ltd v Fisgard Capital Corp*, 2008 BCCA 327, para 37. See also *Crystallex CA*, para 72 where the court held funding furthered the objectives of the CCAA because the litigation was the only prospect of recovery for creditors.
[71] See paras 82 to 84 of this Factum.
[72] *Crystallex SC*, paras 32, 35. See also *Industrial Properties*, para 38.
[73] See *Industrial Properties*, paras 42, 44.

52. While the issue of standard of review is addressed more fully below,[74] the Creditors' Group notes that failure to apply the proper legal test amounts to an error of law reviewable on a correctness standard.[75] Furthermore and as noted by the Ontario Court of Appeal in *Crystallex*, in a passage cited by the Monitor, failure to consider the particular factors of a legal test is, in and of itself, a reason for an appellate court to interfere with the exercise of discretion by a CCAA supervising judge.[76]

53. In light of the foregoing, the Court of Appeal was justified in holding that the Supervising Judge committed reviewable errors in his application of the legal notion of interim financing to the facts before him.[77] The Court of Appeal's comments on the nature and purpose of interim financing were correct and cannot be assimilated to imposing an additional requirement under section 11.2 CCAA, as suggested by the Litigation Funder. Those comments must rather be read in the broader context of the decision appealed from, which determined that the particular litigation funding scheme contemplated in the LFA was highly prejudicial to Creditors and was thus importantly different than that authorized in *Crystallex*, in very different circumstances.

ii. The Court of Appeal correctly distinguished *Crystallex*

54. As noted in the Appeal Judgment, the Appellants and the Supervising Judge placed considerable reliance on the Ontario Court of Appeal's decision in *Crystallex* in determining whether the LFA scheme required Creditor approval.[78] The Litigation Funder and the Monitor disagree with the court below's finding that *Crystallex* was distinguishable and urge this Court to follow the approach taken in the latter decision.[79]

55. Recognizing that both the Appeal Judgment and *Crystallex* are decisions rendered by appellate courts relating to litigation funding in CCAA proceedings, the Creditors' Group notes the following comments of Chief Justice Laskin, dissenting in *Harrison v. Carswell*:

> What is important, […] is not whether we have a previous decision involving a "brown horse" by which to judge a pending appeal involving a "brown horse", but

[74] See paras 104ff. of this Factum.
[75] *Housen v Nikolaisen*, 2002 SCC 33, para 27.
[76] *Crystallex CA*, para 70 cited in Monitor's Factum, para 12.
[77] Appeal Judgment, para 78.
[78] Appeal Judgment, para 79.
[79] Litigation Funder Factum paras 61-64; Monitor Factum, paras 20-22.

> rather what were the principles and, indeed the facts, upon which the previous case, now urged as conclusive, was decided.[80]

56. The Court of Appeal was right to distinguish *Crystallex* for various reasons, including that the litigation funding in that case, unlike that provided for under the LFA, afforded important protections to creditors and was authorized in circumstances where there was only one possible path to realizing on the debtors' last remaining asset.

a. The *Crystallex* litigation funding preserved creditors' rights, unlike that provided for under LFA

57. Under the interim facility authorized in *Crystallex*, the lender was granted a charge priming the unsecured creditors' claims only for the amounts it actually advanced, plus 10% interest.[81] This super-priority secured financing was consistent with the language of the statute[82] and in the nature of debt according to the definition retained in recent insolvency decisions dealing with the characterisation of claims:

> At its heart, the difference between equity and debt lies in the fundamental nature of their respective claims on the assets and cash flow of the company. Debt involves borrowing funds subject to a legal commitment to repay the borrowed money with interest at an agreed rate by a stated maturity date. This commitment is embodied in a contract, and this contract is implemented by the borrower. Lenders receive a contractually agreed set of cash flows, typically through periodic interest payments and one or more principal repayments, the last of which occur on the maturity date.[83]

58. While the funding arrangement in *Crystallex* also included significant additional compensation for the lender, representing 35% of the applicable litigation proceeds, this success fee was only payable

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[80] *Harrison v Carswell*, [1976] 2 SCR 200, at 206.

[81] *Crystallex SC*, para 23 (e).

[82] CCAA, s 11.2(1): On application by a debtor company […], a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. [emphasis added]

[83] *US Steel Canada Inc (Re)*, 2016 ONSC 569, para 183 ("***US Steel Canada SC***") [emphasis added] and *Tudor Sales Ltd (Re)*, 2017 BCSC 119, para 36 ("***Tudor Sales***").

once the claims of unsecured creditors were repaid in full plus, interest of up to 15% *per annum*.[84] This latter portion of the lender's compensation was contingent on the arbitration claim yielding litigation proceeds and subordinated to the unsecured creditors' claims, plus interest. In light of these characteristics, it is understandable that the supervising judge in *Crystallex* applied section 11.2 CCAA and dealt with the funding scheme as interim financing.

59. The funding in *Crystallex* provided for a series of court-ordered charges over the assets of the debtor to establish the priority of the claims of the litigation funder and of the unsecured creditors.[85] The latter were granted a charge (the Prefiling Unsecured Creditors' Charge), which ranked junior to the charge securing the lender's advances plus interest (the DIP Charge) but senior to another charge securing the funder's 35% success fee (the Lender Additional Compensation Charge).[86] As a consequence of the ranking of these charges, all pre-filing unsecured claims were guaranteed to be paid in full before the litigation funder obtained any part of its success fee. Furthermore these charges survived bankruptcy,[87] ensuring the priority of the unsecured creditors' claims over the success fee in all circumstances and that the realization of the unsecured creditors' claims could never be diluted by the success fees in the event the litigation proceeds were insufficient to repay them in full, plus interest.

