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E-File No.: CVQ18CALLIDUS  
Appeal No.: \_\_\_\_\_

IN THE COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE OF CALGARY

CLERK OF THE COURT  
**FILED**  
**APR 24 2018**  
JUDICIAL CENTRE  
OF CALGARY  
Applicant

CALLIDUS CAPITAL CORPORATION

and

KEVIN BAUMANN AND PEKISKO RANCH LTD.

Respondents

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PROCEEDINGS

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Calgary, Alberta  
March 21, 2018

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre, Calgary,  
2 Alberta

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5 March 21, 2018 Morning Session

7 Master Farrington Court of Queen's Bench of Alberta

9 K.A. Robertson For the Applicant

10 W.R. Roberts For the Applicant

11 E.J. Bodnar For the Respondents

12 B. Campbell For the Respondents

13 A. William Court Clerk

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16 **Discussion**

18 THE COURT CLERK: Order in chambers.

20 THE MASTER: Good afternoon, everyone. Thank you. Please  
21 be seated. So yesterday we had Ms. Robertson, and we see -- I see Mr. Roberts is here  
22 today.

24 MR. ROBERTS: Thank you, Your Honour.

26 MS. ROBERTSON: Your Honour?

28 THE MASTER: Yes?

30 **Submissions by Ms. Robertson**

32 MS. ROBERTSON: You'll recall you gave me some homework --

34 THE MASTER: Yes.

36 MS. ROBERTSON: -- when I left last night, and I am happy to say I  
37 think I found the Ritter case.

39 THE MASTER: I -- I think I did. It was actually in a foreclosure  
40 context --

41

1 MS. ROBERTSON: It was.  
2

3 THE MASTER: -- wasn't it?  
4

5 MS. ROBERTSON: But the issue arose because the appraised value  
6 --  
7

8 THE MASTER: Right.  
9

10 MS. ROBERTSON: -- was set in a receivership.  
11

12 THE MASTER: Right.  
13

14 MS. ROBERTSON: And they argued that that is the value. I do have  
15 copies, if you'd like to --  
16

17 THE MASTER: Okay.  
18

19 MS. ROBERTSON: -- see it. But if you've found it...  
20

21 THE MASTER: Actually, if you have a copy, that would be  
22 great. And I saw the word receiver showed up in it, but only in the context of an  
23 assignments of rents, I think.  
24

25 MS. ROBERTSON: Yeah. Well, the argument was more that --  
26

27 THE MASTER: Right.  
28

29 MS. ROBERTSON: -- the basis of the receivership was a \$15 million  
30 appraisal. The Rice Order was being pronounced on the basis of a \$10 million, and there  
31 was an argument of whether the 15 should be used.  
32

33 THE MASTER: Right. Okay.  
34

35 MS. ROBERTSON: The other thing that is included in there is  
36 Section 8 of the *Interest Act*.  
37

38 THE MASTER: Yes.  
39

40 MS. ROBERTSON: With respect to the issue of the remedy, if there  
41 is a breach of the default rate. And I've also --

1  
2 THE MASTER: Right.  
3  
4 MS. ROBERTSON: -- attached the Supreme Court of Canada  
5 decision on this, and it confirms that the remedy is you just go back to the pre-default rate.  
6  
7 THE MASTER: Thank you. Thank you.  
8  
9 MS. ROBERTSON: Oh, and I do have one final thing. Your Honour  
10 asked me about where the evidence is with respect to what happened in that year period.  
11  
12 THE MASTER: Yes.  
13  
14 MS. ROBERTSON: And what the thought process was with respect  
15 to Callidus', or I should Mr. Sinclair's views at the time.  
16  
17 THE MASTER: Right.  
18  
19 MS. ROBERTSON: That is in two places.  
20  
21 THE MASTER: Okay.  
22  
23 MS. ROBERTSON: The first place is Mr. Sinclair's affidavit, which  
24 is at Tab 20. Sorry, Tab -- sorry, Tab 14.  
25  
26 THE MASTER: And that's in which volume?  
27  
28 MS. ROBERTSON: That is in binder 2.  
29  
30 THE MASTER: Okay.  
31  
32 MS. ROBERTSON: And starting at paragraph 73.  
33  
34 THE MASTER: Yes?  
35  
36 MS. ROBERTSON: So he -- he starts at paragraph 73:  
37  
38 As an advisor to Alcan, I had prepared rolling 13 week cash flows to  
39 project revenue expenses and funding requirements for the new year  
40 term. Based on those cash flows, I had determined that Alcan would not  
41 have sufficient funding for the spring, 2005 -- 15, sorry, during breakup

1 when Alcan was unable to provide drilling services in subsequent  
2 months. As a result, I had proposed to Callidus that three primary  
3 modifications be made.

4  
5 Oh, sorry, this is the wrong -- this is with respect to consent for the change.

6  
7 THE MASTER: Right.

8  
9 MS. ROBERTSON: Sorry, the continuing operations is at Mr.  
10 Sinclair's questioning.

11  
12 THE MASTER: Yes.

13  
14 MS. ROBERTSON: Which is at tab 23 of volume 4.

15  
16 THE MASTER: I've got that. What page?

17  
18 MS. ROBERTSON: Page 77.

19  
20 THE MASTER: Yes?

21  
22 MS. ROBERTSON: Starting at line 8 -- or 6, Mr. Bodnar's question:

23  
24 You're looking at Exhibit I to Mr. Baumann's affidavit sworn February  
25 9th, and at the bottom of the first page is an email he sent to you on  
26 January 27th. Do you see that?

27 A Yes.

28  
29 And almost near the bottom of that, it says (as read):

30  
31 Basically, we would like to Schedule a meeting to discuss the present  
32 situation as we're concerned that in -- or increasing payables while  
33 paying extremely high interest rates in a presently distressed market, I  
34 feel it's time to consider truly defaulting on the loan and protecting our  
35 creditors. Do you see that?

36 Yes.

37  
38 You didn't consider this to be a request to liquidate?

39 A First of all, no. And second of all, this equipment which  
40 included -- sorry, this is from January, of 2015, when he was  
41 president and could have liquidated anything he wanted.

1  
2 So you felt that despite your role at that time, it was totally up  
3 to him to do whatever he wanted?

4 Yes, of course.  
5

6 But you never told him of that, did you?

7 Of course I did, repeatedly. It was part of our plan to liquidate  
8 equipment.  
9

10 Q Why did it take you more than a year then after that?

11 A Sure. So for my involvement from December 3rd, 2014, to  
12 April 21st, 2012, Kevin Baumann was in charge. I was an  
13 advisor, and he could have liquidated anything he wanted.  
14 When I became president April 21st, it became immediately a  
15 concern that we were going to be ceased operations in  
16 Lacombe County for lack of a license, and that they were  
17 going to seize the equipment. I had spoken with Hillco. They  
18 told us they needed about a --  
19

20 Hillco is the company that had done the appraisals of the equipment up to that point that  
21 we'd looked at yesterday:  
22

23 They told us they needed about a year to itemize what the equipment  
24 was, get it prepared for sale, and that this was going to happen at great  
25 expense. So my view was we were not in a position to sell anything to  
26 anybody until we dealt with the move and the itemization and the setup  
27 of equipment which included finding a space to move to, orchestrating  
28 the move, creating the list, patching up equipment that had been rusting  
29 in a field for years, and by the time we were done that, it was November,  
30 2015. And then, in fact, we did market the equipment for sale.  
31

32 And that's basically when you started consulting with MNP?

33 About a month later, I believe.  
34

35 So that's what was happening in that year period, and some of this was in the affidavit I  
36 took you to yesterday. This is --  
37

38 THE MASTER: Yes.

39  
40 MS. ROBERTSON: -- a little bit more clear of exactly the process  
41 that was being undertaken and, in my submission, evidence that it was -- liquidation was

1 always a possibility. The realities and logistics meant that it was going to take time to get  
2 there, clearly given the status of the equipment that was in the fields that needed to be  
3 dealt with, and the move, given the lack of licensing at the -- at the premises that had been  
4 leased.

5

6 THE MASTER: And even -- like, there's a reference to he could  
7 have liquidated anything he wanted. That still would have required the consent of  
8 Callidus, right? Well, it would have. They had security --

9

10 MS. ROBERTSON: Logistically, yes, to release their security --

11

12 THE MASTER: Right.

13

14 MS. ROBERTSON: -- over that equipment.

15

16 THE MASTER: Yeah. Okay.

17

18 MS. ROBERTSON: Thank you.

19

20 THE MASTER: Thank you.

21

22 MS. ROBERTSON: And thank you for the additional time.

23

24 THE MASTER: Okay. Mr. Bodnar?

25

26 **Submissions by Mr. Bodnar**

27

28 MR. BODNAR: So first of all if you were going to compliment  
29 me on my snazzy tie, Sir, I'd have to say that I just took it off Mr. Critch about five  
30 minutes ago. I was -- I was so focussed on what I was going to tell you here this  
31 afternoon --

32

33 THE MASTER: Forgot to wear one?

34

35 MR. BODNAR: -- that I forgot to dress properly. So there you  
36 have it.

37

38 But in any event, Sir, you will note by now that we are dealing with something more than  
39 a simple, straightforward, run-of-the-mill foreclosure application here. We agree that this  
40 application is akin to a summary judgment application. We've said as much in our brief.  
41 The fact is that Callidus is applying for a redemption order and a deficiency judgment on



1 the basis of affidavit evidence, and not a trial. So the question is whether there is a  
2 genuine issue requiring a trial.

3  
4 And, Sir, I will just ask you that you have this blue brief available just as a bit of a road  
5 map.

6  
7 THE MASTER: I have that.

8  
9 MR. BODNAR: I'm not going to read from it a lot, but if you  
10 want to take a note that the issues, as we frame them, Sir, are set out in this brief on page  
11 7.

12  
13 So in our respectful submission, Sir, well, you see 38(a), I mean, and we've already really  
14 dealt with that. That's not in dispute. We submit that Callidus did not suffer a loss on the  
15 Alcan loan. We say that Callidus breached the credit agreement. We say that Callidus  
16 breached its fiduciary duties to Mr. Baumann. We submit that Callidus did not engage in  
17 good faith contractual dealings with Mr. Baumann, and we say that if Callidus had  
18 liquidated the assets of Alcan in a timely fashion, Mr. Baumann would not have owed any  
19 amount under his guarantee. If you find, Sir, on the basis of the evidence before you, that  
20 there is a genuine issue requiring a trial on even one of these points, Sir, this application  
21 must fail and the action should proceed to trial.

22  
23 Now, yesterday, Sir, my friend directed you to the decision of Justice Veit at tab 8 of her  
24 authorities.

25  
26 THE MASTER: Yes.

27  
28 MR. BODNAR: And we don't dispute the guiding principles that  
29 are cited there. I won't take you to that case and read from it, but two of the principles  
30 that my friend touched on yesterday are worth noting here, and one is that the application  
31 must fail if the respondent shows that there is at least a reasonable doubt as to whether  
32 there is a genuine issue for trial; and, number two, some evidence must be led which  
33 lends some support to the defences raised in the pleadings, whether it is found in the  
34 applicant's own evidence, or in an affidavit filed by the defendant, or in cross-examination  
35 upon same. And, in my respectful submission, Sir, we have all of that here in this case.

36  
37 There are 10 affidavits. There's hundreds of pages of cross-examination transcripts before  
38 you on this application. We filed three of those affidavits. Two have been sworn by Mr.  
39 Baumann, and one has been sworn by Mr. Williams. As you saw yesterday, he's a  
40 forensic accountant. We have also cross-examined the Callidus deponents, and those  
41 transcripts are in that four volume record book that you've got.

1  
2 Now, my friend yesterday said that you need more than Mr. Baumann's complaints to find  
3 a triable issue and I don't dispute that, but Mr. Baumann's complaints are grounded in the  
4 evidence, and so I want to take a few minutes to look at that evidence.  
5

6 THE MASTER: Yes.

7  
8 MR. BODNAR: And the evidence I'm going to refer you to, Sir,  
9 is set out in more details in the Facts section of this brief. I'm not going to read from it,  
10 but it's all there and it's all footnoted to its sources there.  
11

12 So, Sir, as you indicated to my friend yesterday, the issues in this case, as you saw them,  
13 are with the management of the loan and not with the loan documents themselves. The  
14 credit agreement and the guarantee and the mortgage and the share pledge agreement are  
15 what they are and they say what they say, and the wording of some of those documents is  
16 relevant to whether there are genuine issues for trial, we would submit, and I'll touch on  
17 that this afternoon, but by and large, Sir, we are saying that the breaches Callidus  
18 committed had to do with the management of the loan, as opposed to the paper itself.  
19

20 And, Sir, the timeline is important here. As you heard yesterday and as you will have  
21 seen in the evidence, on April 21st, 2015, Mr. Baumann resigned from his position as  
22 president of Alcan, and he agreed to appoint Mr. Sinclair in his place. Mr. Baumann's  
23 evidence is that this was at the insistence of Callidus. We don't have any evidence  
24 disputing that. Callidus said it had to be Mr. Sinclair, or someone like him. Mr.  
25 Baumann didn't know anyone like him, so it ended up being Mr. Sinclair.  
26

27 Now, Mr. Baumann's evidence, Sir, again uncontroverted in my submission, is that after  
28 that date, April 21, 2015, he was barred from having any involvement in Alcan, or even  
29 setting foot on the company's premises. His evidence is that his request for financial  
30 records and information about the operations of the company were ignored, and this  
31 despite the fact that he remained the majority shareholder of Alcan.  
32

33 So May 26, 2015, is the next important date, I would submit, just over a month later, and  
34 that's when Callidus also took away Mr. Baumann's rights as a shareholder by invoking  
35 that power of attorney.  
36

37 You saw that letter yesterday, Sir, it was written by my friend, Mr. Roberts. It's attached  
38 to Mr. Baumann's affidavit at Exhibit D. It includes the reference to the power of  
39 attorney. The wording of the power of attorney, Sir, is set forth in -- at paragraph 8 of our  
40 brief. Okay?  
41

1 THE MASTER: Yes.

2

3 MR. BODNAR: That's obviously contained in one of the security  
4 documents attached to one of the affidavits, but that's the wording there, page 2,  
5 paragraph 8.

6

7 All right. So that was May 26, 2015. And then about a week later, June 2nd, 2015, is the  
8 third of the three critical dates, Callidus appointed Mr. Sinclair as the sole director of  
9 Alcan, and to the power of attorney. And Mr. Riley of Callidus, Sir, admitted on  
10 cross-examination that from this point onwards, Callidus effectively controlled Alcan, and  
11 that is at Mr. Riley's transcript.

12

13 MS. ROBERTSON: Your Honour, I'm sorry, this is one of the points  
14 that I'm going to object on. Mr. Riley did not admit -- I take -- I ask my friend to take you  
15 to the evidence that Mr. Riley admitted that.

16

17 THE MASTER: Well, let's go there.

18

19 MR. BODNAR: Sure. Now, we can do this this way with my  
20 friend popping up all the time, or we can do it when she responds.

21

22 THE MASTER: Well, let's go there now.

23

24 MR. BODNAR: Sure.

25

26 THE MASTER: And see where -- see exactly what Mr. Riley  
27 said. It's tab 20, volume 4?

28

29 MR. BODNAR: Yeah. So the cite that I have got, the footnote  
30 that we had there is page 40, lines 23 to 27.

31

32 MS. ROBERTSON: I'm sorry, what page did you say?

33

34 MR. BODNAR: 40.

35

36 MS. ROBERTSON: Thank you.

37

38 MR. BODNAR: Well, I don't see that there, I have to admit, and  
39 I -- but I do recall the admission. So we will -- we will run that to ground and get a  
40 pinpoint reference for that.

41

1 THE MASTER: We will -- we will need the reference.  
2

3 MR. BODNAR: Yeah.  
4

5 THE MASTER: Probably it's fairly -- not probably. It is  
6 important, obviously.  
7

8 MR. BODNAR: Sure. Yeah.  
9

10 THE MASTER: To make sure everything's in evidence, and I  
11 don't fault your learned friend at all for --  
12

13 MR. BODNAR: Yeah, no.  
14

15 THE MASTER: -- for call --  
16

17 MR. BODNAR: Fair comment.  
18

19 THE MASTER: -- calling it out.  
20

21 MR. BODNAR: I mean, I -- we had the -- we had the reference.  
22 It turns out to be an erroneous reference. I submit I would expect the proper reference to  
23 be located here.  
24

25 THE MASTER: Sure.  
26

27 MR. BODNAR: But in any event, it -- I think what I said is true.  
28 I mean, as of that point in time, Sir, Callidus controlled all of the pieces on the chess  
29 board. It had its guy in as the president and the sole director of Alcan. It had control of  
30 the majority share plot. And I say Callidus had its guy in as president and sole director,  
31 and in saying its guy, I am, of course, talking about Mr. Sinclair, and I'll have more to say  
32 about him in a moment.  
33

34 Okay. So Ms. Campbell helpfully points out the right --  
35

36 THE MASTER: Yes.  
37

38 MR. BODNAR: -- reference.  
39

40 MS. CAMPBELL: It's page 40.  
41

1 MR. BODNAR: And it's actually page 39. Instead of page 40 at  
2 the bottom, it's page 39 at the bottom. So let's go there. So page 39:  
3  
4

5 Q I think --

6  
7 At the bottom, line 27.  
8

9 THE MASTER: Yes.

10  
11 MR. BODNAR: Page 39:

12  
13 I think you will agree with me, sir, that as of May 26th, 2015, Callidus  
14 effectively controlled Alcan?

