SCC File No.: 38594

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

BETWEEN:

IMF BENTHAM LIMITED,
BENTHAM IMF CAPITAL LIMITED

APPELLANTS
(Impleaded Parties)

-and-

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

RESPONDENTS
(Appellants)

AND BETWEEN:

9354-9186 QUÉBEC INC. (FORMERLY BLUBERI
GAMING TECHNOLOGIES INC.) and
9354-9178 QUÉBEC INC. (FORMERLY BLUBERI GROUP INC.)
FRANÇOIS VIGNEAULT, PHILIPPE MILLETTE,

APPELLANTS
(Respondents)

- and -

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

RESPONDENTS
(Appellants)

- and -

ERNST & YOUNG INC.,
INSOLVENCY INSTITUTE OF CANADA AND CANADIAN ASSOCIATION
OF INSOLVENCY AND RESTRUCTURINGING PROFESSIONALS

INTERVENERS

FACTUM OF THE RESPONDENT CALLIDUS CAPITAL CORPORATION
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In the words of the Quebec Court of Appeal ("**QCA**"), "A debtor company, subject to an order under the *Companies' Creditors Arrangements Act*, has no assets except a litigious claim against its secured creditor. Who should decide whether to pursue that claim or accept a settlement – the debtor or the creditors? That is the bare bones issue in this case."[1]

2. This is not a question of access to justice; it is a question of basic creditor rights in insolvency proceedings.

3. The QCA was correct in concluding that, because their rights are affected and their claims subject to compromise or arrangement, creditors, as a whole, should have the right to decide between (i) an immediate $2.88 million distribution pursuant to the plan of arrangement proposed by Callidus (the "**New Plan**") [2] and (ii) an uncertain, unquantified and contingent distribution by Bluberi following protracted litigation.

4. The QCA decision properly takes into consideration the specific context and fact pattern of this matter, including the following :

   (a) the "restructuring" of Bluberi Gaming Technologies inc. (now the Appellant 9354-9186 Quebec inc. "**Bluberi Gaming**") and Bluberi Group inc. (now the Appellant 9354-9178 Quebec inc. "**Bluberi Group**" and collectively with Bluberi Gaming "**Bluberi**" or the "**Debtors**") under the *Companies' Creditors Arrangement Act* ("***CCAA***") is complete, since the QSC approved the vesting and sale of all of their assets in and to Callidus, with the only exception being the litigation claim against Callidus (the "**Retained Claims**"). Bluberi will not re-emerge from the *CCAA* proceedings;

[1] Judgment of the Court of Appeal of Quebec, 2019 QCCA 171 ("**QCA decision**"), at para. 19.

[2] New Plan of Compromise and Arrangement pursuant to the *CCAA* concerning, affecting and involving 9354-9186 Quebec inc. and 9354-9178 Quebec inc., dated February 12, 2018, Joint Record of the Respondents ("**RR**"), vol. 3, pp. 240 and ff.

(b) aside from the Retained Claims, Bluberi has no assets and has no business operations;

(c) there are two “plans” or alternatives that may provide for a distribution to Bluberi’s creditors; and

(d) the payment waterfall provided under the proposed litigation funding agreement entered into between the Debtors, Mr. Gerald Duhamel (their ultimate shareholder), their attorneys and the Appellant, IMF Bentham Limited (“**Bentham**”) [3], may compromise the claims of creditors. In fact, the creditors may very well recover nothing.[4]

5. The QCA carefully considered this factual context and rendered its judgment in accordance with applicable law and jurisprudence, carefully addressing and dismissing the arguments raised by the Appellants, who sought, and continue to seek, to turn this matter into something it is not: a trial, without evidence or opportunity to defend, of untested allegations impugning Callidus’ conduct as a lender.

6. The Appellants suggest the QCA decision has wide ranging negative implications for access to justice but that is simply not the case. The QCA does not conclude that every attempt to pursue a litigious claim through litigation funding in an insolvency context must be submitted to a creditor vote in the form of a plan of arrangement; nor has Callidus ever made such an argument.

7. What the QCA decision does conclude, and Callidus did argue, is that, in light of the specific facts of this case, preventing creditors from voting on the available alternatives is tantamount to putting the interests of the Debtors’ shareholder before the interests of its creditors.

8. This is all the more concerning in a case where 92% of creditors favour an immediate distribution in accordance with the initial plan of arrangement proposed by Callidus, as

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[3] Litigation Funding Agreement (“**LFA**”), dated January 31, 2018 at section 3.3, AR, vol. 5, p.8.

[4] QCA decision at para. 87.

amended (the "**Initial Plan**").[5] Callidus' Initial Plan provided for the creation of a settlement fund and a distribution of $2.5 million to the creditors of Bluberi in consideration of a full and final release in respect of, in particular, the Retained Claims.

9. Naturally, Bluberi's ultimate shareholder, Mr. Duhamel, would prefer to pursue the Retained Claims rather than receive nothing for his equity stake in Bluberi, especially if the pursuit of the Retained Claims is funded by a third party (Bentham) at no personal risk to him.

10. The reality, however, is that Mr. Duhamel opted to place Bluberi under *CCAA* protection in the first place. As flexible as the *CCAA* can be, it comes with a set of fundamental rules that, as highlighted by the QCA, cannot be disregarded:

(a) The rights of shareholders are subordinate to those of creditors; this is a cornerstone of insolvency law.[6]

(b) Save and except for specific statutory exceptions and the clearest cases of misuse of the insolvency law, all creditors have a right to vote on any "plan" that provides for the compromise or arrangement of their claims.[7]

11. Should Mr. Duhamel wish to pursue the Retained Claims unfettered by the rules of insolvency law, he need only pay Bluberi's creditors or compromise their claims through a plan that allows Bluberi to keep the rights to the Retained Claims. He has elected not to do this.

12. Callidus is a creditor. When it made its initial credit bid to acquire Bluberi's business, it included a $3 million carve-out for that very purpose: to remain a creditor.[8]

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

[6] Section 140.1 BIA, sections 6(8) and 22.1 *CCAA*. See also *Sino-Forest Corporation (Re)*, 2012 ONCA 816 at para. 30; *U.S. Steel Canada Inc. (Re)*, 2016 ONCA 662 ("***U.S. Steel***") at para. 96.

[7] QCA decision at paras. 68-71.

[8] Callidus' Credit Bid at para. 4.1(a), RR vol. 2, p. 210.

13. Contrary to what Bluberi suggests in its factum, there was no negotiation on this point; not even on the amount of the carve-out. Callidus knew full well that Bluberi and Mr. Duhamel would attempt to pursue the Retained Claims and Bluberi and Mr. Duhamel knew full well that Callidus would remain a creditor with a claim of $3 million. For the Appellants to suggest that Callidus had somehow agreed not to fight the Retained Claims and not to exercise its rights as a creditor is incorrect and disingenuous.[9]

14. Even the Monitor, who has curiously and unwaveringly supported Mr. Duhamel since the onset of this matter, recommended the acceptance of Callidus' credit bid for the Bluberi business.[10]

15. That credit bid, including the $3 million carve-out allowing Callidus to remain a creditor, led to the Asset Purchase Agreement ("**APA**")[11], which was recommended by the Monitor for approval[12] and then approved by the QSC.

16. It is therefore not surprising that the QCA found a palpable and overriding error in the QSC judge's refusal to allow Callidus to vote on its plan. Callidus' status as a creditor was sanctioned by the QSC and approved by both the Debtors and the Monitor; how could this situation then be equated to that in *Laserworks*[13], where the party seeking to vote was not even a creditor until it bought a claim and then set out to deliberately bankrupt its competitor by voting such claim?

17. That is not to say that a judge presiding over *CCAA* proceedings does not have the power to exercise discretion, in very limited circumstances, to prevent a creditor from voting. Despite the hyperbolic language used by the Appellants in claiming that the QCA decision "promote(s) lawlessness in the commercial realm"[14], the QCA does not conclude that there

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[9] Factum of the Appellants 9354-9186 Quebec inc. and 9354-9178 Quebec inc. (the "**Bluberi Factum**") at para. 26.

[10] Monitor's Fourth Report at paras. 63-63, RR vol. 2, p.281; Monitor's letter, RR vol. 2, pp. 305 and ff.

[11] Asset Purchase Agreement at section 5.1(a), RR, vol. 3, p. 22.

[12] Monitor's Seventh Report, RR, vol. 3, pp. 84 and ff.

[13] *Laserworks Computer Services Inc. (Re)*, 1998 NSCA 42 ("***Laserworks***").

[14] Bluberi Factum at para. 9.

was no jurisdiction to restrict voting; rather, the QCA concluded that the jurisdiction was misused by the QSC and exercised improperly.

18. The QSC used a flawed interpretation of *Laserworks* and inconsistent logic to prevent Callidus from presenting the New Plan and voting on it. As noted, all parties involved, including the QSC, had agreed that Callidus is a creditor for an amount of $3 million. The Monitor had already considered the Initial Plan filed by Callidus (which includes the same releases as the New Plan) to be reasonable and recommended that it be accepted by the creditors. The QSC considered that that such Initial Plan should be submitted to creditors.[15] How then could it be unfair and unreasonable to allow Callidus to vote on the New Plan?

