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SCC Releases Reasons in 9354-9186 Québec inc. v. Callidus Capital Corp.

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By Sam Babe

On May 8, 2020, the Supreme Court of Canada (the "**SCC**") released its reasons for its January 23, 2020 unanimous decision in *9354-9186 Québec inc. v. Callidus Capital Corp.* ("***Callidus***") to allow the appeal of the decision of the Quebec Court of Appeal (the "**QCCA**") and reinstate the decision of the Quebec Superior Court (the "**QCSC**").[1] In its reasons for decision delivered by Chief Justice Wagner and Justice Moldaver, the SCC found that the QCCA had not given proper deference to the factual findings of the QCSC judge.

The QCSC had dismissed an application by a creditor group to permit Callidus Capital Corp. ("**Callidus**") to vote on its own plan in the *Companies' Creditors Arrangement Act* (the "***CCAA***") proceedings (the "***CCAA Proceedings***") of its debtor, 9354-9186 Québec inc., formerly Bluberi Gaming Technologies inc. ("**Bluberi**"). The plan had been brought by Callidus to compromise litigation claims threatened against it by Bluberi. Callidus had previously been the winning bidder, through a credit bid, of all Bluberi's assets other than the claims against Callidus. Callidus had excluded $3 million of its secured debt from its credit bid, so as to remain the ranking secured creditor in the *CCAA Proceedings*. Callidus' vote in favour of the plan was required in order to cross the two thirds in value of claims voting threshold required under section 6(1) of the *CCAA*. Justice Michaud of the QCSC had held that allowing Callidus to vote on the plan would serve an improper purpose and give rise to a substantial injustice. He also approved, without any creditor vote, a litigation financing agreement (the "**LFA**") to allow Bluberi to pursue its claims against Callidus.

Justice Shrager for a unanimous QCCA found that seeking a settlement of litigation for valuable consideration could not be considered an improper purpose, especially when it would result in employees and smaller creditors receiving full payment on their claims and other creditors receiving between 33% and 39%. Justice Shrager found that Justice Michaud's reliance on improper purpose was not based in any statutory discretion and resembled an application of the doctrine of equitable subordination, despite the fact that equity should not be used to exclude *CCAA* voting rights. Justice Shrager also held that the LFA ought to be put to a vote of creditors, so that they could properly weigh their options as against the Callidus plan.

The SCC held that deference owed by an appellate court to the factual findings of a motion judge is heightened in the case of a *CCAA* judge who has single handily overseen a lengthy proceeding since its inception, who has thereby obtained "extensive knowledge and insight into the stakeholder dynamics and the business realities of the proceedings" and who is exercising the broad statutory discretion granted by section 11 of the *CCAA* to make any order that he or she considers appropriate to respond to the circumstances of the case.[2] This deference is owed as long as the *CCAA* judge exercises his or her discretion reasonably and in furtherance of the remedial purpose of the *CCAA* and has given proper attention to the "baseline" considerations in section 11: that the relief sought is appropriate in the circumstances and that the moving party has been acting in good faith and with due diligence.[3]

Contrary to what the QCCA had found, the SCC held that the QCSC's decision not to allow Callidus to vote on its own plan was grounded in statutory discretion, and, in particular, section 11 of the *CCAA* which required Callidus to have exercised due diligence. The SCC found that Callidus had not exercised due diligence in valuing its claim and security.[4] Callidus' $3 million debt was secured by nothing more than Bluberi's only asset, its retained claims against Callidus. Where Callidus valued that security at zero in order to be able to vote in its plan, the SCC held that it ought to have made that valuation earlier. As a result, there was no justification for appellate intervention in the QCSC's decision to bar Callidus from voting based on its finding of improper purpose.[5]

Similar in breadth to the discretion given under section 11 of the *CCAA*, section 11.2 of the Act also gives a court broad discretion in approving debtor-in-possession financing, the exercise of which discretion also warrants deference. The SCC held that such discretion would include discretion as to the form financing can take.[6] In a case where litigation funding was the only way to monetize the company's sole asset, such funding furthered the basic purpose of interim financing under section 11.2.[7]

The SCC rejected the QCCA's finding that the LFA was essentially a plan of arrangement which required a vote of creditors. Agreeing with the reasoning of Justice Newbould, as he then was, in *Re Crystallex International Corporation*,[8] the SCC found that the concept of an arrangement in the *CCAA* entails, at minimum, some compromise of stakeholder rights and that the LFA would not result in any such compromise.[9] The fact that the litigation funder would take a share of any recovery did not mean creditors would necessarily face a shortfall. If a shortfall did materialize, then an actual plan of arrangement would be presented.[10]

As a result, the SCC also found no justification with the QCCA's interference with the *CCAA* judge's exercise of discretion under section 11.2.

The Financial Services Group at Aird & Berlis regularly advises a broad range of stakeholders on proceedings initiated pursuant to the *Companies' Creditors Arrangement Act*, including plans of arrangement. Details are available at our **Financial Services webpage**.

[1] *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc., 2018 QCCS 1040*; reversed *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.), 2019 QCCA 171*; reversed *9354-9186 Québec inc. v. Callidus Capital Corp., 2020 SCC 10*.

[2] *Callidus*, *supra*, note 1, at paragraphs 47 and 48. The SCC appears to view this heightened deference to *CCAA* judges as a rule of general application. Note that in Ontario, at least, it is not universally the case that a *CCAA* proceeding will be seized by a single judge, as was the case in *Callidus*. It is therefore not clear whether this heightened deference would be owed to the factual findings of the *CCAA* judge who has not been seized of a matter since its beginning.

[3] *Callidus*, *supra*, note 1, at paragraph 49.

[4] *Ibid.*, at paragraph 80.

[5] *Ibid.*, at paragraphs 81 to 82.

[6] *Ibid.*, at paragraph 87.

[7] *Ibid.*, at paragraph 97.

[8] *Re Crystallex International Corporation, 2012 ONSC 2125* (OSCJ [Commercial List]), at paragraph 50; appeal dismissed, *Re Crystallex, 2012 ONCA 404*; application for leave dismissed, *Computershare Trust Company of Canada v. Crystallex International Corporation et al., 2012 CanLII 56139* (SCC).

[9] *Callidus*, *supra*, note 1, at paragraph 101.

[10] *Ibid.*, at paragraph 111.

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