15 A Yes.  
16

17 Okay. So I appreciate my friend correcting me on the reference, but there it is in black  
18 and white.  
19

20 THE MASTER: Does that answer your objection, Ms.  
21 Robertson?  
22

23 MS. ROBERTSON: Well, it doesn't, because if you go further down  
24 into the whole context of it, for example at the bottom of that page:  
25

26 So Callidus maintained ultimate approval of actions taken by Mr.  
27 Sinclair, I take it?

28 No, I think, as would have been the case whether Mr. Baumann was the  
29 president/director, we would have maintained the relationship in the  
30 same way.  
31

32 So in the context of the whole of the questioning, it was not as my friend is suggesting. It  
33 was more in the context of we did, as a lender, and we voted -- we vote -- which we  
34 mentioned yesterday, were able to vote the shares, of course, and what powers that came  
35 with that. To the extent we were having conversations with the management and  
36 operations, it was the same as we would when Mr. Baumann was there. And my friend is  
37 suggesting that it means some sort of agency relationship with Mr. Sinclair, and  
38 everything, and the rest of it. So he's --  
39

40 THE MASTER: Right.  
41

1 MS. ROBERTSON: -- just taking a lot of inferences from --  
2

3 THE MASTER: Well, I guess your objection was did he have  
4 something to back up his statement? I think he did.  
5

6 MS. ROBERTSON: Yes.  
7

8 THE MASTER: I think that sounds more like reply --  
9

10 MS. ROBERTSON: Yes.  
11

12 THE MASTER: -- and putting things into context than it does --  
13

14 MS. ROBERTSON: Definitely.  
15

16 MR. BODNAR: Yeah, I -- that's my --  
17

18 THE MASTER: (INDISCERNIBLE).  
19

20 MR. BODNAR: That's my submission, Sir.  
21

22 THE MASTER: Right.  
23

24 MR. BODNAR: With the greatest of respect --  
25

26 THE MASTER: Yeah.  
27

28 MR. BODNAR: -- I mean, this is not helpful for people to be  
29 hopping up and down and trying to clarify evidence there. They -- my friend has a right  
30 of reply. There is proper right of reply. In my respectful submission, what she's going to  
31 say about Mr. Williams is not proper right of reply, so maybe I'll pop up at that time, but  
32 there's a proper way to do this.  
33

34 THE MASTER: Right.  
35

36 MR. BODNAR: And I submit --  
37

38 THE MASTER: I think if there's something fundamental, I don't  
39 have a problem with that.  
40

41 MS. ROBERTSON: Yes.

1  
2  
3  
4  
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41

THE MASTER: If it -- if it's sort of interpreting the evidence in different ways, I think we need to quite properly save it for reply.

MR. BODNAR: Okay. So, right. I mean, I'll talk about Mr. Sinclair in a moment, but to get back to the timeline, Sir.

THE MASTER: Yes.

MR. BODNAR: My friend yesterday says that we are throwing a bunch of stuff up to see what sticks. She says it's like a game of Whac-A-Mole, and with respect, Sir, I disagree.

Now, what you need to remember, Sir, is that this action was commenced on May 15th, 2015. All right? So I took you to that critical timeline where Callidus took control of Alcan between March and -- sorry, May and June, of 2015. So that was right within that six week period, Sir, when Callidus took control.

The original Statement of Defence and Counterclaim, Sir, that were filed on behalf of Mr. Baumann were filed on June 29th, 2015, which was within a month of Callidus taking control of the company, and so most of the stuff my client is now complaining about happened after that, Sir. The company being run into the ground, the jacking of the debt, the receivership process all unfolded over the following 10 to 12 months, and so once my client became aware of that, his claim obviously evolved to take issue with it.

You allowed the amended Statement of Defence and the Amended Counterclaim last fall, Sir, and it's all pleaded in there. So, with respect, to suggest that we're running around changing the theory of our defence on the fly, Sir, is not really on.

But to get back to Mr. Sinclair, Sir, I do want to spend a few minutes talking about him, because he's an important character in this narrative. We say, as you've noted, that Mr. Sinclair was Callidus' agent. We say it's clear on the evidence that he was Callidus' agent for purposes of executing its loan-to-own scheme. Now, they dispute that, because --

THE MASTER: One of the things in looking at all of this is we've heard a lot about the loan to -- the alleged loan-to-own scheme.

MR. BODNAR: M-hm.

THE MASTER: And the -- and the suggestion that there was some plan to do this to take over the business. I didn't -- and I've read all the transcripts.

1  
2 MR. BODNAR: Yeah.

3  
4 THE MASTER: I didn't see much discussion sort of challenging  
5 the Callidus witnesses on that aspect of it. What -- was there anything in there about that?

6  
7 MR. BODNAR: With respect, Sir, I didn't have Callidus  
8 witnesses to challenge, per se. Mr. Riley is a VP who's a lawyer who wasn't involved, by  
9 his own evidence wasn't involved in any of these matters. Mr. Sinclair, you know,  
10 vehemently denies that he was complicit in any such thing. So I guess what I have to say  
11 on that is, I mean, he's a -- I mean, in my submission, the evidence is there. It's more than  
12 circumstantial.

13  
14 I know that I can't -- can't oppose a summary judgment application by saying, well, you  
15 know, evidence might show up on discovery or at trial, but in my submission, that's a  
16 problem on this application. Well, that's a problem for my friend, because, you know, you  
17 bring an application like this before the discovery process is complete. You oppose  
18 document -- you refuse document production and oppose an application to compel  
19 documents like we saw a couple of months ago and then say, well, look, I mean, heh, you  
20 don't have evidence to establish that you've got a triable issue.

21  
22 This is also -- this also goes to the point that you raised yesterday when you said, well, is  
23 there anything -- is there any evidence that -- of any communications within Callidus as to  
24 why they decided to run this company for -- or have Mr. Sinclair run this company for a  
25 year when at that point in time, early 2015, it was pretty clear that -- you know, that it was  
26 going to turn out the way it did. Well, I mean, they've -- we haven't been produced with --  
27 we've been produced with hardly any internal emails between Callidus -- we've been  
28 produced with hardly any emails between Callidus and Sinclair that would go to this  
29 issue. So we are left largely with -- and we've been that playing the hand that we've been  
30 dealt. We've been left largely with the circumstances in terms of what transpired relating  
31 to what we say is Callidus' takeover of the company, and what -- what occurred thereafter.

32  
33 You saw Mr. Sinclair's transcript, Sir. I think -- I think, to be charitable, I would say he's  
34 an evasive witness. I mean, he gave me very few straight answers to simple questions,  
35 yes or no answers. It was prevaricated. We got into a bit of an obtuse conversation as to  
36 whether he could answer -- he could answer a question that was capable of a yes or no  
37 answer, with a yes or no answer. And I didn't -- I certainly didn't perceive that I was  
38 going to get very far with either Mr. Sinclair or Mr. Riley in terms of challenging them on  
39 the loan-to-own scheme. Now, these are the witnesses that Callidus has chosen to put  
40 forward, and I submit that that, the absence of certain aspects of evidence on that point is  
41 more a problem for them than for Mr. Baumann.



1  
2 So Mr. Sinclair swore this so-called reply affidavit, Sir, which is -- as you will have seen  
3 from both the affidavit and from my cross-examination of Mr. Sinclair, I mean, it doesn't  
4 respond to anything in Mr. Baumann's affidavit until paragraph 31 where he actually says,  
5 has a heading there that Response to Specific Allegations. I mean, the first part of it is -- I  
6 mean, they should have done it. They should have sworn this affidavit and put it forward  
7 at the outset so Mr. Baumann could have a proper opportunity to respond to it. But in any  
8 event, not only is there that, but it's so inherently contradictory, Sir, in my respectful  
9 submission, that -- so as to render it of little or no probative value whatsoever.

10  
11 So you've got that affidavit there, Sir, I think, tab 14?

12  
13 THE MASTER: I do.

14  
15 MR. BODNAR: In the record book. As an example, Mr. Sinclair  
16 has a heading before paragraph 21 of that affidavit. The pages aren't numbered, but you  
17 see on top of paragraph 21, and my friend made a big deal of this yesterday, but there's a  
18 heading there that states Baumann Misappropriates \$1.2 Million, as if there was some sort  
19 of a finding or a criminal proceeding. But in any event, a bald-faced statement, Baumann  
20 Misappropriates \$1.2 Million. Then he goes on to talk about that in paragraphs 21  
21 through 26 where he ultimately admits that all but \$100,000 of it was recovered.

22  
23 But Baumann Misappropriates \$1.2 Million, Sir, is a bald faced statement that we dispute.  
24 We dispute it was a misappropriation. We dispute that it ever ended up at \$1.2 million. It  
25 doesn't respond to anything in my client's affidavit. It 's not even dressed up as a  
26 response, Sir. It's put forward in a responding affidavit so that my client can't respond to  
27 it himself, and this is part of what I was getting at when I commented at the end of my  
28 brief that my friend was splitting her case, and I objected to that. I mean, Mr. Baumann  
29 was able to explain this to some extent on cross-examination, explain that it wasn't a  
30 misappropriation and explain why he did it, but so it goes.

31  
32 Anyway, he makes a bald faced statement that on or about April 20th, 2015, and this  
33 comes from paragraph 21, on or about April 20th, 2015, he discovered that Mr. Baumann  
34 essentially stole \$1.2 million from Alcan. Then later in his affidavit in paragraph 73, and  
35 I'll take you there, Sir.

36  
37 THE MASTER: Yes.

38  
39 MR. BODNAR: My friend briefly referred to it in her  
40 submissions this afternoon, he says that prior to -- prior to the spring of 2015, okay? Prior  
41 to the spring of 2015, he proposed to Callidus that the funding criteria be modified to

1 reflect some things which included, in Item C, that \$100,000 which was still missing as a  
2 result of that alleged misappropriation.

3  
4 So on cross-examination, he said he made that proposal in January or February, and if I  
5 have to dig up the specific line, page and line reference, I will, but he said he made this  
6 proposal in January or February, which would have been months before he allegedly  
7 discovered this alleged misappropriation on or about April 20th, 2015, and, of course, that  
8 would have had to have been the proper timing if Mr. Sinclair was, in fact, making a cash  
9 flow projection for the spring of 2015, that he would have been doing this in January or  
10 February. He wouldn't have been doing it after April 20th, 2015.

11  
12 And so I examined Mr. Sinclair on this alleged proposal and he couldn't point to any  
13 documentary evidence to substantiate, and of course he couldn't, because there was never  
14 such a proposal, because he couldn't make a proposal reflecting something that he had not  
15 yet discovered. Right? I mean, January/February he makes this proposal, and apparently  
16 it went verbally, and it had to do with something that he was yet to discover until April, of  
17 2015. So he also says in paragraph 74, Mr. Baumann was aware of this request, raised no  
18 objection. I tried to press him on how -- well, he says, I mean, it was all verbal, of course.  
19 Mr. Baumann does, in his affidavit, reject any idea, or reject any notion that he agreed to a  
20 Forbearance Agreement or anything of the sort.

21  
22 So in any event, Sir, that's one example. There are other places in this affidavit and the  
23 evidence where I would submit the evidence is contradictory and of limited weight, but in  
24 the interests of time, I'm going to move on here.

25  
26 At paragraphs 34 through 37 of our brief, Sir, we do say a few more things about Mr.  
27 Sinclair.

28  
29 THE MASTER: Yes.

30  
31 MR. BODNAR: The evidence is clear, in my submission, that he  
32 has had a close relationship with Callidus over the years. He admitted on  
33 cross-examination that he worked with Callidus on a number of other engagements.

34  
35 MS. ROBERTSON: I hate to do this again, Your Honour, but that  
36 isn't quite what the evidence is with Mr. Sinclair on the questioning. He said one. One  
37 previous.

38  
39 MR. BODNAR: No, actually, he didn't.

40  
41 THE MASTER: Let's go to the evidence on this one.

1  
2 MS. ROBERTSON: (INDISCERNIBLE).  
3  
4 THE MASTER: On which one?  
5  
6 MS. ROBERTSON: Sorry, it's -- I'm going to say there it's page 17,  
7 or page -- sorry, page 16.  
8  
9 THE MASTER: Of whose transcript?  
10  
11 MS. ROBERTSON: Mr. Sinclair's, at tab 23. It starts --  
12  
13 MR. BODNAR: Yeah, can I address this, Sir, instead of my  
14 friend? Page 15 --  
15  
16 THE MASTER: Yes.  
17  
18 MR. BODNAR: -- line 27. Okay?  
19  
20 THE MASTER: Yes.  
21  
22 MR. BODNAR: So I refer to Mr. Sinclair's affidavit, paragraph  
23 34 where he says he had only been engaged by one other debtor in Callidus' portfolio with  
24 whom he did not have a prior relationship, Leader Energy.  
25  
26 THE MASTER: Right.  
27  
28 MR. BODNAR: Okay? One other debtor. So I questioned him  
29 on that, starting at the bottom of page 15:  
30  
31 So in paragraph 34, sir, you talk about your prior engagement with  
32 Leader Energy. Do you see that?  
33 A Yes.  
34  
35 Q You say in that paragraph, Sir, that in your over 25 years of  
36 experience, you've only been engaged by one other debtor in  
37 Callidus' folio with whom you did not have a prior  
38 relationship, and that was Leader Energy.  
39 Yes.  
40  
41 Q Have you been engaged with other debtors in Callidus'

1 portfolio with whom you did have prior relationships?

2 A Yes.

3

4 Q Which are those, or how many are there?

5 A One would be Beresford Box when they were a client, arrange  
6 advisors and they were -- we were advisors for them, but they  
7 went to stayed Callidus for financing, and we stayed advisors  
8 throughout that time.

9

10 Q So you sent them to Callidus, I take it?

11 A Yes.

12

13 What other ones?

14 One would be Cervelo Cycles where we were advisor to the  
15 company, and Callidus financed them and we stayed an  
16 advisor.

17

18 Q You sent them to Callidus?

19 A Yes. One would be Active Energy. We were advisor to the  
20 company and they were financed by Callidus.

21

22 Q You -- you sent them to Callidus?

23 A Yes.

24

25 And then he says:

26

27 When you say sent them to Callidus in each one of those scenarios, there  
28 was a competitive sourcing processing for (INDISCERNIBLE) your  
29 lender where the client ultimately selected Callidus, and not once was  
30 there a sole reference to Callidus.

31

32 This is what he says. I mean, this is typical of Mr. Sinclair through his --

33

34 THE MASTER: And I recall that (INDISCERNIBLE).

35

36 MR. BODNAR: Through -- right, where he would give  
37 unsolicited evidence to questions that I didn't ask.

38

39 So we went on, Sir. And at this time I want to get a pinpoint reference here so I don't get  
40 someone popping up beside me, saying that I'm misspeaking. So --

41

1 THE MASTER: Ms. Robertson, what exactly are you saying  
2 with the representation made to me that was in --  
3

4 MS. ROBERTSON: Is a number of, when it's a very discrete, small  
5 number over a large period of time, so --  
6

7 THE MASTER: Sounds, again, like --  
8

9 MR. BODNAR: Certainly.  
10

11 THE MASTER: -- a clarification. Thank you.  
12

13 MS. ROBERTSON: Yeah. Thank you, Your Honour.  
14

15 THE MASTER: Okay. Go ahead, Mr. --  
16

17 MR. BODNAR: Well --  
18

19 THE MASTER: -- Bodnar.  
20

21 MR. BODNAR: All right. To carry on, Sir, we see that Mr.  
22 Sinclair and Callidus are both represented by the same counsel in this action, although  
23 Mr. Roberts objected when I tried to explore that on cross-examination. You will have  
24 seen from the transcript that Mr. Sinclair also swore an affidavit in support of this  
25 application, in spite of the fact that he really doesn't even know what the application is all  
26 about. So the point is he continues to do Callidus' bidding, in my respectful submission,  
27 Sir, much like he did when he was the president and sole director of Alcan. I mean, it's  
28 clear that his interests, as far as this litigation in any event, are aligned with Callidus. He  
29 sees it that way. Callidus sees it that way.  
30

31 So as I indicated earlier, and as you will have seen from the transcript, Sir, I think it's fair  
32 to say that Mr. Sinclair was an evasive witness. He did volunteer unsolicited evidence.  
33 There were lots of times where he refused to give me a straight answer to a simple  
34 question, but two things he did admit, which you noted yesterday, were -- were as follows.  
35 Number 1, he admitted that as president and sole director of Alcan, he owed a duty to Mr.  
36 Baumann, as the major shareholder of the company. And, number 2, he admitted that  
37 despite that fact, he chose to interact with Mr. Baumann as little as possible. And  
38 whether he was an agent of Callidus when he was the president and sole director of Alcan  
39 and, if so, whether he breached his fiduciary duties to Mr. Baumann in a way that can be  
40 imputed to Callidus as a result of that, as a result of the way he treated Mr. Baumann,  
41 which is to say largely ignored him, are genuine issues requiring a trial, in my respectful

1 submission.

2

3 And Mr. Sinclair's allegations of misappropriation against Mr. Baumann, Sir, are  
4 particularly ironic, given that Mr. Sinclair himself has admitted to the Ontario Securities  
5 Commission that he engaged in conduct that was contrary to securities law, and he was  
6 sanctioned, as I set out in my --

7

8 THE MASTER: I saw that --

9

10 MR. BODNAR: -- briefs.

11

12 THE MASTER: -- (INDISCERNIBLE).

13

14 MR. BODNAR: So, yes. Paragraph 36 of the brief. And in case  
15 someone wants to suggest that I have maybe somewhat misspoke, you can take a look at  
16 Exhibits D-3 and D-4 marked on the cross-examination, or entered on the  
17 cross-examination of Mr. Sinclair where -- which are at the back of that binder, the last  
18 one that I handed up to you.