60. Thus, if the creditors in *Crystallex* had sought to terminate those CCAA proceedings to pursue the debtor's claim in a bankruptcy, their repayment rights would be preserved and they could vote down any Plan that provided for anything less than full satisfaction of their claims, plus interest. Given that the Prefiling Unsecured Creditors' Charge guaranteed creditors' repayment rights, it follows that the Ontario Court of Appeal agreed with the supervising judge that "[n]*one of* [the creditors'] *rights are taken away by the Tenor DIP*."[88]

61. The litigation funding provided for under the LFA is quite different. As recognized by the Litigation Funder, the funding to be granted by the latter is "*non-recourse*" financing that bears no interest and is only repayable from the Litigation Proceeds.[89] More importantly, the Litigation

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[84] *Crystallex SC*, paras 23 (f), 82 (b).
[85] *CCAA* Financing Order, *Re Crystallex International Corporation* (16 April 2012) Toronto CV-11-9532-00CL (Ont. S.C.J.) ("**Crystallex Financing Order**"), **BOA Tab 1**.
[86] Crystallex Financing Order, para 17.
[87] Crystallex Financing Order, para 21.
[88] *Crystallex CA*, paras 92-93, citing *Crystallex SC*, para 50.
[89] See Litigation Funder Factum, paras 8 and 86.

Financing Charge authorized by the Supervising Judge encumbers the Retained Claims perpetually, even if realized upon by a trustee in bankruptcy, and secures all amounts owed to the Litigation Funder, including its success fee, and to the Lawyers for their contingency fees, all in priority to the claims of Creditors.

62. In its report to the Court prior to the hearing before the Supervising Judge, the Monitor recognized the contingent nature of the Litigation Funder's repayment rights noting that it was unlike "*certain arrangements structured as financings (with the lender earning fees and an interest rate in addition to a portion of the litigation award)*".[90] Furthermore, the table of "*useful precedents*" submitted by the Monitor does not mention the fact that the litigation funder's success fee in *Crystallex* was only payable after the unsecured creditors were repaid in full. Respectfully, this is a fundamental distinction that should have been brought to the Supervising Judge's attention[91] and which was rightly considered by the Court of Appeal.[92]

63. In *Calpine*,[93] cited in *Crystallex*[94] as well as by the Litigation Funder and the Monitor,[95] the supervising judge approved a settlement agreement concluded in a complex cross-border insolvency without requiring the approval of a Plan. The settlement agreement assured substantial recovery for the debtors' estate and was beneficial to creditors as a whole.[96] Leave to appeal that decision was denied, recognising that "[t]*he precedential implications of* [the] *approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid*

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[90] Monitor's Fifteenth Report, para 53, **MBOA, Tab 5, p 10.**
[91] See *Re TOYS "R" US (Canada) Ltd*, 2017 ONSC 5571, para 11.
[92] Appeal Judgment, para 91.
[93] *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)* ("***Calpine SC***"), 2007 ABQB 504.
[94] *Crystallex CA*, para 44 (ii).
[95] Litigation Funder Factum, para 58 and Monitor Factum, para 29. It is noteworthy that the cases identified at note 54 of the Litigation Funder Factum cite *Calpine* in support of a CCAA court's power to approve agreements and transactions otherwise than through a Plan. Such decisions do not address the criteria for identifying an arrangement.
[96] *Calpine SC*, paras 81- 82.

claims of Canadian creditors likely will be paid in full."[97] *Calpine*, like *Crystallex* is thus distinguishable from the case at bar.

64. Indeed, while the Creditors' Group is unable to assess with precision the LFA scheme's financial impact on Creditors, given that several of its material terms are entirely or importantly redacted,[98] there are multiple scenarios in which Creditors could not receive any recovery (let alone be paid in full plus interest). The Litigation Funder can obtain its success fee and the Lawyers could obtain their contingency fees before the Creditors are repaid.[99] As recognized by the Court of Appeal, Creditors could very well receive nothing and are inadequately protected under the proposed scheme.[100]

b. There were no alternatives for creditor recovery in *Crystallex*, unlike in the present case

65. The Court of Appeal was also justified in distinguishing *Crystallex* on the basis that in the present case there are alternative paths to monetizing the Retained Claims.[101]

66. In *Crystallex,* the supervising judge considered that all the parties were in agreement that "*the only way any of the creditors will receive any substantial cash payment is from the proceeds of the arbitration*." [102] The Ontario Court of Appeal affirmed his decision to authorize the litigation funding as interim financing emphasizing that "*most significantly* (…) *the supervising judge found there could be no meaningful recovery, and therefore no successful restructuring, without the financing of the arbitration*."[103]

67. The circumstances of this case are decidedly different where there are at least two competing approaches for realizing on the Debtors' last remaining asset. While both the Litigation Alternative and the Callidus Plan seek to monetize the same asset and seek payment from the same

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[97] *Re Calpine Canada Energy Limited (Companies' Creditors Arrangement Act)*, 2007 ABCA 266, para 31 ("***Calpine CA***").
[98] LFA, s 3.1, "Bentham Return", s 3.2, "Lawyer's Return", s 3.3 "Payment Waterfall", **DR, vol 5, pp 7-8.**
[99] LFA, s 5.1, **DR, vol 5, p 9**; Funding Application, paras 78-79, **DR, vol 4, pp 86-87.**
[100] Appeal Judgement, paras 87, 94.
[101] Appeal Judgment, paras 80, 82, 91.
[102] *Crystallex SC*, 2012 ONSC 2125, para 47 [emphasis added].
[103] *Crystallex CA*, 2012 ONCA 404, para 72 [emphasis added].

party, practically speaking there are still two very different "*sources*" of Creditor recovery, contrary to what is alleged by the Litigation Funder.[104]

68. As recognized by the Monitor,[105] the implementation of the LFA scheme will involve protracted litigation against Callidus and uncertain recovery for Creditors. Moreover and as noted by the Court of Appeal, under the LFA, the Litigation Funder can discontinue the action against Callidus at any time, the Debtors can decide if and when to file a Plan and Creditors have no control over the process or any guarantee of payment.[106] It is not surprising that the Shareholder and Litigation Funder would support the Litigation Alternative on these terms, the former having nothing to lose but everything to gain and the latter seeking only a return on its investment. It is also far from clear, as recognized by the court below,[107] that the lawsuit against Callidus will yield Litigation Proceeds anywhere close to $200 million, contrary to what is suggested by the Appellants.[108]