19. The QSC should have allowed all creditors to vote on both Callidus' New Plan and on Bluberi's alternative. Given the vast majority of creditors in favour of Callidus' Initial Plan, that vote would have likely resulted in an application by Callidus to sanction the New Plan.

20. Within the scope of the plan sanction hearing, the QSC would have had the opportunity to hear evidence and consider all aspects of the plan and of the vote, before determining whether to sanction the plan.

21. Rather than allow the process to play itself out in due course, the QSC judge fell into the trap laid by the Appellants and jumped to the conclusion that Callidus' intentions were improper, despite "the lack of a trial or any other fact-finding process"[16] and clearly without any regard for the facts as presented by Callidus.[17]

22. Had the QSC judge followed the proper process and considered all the submissions, he would surely have concluded that:

[15] Monitor's Fourteen Report at para. 52, RR, vol. 3, p.190; Creditors' Meeting Order dated October 12, 2017, RR, vol. 1, pp.73 and ff.

[16] QCA decision at para. 22.

[17] QCA decision at paras. 28 and 69; Callidus' Contestation at paras. 30-38, 52-59, 60-72, 81-115 and 118-123, AR, vol. 2, pp. 63 and ff.

(a) Callidus' New Plan, being identical in all respects, except for an increase in the amount offered to the creditors, is at least as fair and reasonable as its Initial Plan;

(b) There is nothing improper about wanting to settle litigation especially if in return Bluberi's employees get paid in full and the other creditors received between 35% to 100% of their claims;

(c) The commonality of interest test supports counting Callidus' vote in the same class as the votes of other creditors. The test considers the rights of creditors toward the debtor and does not seek to divide creditors based on the overall effects of a plan on individual creditors[18]; and

(d) It is well established that releases granted to third parties that contribute to a plan may cover civil fraud and willful misconduct. [19]

23. In order to give effect to the underlying purposes of the *CCAA* in the specific circumstances of this case, control over the debtor company's estate and its insolvency process must be given back to the creditors, not transferred to Bluberi's shareholder and to a litigation funder speculating in hopes of a profit. The QCA decision achieves this and reestablishes "a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both"[20] by concluding that a meeting must be held at which all creditors, including Callidus for its unsecured claim, are entitled to vote in a single class on both Callidus' New Plan and on any plan put forward by Bluberi. Creditor democracy and the generally applicable principles of insolvency law require nothing less.

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[18] It should be noted that the Appellants did not argue before the QSC that Callidus should vote in a separate class.

[19] *Metcalfe & Mansfield Alternative Investments Corp., Re*, 2008 ONCA 587("***Metcalfe & Mansfield***"); *Montreal, Maine & Atlantique Canada Cie (Montreal, Maine & Atlantic Canada Co. (MMA) (Re)*, 2014 QCCS 737; *Dans l'affaire de l'arrangement de Montreal, Maine & Atlantic Canada Co./(Montreal, Maine & Atlantique Canada Cie) (Arrangement relatif a)*, 2015 QCCS 3235; *Sino-Forest Corporation (Re)*, 2012 ONSC 7050.

[20] *Lehndorff General Partner Ltd. (Re)*, [1993] O.J. No. 14 at para.6.

B. Statement of Facts

24. The facts, as stated in paragraphs 1 to 26 of the QSC judgment and paragraphs 22 to 41 of the QCA judgment, are not and have never been contested by Callidus. Bluberi purports not to contest paragraphs 1 to 26 of the QSC judgment; however, the statement of facts contained in its factum suggests otherwise.

25. Bluberi Gaming developed and sold casino games and gaming machines. Bluberi Group is a holding company and the sole shareholder of Bluberi Gaming. Through a family trust, Mr. Gerald Duhamel controls Bluberi Group and Bluberi Gaming. At all relevant times, he appears as the sole director of Bluberi.[21]

26. Callidus is what is known in the industry as an asset-based or distressed lender. It provides financing to Canadian and U.S. companies unable to obtain conventional forms of debt financing because the degree of risk is higher than some conventional lenders are willing to accept.[22]

27. In light of the high degree of risk, it is commercially reasonable that the financing conditions are more onerous than one might expect in a lower risk scenario. It is also reasonable and consistent with market factors that Callidus would obtain "certain guarantees in exchange"[23] for taking such risk.

28. In order to understand the guarantees that may be required when lenders accept higher levels of risk, one need only look to the LFA proposed by Bentham (although heavily redacted), which seeks a super-priority charge of $20 million in relation to the litigation financing.[24] The QSC found that Bentham's "risks are greater and it is reasonable that it obtains certain guarantees in exchange".[25]

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[21] QCA decision at paras. 23-24.
[22] Callidus' 2014 annual report, RR vol. 2, pp. 1 and ff.
[23] QSC decision at para. 88.
[24] LFA at section 5.1, AR, vol. 5, p.9.
[25] QSC decision at para. 88.

29. In 2012, Bluberi sought financing from Callidus, which initially advanced approximately $24 million to Bluberi. The credit facilities were increased and amended over time such that, by 2015, approximately $86 million was owed to Callidus.[26]

30. In its attempt to paint a sinister portrait of Callidus, Bluberi systematically overlooks the simple fact that it accepted the terms of Callidus' credit facilities and then failed to respect those terms.

31. In the words of the QCA, "Things did not go well. Sales and profits forecasted by Mr. Duhamel did not materialize. Bluberi Gaming was losing money".[27] Contrary to Bluberi's attempts to characterize the situation as somehow unusual and driven by ulterior motives on the part of Callidus, this matter was no more and no less than a failed lending transaction. Bluberi, the borrower, failed in its business and Callidus, the lender, sought to recover its loans.

32. Despite Bluberi's abysmal results and the myriad of other issues set out in Callidus' Contestation, the reality is that Callidus never called its loans.[28] It simply lost faith in Mr. Duhamel's management abilities and insisted that he withdraw from the operations of the business, as had been agreed between the parties in June 2015.[29]

33. Mr. Duhamel opted to plunge the company into an unnecessary restructuring process under the *CCAA*. Mr. Duhamel took this step despite the fact that Callidus was perfectly prepared to continue to fund Bluberi, notwithstanding its failure to meet performance targets, as long as Mr. Duhamel withdrew from operations in favour of an independent board of directors.[30]

34. Callidus was confident that Bluberi, under proper management and without the crippling burden of restructuring costs, could continue to operate and maintain a positive cash flow.

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[26] QCA decision at para. 25.
[27] QCA decision at para. 26.
[28] Callidus' Contestation at paras. 114, AR, vol. 2, p. 78.
[29] Callidus' Contestation at paras. 128-139, AR, vol. 2, pp. 81-82.
[30] Callidus' Contestation at para. 113, AR, vol. 2, p. 78.

35. It would appear that hindsight is, in fact, 20/20. The Monitor's first report, issued on November 16, 2015, projected a net positive cash flow in the amount of $1,846,119 for the twelve-week period in question.[31] By the time the Monitor issued its fifteenth report covering the period ended on January 27, 2018, Bluberi had already spent $7,239,588 in professional fees relating to the restructuring.[32] Bluberi and Mr. Duhamel thus have no one to blame but themselves for the fact that creditors remain unpaid to this day.

36. On November 7, 2015, in an attempt to exercise its rights under its hypothecs (pledges) on shares[33], Callidus sent a notice of default to Mr. Duhamel asking the latter to refrain from exercising the voting rights related to the hypothecated shares.[34] As described below, the QSC found that this notice was ineffective.

37. On November 11, 2015, Bluberi filed a *Petition for the issuance of an initial order*[35] under the *CCAA*, which was contested by Callidus on several grounds.[36] On November 12, 2015, the QSC judge issued an initial order, naming the intervener, Ernst & Young Inc., as *CCAA* Monitor.[37]

38. Shortly thereafter, in January, 2016, a sale and solicitation process ("**SSP**") was sought by Bluberi and authorized by the QSC to permit Bluberi gaming to sell <u>all of its assets</u>.[38]

39. The SSP procedures authorized by the QSC specifically permitted Callidus to submit a credit bid for the assets (or shares) of Bluberi and on March 7, 2016 Callidus did so, offering to purchase Bluberi's business by way of a credit bid for the total amount of its

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[31] Monitor's First Report at para. 33 and Appendix A, RR, vol. 2, pp. 178 and ff.

[32] Monitor's Fifteen Report at Appendix B, Book of Authorities of the Intervener Ernst & Young Inc. at Tab 5.

[33] 2012 Deed of Hypothec at section 7.1, RR, vol. 2, p. 86; 2013 Deed of Hypothec at section 7.1, RR, vol. 2, p. 123; 2015 Deed of Hypothec at section 7.1, AR, vol. 3, p. 33.