19

20 THE MASTER: Yes.

21

22 MR. BODNAR: Is the -- D-3 is the Order, and D-4 is the  
23 Settlement Agreement in which he admits, paragraph 26, that his conduct was contrary to  
24 Ontario's securities law, and contrary to the public interest. So that's the kind of guy that  
25 Callidus wanted in to run Alcan and that they have been dealing with on other matters,  
26 and that's the kind of guy who casts aspersions on Mr. Baumann.

27

28 So I -- enough about Mr. Sinclair for the moment. I want to get back to the narrative, Sir.  
29 And before I digressed, I said that once Callidus had its guy in place as president and sole  
30 director and had invoked the power of attorney to control the majority share block, they  
31 controlled all the pieces on the chess board. And Mr. Riley admitted that in the proper  
32 reference to the transcript. And it remained that way, Sir, right up until Callidus  
33 purchased the assets of Alcan through its credit bid in the receivership a year later. And  
34 during that time frame, Sir, Callidus over advanced funds to Alcan on more than 40  
35 separate occasions in circumstances where there were insufficient receivables to pay  
36 down those over advances. Mr. --

37

38 THE MASTER: Do we have a handle on how much money was  
39 advanced --

40

41 MR. BODNAR: We do, yes.

1  
2 THE MASTER: -- in roughly that period of time from the --  
3  
4 MR. BODNAR: We -- we absolutely do.  
5  
6 THE MASTER: -- demand to --  
7  
8 MR. BODNAR: And I'm glad you asked --  
9  
10 THE MASTER: -- the receivership.  
11  
12 MR. BODNAR: You did ask my friend and I was --  
13  
14 THE MASTER: Right.  
15  
16 MR. BODNAR: -- prepared to address that with you. So if you  
17 can take a look at Mr. William's affidavit, I just sort of have my own copy --  
18  
19 THE MASTER: Right.  
20  
21 MR. BODNAR: -- but we'll try to identify --  
22  
23 THE MASTER: Which tab --  
24  
25 MR. BODNAR: -- where it is in the --  
26  
27 THE MASTER: Which tab is that one at?  
28  
29 MR. BODNAR: -- in the record book.  
30  
31 THE MASTER: In the record book?  
32  
33 MR. BODNAR: Tab 18, volume 3, I'm told.  
34  
35 THE MASTER: Okay.  
36  
37 MR. BODNAR: So that's Mr. Williams' affidavit. And you had  
38 asked my friend if there's a good ledger of amounts advanced by Callidus after it had  
39 made its demand under the guarantee on March 15th, 2015.  
40  
41 THE MASTER: Okay. I have that.

1  
2 MR. BODNAR: Okay. So if I could take you to Schedule 4 to  
3 Mr. Williams' affidavit, Sir. It's right after the text portion, and --  
4  
5 THE MASTER: Yes.  
6  
7 MR. BODNAR: -- in front of tab A.  
8  
9 THE MASTER: I have that.  
10  
11 MR. BODNAR: Yeah, it's on a sort of -- I guess it's on the  
12 landscape format.  
13  
14 THE MASTER: Yes?  
15  
16 MR. BODNAR: Okay. So you'll see this chart. It says Analysis  
17 of Facility A Advances and Available Funding, April 21, 2015, to May 7, 2016. So in the  
18 -- kind of in the middle, there's a column that's called Wire Amount Per Loan Statement?  
19  
20 THE MASTER: Yes.  
21  
22 MR. BODNAR: Those are the amounts that were advanced  
23 under Facility A to Alcan by Callidus after April 21, 2015. Okay? So we have a short  
24 period of time. You were wondering from March 15th. This is after April --  
25  
26 THE MASTER: Right.  
27  
28 MR. BODNAR: -- 21, of 2015, because that's the date that Mr.  
29 Baumann ceased being president. So there's about one month missing, but there -- all of  
30 those amounts were advanced, and Mr. Williams footnotes them to loan statements that  
31 are marked with Callidus production numbers.  
32  
33 So Mr. Critch, who lent me his tie today, helpfully tallied all those up and they amount to  
34 just over \$5.7 million that was advanced under Facility A, after -- at least after that date,  
35 after April 21st, 2015.  
36  
37 And the other columns here, Sir, show the available margin. And the far column will  
38 show whether there was sufficient availability there, Sir, to collateralize that -- those  
39 advances and in all cases, there were not. So \$5.7 million.  
40  
41 Now, of course, most of that was paid back with accounts receivable during this time



1 frame, Sir, but there was still a shortfall of about \$1.56 million at the end of the day on --  
2 under Facility A, being the -- end of the day being the date of the sale of the assets. And I  
3 can take you to that, as well, just so you can follow the bouncing ball.

4  
5 First of all, if you go to Mr. Sinclair's affidavit I think is again maybe back in Volume 2.

6  
7 THE MASTER: Yes. Okay. I have that.

8  
9 MR. BODNAR: Exhibit I.

10  
11 THE MASTER: Okay. Just give me a minute here.

12  
13 MR. BODNAR: So that would be Tab I to -- just get the index  
14 out so I can see it. And that would be Tab I to Tab 14 of Volume 2 of the record book.

15  
16 THE MASTER: Yes?

17  
18 MR. BODNAR: And behind Tab I, there are loan statements for  
19 various points in time after April 21, after March -- sorry, March 15th, 2015.

20  
21 THE MASTER: Yes.

22  
23 MR. BODNAR: And then page 50, marked in the upper right  
24 hand corner, page 50 behind tab I, there is the loan statement for -- which covers the  
25 period through May 6th, 2016. So the actual final amount that is utilized by Mr. Sinclair  
26 in his affidavit, and by Mr. Williams in his affidavit, is that third, right in the middle three  
27 out of five rows there, \$7,310,433.18.

28  
29 THE MASTER: Yes.

30  
31 MR. BODNAR: Because then there was an adjustment, a couple  
32 of small adjustments there, but a 7 million -- \$7.3 million, essentially, to round it off.  
33 And Mr. Sinclair uses that figure in paragraph 57 of his affidavit, and Mr. Williams uses  
34 that figure in paragraph 30 of his report. He shows a Facility A balance of -- on May 4,  
35 2016, as being \$7.3 million. He subtracts the amount that was transferred in there from  
36 Facility B of \$5.7 million which we submit is a breach of contract, and my colleague, Ms.  
37 Campbell, will address that. So -- and that leaves you with the \$1.564 million number  
38 which, again, was the net amount owing under Facility A at the time of the acquisition of  
39 the Alcan assets by Callidus.

40  
41 THE MASTER: The Statement of Claim was filed May 15th,

1 2015?

2

3 MR. BODNAR: Correct.

4

5 THE MASTER: So there was about, if I look at this, about \$5  
6 million advanced after the issuance of the Statement of Claim. Does that sound about  
7 right?

8

9 MR. BODNAR: That sounds about right. So -- yeah, so about  
10 \$5 million or so was advanced there and, of course, \$5.7 million was also transferred in  
11 there from --

12

13 THE MASTER: Right.

14

15 MR. BODNAR: And, of course, \$5.5 million of interest accrued.  
16 Interest -- they stopped paying interest, Alcan stopped paying interest, and \$5.5 million of  
17 interest accrued, Sir, after that date of March 15, 2015.

18

19 So as I was saying, Sir, Callidus over advanced funds to Alcan on more than 40 separate  
20 occasions in circumstances where there were insufficient receivables to pay down those  
21 over advances, and Mr. Williams' chart explains that for you at Schedule 4.

22

23 THE MASTER: Yes.

24

25 MR. BODNAR: And the text of his affidavit does, as well.

26

27 Mr. Baumann did not know about or consent to any such over advances, Sir, because  
28 Callidus had deprived him of any and all standing within the company. He was no longer  
29 president, he was no longer director, and Callidus was controlling his shares, which was  
30 the majority share block. We say this amounted to a breach of contract. We say it  
31 amounted to a breach of fiduciary duties, and Ms. Campbell again will address that in  
32 more detail in a moment.

33

34 So if we're right here, which I was going to clarify this issue of the ledger for you, Sir. So,  
35 again, \$1.56 million or so was still due and owing under Facility A in May, of 2016. And  
36 in addition to that, like I say, there was about \$5.5 million in unpaid interest which  
37 accrued over that period of time, about a year, that Callidus controlled the company. Mr.  
38 Sinclair refers to that number. Mr. Williams refers to that number. I don't think it's in  
39 dispute.

40

41 So when you look at the \$5.5 million and the \$1.56 million together, Sir, Mr. Baumann's

1 figure of \$7 million that was cited yesterday is correct, Sir. It was not until after Callidus  
2 took control of the company that the debt was run up so that Mr. Baumann became  
3 exposed for the entire amount of a \$6 million guarantee. And the fact is, Sir, that  
4 everyone saw this coming. Mr. Baumann saw it coming, Mr. Sinclair saw it coming, and  
5 Callidus saw it coming. And again Ms. Campbell will refer to some of the evidence on  
6 that point in terms of some of the scant emails that we do have from Callidus and Mr.  
7 Sinclair during that time period.

8  
9 But as we heard yesterday, even before he was forced to resign as president, Sir, Mr.  
10 Baumann had made repeated requests and demands to liquidate Alcan, but Mr. Sinclair  
11 and Callidus either ignored him or refused that. And again as you heard yesterday, and as  
12 you can see in the materials, he even initiated CCAA proceedings on behalf of Alcan, but  
13 Mr. Sinclair did not pursue those proceedings, and you will have seen in the  
14 cross-examination transcript that he claims he was unaware.

15  
16 So my friend indicated that Mr. Baumann, on cross-examination, admitted that he thought  
17 the CCAA proceedings would be better than a liquidation, and as between those two  
18 choices, Sir, that was probably correct, but he just wanted something to be done to stop  
19 the bleeding, and I think the evidence is fairly clear on that point. Either of those options,  
20 Sir, CCAA, or a liquidation, was better than the third option which was maintain the  
21 status quo. But that was the option, Sir, that was chosen by Mr. Sinclair and Callidus to  
22 the complete and utter detriment of Mr. Baumann. Maintain the status quo, let this debt  
23 get out of control, let it get jacked up to the tune of 7 million bucks.

24  
25 And why did they maintain the status quo? And that was your question, I think, of  
26 yesterday. But your question, I think, Sir, and -- you know, and again I might be accused  
27 of erroneously writing notes, but it was whether anyone from Callidus ever gave an  
28 explanation as to why they felt there was merit in keeping the company going. And as we  
29 heard this mornings -- or, sorry, this afternoon when my friend pointed to some stuff Mr.  
30 Sinclair said about having to move office space and do an inventory of the assets, et  
31 cetera, but I haven't seen anything, Sir, along the lines that you asked for. I have not seen  
32 any explanation from anyone at Callidus as to why they felt there was any merit in  
33 keeping this company going for a year, and that's because there is no such explanation,  
34 Sir, in any of the documents that have been produced to date, and there's no such  
35 explanation, Sir, in any of the documents that have been put before you on this  
36 application. And this gets me back to the point that I made earlier about document  
37 production and record production. Callidus has produced very little. Sir, they've refused  
38 to produce most of documents that --

39  
40 MS. ROBERTSON:

Your Honour, I'm sorry, I have to object there.

41 You'll recall from the discovery application, we said there is records, come look at them.

1 We'll make them available. My friend has not taken me up on that, or our client up on  
2 that at all.

3

4 THE MASTER: Okay.

5

6 MS. ROBERTSON: So it isn't appropriate for him to say that we  
7 have refused document production.

8

9 MR. BODNAR: It's a big sea can summer in Vancouver. That's  
10 not proper document production.

11

12 MS. ROBERTSON: In Van -- so, it's not --

13

14 MR. BODNAR: -- in my respectful submission. And it's not  
15 incumbent on me, as you know, under the Alberta Rules of Court, to go to British  
16 Columbia and --

17

18 MS. ROBERTSON: It's -- it's not in BC. I'm not sure where it --  
19 where that came from, but...

20

21 MR. BODNAR: To go anywhere to go rifle through a cannister,  
22 you know, a large sea container when I'm supposed to be appearing at a summary  
23 judgment application. So...

24

25 THE MASTER: Well, I think the issue when we were discussing  
26 some of this was could Callidus provide an Affidavit of Records? And they said, sure.  
27 And that was the end of the discussion and the affidavit -- I expected, actually, quite  
28 frankly, more debate about that, but...

29

30 MR. ROBERTS: Our position always was we overproduced just  
31 in the hopes of ending this discussion.

32

33 MR. BODNAR: Yeah. I -- you know, you recall the application.  
34 I mean, they --

35

36 THE MASTER: Right.

37

38 MR. BODNAR: They produced an Affidavit of Records that was  
39 grossly deficient, and you ordered what you ordered. And our -- I guess our choice at that  
40 stage was to either appeal or proceed with this application. So we're proceeding with this  
41 application, but frankly, Sir, we don't know what, if anything, was discussed on the exact

1 question that you raised. If Callidus could point to something in the evidence, well, that  
2 might help you deal with this in a summary fashion, Sir, but it can't.

3

4 So, again, instead of liquidating Alcan or prosecuting the CCAA proceedings, Mr.  
5 Sinclair continued to operate the company as president and sole director and, frankly,  
6 with the blessing of Callidus, under the power of attorney. And over the course of that  
7 year, the amount owing under the credit agreement increased by more than \$7 million,  
8 while the value of the assets continued to decrease. And then --

9

10 THE MASTER: My impression of the CCAA proceedings was  
11 that they were there, but they were never seriously filed. I mean --

12

13 MR. BODNAR: Well, I don't know. I mean, I --

14

15 THE MASTER: -- there was an application, there was a draft  
16 order, but the meat of a CCAA application is the affidavit that --

17

18 MR. BODNAR: Looks to me like it wasn't filed. I mean, it  
19 looked like the affidavit wasn't filed. I mean, again, I find it difficult to believe or  
20 understand that it just kind of fell into a black hole, and then after Mr. Sinclair was  
21 appointed president of the company, that it didn't get dealt with in some fashion, that  
22 somebody didn't get a call from his lawyer and say what's going on with that CCAA  
23 application? Do you still want us to proceed or not? But, again, we don't have  
24 correspondence or communications to that effect.

25

26 But this is -- this is getting to the theory of the defence here, Sir --

27

28 THE MASTER: Right.

29

30 MR. BODNAR: -- which is that even though Callidus and Mr.  
31 Sinclair knew that Alcan was doomed from the start, they did Jack the debt over the  
32 course of a year so that Callidus could realize on the same sort of loan-to-own scheme  
33 that it has employed with other borrows. And we've pleaded this, Sir, in our amended  
34 counterclaim, and I'll just briefly refer to a couple of examples of this here.

35

36 One of the them, Sir, is at tab 9 to our authorities.

37

38 THE MASTER: Yes.

39

40 MR. BODNAR: So just so that you've got that, we included this  
41 decision of *Callidus v. McFarlane*.

1  
2  
3  
4  
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41

THE MASTER: Yes.

MR. BODNAR: McFarlane was another guarantor of a Callidus borrower. I'm not sure whether he, too, is one of the defendants in the wolf pack action that Callidus has sued, but in any event, here was an Ontario Court of Appeal decision. This is where -- a case where Callidus put its borrower into receivership and purchased the assets with a credit bid of \$37 million, representing the debt minus Mr. McFarlane's \$3 million guarantee. And at paragraph 42 of the decision, we'll get Mr. McFarlane's characterization of it, which is the same characterization that we've put on this action, Sir. Callidus' MO. He argues that, in essence, Callidus could have structured its loan-to-own strategy in a manner that reflected a purchase price and so on and so on.

In that case, the -- Mr. McFarlane's lawyer argued that because of the way Callidus had structured its loan-to-own strategy, it had no recourse to the guarantee in that case, and the Ontario Court of Appeal agreed and reduced a \$3 million judgment to \$250,000. A little bit different on the facts, you'll see, but I mean, in my respectful submission, the same sort of MO on Callidus' part.

And in a Quebec decision released just Friday, Sir, just this past Friday, we have something that I would submit is similar. I have provided this case to my friend. This is -- this is a case where Callidus' borrower sought protection under CCAA, and Callidus once again made a credit bid for an amount that allowed it to pursue the guarantor. You'll see this is -- there's reference here to Blueberry, formerly in the style of cause there, these Quebec numbered computers are formerly Blueberry Gaming Technologies Inc., and formerly Blueberry Group Inc. Mr. Sinclair admitted on his cross-examination that Callidus had tired to have him appointed by the Court as chief restructuring officer in this case, without success. I can go and get you a page and line reference if I'm compelled to do so, but that was his evidence.

So in this case, Sir, which just came out March 16th, I'll just take you to a few paragraphs.

THE MASTER: Yes?

MR. BODNAR: And again it's my client's submission, and it's our theory of the defence that Callidus employs a loan-to-own scheme which its replicated several times and -- laterally, with not great success.

This case, Sir, I take you to paragraph 40 on page 11.

THE MASTER: Yes?

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MR. BODNAR: It is obvious that Callidus contested the appropriateness of the CCAA proceedings only to prevent Blueberry from pursuing its claim in damages against it. At that time, it was already clear that Blueberry management strongly believed that Callidus had deliberately consumed the equity value of Blueberry with a view to ultimately owning the business.

And there's footnotes to that evidence, and that's what Mr. Baumann says in this case as well.

Just while we're on that same page, and I overlooked paragraph 38 which --

THE MASTER: Yes.