69. By contrast, the Callidus Plan contemplates immediate payment in full for all employees and holders of small claims as well as between 35% and 99% recovery for Creditors with larger proven claims.[109] As mentioned by the Court of Appeal,[110] the Monitor concluded that the offer provided for in the Initial Callidus Plan, including the Callidus Releases, was reasonable in the circumstances and recommended its acceptance by Creditors.[111]

70. The Court of Appeal also recognized that Creditor recovery could be pursued in a bankruptcy of the Debtors.[112] Indeed, Callidus has already agreed to make an offer of $2,000,000 in exchange for a full and final release in respect of the Retained Claims.[113] A trustee in bankruptcy would be empowered to accept such an offer, with the permission of inspectors appointed by a simple majority of Creditors, notwithstanding any potential opposition from SMT, the Creditor

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[104] Litigation Funder Factum, para 80.
[105] Monitor's Fifteenth Report, para 87, **MBOA, Tab 5, p. 16.**
[106] Appeal Judgment, paras 88-89, 92.
[107] Appeal Judgment, paras 62, 75, 96.
[108] Debtors Factum, para 6; Litigation Funder Factum, paras 16, 60, 80.
[109] See para 30 of this Factum.
[110] Appeal Judgment, paras 33, 49, 63.
[111] Monitor's Fourteenth Report, para 52, **RR, vol 3, p 190.**
[112] Appeal Judgment, para 94.
[113] Letter from M[e] Benoit to M[e] Perreault dated April 19, 2018, **RR, vol 3, pp 282ff.**

who voted against the Initial Callidus Plan. Unlike in *Crystallex* and contrary to what is alleged by the Litigation Funder,[114] the Litigation Financing Charge would prevent Creditors from effectively realizing on the Retained Claims in a bankruptcy scenario as their claims would remain subordinated to those of the Litigation Funder and the Lawyers.

71. The Litigation Funder and the Monitor also note that *Crystallex* was followed in *Strateco*.[115] In those proceedings, the court authorized the proposed litigation funding in circumstances where there was no contestation, as noted by the Court of Appeal.[116] The secured creditor, whose claim represented close to 80% of the total indebtedness, did not oppose the proposed litigation funding and, more importantly, it was clear that the contemplated litigation was the only means of realizing upon the only asset of the debtor.[117]

72. Ultimately, in the face of numerous and important factual differences, the Court of Appeal rightly determined that *Crystallex* was distinguishable as "[t]*he factual matrix of this case is completely different*."[118] The LFA is structured in a manner that takes away Creditors' rights by unduly subordinating their claims to those of the Litigation Funder and by depriving them of other viable recovery alternatives. For these reasons alone, the Court of Appeal was right to distinguish *Crystallex* and arrive at a different conclusion regarding the nature of the LFA.

73. Nevertheless and contrary to what is submitted by the Litigation Funder,[119] this Court need not endorse either *Crystallex* or the Appeal Judgment as both holdings are compatible and establish a framework for characterising litigation funding schemes. It is respectfully submitted that a litigation funding scheme is an arrangement where it takes away creditors rights or other relevant circumstances require that it be submitted to creditors for approval.

iii. When is litigation funding an arrangement?

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[114] Litigation Funder Factum, para 33.
[115] Litigation Funder Factum, para 42, citing *Strateco Resources inc./Ressources Strateco inc. (Arrangement relatif à)*, 2015 QCCS 4671 ("***Strateco 1***") and Monitor Factum, para 20, citing *Ressources Strateco inc./Ressources Strateco inc. (Arrangement relatif à)* (23 October 2015), Montreal 500-11-048908-152 (Que. S.C.) ("***Strateco 2***"), **MBOA, Tab 3.**
[116] Appeal Judgment, para 84.
[117] *Strateco 2*, paras 18-19 and 21; *Strateco 1*, paras 22-23.
[118] Appeal Judgment, para 82.
[119] Litigation Funder Factum, para 64.

74. As noted by the Court of Appeal, the terms "*compromise*" and "*arrangement*" are not defined under the CCAA.[120] The jurisprudence reveals, however, that a plan of arrangement is a broad and malleable concept that can be applied in a wide range of circumstances. As noted by one CCAA court:

> […] [R]eorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion – the solutions are generally limited only by the creativity of those structuring the plan of arrangement.[121]

75. In *Metcalfe,*[122] the Ontario Court of Appeal considered the term "arrangement" and held that it "*is broader than 'compromise' and would appear to include any scheme for reorganizing the affairs of the debtor*."[123] The court went on to note that that the breadth and vagueness of these terms, as part of the skeletal legislative scheme of the CCAA, served to promote flexibility in CCAA proceedings and endorsed the broad construction adopted by courts in the United Kingdom as well as the following holding:

> It is ... neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeovers or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified by the courts' approach over many years to give the term its widest meaning.[124]

76. In *Calpine*, discussed above, the Alberta Court of Appeal endorsed a contextual approach to determining whether a restructuring initiative – in that case a global settlement agreement (GSA) contemplating certain and immediate recovery for creditors – was an arrangement:

> Whether or not a settlement constitutes a plan of arrangement requiring a vote will be dependent upon the factual circumstances of each case. Here, the supervising judge carefully reviewed the circumstances and concluded, on the basis of a number of the fact findings, that there was no plan of arrangement within the meaning of the CCAA, and that the settlement merited approval. She recognized the peculiar

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[120] Appeal Judgment, para 79.
[121] *Re 843504 Alberta Ltd,* 2003 ABQB 1015, para 14 [emphasis added].
[122] *Metcalfe & Mansfield Alternative Investments II Corp,* (Re), 2008 ONCA 587, application for leave to appeal denied: 2008 CanLII 46997 (SCC) ("***Metcalfe***").
[123] *Metcalfe*, para 60 [emphasis added].
[124] *Metcalfe*, para 66, citing *T & N Ltd & Ors, Re Companies Act, 1985* [2006] EWHC 1447 (Ch), para 53 [emphasis added].

circumstances which distinguishes this case, and observed at para. 76 of her Reasons:

> The precedential implications of this approval must be viewed in the context of the unique circumstances that have presented a situation in which all valid claims of Canadian creditors likely will be paid in full. This outcome, particularly with respect to a cross-border insolvency of exceptional complexity, is unlikely to be matched in other insolvencies, and therefore, a decision to approve this settlement agreement will not open any floodgates.[125]

77. The same reasoning should apply to a litigation funding scheme, such as that provided for under the LFA. As will be explained below, the Supervising Judge's analysis to determine the nature of the LFA scheme was deficient as it was premised on incorrect findings and failed to take into account various key circumstantial elements. As such and as correctly noted by the Court of Appeal, the Supervising Judge erred at law by failing to properly construe and apply the notion of plan of arrangement.[126]

78. Contrary to the Litigation Funder's submission,[127] there is nothing erroneous in the Court of Appeal's endorsement of a broad construction of the concept of arrangement or its holding that an "*arrangement or proposal can encompass both a compromise of creditors' claims as well as the process undertaken to satisfy them.*"[128] This latter comment cannot seriously be construed to mean that every process undertaken to satisfy creditor claims will necessarily constitute an arrangement and require a vote by creditors.

79. The Litigation Funder dedicates an important portion of its submissions to discussing sales of assets under the CCAA.[129] Its argument appears to be that since a debtor company can sell assets outside of the ordinary course of business without filing a Plan, the Court of Appeal erred in holding that the arrangement contemplated in the LFA could not be implemented without Creditor approval. With respect, this argument is a red herring.

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[125] *Calpine CA*, para 31 [emphasis added].
[126] Appeal Judgment, para 21.
[127] Litigation Funder Factum, para 66.
[128] Appeal Judgment, para 85 [emphasis added].
[129] Litigation Funder Factum, paras 67ff.

80. It is well settled that sales of assets can be authorized under section 36 CCAA without the filing of a Plan. Indeed, as explained by authors Bish and Cassey, cited a recent decision of the Ontario Court of Appeal addressing the importance of vesting orders in the modern restructuring landscape:

> Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement …[130]

81. Neither the Supervising Judge nor the Court of Appeal treated the LFA scheme as a sale of assets, considered the applicable requirements or suggested that a sale of any of the Debtors' assets required Creditor approval through a Plan. Respectfully, the Litigation Funder's discussion of the section 36(3) CCAA criteria (which would not, in any event, be satisfied) is not relevant nor is its submission that the Supervising Judge implicitly considered those criteria and would have had the power to authorize the LFA if it were "*to be analogized to a disposition of the company's assets*."[131] It is noteworthy that a sale of assets would presumably generate a guaranteed and quantifiable return for the benefit of Creditors (like the GSA in *Calpine*), which is the exact opposite of the Litigation Alternative.

82. The only sale of assets that is relevant to the present appeal is that which was approved by the Court in 2016, under section 36 CCAA and without a Plan, as part of the Transaction.[132] That sale of assets allowed for the continuation of the Business under new ownership for the benefit of the Debtors' stakeholders.[133] Since that time, the Debtors' Insolvency Proceedings have been geared exclusively towards liquidating the Debtors' last remaining asset for distribution to its

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[130] *Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc*, 2019 ONCA 508, para 27, citing David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l Insolv Rev 41, at p 42.
[131] Litigation Funder Factum, paras 69-75.
[132] Approval and Vesting Order, paras 4, 11, **RR, vol 1, pp 2-3**.
[133] Monitors Seventh Report dated June 20, 2016, para 56, **RR, vol 3, pp 92-93.**

creditors.[134] Indeed, as noted by the Court of Appeal, the Debtors' only "*raison d'être*" is to realize on the Retained Claims. [135]

83. In a recent case decided under the *Bankruptcy and Insolvency Act* ("**BIA**"), the majority of this Court held that where an insolvent company has no chance of financial rehabilitation, the only relevant purpose of the BIA is the equitable distribution of the bankrupt's assets to its creditors:

> The case law has established that the BIA as a whole is intended to further "two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation" (Moloney, at para. 32, citing Husky Oil, at para. 7). Here, the bankrupt is a corporation that will never emerge from bankruptcy. Accordingly, only the former purpose is relevant.[136]

84. It is respectfully submitted that the same reasoning applies to the present case where the Debtors have no remaining operations and the rehabilitation of the Business has already been achieved through the Transaction, satisfying the remedial objectives of the CCAA.[137] Indeed, the Debtors have no remaining employees or contracts to honour and there are no broader public interest or other stakeholder considerations to be taken into account.[138] In such circumstances, the interests of Creditors must be prioritized, particularly over those of the other parties that have a potential interest in the Litigation Proceeds, namely the Shareholder, the Litigation Funder and the Lawyers.

85. The Litigation Funder also argues that the emergence of alternatives to the Litigation Alternative, such as the Callidus Plan, cannot change the nature of the litigation funding contemplated under the LFA.[139] However, as noted above, the litigation funding approved by the Supervising Judge in this case was, even before the filing of the Initial Callidus Plan, not structured as interim financing. Furthermore, the settlement offer contemplated in both of Callidus's Plans existed as a viable alternative at the time the LFA scheme was developed, to the full knowledge of its architects, the Shareholder, the Litigation Funder and the Lawyers.

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[134] *Re Nortel Networks Corporation et al*, 2014 ONSC 4777, aff'd 2015 ONCA 681, paras 20-23; *Papiers Gaspésia Inc (Faillite),* Re, 2004 CanLII 41522 (QCCS), para 65.
[135] Appeal Judgment, para 90.
[136] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5, para 67 [emphasis added].
[137] See *Nortel Networks Corporation (Re)*, 2009 CanLII 39492 (ON SC), paras 33-34.
[138] See *Century Services*, para 60.
[139] Litigation Funder Factum, paras 62-63.

86. Nevertheless, the litigation funding scheme proposed by the Appellants and authorized by the Supervising Judge deprives Creditors of the possibility of accepting the Callidus Plan – or of effectively pursuing any other realization strategy – and imposes the Litigation Alternative upon Creditors without giving them any control over the process and undermining their entitlement to the Litigation Proceeds. For example, if the Motions Judgment had been maintained, the Debtors and the Litigation funder could thereafter have agreed to accept the exact same offer of settlement as that provided for under the Callidus Plan, without the approval of Creditors (or even the Court), and, because of the Litigation Financing Charge, receive the proceeds of settlement that would have otherwise belonged to Creditors.