[34] Callidus November 7, 2015 letter, AR, vol. 3, pp. 11-18. See also response letter from Bluberi's counsel taking position against the exercise of Callidus' rights, AR, vol. pp.19-20.

[35] AR, vol. 2, pp. 1 et ff.

[36] Callidus' Contestation at para. 5, AR, vol. 2, p. 64-65.

[37] QCA decision at paras. 27-28

[38] QCA decision at para. 29.

claim against Bluberi (minus $3 million). Callidus' offer represented the best offer received by Bluberi, as confirmed by the Monitor.[39]

40. In June 2016, the parties finalized an APA, on terms approved by the Monitor, under which Callidus and two related companies purchased all of Bluberi's assets (except for the Retained Claims) through its credit bid. Consequently, Callidus' secured claim against Bluberi ($135.7 million) was reduced to $3 million.[40]

41. On September 11, 2017, Bluberi Gaming filed an application seeking the authorization of a litigation financing and a $20 million interim lender priority charge to finance its litigation against Callidus[41], mere days prior to the hearing to approve these arrangements. The lender was a joint venture company in which Mr. Duhamel was involved. It would make available $2 million to finance the litigation against Callidus. The $20 million charge was required to secure repayment of the loan and the success fee, which, according to Bluberi's plan, would be half of the net proceeds of the litigation.[42]

42. Callidus was forced to react quickly and ultimately decided to sponsor a plan and allow the creditors decide what was best for them. Within a span of days, Callidus drafted and filed a plan of arrangement.

43. On September 18, 2017, in addition to contesting the interim financing application[43], Callidus proposed the Initial Plan, and filed a motion to hold a creditors' meeting, which was supported by Deloitte, one of Bluberi's creditors.[44]

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[39] Monitor's Fourth Report at para. 62-64, RR, vol. 2, p. 281; Monitor's letter, RR, vol. 2, pp. 305 and ff.

[40] QCA decision at paras. 30-31.

[41] Application for the issuance of an order extending the stay of proceedings and authorizing an interim financing, AR, vol. 3, pp. 99 and ff.

[42] QCA decision at para. 32.

[43] Callidus' Contestation of the application for the issuance of an order extending the stay of proceedings and authorizing an interim financing, AR, vol. 3, pp. 129 and ff.

[44] Motion for the convening, holding and conduct of a creditors' meeting and extension of the stay period, RR, vol. 1, pp. 11 and ff.

44. At that stage, the QSC properly concluded that Bluberi's intention to pursue the Retained Claims against Callidus constituted a plan of arrangement. The QSC went so far as to postpone Bluberi's interim financing application to allow Bluberi to submit its own plan.[45]

45. On October 4, 2017, Bluberi agreed to and actually did file a plan of arrangement, which contemplated that half of the proceeds of the litigation after payment of expenses would be distributed to creditors, if net proceeds exceeded $20 million.[46]

46. On October 5, 2017, the QSC judge ordered both parties to shares the Monitor's fees and expenses related to the presentation of the plans of arrangement. He considered it to the creditors' advantage that two competing plans of arrangement be presented to them and ordered the convening of a creditor's meeting to vote on the plans.[47]

47. Later, Bluberi unexpectedly withdrew its plan and did not comply with the funding requirement imposed by the QSC judge.[48]

48. On December 15, 2017, Callidus' Initial Plan was submitted to a vote. Although 92 out of the 100 creditors casting votes were in favour of the Initial Plan, the majority of two thirds in value was not reached because of one creditor, SMT Hautes Technologies ("**SMT**"), holding 36.7% of the total debt present and voting at the meeting.[49] Callidus did not vote on the Initial Plan.

49. On January 15, 2018, Bluberi filed an application for the issuance of an order extending the stay of proceedings and announced its intention to again seek the approval of an interim financing to pursue the litigation against Callidus. In response, Callidus reiterated its opposition and its intention to file a new plan of arrangement.

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[45] Minutes of hearing, September 19, 2017, RR, vol. 1, pp. 22 and ff.

[46] Bluberi's *Plan d'arrangement et de compromis*, RR, vol. 3, pp. 155 and ff.; QCA decision at para. 34.

[47] QCA decision at para. 35; Minutes of hearing, October 5, 2017, RR, vol. 1, pp. 25 and ff; Creditors' Meeting Order dated October 12, 2017, RR, vol. 1, pp. 73 and ff.

[48] QCA decision at para. 36.

[49] QCA decision at para. 37.

50. On January 24, 2018, the QSC rendered an order setting a timeline for Bluberi to file a motion for the approval of an interim financing and for any other parties to file "*leur contestation ou demande auprès du Tribunal*".[50]

51. On February 6, 2018, Bluberi filed its application seeking the authorization of the LFA with Bentham and the imposition of a $20 million super-priority charge.

52. On February 12, 2018, within the timeline set by the QSC, Callidus and the Creditors Group each filed a contestation. In addition, Callidus proposed the New Plan, which is identical to the Initial Plan, except that the overall contribution was increased to $2,880,000 (the "**New Plan**"). According to Callidus' New Plan, Bluberi former employees would be paid in full, while other creditors would recover between 35% to 100% of their claims.[51]

53. Callidus also filed a motion to convene a creditors' meeting to vote on the New Plan. Creditors which had formed a group and who are Respondents herein (the "**Creditors Group**") requested that the QSC declare that Callidus be entitled to exercise its voting rights for the unsecured portion of its claim.[52]

PART II – STATEMENT OF QUESTIONS IN ISSUE

54. Callidus has reviewed the questions in issue proposed by the Appellants and would articulate them as set out below. Callidus will address questions 1 to 3 and 5 in this factum. Callidus adopts the Creditors Group's submissions with respect to questions 4 and 6.

1. Can Callidus vote on the plan it sponsors? (Bluberi's Factum, question (a) and Bentham's Factum, question A)

Yes. Nothing prevents a creditor from voting on a plan it sponsors. Both of the courts below agreed that Callidus is not a related to Bluberi within the meaning of section 22(3) *CCAA*.

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[50] Minutes of hearing, January 24, 2018, RR, vol. 1, pp. 126 and ff.

[51] Callidus' New Plan at section 2.2, RR, vol. 3, pp. 253-254; QCA decision at para. 39.

[52] QCA decision at para. 40.

2. **Can Callidus vote in the same class as the other creditors?** (Bluberi's Factum, question (b) and Bentham's Factum, question B)

Yes. The QSC judge did not even consider this submission and Callidus has sufficient commonality of interest with Bluberi's other creditors to vote in the same class as them on any plan.

3. **Did the *CCAA* court err in the exercise of its discretion in preventing Callidus from voting on the plan it sponsors?** (Bluberi's Factum, question (c) and Bentham's Factum, question C)

Yes. The QSC judge erred in applying the doctrine of "*improper purpose*", to the extent it was available, and in finding that Callidus' vote would give rise to a "*substantial injustice*".

4. **Is the scheme contemplated in the LFA an arrangement that requires the approval of creditors to be implemented?** (Bluberi's Factum, question (d) and Bentham's Factum, questions D and E)

Yes. The QSC erred in characterizing the LFA as an interim financing in the circumstances of this case and not as an arrangement that requires the approval of creditors to be implemented.

5. **Can Callidus elect to value its security as it sees fit and vote all or part of its claim as an unsecured creditor?** (Bluberi's Factum, question (e) and Bentham's Factum, question F)

Yes. 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.

6. **Was the Court of Appeal's observation that Bentham's interest under the LFA is "*akin to an equity investment*" well-founded?** (Bluberi's Factum, question (f) and Bentham's Factum, question G)

Yes. The rights of Bentham under the LFA are indeed akin to an equity investment in Bluberi.

PART III – STATEMENT OF ARGUMENT

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

Nothing prevents a creditor from voting on a plan it sponsors

55. The QCA's reasons and its conclusions confirming Callidus' right to vote on its plan, as set out in paragraphs 57, 68, 69, 70 and 71 of the QCA decision, are consistent with the applicable principles and the existing law:

> [57] There is no impediment to a creditor proposing a plan of arrangement as the judge himself acknowledged in ordering the first creditors' meeting. That a creditor sponsors a plan and stands to gain by it is not an indication of bad faith and does not preclude the sponsoring creditor from voting on the plan[53]. Moreover, there is nothing improper in voting as ordinary for the deficiency in security as long as such deficiency is reasonably calculated. Here, an amount of $3 million is the balance remaining due to Callidus after its purchase of the Respondents' assets by way of a credit bid. The amount was approved by the judge at the time of the APA and found to be in order in the *a quo* judgment[54]. Valuing the security for the remaining debt of $3 million at nil is on its face, reasonable given the litigious claim is the sole remaining asset. It was not considered otherwise by the judge.
>
> [68] This Court long ago decided that voting rights should not be excluded on supposed 'equitable grounds'[55]. Each creditor is entitled to vote unless the law specifically precludes such right. Even when the debtor is suing the creditor, such fact is not justification to exclude such creditor from a vote. The *BIA* provides that such creditor could be disqualified from acting as an inspector but no part of the *BIA* precludes the voting rights in such circumstances[56]. I am well aware that operating under the *CCAA* regime may open the door to the exercise of greater judicial discretion[57], but there is no reasonable basis in law for the judge's exercise of discretion to exclude the Callidus vote because it is seeking a release from the debtors' proposed

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[53] *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, para. 104 ("***Canadian Airlines***"); lv to appeal dismissed 2000 ABCA 238.