MR. BODNAR: -- starts this analysis:

Is Callidus using the CCAA proceedings for an improper purpose? The Court believes so.

Stated so at paragraph 40.

At paragraph 41, if you flip the page, the Court finds that:

Callidus' conduct in the course of the CCA proceedings lacked transparency --

THE MASTER: Yes.

MR. BODNAR:

-- to allow the monitor and the debtors to work on a valuation of the business, and then the appointment of chief structuring officer, Mr. Sinclair, only to eventually adopt a different position before the Court. It seems that Callidus' strategy was to exhaust Mr. Duhammel (phonetic) financially.

And then finally on the next page, Sir, the nub of it in paragraph 48:

Callidus' behaviour is contrary to the requirements of appropriateness, good faith and due diligence that are baseline considerations that a Court should always bear in mind when exercising CCAA authority.

1  
2 And while the same criteria aren't applicable in the case of a receivership, we would  
3 submit that the same sort of principles are in play.  
4

5 Now, Sir, as I say, as I submit, these loan-to-own schemes all have the same modus  
6 operandi. Lend money to a distressed company, take control of the company, acquire the  
7 assets for a restructuring or receivership, and call on the guarantee. That's the pattern of  
8 behaviour that we have pleaded and that is, in my respectful submission, what the  
9 evidence that we see bears out, and there is, at the very least, a triable issue on that point.  
10

11 I referred to the receivership process in my brief, Sir, and I won't say too much about it  
12 here, except that it was one of the vehicles, Mr. Sinclair being the other, that Callidus  
13 utilized to complete its loan-to-own scheme.  
14

15 So as you know, Sir, Callidus acquired the assets of Alcan in the receivership process  
16 through its wholly owned subsidiary, Altair (phonetic) by virtue of a credit bid for the  
17 amount of Alcan's debt to Callidus, less \$4.5 million, which was the maximum amount  
18 under Facility C for which it had recourse against Mr. Baumann. But I'll show you in a  
19 moment, Sir, in my submission, that this acquisition was really just a shell game and that  
20 on its own accounting, Callidus has not suffered a loss. And unless its financial  
21 statements have been misstated, it actually would have had a windfall of more than \$2  
22 million if it had taken a prudent course of action, we would submit the commercially  
23 reasonable course of action, and liquidated Alcan earlier instead of taking a year to run up  
24 the debt, acquire the company and call on Mr. Baumann's guarantee.  
25

26 And so before I do that though, Sir, I do want to briefly respond to a few things arising  
27 from my friend's submission yesterday.  
28

29 THE MASTER: Yes.

30  
31 MR. BODNAR: She said that my client is engaging in a  
32 collateral attack on the receivership proceedings. We submit that that is absolutely not  
33 the case, Sir. This is a separate action involving separate parties and separate issues, and  
34 we do address that in our brief. And I will give you a reference to that, Sir, which is  
35 paragraphs 101 through 104. And you've seen -- frankly, you've seen this transcript  
36 before, which is extracted at 102.  
37

38 THE MASTER: Yes.

39  
40 MR. BODNAR: Mr. Roberts addressing the Court, saying:  
41



1 What I hear Mr. Rombone (phonetic) saying is that his real concern is  
2 what amount of money went to Callidus and, perhaps more importantly,  
3 what is the amount of money owing by him as a guarantor? That is not  
4 an issue in proceedings. There is an extant proceeding. Callidus had  
5 commenced a proceeding against Mr. Baumann on his guarantee. Mr.  
6 Baumann has counsel and has defended that proceeding and in that  
7 proceeding, Mr. Baumann will be able to raise all of the allegations  
8 about what Callidus did or did not do and how that conduct does or does  
9 not affect the debt. So those issues will all be canvassed fully in this  
10 Court.

11  
12 And then Mr. Justice Nixon further on on paragraph 104:

13  
14 Your points are well taken. As counsel, Mr. (INDISCERNIBLE), which  
15 as my friend, Mr. Roberts, touched on quite appropriately, you will have  
16 the ability, through a separate process, to deal with that.

17  
18 And then I believe there was reference to Justice Horner's decision which is attached as an  
19 exhibit to one of the affidavits on the discharge, either on the discharge application or on  
20 the vesting order application where he said, well, that's -- these are issues for another  
21 Court. Well, these are issues for this Court, Sir.

22  
23 This action -- well, they're frankly issues for trial. We say these are issues for trial, that  
24 these are the issues that are being dealt with in this court. So for my friend to have stood  
25 up before Justice Nixon and said, well, you can't listen to Mr. Baumann's grievances, he'll  
26 have -- he'll have another day in another court, and then for him or his partner to stand up  
27 here and say, well, he had his opportunity then, this is a collateral attack on the order, Sir,  
28 is, in my respectful submission, inappropriate.

29  
30 Now, the second thing I want to address, Sir, is this *Servus* decision that my friend  
31 dropped on us two hours into the submissions yesterday. Do you have that decision,  
32 because --

33  
34 THE MASTER: I'll see.

35  
36 MR. BODNAR: I've marked mine up, and I just would like to  
37 take --

38  
39 THE MASTER: I do have it.

40  
41 MR. BODNAR: -- you to it and --

1  
2 THE MASTER: I have it.

3  
4 MR. BODNAR: -- and tell you why, in my respectful submission  
5 this is completely and utterly distinguishable. I may be stealing my associate's thunder  
6 here. I'm not sure whether she was going to address this, but if you flip through this  
7 decision of Justice Ross which ultimately I guess was approved by the Court of Appeal, in  
8 paragraph 4 --

9  
10 THE MASTER: Yes?

11  
12 MR. BODNAR: -- at line 2 now, she says:

13  
14 However, the evidence called at trial was --

15  
16 So and such, and so and so. That's -- this is a trial decision. This is not a summary  
17 judgment application.

18  
19 So then the evidence is canvassed and the case law is canvassed, and then we go to  
20 paragraph 25.

21  
22 THE MASTER: Yes?

23  
24 MR. BODNAR: Accommodation versus compensated  
25 guarantors:

26  
27 Accommodations sureties are guarantors who entered into the guarantee  
28 in the expectation of little or no remuneration and for the purpose of  
29 accommodated others or assisting others in the accomplishment of their  
30 plans and, in contrast, compensated sureties on the other hand are  
31 guarantors whose business consists of guaranteeing performance and  
32 payment in return for a premium.

33  
34 If there's any suggestion that Mr. Baumann was a compensated surety, Sir, I would submit  
35 that it's clear that he was not. He didn't pay anything. I think he might have paid one  
36 dollar, a nominal consideration as a peppercorn, for the -- for the guarantee. He entered  
37 into it in the expectation, Sir, of little or no remuneration certainly pursuant to that  
38 guarantee. There was no suggestion that someone's going to pay him a hundred thousand  
39 bucks or something, as you see with some of these compensated sureties, to guarantee the  
40 indebtedness of Alcan. He, in my submission, did it for the sole purpose of  
41 accommodating Alcan, or of assisting Alcan in the accomplishment of its plans, namely

1 to secure financing from Callidus. So he, Sir, is an accommodation surety and is entitled  
2 to the benefit of the doubt from the Court on that point, as we'll see in a moment.

3  
4 So if you -- if we just do a quick page flip here, Sir, we go to next page 8, paragraph 29,  
5 and talk about a -- where a guarantor will be released from liability on a guarantee in  
6 circumstances where the creditor and the principle debtor, here Callidus and Alcan, agree  
7 to a material alteration of the terms of a contract of debt without the consent of the  
8 guarantor. That's what we're saying happened here.

9  
10 The next paragraph says the origins of this analysis is the English case of this from 1878  
11 which was adopted into Canadian law by numerous cases, including *Bank of Montreal v.*  
12 *Wilder*, Supreme Court of Canada decision that Ms. Campbell will address.

13  
14 And then if you continue flipping, Sir, into paragraph 35. So applying these principles,  
15 the ones from the cases that we've cited in our brief, it seems clear that an increase in the  
16 permitted overdraft to Raven's (phonetic) account, or here the increase to the amounts  
17 loaned under Facility A and the advancements of funds where there wasn't sufficient  
18 receivables, Sir, is a material variation.

19  
20 And then at the bottom of that paragraph, paragraph 35:

21  
22 The guarantors may have been prejudiced by the increase in the loan  
23 amount unless the Credit Union's decision to authorize an increase  
24 without their consent would be result in a discharge -- would result in  
25 their discharge, unless it is authorized by the Bower clause.

26  
27 And my friend went on at length about the Bower clause yesterday, and there's a similar  
28 clause in this --

29  
30 THE MASTER: Right.

31  
32 MR. BODNAR: -- agreement.

33  
34 THE MASTER: Right, the guarantees are well drafted in the --

35  
36 MR. BODNAR: Yeah.

37  
38 THE MASTER: -- sense that they --

39  
40 MR. BODNAR: M-hm.

41

1 THE MASTER: -- give a fairly wide latitude.

2

3 MR. BODNAR: They do.

4

5 THE MASTER: What do you have to say about the Bower clause  
6 in this case? Does it authorize --

7

8 MR. BODNAR: Well, I mean, I think what I would say is this.  
9 When we get down to -- and, again, Ms. Campbell may have more to say. So, I mean --

10

11 THE MASTER: That's her department?

12

13 MR. BODNAR: Yeah, I don't want to steal her thunder.

14

15 THE MASTER: Okay.

16

17 MR. BODNAR: But I would just say in relation to this particular  
18 case, Sir, if you go to paragraph 57?

19

20 THE MASTER: Yes.

21

22 MR. BODNAR:

23

24 I agree with the Court's -- or the Credit Union's submission that as  
25 compensated sureties, the guarantors are not entitled to the same  
26 protection by the Court as accommodations appear to be.

27

28 Now, you know, I -- in this case, we have the opposite situation. Mr. Baumann's an  
29 accommodation surety. He is entitled to additional protection by the Court:

30

31 I also agree that the temporary variations of the overdraft limit, as  
32 granted in the circumstances, were relatively minor.

33

34 Well, here we don't have a relatively minor temporary variation to the overdraft limit, so  
35 it's still -- it's distinguishable on the facts. And it says:

36

37 For those reasons, caused no actual prejudice to the guarantors.

38

39 Here we submit it does cause prejudice to the guarantor:

40

41 And did not justify a discharge of their obligations.

1  
2 And here we say it did. And, again, I -- I would also note that the wording of the  
3 guarantee is, of course, still, by its terms, subject to the wording of the credit agreement.  
4 The credit agreement is paramount. It takes precedence, and clearly the credit agreement  
5 says a few things about what can and cannot be done in terms of exceeding the \$5 million  
6 limit under Facility A, for example.

7  
8 So again, the -- we're not talking about a mere trifling indulgence here. We're talking  
9 about conduct that was completely contrary to the wording of the -- of the credit  
10 agreement, but I'll leave that to Ms. Campbell to address, because I want to make sure  
11 that we cover all the bases here before we run out of time.

12  
13 Now, the third thing I did want to address, Sir, was the decision of Justice Ritter that  
14 Master Waller (phonetic) told you about.

15  
16 THE MASTER: Okay.

17  
18 MR. BODNAR: I haven't found it, so my friend gave it to me as  
19 we entered today.

20  
21 THE MASTER: Okay.

22  
23 MR. BODNAR: So I haven't had a chance to take a look at it,  
24 and so I don't really know what it says. I've asked Mr. Critch to tell me what it says, but  
25 what was I going to say and will still say, Sir, that if such a decision does exist, if there's a  
26 decision out there, Sir, that says that a deficiency under a guarantee ought to be fixed at  
27 the earliest reasonable date, that would be a good decision to see, frankly, and -- and it  
28 would be a good decision for you to make, I submit, because surely a creditor cannot be  
29 allowed to let its borrowers spin its wheels for a year and rack up debt, Sir, just so that it  
30 can be recovered from the guarantor.

31  
32 So now with that in mind, I want to actually get into nuts and bolts of the, what we submit  
33 are the triable issues here.

34  
35 The first issue we raise, Sir, is that Callidus did not suffer a loan on the -- a loss on the  
36 Alcan loan and is, therefore, precluded from enforcing the guarantee against Mr.  
37 Baumann. And, again, for purposes of reference, Sir --

38  
39 THE MASTER: Yes?

40  
41 MR. BODNAR: -- this is outlined at paragraphs 43 through 49 of

1 our brief. And I will also ask you to have this open there just for reference, and I'll also  
2 ask you to have reference to Mr. Williams' affidavit.

3

4 THE MASTER: Yes.

5

6 MR. BODNAR: Which is, I understand, in Volume number 3 of  
7 the record book, tab 18.

8

9 THE MASTER: Yes, I have that.

10

11 MR. BODNAR: Exhibit F. Okay? So it will be tab 18, tab F,  
12 which are Callidus' 2016 -- its annual report.

13

14 THE MASTER: Yes.

15

16 MR. BODNAR: All right. So that annual report, Sir, of Callidus'  
17 public filing sets out the mechanics of a guarantee provided by its parent company,  
18 Callidus Group Inc., and let's take a look at page 52. Page 52 of Exhibit F, Sir, has the  
19 wording.

20

21 THE MASTER: Yes.

22

23 MR. BODNAR: It's right under subheading C. It's called the  
24 Catalyst guarantees:

25

26 In connection with the repayment of a Catalyst debenture at the time of  
27 the offering, the Catalyst Funds agreed to guarantee any losses incurred  
28 by the company on loans in the portfolio at the time of the offering. The  
29 guarantee covers losses of principle incurred by the company on certain  
30 specified loans until fully realized.

31

32 Watchlist loans, and I confirmed with Mr. Riley on cross-examination that the Alcan was  
33 one of the watchlist loans.

34

35 And then further down, it says:

36

37 Neither guarantee generally applies to accrued and unpaid interest.

38

39 All right? Neither guarantee generally applies to accrued and unpaid interest. Okay? But  
40 still...

41

1 If you go then, Sir, continuing in these notes to page 61, there's a discussion here,  
2 (INDISCERNIBLE) 17B of businesses acquired:

3  
4 In November, of 2015, one of the company's borrowers, Wabash,  
5 emerged from formal restructuring proceedings in the U.S. as a going  
6 concern, and in May, 2016, one of the company's borrowers, Altair --

7  
8 Although really the borrower, of course, was Alcan, but it says Altair:

9  
10 -- a water and drilling, oil drilling services company, emerged from  
11 formal restructuring proceedings in Canada as a going concern.

12  
13 And at the bottom of the next paragraph, it says:

14  
15 The losses from the two businesses acquired are fully covered under the  
16 terms of the Catalyst guarantee and, as such, the full recovery of these  
17 losses has been recorded in the statement of comprehensive income.

18  
19 Okay? Full recovery. No distinction there between principle and interest. And I  
20 questioned Mr. Riley on this on cross-examination to try and clarify this, and he did quite  
21 properly admit that the \$4.5 million carve-out that Mr. Baumann is being pursued on in  
22 this action does not consist entirely of interest. And I actually do have a page and line  
23 reference here, if you need to see that.

24  
25 THE MASTER: No, I recall reading that.

26  
27 MR. BODNAR: Yeah.

28  
29 THE MASTER: I understand what you're saying, but it seems to  
30 me that your argument would have to be that any time a loss is covered by insurance or  
31 indemnity or some --

32  
33 MR. BODNAR: Right.

34  
35 THE MASTER: -- other thing, that no action can be brought in  
36 the name of the party --

37  
38 MR. BODNAR: Well --

39  
40 THE MASTER: -- suffering the loss.

41

1 MR. BODNAR: I'm not necessarily --

2  
3 THE MASTER: That would be contrary to --

4  
5 MR. BODNAR: -- saying that, Sir, but I'm --

6  
7 THE MASTER: -- insurance law.

8  
9 MR. BODNAR: -- I'm saying this. I'm saying that on the face of  
10 it here, Sir, Callidus has realized full recovery of this loss from Catalyst and, therefore, if  
11 it were to realize further recovery from Mr. Baumann, there would be double recovery  
12 which, as a general principle, of course, is not allowed under Canadian law.

13  
14 There is no evidence, Sir, for -- this isn't an insurance policy where we have a right of  
15 subrogation, Sir. There is no evidence of anything analogous in this case. There's no  
16 evidence of an agreement between Callidus and Catalyst that requires Callidus to pay this  
17 back. I asked for further information on questioning. I asked for an undertaking which  
18 might help me clarify this, Sir, and was refused, and it was objected to. And so, I mean, if  
19 there is something like that there, I think it's -- I would submit it's a -- it's an easy thing  
20 and a short answer for my friends to say, ah, here goes. Here's the agreement between  
21 Callidus. Here's the guarantee. Here's a copy of the Callidus guarantee, and it provides  
22 for a right of subrogation, and any amount recovered from a guarantor would go back up  
23 to Catalyst. There hasn't been anything like that. Certainly we would expect that to be  
24 produced, Sir. But in the absence of that, in my respectful submission, you're not in a  
25 position to grant summary judgment on this issue, Sir, when on the face of it, it would  
26 appear that there's double recovery. Surely there 's an issue, a genuine issue requiring a  
27 trial there, in the absence of any documents that show that there would not be double  
28 recovery in this case.

29  
30 You know, if my friends wants -- and, frankly, if my friend wants to dispute the evidence  
31 that's before the Court here that says full recovery of the loss has been recorded by relying  
32 on some evidence that it's just a flow-through and that it wouldn't be double recovery,  
33 some evidence that's not before the Court on this application, she's going to have to do  
34 that at trial.

35  
36 So that's the --

37  
38 THE MASTER: I understand your argument.

39  
40 MR. BODNAR: That's the first point, and that's a double  
41 recovery. I'll now turn it over to my colleague. With your leave --



1  
2 THE MASTER:

Sure.