87. Respectfully, it is difficult to comprehend the Litigation Funder's allegation that "*the LFA does not affect the creditors at all*[.]"[140] To the contrary, the overriding consideration taken into account by the court below, in holding that the LFA scheme was an arrangement, is the effect of that scheme on Creditors.[141] Creditors' rights are not protected under the LFA, which both distinguishes this case from *Crystallex* and satisfies the requirements for identifying an arrangement endorsed in that case, namely that the scheme "*compromise the terms of* [Creditors'] *indebtedness or take away any of their legal rights*."[142]

88. While the Court of Appeal correctly noted that the analysis for identifying an arrangement need not necessarily be restricted to these criteria, it concluded that Creditors' rights were taken away under the LFA:

> […] [F]ocusing on whether the LFA viewed in isolation altered creditors' rights is overly restrictive as an analysis to determine whether the scheme constitutes an arrangement. However, if I were to apply such criteria as a test, the scheme proposed by the Respondents with the LFA would qualify as an arrangement, since it allows the Respondents to decide with Bentham whether to accept any settlement of the litigation. The scheme sets the stage for "alteration of creditors' rights" as the reasons of the Court of Appeal in Crystallex would have it. They could very well receive nothing in a settlement where the funds generated were only sufficient to pay the lawyers and Bentham.
>
> Sophistry aside, rather than being paid on normal contractual or commercial terms, the creditors are told to await the outcome of the prosecution of a litigious claim

[140] Litigation Funder Factum, para 66.
[141] Appeal Judgment, paras 87-89, 92, 94.
[142] *Crystallex CA*, para 93.

> for the debtors to obtain cash to perhaps pay something at some future date. I think their legal rights are "taken away" or "compromised".[143]

89. The Litigation Funder suggests that the Appeal Judgment has muddied the waters surrounding the meaning of a plan of arrangement and its characteristics.[144] The Creditors' Group disagrees. In endorsing a broad construction of the notion of arrangement as well as contextual characterization analysis, the Court of Appeal did no more than apply well established legal principles. The Appeal Judgment is consistent with *Crystallex, Calpine* and other applicable precedents and, most importantly, serves to protect Creditors' interests, a recognized purpose of the CCAA.[145]

90. The result of the Appeal Judgment is that CCAA courts will be called upon to examine the particular features of a proposed litigation funding scheme to determine whether it is in fact, an arrangement. The Supervising Judge failed to do so correctly and the Court of Appeal's intervention was necessary in this case.

iv. The Court of Appeal was justified in reversing the Supervising Judge's erroneous characterisation of the LFA

91. In determining that a Creditor vote was not required to implement the LFA scheme, the Supervising Judge, relying on *Crystallex,* incorrectly found that "*creditors are not losing any rights*" and that the Litigation Alternative was the only path to Creditor recovery.[146] As explained above, Creditors are losing rights under the LFA and there are viable alternatives available to monetize the Retained Claims.

92. While the intervention of the Court of Appeal was warranted for these reasons alone, it was also justified in properly characterizing the LFA as an arrangement in light of various contextual elements that were ignored by the Supervising Judge. This is consistent with the fact specific approach endorsed in cases where courts have considered whether a restructuring initiative is an arrangement as well as the intentionally broad and flexible nature of that legal concept.

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[143] Appeal Judgment, paras 87-88 [emphasis added].
[144] Litigation Funder Factum, para 81.
[145] See *Lehndorff,* para 7; *Meridian Developments Inc v Toronto Dominion Bank* (1984) 11 LRT (4th), 1984 CarswellAlta 259 (Alta. QB), para 14.
[146] Motions Judgment, paras 72-73.

93. The prior positions adopted by the Debtors and the Court with respect to Creditor approval of the Litigation Alternative are essential considerations in characterizing the LFA scheme. The CCAA process is one of "*building blocks*", which evolves incrementally and where the parties govern their conduct on the basis of the orders rendered by the Court and agreements reached among them.[147] As correctly noted by the Court of Appeal, the Appellants should not be permitted to circumvent the requirement of Creditor approval that had already been recognized by the Debtors and the Court simply because the Debtors elected to withdraw their Plan before the Creditors' Meeting.[148]

94. In the Initial Funding Application dated September 11, 2017, the Debtors alleged that they had received Creditor support for the Litigation Alternative, thus recognizing that such support was required to implement their proposal:

> […] [S]everal creditors, representing more than half of the total liabilities of the Company (excluding Callidus' purported claim), have already expressed and confirmed their support for the Company's project, including the prosecution of the Bluberi Retained Claims *per se* but also the Company's intentions and proposed plan in terms of how it intends to apply the proceeds of any lawsuit to a distribution in favour of the Company's creditors, after payment of certain priority costs as might be approved by this Court.
>
> […] The Company has received the support and approval of a majority of the creditors in dollars of claims for this application and the proposed course of action.[149]

95. The Debtors also invoked the lack of available recovery alternatives to justify the relief sought in both the Initial Funding Application and the Funding Application, emphasizing that the

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[147] *Target Canada Co (Re)*, 2016 ONSC 316, para 81.
[148] Appeal Judgment, paras 91, 93.
[149] Initial Funding Application, paras 29, 109, **DR, vol 3, p 104-105 and 119**. It should be noted that no evidence was filed in support of such allegations and the ensuing events demonstrated that an important majority of Creditors actually supported the Initial Callidus Plan (92% in number and 59.22% in value) [emphasis added].