[54] QSC decision at paras. 28-30.

[55] *Meublerie Andre Viger inc. v. Groupe Cantrex inc.* [1992] R.D.J. 509, para 39-40 (QCCA) ("***Cantrex***") citing *Bedard Louis inc. v. Teac Canada inc.*, C.A.Q. 1991 CanLII 3533 (QCCA) (« ***Bedard*** »).

[56] *Ibid.*

[57] Section 11 *CCAA*; *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 ("***Century Services***") para. 1.

> lawsuit for alleged damages arising from the parties' commercial dealings. The "courts should not use equity to do what they wish the Parliament had done through legislation".[58] (…)
>
> [69] Cancelling voting rights for behaviour which allegedly caused the debtors' financial demise on allegations and a proposed lawsuit, is a slippery slope. It is perilous to embark on this type of inquiry in a superficial manner based on allegations (even if supported by affidavits). Voting rights are basic to the scheme of creditor democracy under the *BIA* and the *CCAA*. Creditors have two basis rights: to participate in the distribution of the debtor's assets and to participate in the decision-making process of the insolvency through the exercise of their voting right.
>
> [70] Moreover, the judge's enquiry begins to resemble the application of equitable subordination. This doctrine, where a creditor guilty of inequitable conduct towards the debtor has its claim subordinated in the debtor's insolvency is part of American bankruptcy law. It has not been recognized by the Ontario Court of Appeal as forming part of the insolvency law in Canada.[59]
>
> [71] Our Court has also made it clear that a creditor has a right to vote on its own self-interest even if that interest appears contrary to that of the mass of the creditors or to the debtor.[60] (…) Equally, it is not open [the Court] to disallow a vote in similar circumstances by arguing a conflict of interest.[61] I see no reason not to respect the precedent established in *Cantrex*.

56. No provision of the *CCAA* precludes a creditor from filing or sponsoring a plan of arrangement between a debtor company and its creditors. Section 4 *CCAA* states:

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

57. The *CCAA* uses neutral language with respect to the filing of a plan of arrangement ("where a compromise or an arrangement <u>is</u> proposed"). The fact that the *CCAA* does not

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[58] *Sun Indalex Finance, LLC v. United Steelworkers*, [2013] 1 S.C.R. 6 ("***Indalex***"), para. 82.

[59] *U.S. Steel*.

[60] *Cantrex*.

[61] *Bedard*.

specifically address the right of a creditor to propose a plan of arrangement, does not mean that "there is a blind spot in the law".[62]

58. On the contrary, section 4 *CCAA* is flexible and provides no restriction to this effect. It clearly allows any stakeholder to file a plan of arrangement with respect to a debtor company and the courts have consistently approved the filing of plans by creditors.[63] If limits on who can file a plan of arrangement had been intended by Parliament, the *CCAA* would have set them out expressly.

59. Similarly, no provision of the *CCAA* or of any other applicable law precludes a creditor from exercising its voting rights in respect of a plan it sponsors.

60. Again, this is not " a blind spot in the law" requiring judicial intervention to restrict creditors' voting rights, as suggested by the Appellants. The *CCAA* should rather be interpreted in accordance with its fundamental principles, notably creditor democracy. Creditors who hold a valid claim must have the right to vote unless expressly prevented by the clearest of legal principles. No such principles apply to Callidus' vote on the plan that it has proposed.

61. The QSC found twice that Callidus holds a valid claim against Bluberi for an amount of $3 million and, therefore, is a creditor of the Debtors for that amount.[64]

62. A creditor's right to vote is sacrosanct in the Canadian insolvency process and there is no legal or logical reason to deprive a creditor of that right except in the most extreme of

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[62] Bluberi Factum at para. 41.

[63] See *Metcalfe & Mansfield* at para. 105; *1078385 Ontario Ltd., Re*, 2004 CanLII 55041 (ONCA) para. 30 where the Ontario Court of Appeal refused to overturn decisions whereby the courts approved plans of arrangement filed by creditors; *HSBC Bank of Canada* v. *Bear Mountain Partnership*, 2010 BCSC 957, para. 33 where the court granted an application brought by a secured creditor to extend time for the filing of a plan of arrangement; *SLMsoft Inc., Re*, 2003 CanswellOnt 3195 and *Anvil Range Mining Corp., Re,* 2001 CanLII 1325 (ONSC).

[64] Approval and Vesting Order, RR, vol. 1, pp. 1 and ff.; QSC decision at para. 30.

circumstances. Voting rights should not be excluded on equitable grounds. There is no reasonable basis in law for the QSC's exercise of discretion to exclude Callidus' vote because it is seeking a release in consideration for its contribution to the New Plan.

63. In *Canadian Airlines*, the leading decision on this issue, Madam Justice Paperny of the Court of Queen's Bench of Alberta allowed Air Canada to vote a number of claims that it had acquired in favour of a plan it sponsored, even though it stood to profit from the plan:

> [104] <u>if the Plan is approved, Air Canada stands to profit in its operation</u>. I do not accept that the deficiency claims were devised to dominate the vote of the unsecured creditor class, <u>however, Air Canada, as funder of the Plan is more motivated than Resurgence to support it. This divergence of views on its own does not amount to bad faith on the part of Air Canada</u>[65]. [emphasis added]

64. The reasons or motivations of a creditor exercising its voting rights should not be taken into consideration, except in the clearest of cases. The courts "have made it clear that a creditor has a right to vote its own self-interest even if that interest appears contrary to that of the mass of creditors or to the debtor".[66]

65. In *Cantrex*, the Quebec Court of Appeal determined that a creditor being sued by the debtor company (which had no other realizable assets) for improvident and negligent realization, was entitled to vote against the debtor's proposal and defeat it.

66. Although *Cantrex* was decided in the context of a proposal under the *BIA*, the principles pertaining to creditors' votes are equally applicable to arrangements under the *CCAA*. In addition, several facts emphasized by the QCA in *Cantrex* are highly relevant to this matter, namely that: (i) the majority shareholder pursued a claim in damages against Cantrex; (ii) such claim was the sole asset of the debtor company, and (iii) the vote of Cantrex against

[65] *Canadian Airlines* at para. 104.
[66] QCA decision at para. 71.

the proposal was decisive. Furthermore, in *Cantrex*, no other alternative was offered to the creditors.[67]

67. The QCA came to the same conclusion in *Bedard*, where it allowed a creditor also being sued by the debtor company to exercise its voting rights against a proposal under the *BIA* and defeat the lawsuit against it.

Callidus is not a "related party"

68. In its attempt circumvent the law permitting Callidus to vote on the New Plan, Bluberi seeks to draw an analogy from sections 22(3) *CCAA* and 54(3) *BIA*, arguing that the rationale for preventing creditors that are related to the debtor from voting for plans or proposals should also prevent creditors from voting for the plans they put forward. This logic is flawed. The QSC suggested that 22(3) *CCAA* does not prevent a creditor from voting on its own plan, although it opted not to decide this issue[68] and the QCA rejected this submission.

69. The QCA's analysis on this issue at paragraphs 52 to 56 of the QCA decision is correct in law; Callidus is not related to the Debtors within the meaning of section 22(3) *CCAA* and is not a related party to the Debtors within the meaning of section 4(3) *BIA*.

70. As stated by the QCA, "related person" is defined in section 4 *BIA*, which is incorporated by reference in section 2(2) *CCAA*. Voting control is required. Callidus holds no shares or any voting rights over any shares of Bluberi.[69]

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[67] *Cantrex* at paras. 39-40, 58-59. The creditors should be entitled to analogous entitlements under the *BIA* and the *CCAA*: *Indalex* at paras. 50-51.

[68] QSC decision at paras. 50-55.

[69] QCA decision, para. 53.

71. As security for the repayment of the credit facilities it made available to Bluberi, Callidus held a hypothec on the shares held by Bluberi Group in the capital stock of Bluberi Gaming and Bluberi USA, Inc.[70] (which are defined therein as the Investment Property).

72. Section 7.1 of the hypothec provides:

> 7.1. <u>Upon the occurrence and continuance of an Event of Default, the Lender may give the Grantor a notice prohibiting the grantor from exercising the rights and powers of a holder of such Investment Property including</u>, without limitation, the right to vote the Investment Property, at which time all such rights of the Grantor will cease immediately and the Lender will have the right to exercise the rights and powers related to such Investment Property <u>including, without limitation, the right to vote</u>. Notwithstanding the foregoing, the Grantor shall at all times, including prior to the occurrence of an Event of Default, vote the Investment Property in a manner which complies with paragraph 38 of the Credit Agreement and is not inconsistent with any of its provisions.[71] [emphasis added]

73. In November 2015, in an attempt to exercise its rights pursuant to section 7.1 of the Hypothecs, Callidus issued the November 7, 2015 notice[72] putting Bluberi Group and Mr. Duhamel on notice (i) that Mr. Duhamel should refrain from exercising the rights and powers related to the shares of Bluberi Gaming and (ii) going forward, Callidus would exercise such voting rights. Callidus opposed Bluberi's application for an initial order[73] on this basis, amongst other arguments.