3  
4 MR. ODNAR:  
5 points.

-- Ms. Campbell, who will address the next few

6  
7 **Submissions by Ms. Campbell**

8  
9 THE MASTER:

Ms. Campbell?

10  
11 MS. CAMPBELL:

Good afternoon. As Mr. Bodnar indicated, I'm  
12 going to be making submissions on breach of the credit agreement.

13  
14 THE MASTER:

Yes.

15  
16 MS. CAMPBELL:

It's our position that Callidus cannot enforce the  
17 guarantee because they breached the terms of the credit agreement, and as a result  
18 materially increase Mr. Baumann's risk as the guarantor. They never obtained his consent  
19 to vary the agreement, though it was required if they wished to enforce the guarantee.

20  
21 The Supreme Court of Canada has clearly stated that principle in the *Bank of Montreal vs.*  
22 *Wilder*, which is at tab 4 of our brief, Sir. At paragraph 29, the Supreme Court of Canada  
23 stated:

24  
25 It is trite law that any material variation of the terms of the contract  
26 between the creditor and the principle debtor to the prejudice of the  
27 guarantor, without the guarantor's consent, will discharge the guarantor.

28  
29 So before I outline the three ways that we say Callidus breached the credit agreement, it's  
30 important to note that every breach occurred during a time when Callidus acknowledged  
31 it effectively controlled Alcan. And I can pinpoint that reference for you again, Sir, if  
32 you'd like, but my colleague took you to it earlier today.

33  
34 THE MASTER:

Yes.

35  
36 MS. CAMPBELL:

At that part of the transcript, Mr. Riley admitted  
37 that -- or he agreed that they had placed Mr. Sinclair as the president. He was also placed  
38 in as the sole director. That wasn't actually that part of the transcript.  
39 They had the ability to vote Mr. Baumann's shares however they wanted. That was  
40 admitted. And he agreed that as of May, 2015, Callidus effectively controlled Alcan.

41

1 So, Sir, there were no checks and balances here in place to protect Mr. Baumann who  
2 could only rely on Callidus' duty to perform the agreements in good faith and in a  
3 commercially reasonable manner. Callidus failed to meet that simple standard.

4  
5 So I'll take you to why we think the credit agreement was breached.

6  
7 First, on September 16th, 2015, Callidus transferred 5.7 million from Facility B to Facility  
8 A. The maximum amount that Facility A could ever be was \$5 million. This transfer is a  
9 clear breach of the credit agreement. Mr. Riley, the corporate representative of Callidus,  
10 agreed that such a transfer was not allowed without an agreement. And I can pinpoint  
11 that if you'd like, Sir.

12  
13 THE MASTER: That's fine.

14  
15 MS. CAMPBELL: Okay. There was no such agreement, to his  
16 knowledge.

17  
18 Now, my friend yesterday --

19  
20 THE MASTER: Unless the guarantee itself operates as such an  
21 agreement. And I -- as I understand it, that's the argument made by Callidus, is the  
22 guarantee gave a wide latitude to advance additional funds, change the arrangements. I  
23 think that's the argument they make.

24  
25 MS. CAMPBELL: I understand that's the argument she's trying to  
26 make.

27  
28 THE MASTER: Yeah.

29  
30 MS. CAMPBELL: But I think, and I'll take you to the case law --

31  
32 THE MASTER: Right.

33  
34 MS. CAMPBELL: -- it doesn't allow them to act unlawfully in  
35 breach of the credit agreement.

36  
37 THE MASTER: Right. So you don't need --

38  
39 MS. CAMPBELL: Perhaps if the credit agreement --

40  
41 THE MASTER: -- to go through that.

1  
2 MS. CAMPBELL: -- had allowed a mechanism to allow them to  
3 vary the credit agreement with the debtor, Alcan, and they made that decision together to  
4 vary the credit agreement, then that might impose that burden on Mr. Baumann. They  
5 don't have that kind of agreement with Alcan. It's just a *de facto* unilateral decision they  
6 made without any consent, because they were in total control.

7  
8 So my friend argued, though, yesterday that nothing really turns on this breach, that the  
9 movement of the \$5.7 million from one facility to another was simply a bookkeeping  
10 exercise, and so we say that it's more of an effort to cook the books in the sense that after  
11 Callidus obtain an appraisal showing that the values of the assets significantly declined,  
12 they decided to shuffle some money around. They shrunk Facility B so that would -- so  
13 that it was in covenant and properly collateralized, but by pushing it into Facility A, they  
14 created a significant problem under Facility A. Now Facility A was way out of covenant.  
15 They didn't solve any problems. They just moved the risk around. They weren't deal --  
16 they weren't dealing with the realities that were facing Alcan. They realized that Alcan  
17 was way under collateralized. They were out of margin with the credit agreement, and I  
18 don't know why they didn't do anything to fix it. They just shuffled money from Facility  
19 B to Facility A. Surely that was a clear indication that the loan should have been called  
20 and Alcan's assets should have been liquidated, and this was, of course, contrary to any  
21 commercial reasonableness.

22  
23 So that's my submissions on the first breach, and I know my friend disagrees with me.

24  
25 Second, short -- the second breach there is shortly after that large sum of money was  
26 transferred -- or, sorry, shortly before that large sum of money was transferred, Callidus  
27 decided it was going to start accruing unpaid principle and interest a separate account.  
28 Essentially, they entered into a *de facto* forbearance agreement with themselves, because  
29 Callidus was essentially both the creditor and the debtor. He -- they admitted they were  
30 in control of Alcan as the debtor. I mean, did all of that without the agreement of the  
31 guarantor, who was the one truly affected by this.

32  
33 So over the course of about eight months, Callidus allowed interest to accrue to a total of  
34 \$5.59 million. I can point you to John Williams' affidavit, which is at tab 18 of volume 3,  
35 and paragraph 24 of his affidavit outlines that number if you need to see it, Sir.

36  
37 THE MASTER: Okay. Thank you.

38  
39 MS. CAMPBELL: So instead of Alcan making those principle and  
40 interest payments, as it was required to do under the credit agreement, Callidus shirked  
41 that responsibility on to Mr. Baumann. Obviously Mr. Baumann wouldn't have consented

1 to that. That was a breach of the credit agreement, and it negatively affected his  
2 guarantee.

3  
4 Again, it can't be considered commercially reasonable to accrue interest to the tune of  
5 nearly \$6 million without the written agreement of any of the parties. This isn't a mere  
6 indulgence, and this is not operating within the bounds of the day-to-day business realities  
7 as my friend pointed to you in the *Servus* case. That's a case where it was, like, oh, well,  
8 it's -- the day-to-day business realities requires the banks to grant some indulgences every  
9 now and again to ensure they're not going to shut down a company which would, in fact,  
10 put the guarantees at risk. This is not that situation. This is \$6 million of accrued interest  
11 over and above what was allowed under the credit agreement. This is a forbearance  
12 agreement that was not agreed to. That's a significant sum of money. The fact is, and the  
13 record shows that Mr. Baumann didn't want a forbearance agreement. He couldn't find  
14 terms that he thought were beneficial to him. So the record shows that he actually  
15 objected to a forbearance agreement.

16  
17 Finally, to make matters worse for Mr. Baumann, Callidus started over advancing funds  
18 to Alcan when Alcan had nowhere near sufficient collateral. I can point you to the  
19 Facility A, Sir, but I think you understand it. Basically --

20  
21 THE MASTER: Yes.

22  
23 MS. CAMPBELL: -- and very simply stated, I'm not an accountant,  
24 the loan could only amount to about 90 percent of Alcan's eligible net receivables, less  
25 various deductions.

26  
27 So this is a mechanism of the credit agreement that protected Mr. Baumann as a  
28 guarantor. It was a safety net that meant that Alcan's collateral would always be sufficient  
29 to pay back Facility A loan every month so long as Callidus did not over advance funds.  
30 In fact, the way they set it up, there would be a cushion. So there should be money left  
31 over every month, because your accounts receivable is coming in and you have more than  
32 enough to pay off the loan. That's how that's supposed to work. But after Mr. Baumann  
33 resigned from Alcan, and Callidus effectively controlled Alcan, Callidus over advanced  
34 funds to Alcan on 43 occasions when Alcan did not even have sufficient gross  
35 receivables, let alone sufficient eligible accounts receivable, as required by the credit  
36 agreement. This is a clear breach of the credit agreement, and Mr. Baumann never  
37 consented to these over advances. In fact, he didn't even know about them.

38  
39 Sir, if I can direct you to paragraph 30 of Mr. Williams' affidavit?

40  
41 THE MASTER: Yes.

1  
2 MS. CAMPBELL: It's at volume Tab -- at Tab 18.

3  
4 THE MASTER: Okay. I have that.

5  
6 MS. CAMPBELL: So as at May 2nd, 2016, after the 43 over  
7 advances were made, Mr. Williams states there that:

8  
9 The net eligible receivables collateralized only 2.7 percent of the  
10 outstanding loan balance.

11  
12 I did the math on this, and I think -- or maybe Mr. Williams did, but it's point 5 percent if  
13 you take into account the transfer from Facility B to A, which I think you should take into  
14 account, because we're talking about an asset-based lender who loans to Alcan on the  
15 collateral that they have.

16  
17 THE MASTER: Yes.

18  
19 MS. CAMPBELL: So that means that the Facility A loan had  
20 essentially no security, other than Mr. Baumann's guarantee.

21  
22 To put this in perspective Sir, the credit agreement required, as of that date, that the net  
23 eligible AR should have been at least 117 percent of the amount of the Facility A loan to  
24 justify a loan of \$1.5 million. So obviously the 2.7 percent collateral is vastly short of the  
25 117 percent required. And at paragraph 28 of Mr. Williams' affidavit, he states that under  
26 these circumstances, it would be difficult, if not impossible, for Alcan to repay these loan  
27 advances in the absence of a cash infusion, which they never got.

28  
29 My friend agreed that Callidus had an obligation to act in a commercially reasonable  
30 manner, but she argued that there is no evidence that they did not act prudently. She  
31 stated that there is only an assertion that Mr. Baumann does not like how Callidus acted.  
32 Well, we strongly disagree for the reasons mentioned above. I can't imagine how Callidus  
33 could argue that collateralizing the loan with only 2.7 percent security was commercially  
34 reasonable or prudent. It certainly wasn't, especially given that they're asset-based  
35 lenders, like I said. And remember this is all in the context that, as you pointed out,  
36 things were already looking bleak. Alcan had missed its forecast. The industry was in  
37 decline. Asset values were declining, which Callidus was keenly aware of, which resulted  
38 in that transfer from Facility B to Facility A. So why would Callidus continue to operate  
39 in the face of those business realities?

40  
41 Further, Sir, all of these over advances need to be put in the context of the credit

1 agreement. As you pointed out yesterday, there is a provision in the credit agreement that  
2 states:

3  
4           Upon an event of default, the ability of Alcan to borrow money is  
5           immediately terminated.  
6

7 Mr. Baumann was entitled to rely on that assurance. So after the event of default which  
8 occurred, I didn't get the exact date, some time in March, 2015, that's when that letter was  
9 sent out, until the time of receivership, Callidus racked up at least an additional \$1.5  
10 million in over advanced funds, and \$5.6 million in accrued interest.

11  
12 I'm just debating whether or not I need to go through distinguishing the *Servus* case after  
13 Mr. Bodnar did it (INDISCERNIBLE).  
14

15 THE MASTER:   I think the primary point is in *Servus*, Madam  
16 Justice Ross found some things that would normally release the guarantee, and she went  
17 on to hold that the Bower clauses saved the lender in that case. So I think --  
18

19 MS. CAMPBELL:                                       Right.  
20

21 THE MASTER:                                       -- ultimately where all of this converges, is --  
22 are the Bower clauses strong enough here, and what do you have to say about that?  
23

24 MS. CAMPBELL:                                       Right, Sir. So there is case law that suggests  
25 that the Bower clauses will be given force as long as there's not -- as long as the creditor  
26 is acting lawfully, and that they haven't breached the credit agreement. So I think that --  
27

28 THE MASTER:                                       So what cases would you --  
29

30 MS. CAMPBELL:                                       Yes.  
31

32 THE MASTER:                                       -- refer to for that point.  
33

34 MS. CAMPBELL:                                       So, Sir, that's in the *Wilder* decision, but it's also  
35 --  
36

37 THE MASTER:                                       Right.  
38

39 MS. CAMPBELL:                                       -- in a case I have here that I'll hand up. And I  
40 have a copy for my friend. This is *Royal Bank v. W. Got & Associates*, and it's a case  
41 from the Alberta Court of Appeal. It was upheld on appeal to the Supreme Court of

1 Canada.

2

3 THE MASTER: Yes.

4

5 MS. CAMPBELL: So at paragraph 128 of that decision -- Sir, I'll  
6 note that this is a -- this is the dissenting position, but he doesn't dissent on this issue. The  
7 majority upholds this exact same point, but he has a more pithy quote, so I'm going to  
8 take you there. So at paragraph 28, the bank is trying to enforce the Bower clause here.

9

10 THE MASTER: Yes.

11

12 MS. CAMPBELL: And the Court states, which is affirmed by the  
13 Supreme Court of Canada, that:

14

15 The problem with this argument is that counsel for the bank conceded  
16 that the bank could only rely on this clause in respect of lawful dealings.  
17 In two respects, the dealings of the bank were not lawful. They were in  
18 breach of the contract with Got.

19

20 And that's the debtor:

21

22 -- whose is indebtedness Mr. Sanderlin was guaranteeing. In these  
23 circumstances, the bank cannot rely on the clause quoted above.

24

25 And that same principle also is in *Wilder*, Sir.

26

27 THE MASTER: Yes.

28

29 MS. CAMPBELL: So as noted above, we submit that Callidus  
30 could only rely on the Bower clause here if you determined that their actions were lawful  
31 and not in breach of the credit agreement. But in addition to that, I say that in addition to  
32 being lawful, Callidus' actions also had to be commercially reasonable and taken in good  
33 faith. It cannot be the law that Callidus would have carte blanche to increase the loan to a  
34 hundred million dollars, right? It has to be commercially reasonable.

35

36 The effect of these breaches was to drastically increase the amount of  
37 the Alcan debt without sufficient collateral, as required by the credit  
38 agreement, thereby exposing Mr. Baumann to a significant risk under  
39 the guarantee, which he cannot have reasonably expected.

40

41 That's also very important. And I handed up a photocopy to you on the law of guarantees.

1 Do you have that there, Sir? I gave to it my friend, as well.

2

3 THE MASTER: Okay. He do.

4

5 MS. CAMPBELL: At page 9 of 3 there, it says:

6

7 The changes that are made to the principle contract should be in line  
8 with what the surety might reasonably expect.

9

10 I can tell you that Mr. Baumann did not reasonably expect that they would accrue interest  
11 of \$5.5 million, and that they would over advance funds to \$1.5 million.

12

13 Where the guarantor has not consented to a variation of a breach of a  
14 principle contract, that imposes a materially different risk. He is entitled  
15 to an absolute discharge of his guarantee.

16

17 And that comes from the Supreme Court of Canada case *Pax Management*, which is at  
18 tab 5 of our brief at paragraph 40.

19

20 So we submit, Sir, that on that basis, the action against Mr. Baumann ought to be  
21 dismissed. In the alternative, though, it should go to trial.

22

23 So I have more comments, Sir, on the power of attorney and how that also changes things,  
24 but if you have any questions for me on those breaches, I can answer them now.

25

26 THE MASTER: I have no questions on the prior --

27

28 MS. CAMPBELL: Okay.

29

30 THE MASTER: -- prior submissions.

31

32 MS. CAMPBELL: Okay. So I'm just going to turn quickly, and I'll  
33 -- won't take too long.

34

35 THE MASTER: Sure.

36

37 MS. CAMPBELL: So Callidus also breached its fiduciary duty to  
38 Mr. Baumann under the power of attorney and is therefore precluded from enforcing the  
39 guarantee. This power of attorney really changes the context that we're operating in here.  
40 This isn't a simple bank and borrower and guarantor. We have a lender operating under a  
41 power of attorney which imposes a fiduciary duty. So when Callidus invoked its rights



1 under the power of attorney, it owed him a fiduciary duty, and that means that Callidus  
2 had an obligation to Mr. Baumann to act in his best interest, to put his welfare first, to  
3 take his wishes into account and to act prudently and intelligently. And that comes from  
4 the case, *McDonald v. Tobner* at tab 6 of our authorities. All of their actions from the  
5 date they invoked that power of attorney need to be taken to the context of what duties  
6 they owed Mr. Baumann.

7  
8 So instead of acting in good faith during that one year period, Callidus intentionally  
9 increased the Alcan loan by approximately \$5.5 million without sufficient collateral, as I  
10 mentioned, thereby directly putting Mr. Baumann at risk under his guarantee.

11  
12 It was clearly not in Mr. Baumann's interests to increase the debt of the principle debtor  
13 when there was not sufficient collateral to repay the loan. It is reasonable to assume that  
14 Mr. Baumann would not have consented to that increase, given the consequences it had  
15 on his guarantee and his personal assets.

16  
17 It's also reasonable to assume that Mr. Baumann would not have consented to accruing  
18 unpaid interest and principle in a separate account as that also put him at risk under the  
19 guarantee. In fact, we know that Mr. Baumann did not agree to a forbearance agreement.  
20 Callidus couldn't get this agreement to be signed by him, and they decided to forge ahead  
21 anyways, and they did that after he was out of the company and after they had full control  
22 of his shares.

