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File no. T1007046

January 9, 2020

Mr. Roger Bilodeau, Q.C.
Registrar
Supreme Court of Canada
301 Wellington Street
Ottawa, ON K1A 0J1

Dear Mr. Bilodeau

Re: 9354-9186 Québec inc., et al. v. Callidus Capital Corporation, et al. (SCC 38594)

Dear Mr. Bilodeau,

We hereby reply on behalf of Callidus Capital Corporation ("**Callidus**") to the Joint Factum of the Interveners ("**Joint Factum**"), the Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring of Professionals (collectively the "**Interveners**"). Terms not otherwise defined herein shall have the meanings provided for in Callidus' Factum.

First, with respect to the question of the classification of interest test, the Interveners take the position that the QCA "*did not consider the criteria developed by the case law and under subsection 22(2) of the CCAA in assessing the commonality of interest test between the creditors of the same class.*" (Joint Factum at para. 6(a)). Callidus disagrees with this statement.

Section 22(2) provides factors to be considered by the court in determining whether creditors have sufficiently similar interests or rights to give them a commonality of interest. This section codifies existing case law establishing principles addressing commonality of interest that focus on the rights of the creditors against the debtor company. Notably, in *Canadian Airlines,* the Court of Queen's Bench of Alberta set forth principles applicable to the assessment of the commonality of interest test, certain of which are stated by the Interveners at paragraph 10 of the Joint Factum. In addition, Callidus wishes to point out that the *Canadian Airlines* decision establishes the following additional principles: (i) "*the commonality of (…) interest should be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganization*", (ii) "*the court should be careful to resist classification approaches which would potentially jeopardize viable plans*" and (iii) "*Absent of bad faith, the motivations of the creditors to approve or disapprove are irrelevant*"[1].

The QCA's findings on classification are consistent with the principles set out in the case law and the criteria provided under section 22(2) CCAA. The fact that (i) Callidus is a plan sponsor voting as an unsecured creditor in the same class as all other ordinary creditors and that (ii) it is seeking to obtain releases under the plan is not a "*state of affairs to justify an order that Callidus exercise its voting rights*

[1] *Resurgence Asset Management LLC v. Canadian Airlines Corporation,* 2000 CarswellAlta 623 (Q.B.) ("***Canadian Airlines***"); lv to appeal dismissed 2000 ABCA 149.

in a separate and distinct class of ordinary creditors" (para. 74). Furthermore, there is no conflict between a creditor who sponsors of a plan and stands to benefit from it, whether by seeking releases or acquiring shares of the debtor company, and creditors wishing to maximize their recoveries that would prevent the plan sponsor from voting with the rest of the creditors. As found by the court in *Canadian Airlines*, the benefits to a creditor/sponsor should be considered as part of the plan approval or fairness hearing, not as pretext to prevent the sponsor from voting as one of the general body of ordinary creditors.[2]

Second, Callidus submits that the decision *San Francisco Gifts* as it relates to the treatment of the voting rights of the shareholders Slawsky and Laurier is not relevant to this case. As stated by the Interveners, the court found that they held "unaffected claims" that were not compromised by the plan[3]. The plan provides that "*Slawsky and Laurier's claims will survive the reorganization*" (our emphasis added)[4]. Therefore, the real issue submitted to the court in *San Francisco Gifts* with respect to Slawsky and Laurier was not a classification issue *per se* but rather whether creditors whose rights are not compromised under a plan should be allowed to vote with other creditors whose rights are affected. In this case, the New Plan proposed by Callidus provides that the totality of Callidus' claim will be compromised following valuation of its security at nil[5]. Clearly, this situation does not compare with the case of Slawsky and Laurier in *San Francisco Gifts*. That said, it is worth noting that the court in *San Francisco Gifts* did address the issue of classification with respect of landlord claims and, in doing so, relied heavily on the principles set forth in *Canadian Airlines* as well as a non-fragmentation approach to the commonality of interest test.

Third, Callidus agrees with the position taken by the Interveners at paragraphs 24 and 25 of the Joint Factum. As stated by the Interveners, "*a CCAA judge may be well advised in appropriate circumstances to order that an LFA be integrated as part of a plan subject to creditor vote.*" This determination is indeed based on the specific facts of each case. In the circumstances of this case, the QCA correctly characterized the LFA as an accessory to or part of a plan of arrangement. The Interveners further correctly noted that in *Crystallex* there was no competing plan such that the creditors were not faced with a choice between recovering under a plan of arrangement and the potential recovery of their claims through the pursuit of a lawsuit financed by a LFA. As suggested by the Interveners, in the present case, the creditors (including Callidus who is a creditor) should have the opportunity to exercise their voting rights and choose between the two alternatives being presented to them, namely to accept the proposed plan of arrangement or to permit the debtor company to borrow to litigate its claims.

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[2] Canadian Airlines Corporation 2000 ABQB 442 at para. 104 and *Canadian Airlines* at para. 35.
[3] *San Francisco Gifts Ltd,* 204 ABQB 705 ("***San Francisco Gifts***") at para. 6 and 49.
[4] *San Francisco Gifts* at para. 6.
[5] Sections 3.3.(b) and 5.1 of the Plan of Arrangement and Compromise dated February 12, 2018 (the "**New Plan**")proposed by Callidus.

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Sincerely,

Gowling WLG (Canada) LLP

for Geneviève Cloutier

c.c. Agents for the parties to the appeal

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