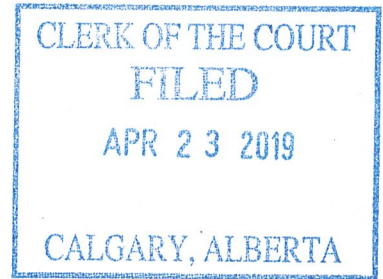


**Court of Queen's Bench of Alberta**

**Citation: Baumann v Callidus Capital Corporation, 2019 ABQB 281**



**Date:**  
**Docket: 1801 09078**  
**Registry: Calgary**

Between:

**Kevin Baumann**

Applicant

- and -

**Callidus Corporation and James Riley**

Respondents

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**Endorsement  
of the  
Honourable Mr. Justice P.R. Jeffrey**

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***Background***

[1] On May 3, 2018, a company called Alken Basin Drilling Ltd (“**Alken**”) sued the Respondent Callidus for fraud, for breach of a credit agreement, and for misappropriating Alken’s opportunities (the “**Claim**”). On May 15, 2018, Alken discontinued the Claim. This application seeks its reinstatement. Different persons purported to control Alken at those times. At issue is which was a valid act of Alken.

[2] Callidus had been Alken’s primary lender. The Claim alleges, essentially, that Callidus “jacked-up” Alken’s debt to trigger its default, placed it in Receivership, and then via a wholly owned subsidiary bought all Alken’s assets and opportunities at a discount.

[3] Callidus had applied for Alken to be placed in receivership, successfully. The receivership resulted in a Court approved sale of all Alken's assets to a wholly owned subsidiary of Callidus, Altair Water and Drilling Services Ltd. ("**Altair**"). Some months later this Court discharged the Receiver.

[4] The Applicant Baumann caused Alken to commence the Claim. He owned the majority of Alken's shares before the receivership; he continues to own a controlling interest now.

[5] To commence the Claim, Baumann notified corporate registry that he was Alken's director. Then he revived Alken's status at corporate registry; it had not made its filings.

[6] Callidus says that Baumann did not have the authority to proclaim himself director of Alken or, therefore, to have it commence the Claim. Callidus says it alone had the power to vote Baumann's shares in Alken, pursuant to a power of attorney granted to it by Baumann some time earlier, as part of a further share pledge agreement (the "**Power of Attorney**"). Callidus previously triggered its right to vote Baumann's shares, and did so, after Alken defaulted on its loan from Callidus. Callidus says that it continues to be solely entitled to vote those shares. It says, in effect, that its rights under the Power of Attorney have not ended, lapsed or expired.

[7] So, after Callidus was served with Alken's Claim against it, Callidus notified corporate registry that a Mr. Riley (the second named Respondent in this application) had been installed as its new sole director, thereby replacing Baumann (the "**Director Change**"). Riley then retained new counsel for Alken and instructed that new counsel to discontinue the Claim. The new lawyer did so (the "**Discontinuance**").

[8] The sale of Alken's assets did not generate enough funds to repay all that Callidus claims it is due. There remains, it alleges, a deficiency. Callidus sued Baumann on his personal guarantee of Alken's obligations to Callidus (the "**Guarantee Action**"). Baumann has defended that action, alleging a change to the risk profile of the guarantee and, as a consequence, opposing the enforceability of the guarantee. Baumann also counter-claimed, alleging essentially the same things as Alken alleges in the Claim.

[9] The Guarantee Action continues in litigation before this Court.

### ***The Application***

[10] Baumann asks the Court to set aside the Director Change and the Discontinuance (the "**Impugned Steps**"). Baumann says that Callidus did not have authority to replace him as sole director of Alken or, in any event, to authorize the Discontinuance. Baumann says the Power of Attorney and the broader share pledge agreement were no longer in effect at the time, after the completion of the receivership of Alken and the conveyance of all Alken's assets to Altair.

[11] He says further that Callidus was "high handed" when it discontinued the Claim and, further, it usurped the authority of the Court. Baumann asks the Court to declare him the legitimate director of Alken.

***Decision***

[12] I grant the application in part. I set aside the Discontinuance and I suspend the ability of Riley to direct the affairs of Alken pending agreement of the parties or further order of the Court. I decline the remaining relief requested.

[13] I decline the remaining relief and only suspend the authority of Riley as director, for the same reason I grant the request to set aside the Discontinuance. Coming to the contrary conclusion on any of those matters would deny one of the parties access to procedural fairness on the issue.

[14] The validity of the Impugned Steps is a foundational issue in the Claim. By the Discontinuance, Callidus has achieved its preferred trial outcome, without the bother of the trial. More critically, Alken's allegations have been silenced without opportunity for their hearing.

[15] The validity issue can be heard fairly to all parties, then determined, in the normal course of litigation of the Claim. It cannot be determined fairly to all parties unless the Discontinuance is set aside. To *not* set aside the Discontinuance would be to deny Alken and the stakeholders it represents (under Baumann's understanding of his status *viz à viz* Alken) their day in court on that issue. It would be to allow Callidus to win on the issue of its authority to vote Baumann's shares, in the Alken Claim, without ever having to prevail on the issue in court. The effect would be to end forever the Alken Claim without fair process around a foundational issue. It would amount to the court endorsing Callidus' unilateral action with the effect that it would avoid any accountability for its allegedly illegal actions. It would effectively amount to a striking of the Claim without Callidus having to satisfy the requisite test.