Litigation Alternative was the "*only option for the Company to realize on the Bluberi Retained Claims*" and the "*only avenue available*" to further that purpose.[150]

96. On September 19, 2017 after the filing of the Initial Plan Application, the Supervising Judge recognized that all the parties, including the Debtors, were of the view that Creditors should have the opportunity to take a position on the competing arrangements, including the Litigation Alternative:

> **CONSIDERANT QUE** toutes les parties concèdent que les créanciers doivent avoir l'opportunité de se prononcer sur les plans d'arrangement que soumettront Callidus, les requérantes ou toute autre partie.[151]

97. Shortly thereafter, on October 5, 2017, the Debtors filed the Debtors' Plan, which expressly recognized the appropriateness of seeking Creditor approval before implementing the Litigation Alternative:

> **[H] ATTENDU QUE,** vu les circonstances, il est maintenant opportun de déposer le Plan des Compagnies Débitrices avant que la Poursuite ne soit jugée afin de permettre à tous les Créanciers de se prononcer.[152]

98. That same day, the Supervising Judge issued directions to the parties recognizing that the competing Plans would be submitted to Creditors for approval:

> **CONSIDERANT QUE** les compagnies débitrices, tout comme Callidus, recherchent l'approbation de leur plan d'arrangement par la majorité des créanciers et qu'il n'est pas déraisonnable, dans le contexte de l'affaire, qu'elles participent également aux couts associés à ce processus;
>
> **CONSIDERANT QUE** les créanciers seront ultimement les bénéficiaires d'une assemblée ou deux plans d'arrangement leur seront soumis pour un vote; [153]

99. These facts simply cannot be ignored. Contrary to the view of the Litigation Funder and the Monitor,[154] the approval of the funding under the LFA as interim financing did indeed

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[150] Funding Application, paras 29, 70 [emphasis added], **DR, vol 3, pp 146 and 153.** The Debtors had made similar allegations in the Initial Funding Application, paras 117-118, **DR, vol 3, p. 120.**
[151] Minutes of Hearing, September 19, 2017 [emphasis added], **RR, vol 1, p 23.**
[152] Debtors Plan, p 4, recital [H] [emphasis added], **RR, vol 1, p 158.**
[153] Minutes of Hearing, October 5, 2017 [emphasis added], **RR, vol 1, p 28.**
[154] Factum of the Litigation Funder, paras 34 and 55; Monitor Factum, para 7.

contradict the Supervising Judge's initial approach, as expressed in various orders, and the Court of Appeal was right to consider this "*juridical 'about face'*" as an inappropriate exercise of discretion.[155] In alleging that this is the "*most significant error*" affecting the Appeal Judgment, the Litigation Funder, which was not even party to the proceedings until February 2018, demonstrates a total disregard for the "*building blocks*" upon which all parties, particularly the Debtors and Creditors, had relied and which establish that Creditor approval of the Litigation Alternative is necessary.

100. The Court of Appeal also correctly considered the position taken by Creditors themselves in the Debtors' Insolvency Proceedings, recognizing that no Creditor approval for the Litigation Alternative could be inferred from the Initial Callidus Plan narrowly failing to satisfy the statutory majorities required by the CCAA.[156] Indeed, 92 out of 100 Creditors representing close to 60% of the value of all voting claims voted in favor of the Initial Callidus Plan at the Creditors' Meeting. SMT's vote against does not negate the obvious Creditor support for such Plan.

101. Moreover, as appears from their support letters, various other Creditors have indicated that they support the position of the Creditors' Group in the present appeal and, in particular, that the Callidus Plan or any competing Plan proposed by the Debtors be submitted to a Creditor vote. [157]

102. Even if Callidus is not entitled to vote, the Appellants are wrong to suggest[158] that the Callidus Plan can never obtain Creditor approval merely because SMT indicated at the hearing before the Supervising Judge, through its attorneys, that it would vote against such Plan. Promoting negotiations between the parties affected by the CCAA process, notably the Debtor and Creditors, is a recognized purpose of the legislation and should be encouraged wherever possible.[159] By contrast the rejection of plans for being "*doomed to fail*" should be discouraged, as noted by one CCAA court:

> The Canadian Imperial Bank of Commerce submits that any plan brought forward is doomed to fail as it will oppose any plan. I cannot accede to that argument. I

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[155] Appeal Judgment, paras 78.
[156] Appeal Judgment, para 83.
[157] Support Letters, **CGSR, vol 1, pp 1-63.**
[158] Debtors Factum, para 31; Litigation Funder Factum, para 16.
[159] *Lehndorff*, para 6; *Northland Properties Ltd. v Excelsior Life Ins Co of Can*, 1989 CanLII 2672 (BCCA), para 37.

> think that argument has been generally discredited by various court decisions. The example I gave is that, if the plan foolishly said, "we will pay to the bank twice as much as it is owed", I am quite confident that even the Bank would vote for such a plan.[160]

103. By ordering that the arrangements be submitted to a Creditor vote, the Court of Appeal opened the door for additional negotiations between Creditors and the competing proponents. By way of illustration, when the Debtors sought Creditor approval for the Litigation Alternative through the Debtors' Plan, they proposed to grant Creditors interest and the possibility of a premium on their proven claims,[161] which is significantly better treatment than that afforded to Creditors under the LFA scheme. The Appeal Judgment thus serves to create conditions that may result in improved offers to Creditors.[162] As noted above, the members of the Creditors' Group have never undertaken to vote for the Callidus Plan[163] and remain open to any realization alternative that furthers their interests, provided they have an opportunity to consider and approve it.

104. The Appellants and the Monitor argue that the Court of Appeal failed to accord adequate deference to the Supervising Judge's findings.[164] The Litigation Funder further submits that the court below did not "*specify the applicable standard of review*" or explain the basis for finding that the Supervising Judge inappropriately exercised his discretion.[165]

105. It is clear from the Appeal Judgment, however, that the court below was fully cognisant of the applicable standard of review and nevertheless determined that the Supervising Judge committed numerous reviewable errors.[166] Indeed, the specific errors and the basis for the Court's intervention are identified in the body of its reasons.[167] The Court of Appeal also rightly noted that

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[160] *Can-Pacific Farms Inc (Re)*, 2012 BCSC 760, para 8. See also *Pacific Shores Resort & Spa Ltd (Re)*, 2011 BCSC 1775, para 44.
[161] See para 22 of this Factum.
[162] See for example *Blackburn Developments Ltd. (Re)*, 2011 BCSC 1671, para 40.
[163] Letter from M[e] Perreault to M[e] Benoit dated February 10, 2018, **RR, vol 3, pp 237ff.**
[164] Debtors Factum, paras 9- 96; Litigation Funder Factum, paras 52-55; Monitor Factum, para 16.
[165] Litigation Funder Factum, para 54.
[166] Appeal Judgment, para 48.
[167] See Appeal Judgment, paras 21, 59, 68-69 76, 78, 91, 96.