23  
24 Callidus itself knew that if they agreed to a forbearance agreement:

25  
26 The problem worsens, because the company will have close to 29  
27 million in debt at the end of the forbearance period.

28  
29 And, Sir, I think this is an important exhibit I'll take you to. It's Exhibit M to Mr.  
30 Baumann's affidavit.

31  
32 THE MASTER: That's in which Volume? 2, is it?

33  
34 MS. CAMPBELL: It's tab 17, Sir, Volume 3.

35  
36 THE MASTER: So that sounds like Volume 3, I guess.

37  
38 MS. CAMPBELL: Yes, Volume 3. Do you have that there, Sir?

39  
40 THE MASTER: Okay. I do now.

41

1 MS. CAMPBELL: It's Exhibit M.

2

3 THE MASTER: M?

4

5 MS. CAMPBELL: Yes. It's a March 29th letter from Range  
6 Corporate advisors to Craig Boyer at Callidus.

7

8 THE MASTER: Yes.

9

10 MS. CAMPBELL: And the second last paragraph, the last sentence  
11 of that second last paragraph says:

12

13 In fact, the problem worsens because, potential asset sales aside, the  
14 company will have close to 29 million in debt at the end of a  
15 forbearance period.

16

17 Which is correct. That's what happened. At the end of the forbearance period that they  
18 *de facto* entered into, there was \$29 million of debt. By all accounts, that was worsening  
19 the problem.

20

21 THE MASTER: Yes.

22

23 MS. CAMPBELL: Based on that, it seems that Callidus and  
24 Sinclair knew what the intelligent and prudent course of action was, but instead decided  
25 to gamble on the economy, hoping, without consulting an expert in the industry, that the  
26 economy would bounce back and asset prices would recover. Mr. Riley did admit, I  
27 believe on -- I can find the pinpoint for you -- that they did not consult any experts in  
28 industry.

29

30 THE MASTER: I think I read that.

31

32 MS. CAMPBELL: You asked my friend yesterday if there was any  
33 evidence as to why Callidus opted to continue to operate Alcan, considering how bleak  
34 things were looking, and I think we all agree that that's the question of the hour. We don't  
35 know why they did that. We can -- we can make assumptions, but that's not proper for  
36 this Court.

37

38 What we can say for sure is that it was not commercially reasonable to operate in the face  
39 of declining asset values as a result of industry-wide downturn when the amount loaned  
40 was only secured by 2.7 percent of accounts receivables, when \$5.5 million of interest had  
41 accrued, when they had accurately predicted what the loan would be after that year, and

1 when they didn't even consult an expert in the industry to figure out if this was an  
2 industry-wide problem. We think that those facts that I just listed are supported by the  
3 record and are sufficient for you to conclude that they acted in a commercially  
4 unreasonable manner.

5  
6 And all of that is in the context of Mr. Baumann asking that the assets be liquidated. He  
7 made requests to Callidus and Sinclair as early as January, 2015, and again in June, and  
8 again in September, but his requests were brushed off and ignored. I can pinpoint you to  
9 some of those references, too, if you'd like.

10  
11 When he said he was going to hold a shareholders meeting to elect officers and directors  
12 and to determine the future of Alcan, he was advised in a letter from Callidus' counsel that  
13 he did not have the right to convene a shareholders meeting or exercise any rights as a  
14 shareholder. And if you need a pinpoint there, Sir, I can give it to you, but I think you've  
15 seen that letter.

16  
17 THE MASTER: Yes.

18  
19 MS. CAMPBELL: But Mr. Baumann did have the right to expect  
20 Callidus to take his wishes into account while operating his shares under the power of  
21 attorney. Instead, they thwarted his attempts to be involved in management of the  
22 company, including decisions on whether to liquidate. As a result, Callidus breached its  
23 fiduciary duties to Mr. Baumann and cannot now pursue them under the guarantee when  
24 they were the ones that caused the risk that that guarantee would be required at all.

25  
26 And this is all, again, in the context of the Supreme Court of Canada's ruling in *Bhasin v.*  
27 *Hrynew*, which states that parties have an obligation to perform their contractual  
28 obligations in good faith. We submit that Callidus fell well short of that standard in its  
29 performance of the credit agreement, the power of attorney and the share pledge  
30 agreement.

31  
32 So I just want to close with this, and I'll turn it over.

33  
34 THE MASTER: Sure.

35  
36 MS. CAMPBELL: What could Mr. Baumann have done differently  
37 to protect himself? He was completely railroaded. He was kicked out of the company.  
38 His voting rights were taken away. Mr. Sinclair admitted he refused to communicate with  
39 him, or communicate with him as little as possible. Callidus controlled all of the pieces  
40 on the chess board. They controlled Mr. Sinclair, in our submission, the president and  
41 sole director. They controlled the majority shareholdings. They refused to communicate

1 with Mr. Baumann. They unilaterally made the decision to increase the debt by 7 million,  
2 knowing full well that Alcan did not have collateral to support that. They breached the  
3 credit agreement, in our submission, and as a result increased the risk to Mr. Baumann. It  
4 can't be the just result that Mr. Baumann is on the hook for \$6 million in light of all of  
5 those things that I just mentioned, and such flagrant breaches of the credit agreement and  
6 a lack of commercial reasonableness and good faith.

7

8 So, again, on that basis, we submit that this action should go to trial or be dismissed.

9

10 THE MASTER: Okay.

11

12 MS. CAMPBELL: Do you have any questions for me?

13

14 THE MASTER: No. Thank you. Before you --

15

16 MR. BODNAR: Sorry.

17

18 THE MASTER: You have something, Mr. Bodnar?

19

20 MR. BODNAR: I do have one more thing.

21

22 THE MASTER: Sure.

23

24 MR. BODNAR: I have one more section to address.

25

26 THE MASTER: Okay.

27

28 **Submissions by Mr. Bodnar**

29

30 MR. BODNAR: And that is, in my submission, Sir, the last of  
31 those issues that we had outlined, and that is if Callidus had liquidated the assets of Alcan  
32 in April, of 2015 --

33

34 THE MASTER: Yes.

35

36 MR. BODNAR: -- or shortly thereafter, as a prudent lender  
37 would have done, Mr. Baumann would not owe any amount pursuant to his guarantee.

38

39 Now, I know this is a bit of an esoteric, complicated analysis, so I don't want to get  
40 bogged down in it, and I'm also cognizant of time, but I do want to take you through it  
41 even just from 30,000 feet.

1  
2 THE MASTER:

Sure.

3  
4 MR. BODNAR:

We submit it was in the best interests of Alcan's stakeholders, Sir, including both Callidus and Mr. Baumann, for the company's assets to have been liquidated early on in the piece. Put differently, Sir, it was decidedly contrary to the best interests of the company's stakeholders, including both Mr. Baumann and Callidus itself, to continue operating Alcan in view of its inability to make the monthly principle and interest payments required by the credit agreement. And we submit that Callidus' fiduciary duties and duty of good faith, contractual performance, as well as prudent business management, required it to liquidate the assets of Alcan as early as April, of 2015, when it forced Mr. Baumann to resign as president, but instead of doing so, it intentionally, and we submit unreasonably, allowed the amount of the Alcan loan to increase by almost \$7 million.

15  
16 So this section, Sir, is at, starting at paragraph 72 of our brief, and again I'll just have you open it up there as a bit of a road map. So, essentially, this -- it's a lengthy section, but -- so I won't get into a lot of detail, but it's paragraph 72 through 100 of our brief. And you will have seen from the cross-examination transcript of Mr. Williams, Sir, he explains this at length in his transcript, that if Alcan had been liquidated in a timely fashion, Mr. Baumann would not have owed anything under his guarantee, and Callidus would not have suffered a loan impairment. Instead, you look at Mr. Williams' affidavit, paragraph 25, there would have been an excess of cash in Alcan of about \$2.2 million, instead of a big delta of, you know, \$7 million under water.

25  
26 And so to determine if Mr. Baumann would have been owed any -- would have owed any amounts under his guarantee in April, of 2015, Sir, we need to first determine what the debt of Alcan was at that time, and then determine what the purchase price of the Alcan assets would have been at that time. And we outline this, Sir, starting on page 15 of our --

30  
31 THE MASTER:

I see that.

32  
33 MR. BODNAR:

-- brief. As Mr. -- and as Mr. Williams indicates in his affidavit, and as we summarize there in those sections 76 through 80, the total debt of Alcan in April, of 2015, was about \$22 million and change, Sir, but that doesn't necessarily mean Callidus would have paid \$22 million, less \$4.5 million, or some lower figure at the time. My friend yesterday said, well, sure, they might have paid a lower figure, because the scrap value bid, auction bids that were coming in were significant lower. All they had to do was be one dollar higher than those, Sir, but keep in mind that back in April, of 2015, the company was a going concern. The economy was better. Asset values clearly would have been stronger in -- at that time than they were a

1 year later when this distressed company in receivership ended up having to sell its assets.

2  
3 So Mr. Williams gives his opinion, Sir, in the affidavit, saying that in his view, you know,  
4 Callidus would have paid at least 24.2 million, which was the amount of his credit bid in  
5 May, of 2016.

6  
7 And this analysis again, Sir, is -- starts at paragraph 81 of our brief. Mr. Williams makes  
8 these points that Callidus recorded the value of its assets in its 2016 financial statement,  
9 the assets that it had acquired from Alcan, as being \$24.2 million, and in so doing it  
10 reported to its shareholders that the value of those assets was \$24.2 million. If Callidus  
11 truly believed the assets were worth less, it had an obligation to its shareholders under  
12 international financial reporting standards, and it's own accounting standards --

13  
14 MR. ROBERTS: I'm just going to -- I'm going to object. I don't  
15 know if my friend's giving evidence of what international financial reporting standards  
16 are.

17  
18 MR. BODNAR: Yeah, this is what --

19  
20 MR. ROBERTS: Because I -- because I don't think that's in --

21  
22 THE MASTER: Mr. Williams in his --

23  
24 MR. BODNAR: This is what Mr. Williams says, so I can read  
25 from his affidavit.

26  
27 THE MASTER: I -- I understand where you're going.

28  
29 MR. ROBERTS: Sir, yes.

30  
31 THE MASTER: It seems to me that, and I understand the  
32 argument and it's a very -- they reported it that way financially. Therefore, that's what  
33 they must have truly believed.

34  
35 MR. BODNAR: Right.

36  
37 THE MASTER: I don't know if you can attribute that much fact  
38 to it, what somebody does in their financial statements. The other thing is probably the  
39 best one is to indicate whether they would have made the same credit bid or not. Or  
40 probably Callidus, as opposed to Mr. Williams. And that being said, it's probably largely  
41 hypothetical.

1  
2 The other thing is a big part of Callidus' credit bid was the preservation of the right under  
3 the guarantee, right?

4  
5 MR. BODNAR: Sure.

6  
7 THE MASTER: So --

8  
9 MR. BODNAR: But I'm just making the obvious point that this  
10 is the way Callidus reports in it their -- in their public -- in their publically available  
11 disclosure.

12  
13 THE MASTER: Right.

14  
15 MR. BODNAR: They are bound by accounting standards, and  
16 truly they can't be saying one thing to the public and another thing to --

17  
18 THE MASTER: Oh, I understand that.

19  
20 MR. BODNAR: Sure. So they can't have it both ways. Yeah.  
21 And I mean, as I -- as Ms. Campbell reminds me, and as I pointed out, the value of the  
22 assets were worth more in 2015 than 2016.

23  
24 THE MASTER: Right. It's --

25  
26 MR. BODNAR: And --

27  
28 THE MASTER: -- different time.

29  
30 MR. BODNAR: Different time. But, I mean --

31  
32 THE MASTER: Yeah.

33  
34 MR. BODNAR: -- so there was nothing to suggest, though, with  
35 the assets being worth more that, frankly, the bid would have been less. You know, if the  
36 -- if you had -- you know, the company was a going concern. As Mr. Williams says, the  
37 value of an asset is tied to its ability to generate revenue. Well, in March of 20 -- or May,  
38 of 2015, it had generated revenue of \$9.3 million in the previous 12 months. In May, of  
39 2016, it generated 4.4 million in the previous twelve months. The economy was going  
40 down. This was a distressed company. Asset values were decreasing. I mean, the only  
41 reasonable inference, frankly, is that the -- is that the bid would have been -- would have





1  
2 MS. ROBERTSON: It's also --  
3  
4 MR. BODNAR: Well, I mean, he's -- he gives -- his c.v. is there.  
5 I meant, he is an accounting expert.  
6  
7 THE MASTER: He's CBV.  
8  
9 MR. BODNAR: Well, he's a CBV, among other things, right? I  
10 mean, he's a chartered accountant, and certainly, in my respectful submission --  
11  
12 THE MASTER: Yeah.  
13  
14 MR. BODNAR: -- this is well within his area of expertise to be  
15 opining on the hypotheticals that we've put before him.  
16  
17 THE MASTER: He can opine on accounting standards. He can  
18 certainly do that. The fact is sort of if the liquidation's happening a year later, it's a  
19 different -- or a year earlier, everything's different. It's a different economy. It's --  
20  
21 MR. BODNAR: Right, and he (INDISCERNIBLE).  
22  
23 THE MASTER: -- different assets. We don't have any evidence  
24 from appraisers as to what liquidation value would have been at that point, other than we  
25 can assume different set of facts, different result might have happened.  
26  
27 MR. BODNAR: True. True enough, I mean.  
28  
29 THE MASTER: Right.  
30  
31 MR. BODNAR: But again -- we say all of that, but then, again,  
32 recognizing, sure, it was a different economy, but it was a stronger economy. The assets,  
33 sure, would have had different values. They would have had more value. The company  
34 was stronger back then, as a going concern. So I appreciate it would have been a different  
35 analysis, but for all intents and purposes, the only reasonable inference to make was that  
36 that bid would have had to have been higher. Certainly, if they wanted to bid the assets  
37 significantly lower at that point in time, a year earlier, they would have had to have been  
38 aware of other potential bidders who, at that point in time, might have had stronger bids  
39 than they ultimately had to deal with in 2016.  
40  
41 THE MASTER: Right. Yes.

1  
2 MR. BODNAR: All right. So but -- but in any event, Sir, the  
3 analysis and the -- and the argument is what it is, Sir. And I realize that it's -- you know,  
4 it's somewhat esoteric.  
5  
6 THE MASTER: Right.  
7  
8 MR. BODNAR: It's an accounting exercise, but if you were to  
9 accept that, Sir, that if Callidus had done the prudent thing and taken steps to liquidate  
10 this company a year earlier, then on Mr. Williams' analysis, at the very least, it would  
11 have had a \$2.2 million windfall. It certainly would not have had a shortfall that Mr.  
12 Baumann would have been on the hook for.  
13  
14 THE MASTER: Okay.  
15  
16 MR. BODNAR: Thank you.  
17  
18 THE MASTER: Thank you. Let's actually break for five  
19 minutes, if I could. And then --  
20  
21 MR. ROBERTS: Thank you, Your Honour.  
22  
23 THE MASTER: -- then we'll deal with your reply.  
24  
25 MS. ROBERTSON: I expect to be about 15 or 20 minutes.  
26  
27 THE MASTER: You're done, Mr. Bodnar?  
28  
29 MR. BODNAR: I am.  
30  
31 THE MASTER: Okay. Thank you.  
32  
33 THE COURT CLERK: Court adjourned.  
34  
35 THE MASTER: I'll just be five minutes.  
36  
37 (ADJOURNMENT)  
38  
39 THE COURT CLERK: Order in chambers.  
40  
41 THE MASTER: Thank you. Please be seated.

1  
2 So reply, please?

3  
4 MS. ROBERTSON: Thank you, Your Honour.

5  
6 THE MASTER: Yeah.

7  
8 **Submissions by Ms. Robertson**

9  
10 MS. ROBERTSON: I'll start with just responding to my friend Mr.  
11 Bodnar's last statement. He said that -- I'd submit he's giving his own evidence on this,  
12 but that Callidus did not do the prudent thing, and I say quite simply prudence is not  
13 determined in hindsight. The problem with my friend's submissions in this respect is  
14 there's an assumption that everybody knew in 2015 that the economy was worsening, that  
15 it was not going to get better.

16  
17 There is also an internal inconsistency in his submissions on value. He says the value  
18 would have been much better in 2015. We all knew it, because a going concern is worth  
19 more, and I don't know how you have a going concern without funding. So on the one  
20 hand he's saying Callidus should have just put a drop dead date, not funded another penny  
21 to this operation, liquidated right then and there, and yet he's also saying it would have  
22 been worth more, because it was a going concern and we would -- which implicitly means  
23 money going in. And so I have a little bit of a concern about that over and above the fact  
24 that, again, there's absolutely no evidence other than what my friend, I would say,  
25 attempted to give himself, that another lender would have done something different, that  
26 this wasn't prudent, this wasn't commercially reasonable, it was outside the norms.  
27 There's nothing here to suggest that.

28  
29 And that leads me to Mr. Williams' evidence.

30  
31 Mr. Williams' evidence was not submitted as an expert report. When questioned on it, he  
32 very clearly said he was doing math. That's all that report -- that report or affidavit does,  
33 is it's a mathematical exercise. And so it's usefulness to this Court is -- it's there in terms  
34 of the math, but that is the limit to which it can be given.