74. The QSC dismissed Callidus' opposition to the initial order, agreed with Bluberi and refused to allow Callidus to exercise voting control. The QSC concluded that Callidus' right to exercise voting control pursuant to the pledge of the shares was conditional upon the occurrence of an Event of Default, which, in the view of the QSC judge, had not occurred.[74]

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[70] 2015 Deed of Hypothec at section 2.1(f), AR, vol. 4, pp. 26. See also the 2012 Deed of Hypothec at section 2.1(f), RR, vol. 2, pp. 78-79 and 2013 Deed of Hypothec at section 2.1(f), RR, vol. 2, p. 116.

[71] Amended and Restated Initial Order at para. 10, AR, vol. 2, pp. 90-91.

[72] Letter from Callidus' counsel, AR, vol. 3, pp.11-18.

[73] Debtors' Petition for the issuance of an Initial Order, AR, vol. 2, pp. 1 and ff.

[74] Amended and Restated Initial Order at paras. 11-13, 34, AR, vol. 2, pp. 91 and 94.

75. The QSC's decision in this regard was not appealed and the question of Callidus' share ownership or voting control (or lack thereof) is therefore *res judicata*. The QSC further ordered a stay of proceedings against Bluberi and its property[75], which has since been renewed on several occasions, most recently to April 30, 2020.

76. The result is that Callidus is not, nor has it ever been, in control of the Debtors or the shares in the Debtors. Since the issuance of the Initial Order, Mr. Duhamel has maintained complete control over the Debtors and has remained the only party with the capacity to sign (or not sign[76]) the voting trust agreement, to keep the Debtors under *CCAA* protection, to approve the implementation of the SISP, to accept or reject Callidus' credit bid, to conclude the APA with Callidus and conclude the LFA with Bentham.

77. Bluberi's line of argument on this point is disingenuous. On the one hand, it argued (successfully) that Callidus could not gain control of the Debtors through its hypothecs on shares. On the other, it attempts to argue that the very same hypothec granted Callidus control, in an attempt to characterize Callidus as an entity related to Bluberi within the meaning of section 4(3)(c) *BIA*.

78. Bluberi further relies on the Quebec Superior Court decision in *Boutique Euphoria*[77] to argue that a person is related to "an insolvent entity simply because it had the right to purchase a majority of the shares of the insolvent entity, even if that person never exercised that right"[78] and contends that this result should apply to Callidus as the holder of hypothecs on shares. There is no validity to this argument.

79. The *Euphoria* decision looks at the issue of fraudulent preferences in the context of a bankruptcy resulting from a failed *CCAA* restructuring involving a creditor that was granted security over the assets of the debtor company a few months prior to the insolvency. The sole director of the debtor company was also the sole director, officer and shareholder

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[75] *Ibid*. at para. 39.
[76] QCA decision at para. 55.
[77] *Boutique Euphoria inc. (Arrangement relatif à),* 2008 QCCS 4717 (« ***Euphoria*** »).
[78] Bluberi Factum at para. 51.

of the secured creditor. The secured creditor and its director also had the right to buy 80% of the shares of the debtor company pursuant to a memorandum of understanding.[79]

80. The QSC found that, by virtue of sections 4(2)(c)(ii) and 4(3)(c) *BIA*, the secured creditor and the debtor were deemed to be related persons for the purposes of the *BIA* and the application of the 12-month period for the presumption of preferences under sections 95 and 96 *BIA*.[80]

81. Respectfully, the QSC decision in *Euphoria* has no application to the case at bar. In *Euphoria*, the creditor's right to acquire 80% of shares in the debtor company was not conditional upon the occurrence of an event of default, or anything else.

82. Callidus' rights under the hypothecs on shares are conditional upon the occurrence of an event of default, which the QSC ruled did not occur prior to the issuance of the Initial Order.

83. There is a clear difference between the holder of a right (or option) to acquire shares and a creditor holding a hypothec on shares. An option to purchase shares is something someone can unilaterally choose to exercise. The control over whether or not to exercise the option remains with the holder of the option. The holder of an option can decide at any moment to take control of the shares and the related voting rights. In contrast, a default under agreements with a creditor holding a share pledge may never occur and the creditor holding such security may never be entitled to gain control over the pledged shares.

84. Whether or not a default may occur is completely irrelevant here, since the QSC specifically refused to find a default and grant voting control to Callidus. In this specific case, since Callidus' request to control the shares was refused in the context of the issuance of the Initial Order, Callidus never gained voting control of Bluberi and can never be "related" to Bluberi given the stay of Callidus' rights. When the time comes to vote on the New Plan, there is no possibility of Callidus being a related party to Bluberi.

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[79] *Euphoria* at paras. 1 and 31-33.
[80] *Euphoria* at para. 89.

85. Contrary to Bluberi's arguments[81], the correct interpretative approach to section 4(3)(c) *BIA* is not literalist and simplistic. Taking the correct purposive and contextual approach to these provisions, Callidus' share pledge does not in and of itself make Callidus related to Bluberi as the holder of "future" or "contingent" rights to acquire ownership or control over the shares of Bluberi.

86. In common with other related person or non-arm's length provisions found in multiple statues,[82] the provisions of section 4(3)(c) *BIA* are intended to ensure that parties who share the same effective interest cannot act in concert and avoid the consequences of legislative rules and restrictions.

87. Examples of application of related party or non-arm's length provisions include enactments: (i) imposing liability for tax, (ii) mandating securities disclosure, and (iii) extending preference or under-value transaction review periods.

88. In all of the foregoing examples, the related party provisions are aimed at catching persons acting in like interest for a common goal. The same is true for the voting restrictions imposed under the combination of section 4(3)(c) *BIA* and section 22(3) *CCAA*. Persons related to the debtor cannot vote for its plan to the extent that these persons share the debtor's interests and not the interests of creditors.

89. Secured creditors like Callidus holding share pledges do not share any such interests with their debtors. They share the interest that other creditors have and the essence of their rights is in opposition to the interests of the debtor. With this understanding of the purpose and context for the related party or non-arm's length provisions, it is clear that they have no application to Callidus, whose interests are completely opposed to the debtor Bluberi.

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[81] Bluberi Factum at paras. 46-53.

[82] By way of examples: *Income Tax Act*, RSC 1985, c.1 (5th Supp), s. 227(5) and 251(5)(b)(i); *Excise Tax Act*, RSC 1985, c. E-15, s. 2(2.1), 2(2.2), 126 and 325; *Securities Act*, CQLR c. 1.1, s. 5.2, 9, 89 and ff. and 115.

90. Such an interpretation of the related party provisions of the *BIA* and *CCAA* is further supported by an understanding of the equitable and beneficial interests of option holders, trust beneficiaries and other persons standing behind the holders of legal title to shares. The extension of the concept of relatedness ("a right in equity or otherwise") is aimed at sweeping in persons with these types of beneficial interest that are in harmony with the interests of debtors and their shareholders. Again, these considerations do not apply to Callidus. What Bluberi terms the straightforward approach to section 4(3)(c) *BIA* and section 22(3) *CCAA* in its factum is straightforward wrong and contrary to applicable principles of statutory interpretation.[83]

91. In addition, Bluberi's suggestion that the related party provisions should be interpreted to include any creditor that holds a hypothec on shares and whose rights are conditional is a distortion of the existing law that would have far-reaching consequences for financing in this country.

92. According to Bluberi's flawed logic, any financial institution or any other creditor holding a hypothec on shares (or any other security on shares under a contract or otherwise) is a person related to its debtor under the *BIA* (and consequently under the *CCAA*) for the sole reason that, in the future or contingently, upon the occurrence of a default, it could gain control of the voting rights in its debtor. By extension in other statutory contexts, this could have the effect of making lenders holding share pledges that were not exercised or exercisable exposed to a range of obligations, including the taxation, securities and insolvency liabilities referenced above.

93. Both on the specific facts of this case and as a general proposition, the mere holder of a pledge of shares such as Callidus ought not to be treated as "related" and deprived of its ability to vote for a plan that provides tangible benefits to all creditors.

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[83] Section 5 of the *CCAA* contemplates arrangements with secured creditors. Bluberi's interpretation of the related party provision would prevent all secured creditors with share pledges, a common form of security, from voting on plans as secured creditors and would improperly disenfranchise them.

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

Commonality of interest

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

95. The Appellants argue that Callidus should vote in a separate class from the other creditors because it seeks to obtain a release from the plan, whereas the other creditors want the best monetary recovery possible.