discretionary decisions, while entitled to deference, are not immune from review by an appellate court in appropriate circumstances.[168]

106. Given the errors affecting the Motions Judgment, the Court of Appeal was required to exercise its corrective function and reverse the Supervising Judge's erroneous characterisation of the LFA scheme on the basis that:

(a) the decision of the Ontario Court of Appeal in *Crystallex* is distinguishable as it was decided on importantly different facts (paras. 82, 90 and 91);

(b) the LFA scheme takes away the rights of Creditors and affords them insufficient control over the process or other protections (paras. 87, 88, 90 and 94); and

(c) there are multiple paths for creditor recovery in this case including the Callidus Plan and a possible bankruptcy of the Debtors (paras. 82, 91 and 94).

107. Furthermore, the Court of Appeal's analysis was properly informed by the following particular circumstances of this case, which were ignored by the Supervising Judge:

(a) the Debtors have no remaining commercial operations and their only *raison d'être* is to monetize the Retained Claims for the benefit of Creditors (paras. 78 and 87);

(b) the Debtors filed a Plan in connection with financing the Litigation Alternative, which was, in accordance with orders of the Court, to be presented to Creditors for approval (paras. 78, 91 and 93);

(c) there was strong Creditor support for the Initial Callidus Plan and no Creditor support can be inferred for the Litigation Alternative from the fact that the Initial Callidus Plan did not meet the statutory majorities (para. 83); and

(d) the LFA unduly prioritizes the interests of the Shareholder and the Litigation Funder over the interests of Creditors (paras. 90 and 94);

[168] Appeal Judgment, para 68.

108. It is important to remember that there was no *viva voce* evidence presented before the Supervising Judge at the one-day hearing which gave rise to the Motions Judgment and that the Court of Appeal had access to essentially the same factual record. It is respectfully submitted that given the detailed and well supported intervention of a unanimous bench of the Court of Appeal, this Court owes deference to the latter's findings:

> It is helpful at this point to recognize that the Housen standards of review also apply to this Court (*Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 SCC 26 (CanLII), [2017] 1 S.C.R. 478, at para. 51; see also *St-Jean*, at paras. 37 and 46). That said, the focal point of the analysis that this Court — as the second and final court of appeal — has to perform in applying these standards is the decision of the first court of appeal, not that of the trial judge. The onus is on the appellants to demonstrate an error in the court of appeal's decision; this Court's role is not to conduct a *de novo* analysis of the trial judge's decision. Where the first court of appeal has justifiably intervened in the trial judgment and disagreed with the trial judge, this Court will intervene only if its own disagreement stems from "a clear satisfaction that an error has occurred in the first appellate court's assessment of the facts" (St-Jean, at paras. 38-39 and 46).[169]

109. This Court's intervention is therefore warranted only if it is clearly satisfied that the Appellants have demonstrated a reviewable error in the Appeal Judgment. It is respectfully submitted that no such error has been established.

E. Is the Court of Appeal's observation that the Litigation Funder's interest under the LFA is "*akin to an equity investment*" well-founded? (Debtors Factum, question (f) and Litigation Funder Factum, question G)

110. The Litigation Funder complains of a "*host of issues*" contained in one paragraph of the Appeal Judgment, including, in particular, the statement that "*the LFA is akin to an equity investment*."[170] The latter comment was made in *obiter* and it is respectfully submitted that it affords no basis for intervention by this Court.[171] In any event, the impugned statements of the

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[169] *Salomon v Matte-Thompson*, 2019 SCC 14, para 34 [emphasis added]. See also, *St-Jean v Mercier*, 2002 SCC 15, paras 36, 37 and 46; *Dorval c Bouvier*, [1968] RCS 288, pp 293-294; *Pelletier v Shykofsky*, [1957] SCR 635, p 638.

[170] Litigation Funder Factum, para 85 citing Appeal Judgment, para 90.

[171] See *Packers Plus Energy Services Inc v Essential Energy Services Ltd*, 2019 FCA 96, para 42, leave to appeal to this Court denied, 2019 CanLII 120700 (SCC).

Court of Appeal, while secondary to its ultimate decision, are well founded and consistent with established principles of Canadian insolvency law.

111. The Litigation Funder's rights under the LFA are indeed akin to an equity investment in the Debtors. The Litigation Funder repeatedly highlights that it can only be compensated from the Litigation Proceeds and maintains that it "*is more dependent on the successful outcome of the litigation than was the litigation funder in* Re Crystallex."[172] This is illustrative of the nature of the contingent and residual repayment rights held by the Litigation Funder, which, like the Shareholder, is inclined to accept the risks of the Litigation Alternative whereas many Creditors would prefer immediate payment of their claims. As explained by this Court:

> While shareholders might well prefer that the directors pursue high-risk alternatives with a high potential payoff to maximize the shareholders' expected residual claim, creditors in the same circumstances might prefer that the directors steer a safer course so as to maximize the value of their claims against the assets of the corporation.[173]

112. As it provides for the Litigation Funder to receive a percentage of the Litigation Proceeds rather than reimbursement of its advances, plus interest, the funding contemplated under the LFA appears to be structured in a manner that resembles an equity investment more than a debt obligation.[174] It is also instructive that American commenters, describing a litigation funding arrangement that appears quite similar to that provided for under the LFA, have noted as follows:

> The second type of loan involves investing in a commercial claim where the funder pays the costs of the litigation in return for a share of the proceeds from the lawsuit. <u>This can be thought of as equity based financing</u> because the plaintiff is essentially selling a portion of his or her recovery to the funder. […] <u>The claims in this category must be of a high potential value so that the investment is worthwhile</u>.[175]

113. The Debtors have also recognized that the LFA financing is in the nature of equity asserting that the Litigation Funder will be "*entitled to a <u>return on its investment</u> only if the litigation is*

