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

RE: File No: 38594: Reply by Applicants 9354-9186 Québec Inc. and 9354-9178 Québec Inc. to the responses of the Respondents

Dear Registrar,

We hereby reply to the responses filed by Callidus Capital Corporation ("**Callidus**") and the Creditors' Group, as that term is defined in Callidus' response. For ease of reference, we apply herein the definitions used by Callidus in its response and the ones used in our application for leave to appeal ("**A.L.A.**"), including for the references.

First, on the question of whether a creditor can vote on the plan it sponsors, Callidus contends that "*Courts in Canada have already tackled this issue and have determined that a creditor is entitled to vote on a plan it sponsors*" (para. 28). Callidus had an entirely different opinion before the QCA, where it pleaded that it is "*the first time that this question is raised before a Court of Appeal since the addition of section 22(3) CCAA*" (para. 25(b), A.L.A., vol. III, p. 118). Beyond the naked inconsistency of its position, Callidus' statement that this question has already been "*tackled*" in Canada is perplexing considering the three cases it cites in support thereof.

Two of the cases cited by Callidus, *Cantrex* and *Bédard*, address whether a creditor can vote against a proposal filed by the debtor. There is not a word in these cases about whether a creditor can vote in favour of the plan it sponsors. In the third case, *Canadian Airlines*, while Air Canada was allowed to vote on its own plan by the *CCAA* court, there was no discussion or analysis on this issue (as Callidus' response makes plain: see para. 30), let alone a consideration of the arguments raised by the Applicants in the A.L.A. Moreover, section 22(3) *CCAA*, which Callidus admitted to the QCA was critical to this question, did not even exist when *Canadian Airlines* was decided. In this context, one can hardly suggest that the issue has "*already [been] tackled*". In the final analysis, Callidus was right before the QCA and is wrong before this Court: this question is unresolved, important and critical to the practice of insolvency.

Second, Callidus argues that the Debtors' argument that Callidus is a party related to the Debtors was "dismissed by both the QSC and the QCA" (para. 42). That is true. It is also true that the voting control in the Debtors was not transferred to Callidus (para. 44). But that is not the end of the analysis. Callidus can also be related because it could, "in the future" or "contingently", "control the voting rights in" the Debtors (4(3)(c) *BIA)*. That part of the test is clearly met (A.L.A., paras. 35-37, pp. 74-75), yet it was not addressed by the QSC or the QCA, and Callidus offers no response to that reasoning.

Third, Callidus argues that it can vote in the same class as the other creditors because, "*[a]bsent bad faith, the motivation of the creditors to vote in favour or against a plan is not relevant*." This is both wrong and beside the point. It is wrong because "*appropriateness*" and "*due diligence*" – not just "*good faith*" – "*are baseline considerations that a court should always bear in mind when exercising CCAA authority*" (*Century Services*, para. 70). The first judge found that Callidus pursued an

"*improper purpose*", which is sufficient to justify its order, even absent bad faith (QSC Decision, para. 48, A.L.A., p. 22).

More importantly, Callidus' "*motivation*" is largely irrelevant for classification because of the difference of treatment between creditors under its plan: Callidus obtains a release, whereas the other creditors obtain a payout. Callidus argues that this difference of treatment does not warrant it voting in a separate class. In doing so, Callidus turns a blind eye on authorities that hold that in "*determining commonality of interests, the court should also consider factors like the plan's treatment of creditors*" (*San Francisco QB*, para. 12, emphasis added; see also *San Francisco CA*, paras. 12-15), and relies instead on two cases that do not support its position. *Resurgence*, which predates *San Francisco*, does not hold that *Air Canada*'s different treatment did not warrant it voting in a separate class. Wittman J.A. held that the Court of Appeal should not intervene in the first judge's exercise of discretion to defer this question to a later time (*Resurgence*, paras. 37-39). Callidus' reliance on *Sido* is even more fragile: the question of whether creditors who receive different treatment should vote in separate classes was not even raised before the first judge, and Bich J.A. found that the only question on appeal would be to "*vérifier si le juge de première instance a appliqué correctement ces règles [relatives à la classification] aux faits particuliers de l'espèce*" (paras. 28-29). She declined to grant leave on that basis.

Fourth, Callidus now contends that the QSC did have jurisdiction to prevent Callidus from voting on the plan it sponsors, but erred in the exercise of its discretion. It asserts that the QCA never denied this jurisdiction and that the undersigned were "*misleading*" this Court by arguing that it did (paras. 18-19). With respect, this accusation is inexcusable. The QCA clearly held that the QSC did not have jurisdiction to prevent Callidus from voting on its release: "*The exercise of discretion, which is not legally available, is an error in principle to which deference is not due by an appellate court*" (QCA Decision, paras. 59-61, A.L.A., pp. 51-52). It is only in *obiter* that the QCA held that "*[e]ven if […] the discretion to preclude a creditor from voting exists despite the absence of statutory language, its application should be reserved for the clearest of cases*" (QCA Decision, para. 62, emphasis added, A.L.A., p. 52)[1]. But even if this Court disagreed with our reading of the QCA's transparent reasons, it would not mean that we attempted to mislead this Court. Otherwise, it would mean that Callidus attempted to mislead this Court with its statements on *Cantrex, Bédard, Canadian Airlines, Resurgence* and *Sido*. We do not think they did, and neither did we. In any case, this demonstrates that the question of whether the CCAA Court has jurisdiction to prevent a creditor from voting on a plan is not only central to the practice of insolvency law, but also hotly debated.

Lastly, we also subscribe to the arguments set out in the reply filed or to be filed by Applicants IMF Bentham Limited and Bentham IMF Capital Limited, particularly on the matter of whether the litigation funding agreement meets the definition of a plan of arrangement under the *CCAA*.

Yours very truly,

Jean-Philippe Groleau
JPG/mcl

1 A.L.A., paras. 47-51, pp. 79-80.