35  
36 Going then to my friend Ms. Campbell's submissions, she ended with a question. What  
37 could Mr. Baumann have done different in this circumstance? And I answer very clearly.  
38 What he could have done different is not divert \$1.2 million out of his block accounts,  
39 because that's when the distress happened. That's when Callidus was no longer willing to  
40 work with Mr. Baumann, for obvious reasons, and that's illustrated by the letter that is  
41 attached. And I'm not sure if I took you to that or not, but it is at tab 12, the affidavit of

1 Mr. Riley.

2

3 THE MASTER: I think -- I think that saw that one earlier.

4

5 MS. ROBERTSON: And there's two things about this letter. One, it  
6 is this letter that says we're not going to do a forbearance any more as long as Mr.  
7 Baumann is act -- so my friend suggests Mr. Baumann refused to sign a forbearance. No,  
8 Callidus said we're not going ahead with forbearance with Mr. Baumann at the helm, so  
9 that's a little bit different. But the other thing is it does illustrate that that is why Mr.  
10 Baumann was not longer consulted and left at the helm of the business.

11

12 Turning then to the guarantee itself, just a couple of --

13

14 THE MASTER: Yes.

15

16 MS. ROBERTSON: -- basic points. Mr. Baumann had legal counsel  
17 throughout all of this. I say that, and this is one of the problems with the way my friends  
18 have framed their argument is they seem to look at this as whether -- if there's a breach of  
19 the credit agreement, all obligations under the guarantee are done. Two problems with  
20 that. One -- number one is the guarantee isn't a guarantee of the credit agreement. It's a  
21 guarantee of all obligations from Alcan -- between Alcan and Callidus. And I took you to  
22 the terms of the guarantee in that respect yesterday, and it's quite broadly worded.  
23 Number one, it defines loan not just as Facility A, but as all three credit facilities, and  
24 then it also says -- or the credit agreement defines it as all three credit facilities, I should  
25 say, which is also --

26

27 THE MASTER: Yes.

28

29 MS. ROBERTSON: -- another thing. They seem to parse out the  
30 three different facilities. But it also, in the guarantee, says all future credit documents and  
31 credit, and all obligations, and it's a very, very broad definition.

32

33 So it's a bit of a red herring whether or not these advance were being made under the  
34 existing credit agreement, a new credit agreement or just a verbal agreement to continue  
35 to advance whatever it was, because it was still an understanding by Mr. Baumann that he  
36 was guaranteeing all obligations between Alcan and Callidus. And in any event, Mr.  
37 Baumann agreed to this. The evidence is that he agreed. That is at the affidavit of Mr.  
38 Sinclair at paragraph 74. My friend started to take you to that and kind of backed off a bit  
39 and then made a right turn. And Mr. Sinclair's affidavit is at tab 14 paragraph 74.

40

41 THE MASTER: Yes.

1  
2 MS. ROBERTSON: After talking about the changes in the facility  
3 that he was requesting on behalf of Alcan, he deposes:  
4

5 Mr. Baumann was well aware of this request to Callidus and raised no  
6 objection at any time. Callidus agreed to the above modifications.  
7

8 Where my friend took a right turn is he said, in response to reading this paragraph, Mr.  
9 Baumann didn't agree to a forbearance agreement. That is not what this paragraph is  
10 about. This paragraph is about the changes and modifications referenced in paragraph 73.  
11

12 THE MASTER: Well --

13  
14 MS. ROBERTSON: And that is --

15  
16 THE MASTER: -- I think I heard your learned friend basically  
17 abandon all arguments about the creation of the paper at first instance, and focus his  
18 arguments entirely on the administration aspect.  
19

20 MS. ROBERTSON: Correct. This is the after -- the funding after  
21 Mr. Sinclair was at the helm.  
22

23 THE MASTER: Right.  
24

25 MS. ROBERTSON: And these are what they -- they're describing as  
26 the over advances. Mr. Baumann agreed to those. The evidence here from Mr. Sinclair is  
27 Mr. Baumann agreed to the over advance of a bulge of Facility A, for example, of  
28 \$600,000, and that was all in the spring of 2015. This is further --  
29

30 THE MASTER: Yeah, that was in preparation for the spring of  
31 2015.  
32

33 MS. ROBERTSON: Correct. Right, yes.  
34

35 THE MASTER: Yes.  
36

37 MS. ROBERTSON: It's -- and, in fact, it doesn't say exactly when  
38 that was done.  
39

40 THE MASTER: Right.  
41

1 MS. ROBERTSON: But it's in preparation for the spring, of 2015,  
2 you're right.

3  
4 This is also addressed on the questioning of Mr. Sinclair, which is at tab 23.

5  
6 THE MASTER: Yes.

7  
8 MS. ROBERTSON: Mr. Baumann's consent, specifically. Paragraph  
9 -- or, sorry, tab 23.

10  
11 THE MASTER: Yes?

12  
13 MS. ROBERTSON: Page 130.

14  
15 THE MASTER: Yes?

16  
17 MS. ROBERTSON: You'll see at line 11 of page 130, Mr. Bodnar:

18  
19 So in the spring, of 2015, Sir, you had determined that Alcan would not  
20 have sufficient funding unless those modifications were made, correct?  
21 Correct.

22  
23 So your own projections were saying that continued operation of Alcan  
24 was not feasible, unless these modifications occurred?  
25 Yes, correct.

26  
27 And even then I take it you had no certainty that that would help get the  
28 company in a situation where it was once again viable, correct?  
29 No, I felt pretty strongly. We discussed this as a management team and  
30 we thought this was a reasonable target to get us through that period.  
31 And, in fact, it proved that we never did spend anywhere close to that  
32 amount of over advances.

33  
34 I guess it turned out you were wrong ultimately in terms of --  
35 No, I just said that I was right. We didn't spend anywhere close to that  
36 amount.

37  
38 But you were wrong in terms of these measures being helped to put the  
39 company back in a viable position?

40 These measures, as it says, were intended to get us through breakup  
41 season in 2015, and they did precisely that. We never ran out of the

1 availability on Facility A.

2  
3 Well, Callidus did advance on a number of occasions where there was  
4 insufficient margin, right?

5 Not on this adjustment basis.  
6

7 And I should point out that we -- I did take you to the provision of the credit agreement  
8 that said there the adjustments and calculations were solely at the discretion of Callidus  
9 availability. And then:

10  
11  
12 Q Well, Callidus did advance on a number of occasions where  
13 there was insufficient margin, right?

14 Not on this adjustment basis.  
15

16 The adjustment basis being set forth in paragraph -- in  
17 73(a)(b) and(c)?

18 Correct.  
19

20 We'll get that -- to that in a moment. When you say spring, of  
21 2015, do you recall whether that was April, May, June?  
22 Where specifically, sorry?

23  
24 In paragraph 73.  
25

26 And he reads where -- the paragraph we were just at:  
27

28 We had -- we had -- so the funding is for the spring breakup season.  
29 You're asking, I think, if we were -- if I were -- if you were to repeat  
30 your question, I think what I heard you say is when did we come to that  
31 conclusion?  
32

33 Sure.

34 That would have been in probably starting late January until when I was  
35 rehired in mid-February.  
36

37 Okay. So Mr. Boyer --  
38

39 And that's obviously a typo:  
40

41 Mr. Baumann was still the president and director --

1 Yes.

2

3 -- of Alcan at that time?

4 Okay, yes.

5

6 You say in paragraph 74 that he was well aware of that request.

7 Obviously, you can't get into his brain. How are you telling me that he

8 was aware of that request?

9 I was part of the planning process.

10

11 He never provided his consent to you on that, did he?

12 Yes, he did.

13

14 Do you have something in writing, or are you telling me it was all  
15 verbal?

16 It was all verbal.

17

18 So there's Mr. Sinclair's sworn evidence that Mr. Baumann was aware of it and consented

19 to those modifications. And, in any event, my friends still needed to prove prejudice.

20 They haven't done that. They haven't shown how any of this would have affected the

21 ultimate outcome, i.e. the exposure and risk on Mr. Baumann's guarantee.

22

23 And I don't think I need to take you to the numbers again, but the credit agreement is not,  
24 we are credit bid -- or, sorry, the credit bid is not we are bidding 29 point -- \$29 million of  
25 which we're asking that you deduct, in exchange for payment, forgiveness of loan A.

26

27 It could have been worded that way. I've seen many credit agreements -- or, sorry, credit

28 bids worded that way. They -- the credit bid was we are bidding whatever we're owed,

29 minus \$4.5 million. So whatever we're owed was a changing -- is -- it could be a

30 changing number. So unless, and I've already taken Your Lord -- Your Honour to that --

31 unless they can establish today essentially an \$8 million difference, they don't get into the

32 prejudice. There's no prejudice to Mr. Baumann.

33

34 The numbers they've taken Your Honour to are \$5.5 million of the advances from which

35 you have to deduct \$1.3 million in receipts, which means a \$3.7 million difference, and

36 interest on that. That's nowhere near getting from 29 million to what the next highest bid

37 was, which was \$14.5 million, plus \$4.5 million, which is 19-plus, and that's the problem.

38 They can't get over the hurdle of showing prejudice on anything that they have taken Your

39 Honour to today or yesterday.

40

41 So one of -- one of the comments that my friend -- or one of the things my friend has



1 taken you to is previous cases of Callidus, involving Callidus, and just -- I don't even  
2 know what --

3  
4 THE MASTER: I'm considering those from --

5  
6 MS. ROBERTSON: -- relevance that is.

7  
8 THE MASTER: I'm not considering them from --

9  
10 MS. ROBERTSON: Okay.

11  
12 THE MASTER: -- a similar fact evidence --

13  
14 MS. ROBERTSON: Okay.

15  
16 THE MASTER: -- perspective.

17  
18 MS. ROBERTSON: I won't go into that, then.

19  
20 They -- one of the other comments my friend made was in respect to the Ritter decision,  
21 and he said he would like to see a case that says that deficiency needs to be fixed. I have  
22 had handed up a decision which part of our discussion yesterday about Ritter, and I think  
23 what led to the discussion about what decision Ritter had --

24  
25 THE MASTER: Right.

26  
27 MS. ROBERTSON: -- Mr. Justice Ritter might have rendered was  
28 my statement that it's trite that a secured creditor can realize their security --

29  
30 THE MASTER: Right.

31  
32 MS. ROBERTSON: -- whenever they want. I have handed to  
33 Madam Clerk a decision that supports that, and it's probably on your desk now. It is the  
34 decision of Ontario Court of Appeal, and it's -- contains the citation which is everywhere  
35 and used for this proposition at --

36  
37 THE MASTER: Right.

38  
39 MS. ROBERTSON: -- paragraph 67 from *Oak Orchard*. And this is  
40 specifically with respect to a mortgage, although it's been applied in receivership, has  
41 been applied all over the place with respect to secured creditors enforcing their securities:

1  
2 A mortgagee selling under a power of sale is under a duty to take  
3 reasonable precautions to obtain the true market value of the mortgaged  
4 property at the date on which he decides to sell it.  
5

6 And then over at paragraph 4 of that citation:  
7

8 The mortgagee is entitled to exercise an accrued power of sale for his  
9 own purposes whenever he chooses to do so. It matters not that the  
10 moment might be unpropitious.  
11

12 Why can't I say that?  
13

14 THE MASTER: (INDISCERNIBLE).  
15

16 MS. ROBERTSON: Propitious?  
17

18 And that by waiting, a higher price could be obtained.  
19

20 I have to say there was an entire year that I couldn't say remuneration so I'd avoid using  
21 that word in submissions at all cost.  
22

23 The other point I wanted to address is my friend's comment that Mr. Baumann is a -- is an  
24 accommodation surety, and I didn't expect that to be raised, because I think it's kind of  
25 obvious that he is not an accommodation surety. An accommodation surety is a surety  
26 that has no interest in the business. It's generally the difference between insiders and  
27 outsiders. Often spouses, for example, will be considered accommodation sureties, but  
28 even they will sometimes be considered compensated if they're deriving a benefit from  
29 the company. And because I wasn't expecting that, I don't have a case on that point, but I  
30 do know the name of a BC Court of Appeal case that references this and says that  
31 shareholders are generally compensated sureties, because they're deriving a benefit from  
32 the company, and that case is *Coast Mountain Aviations v. Brooks*, and it's a 2012  
33 decision of the BC Court of Appeal. And I believe it's at paragraph 69 that that is  
34 referenced. And I also note in the *Waylands* case that the Court does go on and say he's  
35 compensated, even though he would -- never got these fees, because he had an investment  
36 interest in the company. And in any event, the only thing, the difference between a  
37 compensate and accommodation surety, what that rests on is only the level of degree you  
38 hold the person to the -- to the guarantee itself. And, again, you get back to fact that Mr.  
39 Baumann was represented by legal counsel. I took you yesterday through the pretty  
40 vigorous negotiations. There was negotiations back and forth at that time about all of  
41 these agreements which just -- which shows there was -- this wasn't a situation where he

1 was vulnerable and had no understanding of what his obligations was with respect to this.

2  
3 So then I think my final point, subject to a note being madly handed to me, is one that I  
4 think I said many times, but is bearing worth repeating. Other than counsel's opinion,  
5 there has been absolutely no evidence as to what another lender would have done. The  
6 onus is upon them to show that there is a triable issue on evidence, that what was done  
7 was not reasonable, was not prudent, was not commercially acceptable. We have nothing.  
8 We don't have a licensed receiver. We don't have another banker saying, look, if I  
9 stepped into this, there's no way I would have let it ride a little bit. I would have just  
10 brought down the hammer. I wouldn't have brought in Paleco. I wouldn't have moved the  
11 equipment, despite that we had a landlord kicking us out. I would have just thrown the  
12 keys to an auctioneer and this would have been so much better. And that's a pretty  
13 startling position to be taking, that that's what should have been done, and that would  
14 have been what a prudent lender would have done. I cannot imagine, but that's me giving  
15 evidence, as my friend did, as to what a prudent lender would have done.

16  
17 And I think that those are the -- those are the extent of my reply submissions, Your  
18 Honour.

19  
20 THE MASTER: I just have --

21  
22 MS. ROBERTSON: -- subject to any questions.

23  
24 MS. ROBERTSON: -- a question. I don't know if anything turns on  
25 it or not, but Mr. Sinclair, if I recall, was a -- became a director of the corporation, puts  
26 him in a fiduciary position in relation to the corporation, at least.

27  
28 MS. ROBERTSON: M-hm.

29  
30 THE MASTER: And the corporation's stakeholders. Is there any  
31 obligation on Mr. Sinclair, who's also your client, to disclose that he had -- and I  
32 recognize this isn't a publically traded company.

33  
34 MS. ROBERTSON: Right.

35  
36 THE MASTER: But to disclose that, by the way, he had been  
37 banned from being a director of publically traded companies? It seems to me that's  
38 awfully close to the line in terms of if you're going to serve as a director of a -- of a  
39 corporation, you might want to disclose those things.

40  
41 MS. ROBERTSON: Well, A, there's no evidence that he didn't. It

1 was clearly publically available information. His obligations are the obligations as a  
2 director and officer under the *Business Corporations Act* and common-law, but I don't -- I  
3 guess it goes back to where's the evidence that he did anything that breached his fiduciary  
4 duties?

5

6 THE MASTER: Well, I'm just asking --

7

8 MS. ROBERTSON: Yeah.

9

10 THE MASTER: -- was there a duty to even disclose it --

11

12 MS. ROBERTSON: I don't know.

13

14 THE MASTER: -- in the first place?

15

16 MS. ROBERTSON: I honestly --

17

18 THE MASTER: I think Mr. Baumann's evidence, if I'm not  
19 mistaken, was he didn't find that out until well after the fact.

20

21 MS. ROBERTSON: Oh, I don't think --

22

23 THE MASTER: I think that was --

24

25 MS. ROBERTSON: -- he said when he found it out. I don't think  
26 there was timing on that.

27

28 THE MASTER: Okay.

29

30 MS. ROBERTSON: But I don't think -- I mean, with respect, I don't  
31 think anything --

32

33 THE MASTER: Yeah.

34

35 MS. ROBERTSON: -- turns on that at all, I -- but I can't answer --

36

37 THE MASTER: Okay.

38

39 MS. ROBERTSON: -- whether or not there was a duty to disclose  
40 that --

41

1 THE MASTER: Okay.  
2

3 MS. ROBERTSON: -- or not. I mean, it was 2009.  
4

5 THE MASTER: Right.  
6

7 MS. ROBERTSON: So we're talking --  
8

9 THE MASTER: Okay.  
10

11 MS. ROBERTSON: -- almost a decade earlier.  
12

13 THE MASTER: And then my other question is, is more than \$5  
14 million was advanced post-issuance of -- post-demand was about \$5.7 million was  
15 advanced.  
16

17 MS. ROBERTSON: M-hm.  
18

19 THE MASTER: Post-issuance of Statement of Claim was 5  
20 million.  
21

22 MS. ROBERTSON: M-hm.  
23

24 THE MASTER: More or less. And the only consent that I've  
25 heard argued for that are the Bower clauses in the guarantee. There's no suggestion that  
26 there was any expressed consent given for that, is there?  
27

28 MS. ROBERTSON: Well, the provision I took you to, Mr. Sinclair  
29 said the modifications that were being done in early 2015 were agreed to by Mr.  
30 Baumann.  
31

32 THE MASTER: They don't come remotely close to --  
33

34 MS. ROBERTSON: That --  
35

36 THE MASTER: -- to amount --  
37

38 MS. ROBERTSON: To five million.  
39

40 THE MASTER: Not even, close.  
41

1 MS. ROBERTSON: No, but I --  
2  
3 THE MASTER: Right?  
4  
5 MS. ROBERTSON: I mean, I guess it gets to the point I was making  
6 yesterday which is you can't put all of these together, which is -- there is two sources of --  
7 and avenues for recovery by Callidus. They have two baskets of security. They had the  
8 baskets of security, which were the Alcan assets that they were going after, and how'd  
9 they realize on those assets? They -- again, the question is whether or not they were  
10 prudently doing it. They did that through the process and continued to advance whether --  
11 let's -- if they appointed a receiver right then and there, these would be receiver's  
12 borrowings and they would be receiver's charges and all of the rest. There would be --  
13  
14 THE MASTER: And everybody --  
15  
16 MS. ROBERTSON: -- advances.  
17  
18 THE MASTER: -- would know up front that --  
19  
20 MS. ROBERTSON: Right, yes.  
21  
22 THE MASTER: Everybody -- and that's the problem.  
23  
24 MS. ROBERTSON: Yeah.  
25  
26 THE MASTER: And this is when --  
27  
28 MR. ROBERTS: Can I maybe try -- try and answer your  
29 question?  
30  
31 THE MASTER: Sure. Sure.  
32  
33 **Submissions by Mr. Roberts**  
34  
35 MR. ROBERTS: Your Honour, when you say 5 million advanced,  
36 it was an aggregate of 5 million against the revolver.  
37  
38 THE MASTER: Right.  
39  
40 MR. ROBERTS: So the facility is the revolver. B and C are fixed  
41 term loans. No new money was advanced against B and C. It's only against A.