96. This argument seeks to rewrite section 22(2) *CCAA* and is intended to give SMT a veto right to ensure the failure of Callidus' New Plan. Other than Callidus, SMT is the creditor with the largest claim in value. It voted against the plan previously sponsored by Callidus and announced before the QSC that it would vote against the New Plan.

97. The Appellants did not raise arguments regarding the classification of creditors before the QSC. The issue was, however, raised before the QCA and is addressed at paragraphs 72 to 76 of the QCA decision.

98. The QCA applied the existing and non-controversial jurisprudence in Canada in respect of classification of creditors and refused to force Callidus to exercise its right to vote in a separate class. The QCA found at paragraph 73 of the QCA decision:

> [74] In this case, Callidus is both a creditor and a plan sponsor. Upon valuation of its security, it should vote with the ordinary creditors. The plan is a settlement of proposed litigation targeting it. In such capacity, it is only natural that it receives a release. The crossover between the two capacities is that it has renounced to participation in the dividend. I see noting in this state of affairs to justify an order that Callidus exercise its voting rights in a separate and distinct class of ordinary creditors.

99. As noted by the QCA, the specific issue of classification was addressed in *Resurgence*[84] where the court allowed the plan sponsor, Air Canada, also a creditor, to vote on the plan in the same class as ordinary creditors. Resurgence argued, *inter alia*, that because Air Canada had other interests in the outcome of the plan, it should vote in a separate class. Based on a thorough review of the applicable case law, both the court of first instance and the Court of Appeal of Alberta dismissed this argument and allowed Air Canada's vote to be tabulated.

100. Contrary to the Appellants' assertion that "the question thus remained unanswered,"[85] the court did allow Air Canada to vote in the same class as the other unsecured creditors, adding that it would "allow the "voice" of unsecured creditors to be heard, while at the same time, permit rather than rule out the possibility that a plan might proceed. It is important to preserve this possibility in the interests of facilitating the aim of the *CCAA* and protecting interests of all constituents. To fracture the class, prior to the vote, may have the effect of denying the court's jurisdiction to consider sanctioning a plan which may pass the fairness test but which has been rejected by one creditor. This would be contrary to the purpose of the *CCAA*.[86] Both the *CCAA* judge and the Court of Appeal of Alberta subsequently found that the plan proposed by Air Canada was fair and reasonable in *Resurgence*.[87]

101. In *Sido*, the QCA considered the issue of classification brought by the appellant and refused the broader interpretation of the commonality of interest proposed by the debtor's minority shareholder (who held a litigious claim against the plan sponsor). The court rejected this shareholder's request to segregate employees, holders of debentures (which could be

[84] *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2009 Carswell Alta 623 ("***Resurgence QB***") at paras. 33-41 and 44-45; leave to appeal denied 2000 ABCA 149 at paras. 36-40.

[85] Bluberi Factum at para. 61(a).

[86] *Resurgence QB* at paras. 40 and 41.

[87] *Canadian Airlines* at para. 103-104. *Canadian Airlines Corp. (Re)*, 2000 ABCA 238.

converted into shares) into separate classes on the basis of what such creditors may derive from the plan of arrangement.[88]

102. The Appellants rely on *Sovereign*[89], a decision rendered in 1892, to suggest that the interests to be taken into account in assessing the classification test in section 22(2) *CCAA* are not limited to legal interests as against the debtor.

103. While it is true that *Sovereign* is often cited as the origin of the commonality test, the courts have recognized that "it is necessary to have the facts of that case in mind before turning to what was said in the judgment".[90]

104. In *Sovereign*, the issue was whether the defendant was bound by a scheme of arrangement made under section 2 of the *Joint Stock Companies Arrangement Act, 1870* and agreed by a majority, representing three-fourths in value, of policy-holders at a meeting. All policy-holders were called at the same meeting to vote in one class. No distinction was made between those whose policies had matured and those whose policies had not matured.

105. The court in *Sovereign* found that the defendant was not a policy-holder whose policies were dealt with through the plan. He was a creditor of the company who the company's liquidator had sued to recover money. In response, the defendant argued a right of set-off against the liquidator as a defence. The court had to determine whether "the defendant is, therefore entitled to the benefit of his set-off unless the plaintiffs can say that his debt has been released as against them [as a result of the arrangement]".[91]

106. It is in this context that the court considered who should have been summoned to attend the meeting of creditors and whether claimants should have voted in different classes.

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[88] *Société industrielle de décolletage et d'outillage (SIDO) ltée (Arrangement relatif à)*, 2010 QCCA 403 (« ***Sido*** ») at paras. 27 to 30.

[89] *Sovereign Life Assurance Co. v. Dodd* (1892), [1891-4] All E.R. Rep. 246, [1892] 2 Q.B. 573 (C.A.)

[90] *Re Hawk Insurance Company Ltd.*, [2001] EWCA Civ 241 at para. 24.

[91] *Sovereign* at para. 249.

107. In reaching its decision, the court stated that : "it is clear, therefore, that he [the defendant] would not consider the matter with the same mind and form the same point of view as the policy-holders who were summoned to the meeting. A creditor such as the defendant could not be said to be in the same class as the policy-holders whose policies had not matured. The defendant belongs to a different class of creditors from those persons who were summoned to the meeting as policy-holders, because his policies, have matured, had not to be dealt with in any way. [92]

108. On that basis, the court held that the defendant was not bound by the arrangement applicable to the class of policy-holders whose claims had not matured, because his claims against the debtor were legally different, and permitted the defendant to set-off these claims as against the amounts he owed the Sovereign.

109. The "different state of facts" considered by the court in *Sovereign* to justify different classification were therefore the distinctions between (i) those whose policies had not matured (unliquidated claim), (ii) those whose policies had matured and were dealt with in the arrangement, and (iii) those whose policies had matured and were not dealt with in any way. These distinctions go straight to the *legal* rights of each class of creditors as against the debtor. They have nothing to do with the overall effect of arrangement on the defendant.

110. Section 22(1) *CCAA* allows for the creation of classes of creditors for the purposes of voting on a plan of arrangement in accordance with sections 4 and 5 *CCAA*.

111. Pursuant to section 22(1) *CCAA*, a "debtor company" "may" divide its creditors into classes, subject to court approval. The prevision is permissive and does not require the division of creditors into multiple classes.

112. Indeed, the factors listed at 22(2) *CCAA* are not meant to determine when classification is necessary; they simply set out the factors to be considered by the court in the event that classification is requested.

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[92] *Sovereign* at para. 250.

113. Most importantly, as stated by the Ontario Court of Appeal in *Stelco*, "it is important to remember that classification of creditors, like most other things pertaining to the *CCAA*, must be crafted with the underlying purposes of the *CCAA* in mind, namely facilitation of the reorganization of an insolvent company through the negotiation and approval of a plan of compromise or arrangement between the debtor company and its creditors".[93]

114. Permitting Callidus to vote in the same class as the other Bluberi creditors gives effect to the underlying purposes of the *CCAA* insofar as it facilitates a plan of arrangement that is acceptable to the vast majority (92%) of creditors and guarantees a real payment on account of ranking creditors claims.

115. In contrast, the effect of the Appellants' efforts to block Callidus' vote in the general class of unsecured creditors and on Callidus' New Plan will be to impose speculative recoveries (if any) on creditors while permitting payment of Bentham's success fees and the fees of the attorneys (without any apparent distinction to those incurred by Mr. Duhamel[94]) without any assurance that creditors' claims will be satisfied first. As stated by the QCA, the creditors under the LFA may very well received nothing.[95] These results are contrary to the purpose and scheme of the *CCAA*.

116. The "reorganization" of Bluberi is completed since all of its assets (except for the Retained Claims) were vested to Callidus. Bluberi's sole purpose for seeking a separate classification for Callidus is to ensure that the New Plan is defeated and to thereby provide its shareholder, Mr. Duhamel, with a chance, however slim that chance may be, to recover his equity. As for Bentham, it is not a stakeholder of Bluberi and, therefore, clearly has no legal standing to request a separate classification for Callidus. It is clear that Bentham's interest rests in the approval of the LFA and the possibility to make a significant return on its investment in the litigation. These objectives are not consistent with the underlying purposes of the *CCAA*.

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[93] *Stelco Inc., Re,* 2005 CarswellOnt 6818 (ONCA) ("***Stelco***"), para. 36.
[94] See definition of "Plaintiffs" and sections 3.1 to 3.3. in the LFA, AR, vol. 5, pp. 5 and 7-8.
[95] QCA decision para. 87.

117. As Paperny J. noted in *Canadian Airlines*, "the Court should be careful to resist classification approaches that would potentially jeopardize viable plans."[96]

118. The Appellants also rely on the decision of Conrad J.A. in *San Francisco*[97] (a decision rendered before *Stelco* and 5 years before section 22(2) *CCAA*) to argue that Callidus should vote in a separate class from the other unsecured creditor based on the "broader interests" found in this decision to assess the commonality of interest test. However, in *San Francisco* case, the court decided to place the two ultimate shareholders of the debtor company in a separate class because there was no compromise of their claims under the plan, while the claims of the other unsecured creditors were being compromised. Further, the shareholders appeared to be unaffected by a bankruptcy of the debtor companies, while all of the other creditors in the class would receive nothing in bankruptcy.[98] This decision has no application in this case.

