

Goodmans^{LLP} Update

Supreme Court of Canada Approves Litigation Funding in CCAA Proceeding

In a decision released last week, in addition to providing useful guidance regarding the objectives of the *Companies' Creditors Arrangement Act* (CCAA), the Supreme Court of Canada (SCC) approved a litigation funding agreement in an insolvency proceeding. The case could have significant implications for the use of litigation funding in future cases.

Background

The case involves an ongoing proceeding under the CCAA by the debtor companies, Bluberi Gaming Technologies Inc. and Bluberi Group Inc. (collectively, “Bluberi”). In the CCAA proceeding, Bluberi liquidated substantially all of its assets, such that its only remaining asset was a claim against one of its largest creditors, Callidus Capital.

To pursue its claim against Callidus, Bluberi attempted to secure litigation funding from a publicly traded litigation funder, IMF Bentham Limited, or its Canadian subsidiary, Bentham IMF Capital Limited (collectively, “Bentham”). As part of the litigation funding agreement, Bluberi applied for court approval of a \$20 million super-priority charge in favour of Bentham over Bluberi's assets, which would rank ahead of the claims of Bluberi's creditors. Callidus and certain other creditors opposed approval of Bluberi's litigation funding agreement, arguing it constituted a plan of arrangement requiring applicable creditor approval because it purported to compromise creditors' claims.

The CCAA supervising judge approved Bluberi's application and declined to submit the litigation funding agreement to a creditors' vote. The Quebec Court of Appeal reversed the CCAA supervising judge's decision, holding Bluberi was required to obtain creditor approval of the litigation funding agreement.

The SCC's Decision

The SCC overturned the Quebec Court of Appeal's findings and reinstated the CCAA supervising judge's order.

The SCC emphasized that supervising judges in CCAA proceedings have considerable discretion, including to decide whether to approve interim financing provided for under the CCAA, noting that “whether proposed interim financing should be approved is a question that the supervising judge is best-placed to answer.” With respect to the litigation funding, the SCC concluded that “third party litigation funding agreements may be approved as interim financing in CCAA proceedings when the supervising judge determines that doing so would be fair and appropriate, having regard to all the circumstances and the objectives of the [CCAA]”.

The SCC found there was no reason to overturn the CCAA supervising judge's exercise of discretion in approving the litigation funding as interim financing without requiring a creditor vote. That finding was largely tied to the specific circumstances of this case, including that the only remaining major asset of Bluberi was its claim against Callidus. The SCC noted that “where there is a single litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery has taken centre stage. In those

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circumstances, litigation funding furthers the basic purpose of interim financing: allowing the debtor to realize on the value of its assets.” Accordingly, the SCC found no reason to interfere with the CCAA supervising judge’s decision to approve the litigation financing.

In addition, the SCC found the litigation funding was not a plan of arrangement “because it does not propose any compromise of the creditors’ rights.” When making that finding, the SCC stated that plans of arrangement “determine how to distribute the pot [of assets]”, but they “do not generally determine what a debtor company should do to fill it.” The SCC also noted that the super-priority charge over Bluberi’s assets in favour of Bentham did not automatically convert the litigation funding plan into a plan of arrangement. While the effect of the charge is to place creditors like Callidus behind the prior rank of Bentham, the SCC concluded that such a result is expressly contemplated by the CCAA’s interim financing provisions. Again, there was no reason to disturb the CCAA supervising judge’s findings on this point.

Potential Implications

This case could have significant implications for the future of litigation financing in CCAA proceedings. The SCC expressly stated that, in appropriate circumstances, litigation funding can be approved as interim financing in CCAA proceedings, which could lead to an expansion of litigation funding in future cases. However, many issues remain unresolved, as the SCC largely left the decision of whether to approve litigation funding in the supervising judge’s hands in each proceeding, granting supervising judges considerable discretion to decide whether litigation funding is consistent with the CCAA’s objectives based on the particular facts of the case.

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