[16] The validity of the Impugned Steps, Callidus says, can be litigated in the Guarantee Action. That may be, but Alken is not a party to the Guarantee Action; Alken's interests and its legal position are not coincident with Baumann's.

[17] The validity of the Impugned Steps cannot be resolved on this record. Such determinations require consideration of the validity of antecedent events, a sufficient record of which is not before the Court.

[18] Callidus raises many seemingly valid reasons for why I should dismiss this application. It says any cause of action alleged in the Claim was sold to Altair in the receivership. It says the court decisions and events in the receivership, following notice of them to Baumann, foreclose Baumann's conduct. It says Alken's Claim was commenced improperly. It says Baumann improperly assumed the director role of Alken. It says its right to vote Baumann's shares has continued throughout because Baumann remains in default of his guarantee of Alken's debt to Callidus, despite demand. It says the Claim may be filed too late.

[19] Again, determining these issues requires findings on prior events between the parties, which is not fairly feasible on this record. Further, many of these arguments succeed only if Baumann's allegations in the related claim fail. But they should have opportunity to be heard first. These are issues for the Court to determine, not to be circumvented by Callidus continuing the very conduct challenged in the lawsuit itself. If Baumann is correct, then Alken and its proper stakeholders are entitled to their day in Court as the Claim is prosecuted. Their day in court will

determine whether Baumann is correct. Absent the relief I grant, those (potential) Alken stakeholders would be denied opportunity to be heard, denied the fair process court litigation entails for such disputes. Callidus would be permitted to behave as Alken alleges with impunity. Put in the extreme, an exception will have been found to the rule of law.

[20] This record does not permit a determination on such questions fairly at this stage. It does not permit a determination of which party enjoyed the requisite authority to vote Baumann's shares in Alken, and to direct Alken in respect of its Claim, at the relevant times. It does not permit any disposition summarily, which is effectively the request of each.

[21] For the same reasons, this record also does not permit a determination of Baumann's allegation that the effect of the various security agreements in play would grant it "an absolute shield in their dealings with" the debtor Alken, as described in the case relied upon by Baumann: *1239745 Ontario Ltd v Bank of America Canada*, [1999] OJ No 3178 (Ont SCJ) at para 74.

[22] Just as not setting aside the Impugned Steps would be to end the entire Claim without Alken having opportunity to be heard on the questions around the validity of those Steps, under Baumann's understanding of it, so too would it be unjust for the Court to now declare Baumann to be the legitimate director. These issues are for trial, or at least for determination following a process in which procedural fairness operates. Similarly, I have declined to rule Callidus' approach as either high-handed or an usurpation.

#### ***What has not been decided***

[23] This application arises in the context of a complex web of related litigation. My findings and conclusions pertaining to this application are not to be taken as deciding or estopping anything else, directly or collaterally, in those other related contexts, including the Claim and the Guarantee Action. My findings and conclusions are for purposes of the narrow issue on this application alone. For example, and without limiting the generality of the foregoing, this decision is not a determination of:

- a. Who currently enjoys validly the authority of "director" over the affairs of Alken, if any of the contenders, or who did at any particular time;
- b. Whether Callidus' rights to vote Baumann's shares expired following some event within the receivership or upon its conclusion;
- c. Whether there was ever any valid event of default and if so whether it was continuing;
- d. Whether the Power of Attorney was limited in scope, specifically only to ensure Baumann's shares were voted to ensure Alken complied with the covenants in the security it granted Callidus;
- e. Whether the Alken Claim was validly commenced;
- f. Whether any cause of action alleged in the Claim existed prior to the sale of assets to Altair via the receivership;

- g. Whether any cause of action alleged in the Claim was included in the assets sold in the receivership process to Altair;
- h. Whether the Claim is a collateral attack on one or some of the Orders in the receivership;  
and
- i. Whether the Claim is out of time under limitations legislation.

[24] A finding on such issues is not necessary for the proper determination of this application. More critically, a finding on a sufficient number of these issues to be dispositive of this application is not possible on this record and at this preliminary stage, while still being procedurally fair to the parties.

***Conclusion***

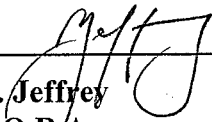
[25] For the reasons above, I set aside the Discontinuance and suspend the ability of Riley to direct the affairs of Alken. Neither Riley or Baumann may direct Alken, without prior written agreement of the parties or further order of the Court.

[26] The passing of time shall not count against Alken for limitations purposes and for purposes of litigation deadlines in the Rules of Court and for corporate registration purposes, commencing from the date Callidus discontinued the Claim until the time the issue of who may instruct its litigation counsel is determined.

[27] Baumann is entitled to his party and party costs of this application plus any costs incurred in reinstating the Claim in this Court.

Heard on the 21<sup>st</sup> day of February, 2019 and the 8<sup>th</sup> day of April, 2019.

**Dated** at the City of Calgary, Alberta this 23<sup>rd</sup> day of April, 2019.

  
\_\_\_\_\_  
P.R. Jeffrey  
J.C.Q.B.A.

**Appearances:**

Eugene J. Bodnar  
for the Applicant

Kyle T. Gardiner  
for the Respondents