119. Callidus does not have interests or rights with respect to Bluberi that differ from those of other creditors. As confirmed by the QCA, Callidus is well within its rights to value its security at nil and proceed to vote for the amount of its claim, the quantum of which has already been approved by the QSC judge[99], as an unsecured creditor.

120. In view of the creditors' meeting on Callidus' Initial Plan, the Monitor further recognized in its report Callidus' right to assess and vote an unsecured claim: "Callidus <u>may vote on the Plan at the Creditors' Meeting for the portion of its claim, assessed by Callidus, to be an unsecured claim</u>." [100] (emphasis added)

121. There is no question that the more creditors are forced to vote in separate classes, the less likely it is that a plan will obtain the requisite majority of votes. Applying classification

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[96] *Stelco*, at para. 36. See also *SemCanada Crude Co. (Re)*, 2009 ABQB 490 at paras. 33-37; See on the non-fragmentation approach *Woodward's Ltd. Re*, 1993, CarswellBC 555 (BCSC) at paras. 11-14; *Trends Publishing International Limited* v. *Advicewise People Limited*, [2018] NZSC 62 at paras. 67-68.

[97] *Re San Francisco Gifts Ltd*, 2004 ABQB 705 ("***San Francisco***").

[98] *San Francisco* at para. 12.

[99] QSC decision at para. 29-30; QCA decision at paras. 74-76.

[100] Monitor's Fourteen Report at para. 38, RR, vol. 3, pp. 187-188.

more broadly than provided for in Section 22 *CCAA* would inevitably result in fewer plans being approved by creditors and fewer plans being submitted to the court for consideration and approval.

122. A broad interpretation of section 22 *CCAA* and of the commonality test should not be used to divide creditors into classes when the result is the inevitable failure of an otherwise fair and reasonable plan that is in the best interests of creditors and stakeholders generally.

123. The risks associated with a broad interpretation are even greater in the case of creditor sponsored plans, when the practical interests of the plan sponsor generally (if not necessarily) differ from those of the Debtor's shareholders, as is the case here.

124. As an unsecured creditor, the remedies available to Callidus are no different than the remedies available to all other unsecured creditors in the absence of a compromise.

125. Even in the event of the bankruptcy of the Debtors, given the absence of assets, the remedies available to Callidus would be no different. Although the rights of secured creditors are not stayed in the event of a bankruptcy, Callidus could not avail itself of any recourses not otherwise available to unsecured creditors, given that Bluberi effectively lacks assets except for the Retained Claims. These facts are a full answer to any argument that Callidus should be in a separate class based on section 22(2)(c) *CCAA*.

QUESTION 3: DID THE *CCAA* COURT ERR IN THE EXERCISE OF ITS DISCRETION IN PREVENTING CALLIDUS FROM VOTING ON THE PLAN IT SPONSORS?

126. The Appellants and the QSC relied primarily on *Laserworks* to support that Callidus should be prevented from exercising its voting right with respect to the plan its sponsors.[101]

127. The Appellants suggest that the QCA held that courts do not have jurisdiction under the *CCAA* to preclude a creditor pursuing an improper purpose or otherwise not abiding by the *Century Services* requirements from exercising its voting rights.[102] This interpretation of the QCA decision is wrong.

[101] QCA decision, para. 60; QSC decision, paras. 32-35.
[102] Bluberi Factum at paras. 72-73.

128. Paragraphs 59 to 64 of the QCA decision demonstrates that the QCA conducted a thorough analysis of the notion of "improper purpose" and noted that such notion developed as a reason for a court to exercise its jurisdiction to dismiss or stay a petition for a bankruptcy order under what is now sections 43(7) and 43(11) *BIA*. The QCA properly found that an "improper purpose" can be the reason a court exercises its discretion but cannot be the source of the existence of that discretion.[103]

129. The QCA further found that, given the result of a vote defeating a proposal made under the *BIA* is a deemed assignment in bankruptcy, the reliance on the notion of improper purpose to deny a creditor the right to vote in *Laserworks* is in harmony with the general scheme of bankruptcy law.[104] However, since the failure to achieve the statutory majority for approval of a plan under the *CCAA* does not automatically result in a bankruptcy, the QCA found that the exercise of discretion by the QSC to deny Callidus the right to vote is an error in principle for which deference is not due by the QCA. [105]

130. Therefore, the QCA did not conclude that the court in a *CCAA* process lacks the inherent jurisdiction to supervise its own process. To the contrary, it found that, even if *Laserworks* is correctly decided as a matter of law and the court has discretion to preclude a creditor from voting, despite the absence of statutory language to that effect, its application should be reserved to the clearest of cases[106] and this case is not one of those cases.

131. In *Laserworks*, a party who was not originally a creditor purchased claims with the specific intention of voting down a proposal under the *BIA* in order to bankrupt the debtor and eliminate a competitor from the marketplace. The Nova Scotia Court of Appeal concluded that this new creditor acted for an improper purpose. In this unique situation, the Court precluded that creditor from voting the claims it had acquired.

[103] QCA decision at para. 59.
[104] QCA decision at para. 61.
[105] QCA decision at para. 59.
[106] QCA decision at para. 62.

132. The improper purposes found in *Laserworks* were: "substantial injustice from tortious behaviour", "conspiracy to harm", "abuse of process and fraud", "annihilation of an individual business". [107] This behaviour does not compare to the case at bar.

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

> [63] The clear and transparent purpose of Callidus in proposing the plan is to obtain a release from the Respondents' claim against it, or, in other words, to settle the threatened lawsuit. I cannot fathom that seeking a settlement of litigation for valuable consideration constitutes an improper purpose. I underline that the proposed settlement yields full payment to employees and creditors of small amounts while providing payment of 35-39% of larger claims. A more modest payout (under the initial plan as amended) was, in the opinion of the Monitor, fair and reasonable.
>
> [64] Obtaining a release through a plan of arrangement even for third parties and plan sponsors is not improper and has been recognized as an integral part of the *CCAA* arrangement landscape.[108]

134. Callidus has always been transparent that its sole purpose in proposing the Initial Plan as well as the New Plan is to settle the lawsuit against it. The QCA decision underlined that it was far from clear that creditors would not ultimately be better off with the Callidus settlement than with the financed litigation option.[109]

135. The QCA further noted that the settlement proposed by Callidus by way of the New Plan offers full payment to former employees of Bluberi (who have gone unpaid for over 4 years now), while proposing payment between 35% to 100% to the other creditors.

136. The QCA further refers to the *Blackburn*[110] decision in which the British Columbia Supreme Court, having considered *Laserworks*, refused to disallow the vote of a "vulture

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[107] *Laserworks* at p.13.

[108] QCA decision, paras. 61, 63-64.

[109] QCA decision, para. 62.

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

fund" that had purchased a controlling block of claims to defeat a plan of arrangement with a view to putting the debtor into a liquidation. It concluded that "such a result would only be appropriate in the clearest of cases."[111]

137. It is also well established that the reasons or motivations for a creditor to exercise its voting rights should not be taken into consideration, except in extreme situations. As stated by the QCA, "Our Court has also made it clear that a creditor has a right to vote its own self-interest even if that interest appears contrary to that of the mass of creditors or the debtor".[112]

138. The QSC erred in law in relying on the decision of the Nova Scotia Court of Appeal in *Laserworks* to conclude that Callidus was using the *CCAA* for an improper purpose. The case at bar is far from the clearest of cases to which any form of the improper purpose doctrine may be applied. Callidus has consistently remained transparent in its desire to obtain releases in respect of the Retained Claims through a process that has been recognized as an integral part of the *CCAA* arrangement landscape.[113]

139. Contrary to Bluberi's arguments in paragraphs 83 and 84 of its factum, the decision of the Ontario Superior Court of Justice in *Target*[114] provides no basis to suggest that the court in the present case should exercise its discretion to refuse the convening of a creditors meeting because Callidus' New Plan is "doomed to failed" and prevent all of Bluberi's creditors, including Callidus, to vote on it. In their references to the *Target* decision, the Appellants ignore the most critical aspect of that case: the plan being considered by the court for filing was found to be in breach of prior orders made in the Target *CCAA* proceedings. No such considerations apply in any way to the New Plan proposed by Callidus.

140. In *Target*, an amended version of the initial order providing *CCAA* relief included an express term providing that claims by Target's landlords against its US parent would be treated as unaffected and not released by any plan filed in Target's *CCAA* proceedings.

[111] QCA decision at para. 61
[112] QCA decision at para. 71. *Cantrex* and *Bedard*.
[113] QCA decision at paras. 62-64
[114] *Target Canada Co. (Re)*, 2016 ONSC 316 ("***Target***").

These provisions were included in Target's amended initial order as part of a negotiated arrangement with the landlords.