1  
2 THE MASTER: Right.  
3  
4 MR. ROBERTS: So \$5 million is advanced, but it revolves up  
5 and down. And so what Ms. Robertson was saying was there was consent to a change in  
6 the margining criteria. Based on that changed margining criteria, I -- an aggregate of 5  
7 million was advanced of which 4-point-something-million was repaid, because the end  
8 balance of Facility A was -- I forget the number, but it's 1.5ish, meaning 5 million  
9 advanced, but 3.5 paid back.  
10  
11 THE MASTER: Right.  
12  
13 MR. ROBERTS: So if your question was was there consent when  
14 Ms. Robertson took you to what Mr. Sinclair says that Mr. Baumann -- Mr. Baumann  
15 consented, consenting to the changed margin criteria is a consent --  
16  
17 THE MASTER: Where --  
18  
19 MR. ROBERTS: -- to advance of the 5 million.  
20  
21 THE MASTER: Where is an express statement of that, to a  
22 change in the margin criteria?  
23  
24 MR. ROBERTS: That was in Mr. Sinclair's questioning  
25 transcript.  
26  
27 MS. ROBERTSON: Which is tab 23 page 170?  
28  
29 MR. ROBERTS: And at page 13 --  
30  
31 MS. ROBERTSON: 130, or 1 --  
32  
33 MR. ROBERTS: 132?  
34  
35 THE MASTER: Because basically the change in the margin  
36 criteria went from very strict criteria to almost no criteria.  
37  
38 MR. ROBERTS: Well --  
39  
40 MS. ROBERTSON: Well --  
41

1 MR. ROBERTS: -- as Mr. Sinclair says, the change was actually  
2 on a week-by-week basis to a \$600,000 bulge, to allow 600 extra.

3  
4 THE MASTER: Right.

5  
6 MR. ROBERTS: It's just that if you do 600 each week, you'd have  
7 an aggregate advance of 5 million, but he does say that Mr. Baumann consented to it.

8  
9 THE MASTER: And, okay.

10  
11 MR. ROBERTS: Yeah.

12  
13 THE MASTER: I'll leave it at that.

14  
15 **Submissions by Ms. Robertson**

16  
17 MS. ROBERTSON: And just to finish my thought, you had that in  
18 the Alcan security baskets. You had the guarantee, which is a completely different basket  
19 of security. And so it's -- the tendency is to kind of lump all these things together, but  
20 Alcan was dealing with that in that manner, was dealing with the guarantee in this manner  
21 in the foreclosure proceedings, and the defences that were brought has been for  
22 proceeding with that action accordingly.

23  
24 THE MASTER: Okay. Thank you.

25  
26 **Submissions by Mr. Bodnar**

27  
28 MR. BODNAR: Sir, I would just like to comment and clarify  
29 something in paragraph 73, if I might.

30  
31 THE MASTER: And then I'll give the last word to --

32  
33 MR. BODNAR: Sure, yeah. That's fine. But think that it's  
34 important here, because --

35  
36 THE MASTER: Yeah.

37  
38 MR. BODNAR: -- as I had indicated on the evidence, I mean --

39  
40 THE MASTER: Yes.

41



1 MR. BODNAR: -- 73 never happened, and I just want to make  
2 sure that you're clear on that. I mean, there was nothing in writing. There's no evidence  
3 in writing that this was -- that this was ever done, this was ever proposed to Callidus. As  
4 he says, there'd been -- because -- and it couldn't have been done, because of the timing,  
5 right? And I tried, and maybe I -- you know, maybe I got lost in the thought here, but I  
6 think I tried to establish that with you is that when Mr. -- when Mr. Sinclair allegedly  
7 made this alleged modified funding criteria, he says in the transcript reference that my  
8 friend read, that was January, or February. It would have been January or February,  
9 because he's projecting 13 weeks out to spring, 2015, and he's talking about modifications  
10 that also take into account the \$100,000 net of recovery which he didn't -- which he didn't  
11 discover until April 20th.

12  
13 So it's impossible. He's not -- he -- there's nothing -- there's nothing in writing. It's  
14 impossible. The timing is impossible.

15  
16 And 74, again, I questioned him on this, but on 74 he says Mr. Baumann's well aware of  
17 this request and raised no objection at any time. Well, I mean, it's nice for him to say that  
18 he was aware of a verbal -- verbally consented to a request that -- to a modification that's  
19 never, in fact, happened, or never, in fact, were proposed. But, you know, again Mr.  
20 Baumann -- first of all, this is reply evidence, so Mr. Baumann didn't have an opportunity  
21 to look at this and say, well, nothing like this was ever proposed to me, and I -- and I  
22 didn't consent.

23  
24 What he did, what is clear, the evidence is clear on is that he did not consent to a  
25 forbearance. And if you look at paragraph 73, these -- this alleged -- this alleged change  
26 in funding criteria, 73(a), is a forbearance agreement. Callidus would begin to accrue  
27 interest in all three facilities and not debit interest payments on those facilities from  
28 Facility A. That was a forbearance agreement. The evidence is clear Mr. Baumann didn't  
29 agree to it. B talks about an over advance or bulge of \$600,000, and Mr. Williams, in his  
30 affidavit -- sorry, in his cross-examination transcript said it would have only changed two,  
31 his opinion with respect to the first two over advances, and there still would have been 41,  
32 which were at margin. And number -- and C, just plain and simple, never happened,  
33 because Mr. Sinclair didn't discover this alleged misappropriation until three months after  
34 this alleged modified funding criteria occurred.

35  
36 So I just wanted to clarify that, because, again, I'm not contesting the wording of the -- of  
37 the credit -- the loan documents in the sense of the credit agreement and the share pledge  
38 agreement and the guarantee that were executed back in 2014, but, Sir, I'm certainly not  
39 admitting that there was ever any agreed upon modification to the -- to the loan  
40 documents, as Mr. Sinclair alleges.

41

1 And the only other thing, Sir, is that this case that my friend gave me at the break about  
2 20 minutes ago, *Manufacturers Life*, it's a mortgage -- it's a decision in a mortgage  
3 context, and if we're going to be talking about mortgage cases, Sir, you'll be aware of the  
4 cases that say if a lender delays in applying for a Rice Order, then courts can require the  
5 Offer to Purchase to be at an earlier higher value. So, I mean, again I'm not sure how  
6 closely the mortgage cases relate to these cases, but if we're looking at mortgage cases,  
7 we have to keep that in mind and draw an analogy, in my respectful submission, about  
8 waiting until a guarantee can get exposed to the full \$6 million.

9  
10 Thank you.

11  
12 THE MASTER: Thank you. Ms. Robertson?

13  
14 **Submissions by Ms. Robertson**

15  
16 MS. ROBERTSON: With respect, my friend there has miss -- not  
17 quite under -- appreciating the distinction between the Rice Order line of authorities,  
18 which is what Mr. Justice Ritter was looking at, and the purposes of valuation for a  
19 deficiency, which is entirely different than a secured creditor realizing on its security  
20 under a general security agreement, as is the case here.

21  
22 In any event, I go back to again my friend is making whole -- a lot of inferences on  
23 paragraph 73 and what Mr. Sinclair is saying, and he's filling in a lot of gaps. Mr.  
24 Sinclair's evidence is he started preparing cash flow statements, and as they did -- as he  
25 did those, he took these sorts of things into account with his intention to ask for these  
26 modifications. He asked for these modifications, and Mr. Baumann, as per the  
27 questioning, consented to those modifications which you heard my friend describe what --  
28 how that \$600,000 really translates to the \$5.5 million.

29  
30 And I think that that's -- that's it, subject to any further questions.

31  
32 **Decision**

33  
34 THE MASTER: Okay. Thank you all for your submissions.

35  
36 I think I am in a position to give a decision here. It is an application for summary  
37 judgment, no more, no less. That is what the application was for, because that is what  
38 you need to get to be able to get a redemption order. So it is an application for summary  
39 judgment on Callidus' main claim.

40  
41 In my view, the facts here are not sufficiently developed, or the record sufficiently

1 developed such that I can grant summary judgment and grant the redemption order. I  
2 think this case stretches the limits of Bower clauses. It may well be that Callidus prevails  
3 at trial and what appears to be, on its face, well-worded documents in terms of the consent  
4 given to Callidus to make variations and the like and to advance what it wishes when it  
5 wishes, and to grant extensions as it sees fit, it may well be that that position ultimately  
6 prevails, but I think there's enough on the facts here to show issues with merit for trial.

7  
8 What we have got is a demand that was made in March, of 2015, a loan agreement that  
9 seems to suggest that concurrently with declaration of the balance owing, that the ability  
10 of the borrower to make further borrowings, at least arguably, is immediately terminated.  
11 That's contained in the loan agreement, as opposed to the guarantee, but there is an  
12 argument that that is the underlying obligations, the loan agreement, in terms of what is  
13 owed. So there is at least an argument that further borrowings ought to have been  
14 terminated then.

15  
16 There is evidence that is largely undisputed that shows at least \$5 million advanced  
17 post-issuance of the Statement of Claim, albeit revolving, but it was advanced. It shows  
18 \$5.7 million more or less post-demand and, again, while that is revolving, the  
19 consequence of carrying on the business for a further year was about at least \$7 million in  
20 additional interest.

21  
22 One can get into the ability of the lender to postpone sale and the like, but at some point a  
23 Court needs to evaluate whether the Bower clause saves some of the things that were  
24 done in terms of the administration or not, whether the Bower clauses and the guarantees  
25 save that or not, and in my view that needs to be done within a fuller factual matrix, and  
26 assessing credibility of witnesses and the like. So there is an argument at least that Mr.  
27 Baumann can show some prejudice with respect to him on his guarantee, the primary  
28 prejudice being the incurring of significant additional interest during the administration  
29 and in many ways, it might be possible to characterize what happened as a soft  
30 receivership, but that is neither here nor there.

31  
32 There is little direct evidence on Mr. Baumann's allegation of some underlying plan to  
33 take over the business. Mr. Baumann alludes to that in his evidence. There is no direct  
34 comment denying that on the affidavits of the Callidus people, and the evidence is  
35 relatively slim on that.

36  
37 There is some corroborative evidence in terms of Mr. Baumann's allegation that Mr.  
38 Sinclair was acting favouring Callidus, rather than favouring the interests of the  
39 corporation and its shareholders. There is at least some corroborative evidence of that,  
40 because as was reviewed in May, of 2015, Mr. Sinclair was operating thereafter after  
41 having the power of attorney exercised. So it was clearly Callidus that was in a position

1 to control the corporation and control this appointment or removal as a director.  
2

3 I think primarily the thing that leads me to conclude that this simply can't be concluded on  
4 a summary basis at this stage is the fact that there were significant advances post-demand  
5 and post-issuance of the Statement of Claim, and I think that needs to be properly  
6 explained before Callidus is in a position to enforce the mortgage by way of a redemption  
7 order.  
8

9 So the application for summary judgment and a redemption order is dismissed. I think  
10 that leads to a couple of issues.  
11

12 One thing we need to discuss probably is costs, and the other thing we need to discuss is  
13 Mr. Baumann posted some security in exchange for an adjournment of this application.  
14 This application has now been heard, and I think the thing that needs to be discussed is  
15 what ought to happen with that security.  
16

17 **Submissions by Mr. Bodnar (Costs)**  
18

19 MR. BODNAR: Yes, Sir. If I might, I would just submit costs  
20 ought to be paid forthwith in any event of the cause, and I would also submit that Mr.  
21 Baumann ought to unconditionally get his funds back.  
22

23 THE MASTER: Ms. Robertson and/or Mr. Roberts, whoever  
24 wishes to speak to it.  
25

26 MR. ROBERTS: Yes.  
27

28 THE MASTER: Okay. Yes, go ahead --  
29

30 MR. ROBERTS: We --  
31

32 THE MASTER: -- Mr. Roberts.  
33

34 **Submissions by Mr. Roberts (Costs)**  
35

36 MR. ROBERTS: Costs be in the cause, (INDISCERNIBLE) if  
37 Callidus turns out to be correct, the debt will far, far, far exceed the value of these lands.  
38 Callidus will be looking at a very, very significant shortfall, and so costs in the cause, as  
39 opposed to paying it now, would put them further behind the eight ball. So we'd just ask  
40 that costs be in the cause.  
41

1 We'd ask that the funds continue to be held as they did delay things by six months or  
2 whatever it is, meaning if this application had been -- happened six months ago, we could  
3 be now well advanced to having a trial by today, and so we'd ask that the funds continue  
4 to be held.

5  
6 THE MASTER: Yeah, thank you. Mr. Bodnar, reply?

7  
8 **Submissions by Mr. Bodnar (Costs)**

9  
10 MR. BODNAR: Well, I mean, I can't say much of anything  
11 except to reiterate my initial submissions. This was a separate, discrete issue. Maybe if  
12 Callidus had recognized that there were triable issues, we wouldn't have had to have --  
13 have this whole application. We wouldn't have had to waste the last six months doing a  
14 summary judgment application. We wouldn't have had to worry about an adjournment.  
15 We would have gone on to trial.

16  
17 So this was a separate, discrete piece. Costs ought to be payable forthwith in any event of  
18 the cause. Mr. Baumann has had to concur significant legal fees to oppose this  
19 application on which he prevailed. And, again, the -- there's no reason for the -- his  
20 \$150,000 to be -- continue to be tied up in court. They were there for security to make  
21 sure that this application was heard today. They weren't posted in the nature of penalty.  
22 They weren't posted in the nature of security. The condition precedent has now been  
23 fulfilled. There's no reason for those funds to continue, for him to continue to be deprived  
24 of access to those funds.

25  
26 THE MASTER: Okay.

27  
28 **Submissions by Ms. Robertson (Costs)**

29  
30 MS. ROBERTSON: My -- Your Honour, I'll just raise one point.  
31 The first time that it was ever brought up that this matter was not suitable for summary  
32 determination was when their brief was filed. So the fact that it didn't proceed to trial  
33 certainly was not in the face of opposition of this process.

34  
35 THE MASTER: Well, I think they opposed summary judgment  
36 and made you bring an application, which is a pretty good sign that they don't agree to  
37 summary judgment, isn't it?

38  
39 MR. BODNAR: But the adjournment -- the adjournment  
40 application --  
41

1 THE MASTER: Yeah.

2

3 MR. BODNAR: -- was to adjourn, not because of a summary  
4 judgment.

5

6 THE MASTER: Well, it was to adjourn, because they opposed  
7 application for summary judgment.

8

9 MR. BODNAR: Right.

10

11 **Decision (Costs)**

12

13 THE MASTER: So costs, the normal rule is -- in Alberta is costs  
14 follow the event of an application. In this one, the summary judgment application was  
15 unsuccessful. The parties did need to expend costs on it. It turned out to be an  
16 unsuccessful summary judgment application, so I do think the normal rule should apply  
17 and Mr. Baumann's entitled to costs payable forthwith. I think Column 5's the appropriate  
18 column, based on the numbers involved. So pursuant to Column 5.

19

20 And with respect to the funds that are held in court -- are they in court or in a trust  
21 account? I can't remember.

22

23 MR. ROBERTS: In a trust account.

24

25 THE MASTER: In a trust account. Okay.

26

27 With respect to those funds, I do think they ought to go back to Mr. Baumann. He posted  
28 that as security for any prejudice arising from a delay in the hearing of the summary  
29 judgment application. He successfully resisted the summary judgment application. So I  
30 think the purpose has been met in relation to that.

31

32 The lender did have options of instead of pursuing the summary judgment application,  
33 going ahead with the normal movement towards trial process. It had its -- it made its  
34 decision as to what it was going to do, and that's not to be second-guessed. The lender  
35 made its decision, but I think Mr. Baumann did post the security, as required. It did meet  
36 its purpose in terms of posting some additional security in the event that he was  
37 unsuccessful in defending the summary judgment application, and I think that purpose has  
38 now been met and those funds can be released back to Mr. Baumann. Okay? Thank you.

39

40 MR. BODNAR: Thank you, Sir.

41

1 MR. ROBERTS:

Thank you, Your Honour.

2

3 MS. ROBERTSON:

Thank you, Sir.

4

5

6

7 PROCEEDINGS CONCLUDED

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I, Amanda Williams, certify that this recording is a record made of the oral evidence in the proceedings held in courtroom 902 in Calgary, Alberta, it's Court of Queen's Bench, on Wednesday, March 21st, 2018, and that I was the court official in charge of the sound-recording machine during the proceedings.



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I, Deborah Jane Brower, certify that

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