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[172] Litigation Funder Factum, para 87.
[173] *Peoples Department Stores Inc (Trustee of) v Wise*, 2004 SCC 68, para 45. See also *Stelco Inc, Re,* 2006 CanLII 1773 (ON SC), para 18.
[174] See definitions of debt and equity cited in *US Steel Canada SC*, para 183 and *Tudor Sales*, para 36.
[175] Ronen Avraham & Abraham Wickelgren "Third-Party Litigation funding – A Signaling Model" (2014) 63 DePaul L Rev 233 at 239, [emphasis added], **BOA Tab 3**.

successful."[176] Indeed, the claims of the Litigation Funder appear to constitute claims for the "*return of capital*" one of the types of interests which give rise to an "*equity claim*"[177] under the CCAA, a legal notion which the Litigation Funder incorrectly asserts was ignored by the Court of Appeal.[178]

114. It is noteworthy that through the 2009 amendments, Parliament broadened the interpretation of "*equity claim*" and "*clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims*.[179] In furtherance of that purpose, insolvency courts should occupy an expanded role in characterizing claims by considering their true nature or substance.[180] Respectfully, the distinction raised by the Litigation Funder between an investment in the "*litigation*" as opposed to in the "*corporation*" is artificial, particularly given its acknowledgement that the performance of the Debtors in this case is entirely dependent upon the success of the Litigation Alternative.[181] The Court of Appeal was entirely justified in assessing the substance of the Litigation Funder's claims under the LFA and in noting that they were akin to an equity investment.

115. It is also a well-settled principle of corporate and insolvency law that equity claims must be subordinated to outstanding debt claims once a debtor becomes insolvent.[182] Given the nature of the Litigation Funder's repayment rights,[183] and the effect of the LFA scheme on Creditors, the

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[176] Funding Application, para 48 [emphasis added], **DR, vol 4, p 82.**
[177] CCAA, s 2 definition of "*equity claim*".
[178] Litigation Funder, para 91.
[179] *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, paras 82, 101 ("***Bul River***"). See also CCAA, ss 2, "equity claim", 6 (8), 22.1; *BIA*, ss 2, "equity claim", 54 (2) (d), 60 (1.7), 140.1.
[180] *Bul River*, para 102. The characterisation of claims requires an examination of the "substance" and "true nature" of the transaction in light of all of the surrounding circumstances: *Ghassemvand v Premium Weatherstripping Inc*, 2017 BCCA 309, para 51. See also *Canada Deposit Insurance Corp v Canadian Commercial Bank*, [1992] 3 SCR 558, pp 584-585.
[181] Litigation Funder Factum, para 90.
[182] *Sino-Forest Corporation (Re)*, 2012 ONCA 816, para 30; *US Steel Canada Inc (Re)*, 2016 ONCA 662, para 96.
[183] Even if the claims of the Litigation Funder are characterized as debt claims, its repayment rights are contingent on receiving a share of the profits arising from the Litigation Alternative and should be subordinated to the claims of Creditors: *BIA*, s. 139; *Tudor Sales*, para 45. The BIA and CCAA

Court of Appeal was correct in noting that the claims of Creditors were unduly subordinated and that this fact further supported the scheme's characterization as an arrangement.[184] While the Litigation Funder is correct to note that interim financing generally provides for priming of other Creditors' claims,[185] the super-priority "return" contemplated under the LFA is inconsistent with the notion of interim financing, as explained above.

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116. The Litigation Funder alleges that the Appeal Judgment serves to jeopardize the availability of litigation funding and contingency arrangements and to introduce uncertainty into commercial relations "*far beyond the bounds of insolvency law*."[186] Respectfully, the Court of Appeal intervened because the LFA scheme, as structured, affects Creditors profoundly but provides them with no control over the proposed litigation process and deprives them of other viable recovery alternatives, all without their consent.[187]

117. Qualifying the Debtors as "*impecunious plaintiffs*" and invoking access to justice principles, the Litigation Funder submits that "*parties with fewer means should not have fewer* […] *rights*."[188] In this case, Creditors – including former employees and trade suppliers – are the vulnerable parties[189] that require this Court's protection, not the Debtors with no remaining operations or the Litigation Funder seeking a return on its investment. If the Motions Judgment is restored, Creditors, whose rights have already been stayed since 2015, will be forced to bear the risks and additional delays associated with the Litigation Alternative, while they are prevented from accepting the settlement contemplated in the Callidus Plan or the possibility of negotiating a different, acceptable arrangement with the Debtors. Creditors will also, because of the Litigation

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should be interpreted harmoniously wherever possible and creditors should be granted analogous entitlements under the two statutes: *Century Services*, para 47; *Sun Indalex*, paras 50-51.

[184] Appeal Judgment, para 90.
[185] Litigation Funder Factum, para 88.
[186] Litigation Funder Factum, paras 92-94.
[187] Appeal Judgment, para 89.
[188] Litigation Funder Factum, paras 1, 2, 119.
[189] See *Bridging Finance Inc c Béton Brunet 2001 inc*, 2017 QCCA 138, paras 20- 21.

Financing Charge, be subordinated in a bankruptcy scenario, where they would have sole decision-making power over the realization of the Retained Claims.

118. Given its impact on the rights of Creditors and the circumstances of this case, which strongly support requiring Creditor approval for the Litigation Alternative, the Court of Appeal was right to characterize the LFA scheme as an arrangement and direct that it to be submitted to a Creditor vote before being implemented. To the extent that making litigation funding more readily available in the insolvency context is necessary to promote access to justice, as suggested by the Appellants, the solution is simple: obtain the approval of creditors or ensure that their interests are adequately protected under the proposed scheme.

PART IV – COSTS

119. The Creditors' Group seeks costs against the Appellants.

PART V – ORDER SOUGHT

120. The Creditors' Group request that this Court dismiss the appeal and confirm the Appeal Judgment.

PART VI – SUBMISSIONS ON CASE SENSITIVITY

121. n/a

ALL OF WHICH IS RESPECTFULLY SUBMITED this 6th day of January 2020.

FOR

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PART VII – TABLE OF AUTHORITIES

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