141. The plan of compromise and arrangement presented by Target for filing and rejected as unfair by the court provided a broad release of all landlord guarantee claims against Target's US parent. This was directly contrary to the negotiated provisions of the amended initial order barring such a release. In ruling that the plan presented by Target for filing could not be accepted, the court held as follows:

> (…)by proposing this Plan, Target Canada and Target Corporation seek to override the provisions of paragraph 19A. They ask the court to let them back out of their binding agreement after having received the benefit of performance by the landlord. They ask the court to let them try to compromise the Landlord Guarantee Claims against Target Corporation after promising not to do that very thing in these proceedings. They ask the court to let them eliminate a court order to which they consented without proving that they have any grounds to rescind the order. In my view it is simply not appropriate to proceed with the Plan that requires such an alteration.

142. Clearly, the circumstances surrounding the plan rejected by the court in *Target* are entirely distinguishable from the circumstances surrounding Callidus' Initial Plan and the New Plan. The rationale for rejecting the plan in *Target* has no application whatsoever to this case.

143. The QCA found that the QSC decision was "tainted with errors in the appreciation of the facts, but more significantly, errors in law in the application of the *CCAA*, particularly the notion of that which constitutes a plan of arrangement".[115] The QCA properly states at paragraph 49 of the QCA decision the standard of review applicable to the QSC decision and found errors on both questions of fact and mixed fact and law, which are palpable and overriding, in the exercising of the QSC judge's discretion.

144. The reasons for the QSC judge's findings of "heavy-handed behaviour and strenuous contestation of proceedings by Callidus" upon which he relied to conclude that Callidus

[115] QCA decision at para. 22.

was using the *CCAA* proceedings for an improper purpose are found at paragraphs 38 to 44 of the QSC decision.

145. The QCA found the QSC judge erred and did not properly exercise his discretion in making such findings based on unproven allegations in proceedings, without a fact-finding inquiry and while he had never sanctioned Callidus for any abuse of conduct[116] :

> [66] As for the judge's findings of heavy-handed behaviour and strenuous contestation of proceedings by Callidus, I fail to see how this justifies the exclusion of the Appellant's voting rights. Firstly, a perusal of the contestation filed by Callidus to the initial *CCAA* filing paints a very different factual picture (…). Moreover, there was no sanction issued by the judge against Callidus over the life of the matter for any abuse in its conduct before the court or of any proceedings or contestation filed by it. I underline as I indicated at the outset of these reasons that there was no fact-finding inquiry by the judge."
>
> [69] (…) Here the judge relied "on allegations of a yet to be instituted lawsuit against the creditor to deny the latter's voting rights. This is not an appropriate exercise of discretion. Denial of a fundamental right should not depend on unproven allegations.[117]

146. In addition, the QSC judge's findings that Callidus' behaviour is contrary to the requirements of appropriateness, good faith and due diligence[118] based on mere allegations in proceedings are contrary to a prior decision in which he refused to force Callidus to assume 100% of the cost of the creditors' meeting based on unproven allegations of abusive conduct:

> Considérant que les compagnies débitrices demandent à ce que Callidus assume 100% des frais et honoraires du contôleur <u>en raison des agissements de Callidus qu'elles qualifient d'abus</u> (…)
>
> Considérant que <u>le Tribunal ne peut, sans une audition au mérite, statuer sur les agissements de Callidus et, par voie de conséquence, ne peut déclarer</u>

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[116] QCA decision at para. 70. The QCA further noted that the QSC judge's enquiry begins to resemble to the application of equitable subordination, citing *U.S. Steel*.

[117] QCA decision at paras. 66 and 69.

[118] QSC decision at para. 48.

> aujourd'hui que Callidus a commis un abus en déposant un plan d'arrangement le 18 septembre 2017.[119] (emphasis added)

147. Nothing changed between the hearing that led to this order by the QSC and the QSC decision. No fact-finding inquiry ever took place, neither Mr. Duhamel nor any other witness ever testified before the QSC about abusive or improper conduct by Callidus and no other evidence was ever presented before the QSC.

148. Finally, the QSC erred in law in characterizing the LFA as an interim financing, in the circumstance of this case, and not as a plan of arrangement.[120]

149. These are all palpable and overriding errors made by the QSC that justified the intervention of the QCA. Any finding of bad faith on the part of Callidus made by the QSC is tainted by these errors and cannot stand, either as an application of the newly introduced provisions of what is now section 18.6 *CCAA* or as a matter of general law.

150. At heart, the QSC judge's erroneous findings arise from his fundamental misunderstanding of Callidus' request for a release as part of the New Plan. Seeking a release as part of an arrangement is entirely consistent with established law and part and parcel to the contribution made to the plan by Callidus. In this respect, Callidus is in a comparable position to the participants in the ABCP plan of arrangement approved by the court *Metcalfe & Mansfield* [121]- it properly and openly seeks to obtain finality in consideration for its economic contribution to a plan. The QCA decision does no more than apply existing law on these points and correct the errors of the QSC judge, whose decision incorrectly expands the improper purpose doctrine on the basis of unproven allegations

QUESTION 5: CAN CALLIDUS ELECT TO VALUE ITS SECURITY AS IT SEES FIT AND VOTE ALL OR PART OF ITS CLAIM AS AN UNSECURED CREDITOR?

151. Callidus evaluated its security at nil and may thus vote its claim as an unsecured creditor. As highlighted by the QCA, a nil valuation is reasonable given that the litigious and

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[119] Minutes of hearing, October 5, 2017, RR, vol. 1, p. 28.
[120] QCA decision at paras. 21, 78-79.
[121] *Metcalfe & Mansfield*.

completely unsubstantiated Retained Claims are the sole remaining assets of the Debtors.[122]

152. Bentham submits that the QCA erred in accepting that Callidus could value its security at nil, arguing that such security must be worth at least the amount of the settlement payment contemplated in the New Plan, namely $2,880,000.[123] Callidus disagrees.

153. It is uncontested that Callidus is a secured creditor of Bluberi for $3 million. The claims process[124] applicable to Bluberi' insolvency proceedings does not distinguish between the process applicable to proving claims of secured and unsecured creditors. However, guidance as to Callidus' rights as a secured creditor under the *CCAA* can be drawn from the relevant provisions of the BIA, as creditors should have analogous entitlements under the two statutes. [125] This Court has held that the *BIA* and *CCAA* should be interpreted harmoniously wherever possible.[126]

154. Under the *BIA*, secured creditors can generally assess the value of their security and receive a dividend for the balance of their claim.[127] In the present case and as recognized by the Monitor in its report on the Initial Plan: "Callidus may vote on the Plan at the Creditors' Meeting for the portion of its claim, assessed by Callidus, to be an unsecured claim."[128]

155. The *BIA* also provides that Callidus could surrender its security for the benefit of creditors and prove its entire claim.[129] It is important to remember that, under the New Plan, Callidus would effectively renounce its security and renounce any right to receive a dividend. This is a direct benefit to creditors that would only be available under the New Plan and would

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[122] QCA decision, at paras. 57, 74 and 75

[123] Factum of the Appellants IMF Bentham Limited and Bentham IMF Capital Limited, para. 84 citing the QCA decision at para. 57.

[124] Claim Procedure Order dated October 12, 2017, RR, vol. 1 pp. 30 and ff.

[125] *Indalex* at para. 51. See also *Arrangement relatif à Bloom Lake*, 2017 QCCS 4057 at para. 164.

[126] *Century Services* at para. 47; *Arrangement relatif à Kitco Metals Inc.*, 2017 QCCS 4404 at para. 73 and 74.

[127] Sections 127 (1) and 128 (2) *BIA*

[128] Monitor's Fourteenth Report at para. 38.

[129] Section 127 (2) BIA.

be lost if Bluberi is allowed to pursue litigation against Callidus. Even in the unlikely event of the success of that litigation, Callidus could set its Claim off against any litigation proceeds.[130]

156. Therefore, there is nothing preventing Callidus from determining that its security has no value or simply surrendering its security and electing to prove its entire claim as an unsecured creditor. In either scenario, the result would be beneficial to creditors.

PART IV – SUBMISSION ON COSTS

157. The Respondent seek costs against the Appellants and the Intervener Ernst & Young Inc. in its capacity as Monitor.

PART V – ORDER SOUGHT

158. The Respondent request that this Court dismiss the appeals from the decision of the QCA rendered on February 4, 2019.

Dated at the City of Montreal, Province of Quebec this 6th day of January, 2019

for: Lynn Watt as Agent

Geneviève Cloutier
Clifton P. Prophet

Counsel for the Respondent,
Callidus Capital Corporation

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130 Acknowledged by the Debtors in their *Plan de compromise et d'arrangement* at para. 3.1, RR, vol. 3, p.162.

PART VI – SUBMISSIONS ON CONFIDENTIALITY INFORMATION

159. As the Appellants have noted in their facta, the QSC ordered that the non-redacted version of the LFA is to be kept confidential and not released until further order of the court. There are no other sealing or confidentiality orders, publication bans, or classification of information in the file that is confidential under legislation or any restriction on public access to information in the file that could have an impact on this Court's reasons.

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