SUPERIOR COURT

(Commercial Division)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-057679-199

DATE: November 1, 2021

BY THE HONOURABLE MARIE-ANNE PAQUETTE, J.S.C.

IN THE MATTER OF THE RESTRUCTURING UNDER THE ***COMPANIES CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36 OF:**

FORTRESS GLOBAL ENTERPRISES INC.

FORTRESS SPECIALTY CELLULOSE INC.

FORTRESS BIOENERGY LTD.

FORTRESS XYLITOL INC.

9217-6536 QUÉBEC INC.

Debtors

DELOITTE RESTRUCTURING INC.

Monitor / APPLICANT

INVESTISSEMENT QUÉBEC
FIERA PRIVATE DEBT INC.

Secured Creditors

GOULDS PUMPS CANADA INC.

ITT GOULDS PUMPS INC.

Mises-en-cause

OMNI BRIDGEWAY (FUND 5) CANADA INVESTMENTS LIMITED

Mise-en-cause

JUDGMENT
ON THE APPLICATION OF THE MONITOR FOR THE ISSUANCE OF AN ORDER APPROVING: (I) A LITIGATION FUNDING AGREEMENT; (II) A $6M LITIGATION FINANCING CHARGE; AND (III) THE TRANSFER OF LITIGATION PROCEEDINGS TO THE COMMERCIAL DIVISION OF THE SUPERIOR COURT (SEQ. 100)

OVERVIEW

[1] For various understandable reasons, a plaintiff may lack the financial means or the motivation (or both) to properly assert his rights and to pursue a litigation. Third parties may then come into play and offer the necessary financing, in exchange for expected returns and advantages. Such agreements, commonly known as "litigation funding agreements" are no longer new to class action proceedings and are increasingly part of the landscape in insolvency matters.

[2] In the current case, Omni[1] (**Litigation Funder**) offers to finance Fortress[2] (**Debtor**), who is subject to a restructuring process under the *Companies' Creditors Arrangement Act* (**CCAA**)[3] since 2019. In essence, Omni proposes to provide the financing necessary to pursue a $17 million claim which Fortress filed against Goulds[4] long before the inception of the CCAA restructuring. The proposed financing is along the features set forth in the Litigation Funding Agreement (**LFA**)[5] which the Monitor tenders for Court approval.

[3] One of the main conditions of the proposed financing is a $6 million first ranking charge in favour of Omni and thereafter of the lawyers[6] representing Fortress in the litigation proceedings against Goulds (**Litigation Financing Charge**).

[4] The Monitor pleads that the terms and conditions of the LFA and of the Litigation Financing Charge are commercially reasonable and represent the only alternative available to resume and pursue the proceedings, for the benefit of Fortress' stakeholders.

[5] The Interim lender (Investissement Québec (**IQ**)) and the two main secured creditors (IQ and Fiera Private Debt Inc. (**Fiera**)) of Fortress are also supportive of the approval of the LFA and of the Litigation Financing Charge.

[6] Goulds, the opposing party in the proceedings, objects that such approval would undermine the integrity of the judicial process and the administration of justice and would not meet specific requirements for approval, as the LFA and the Litigation Financing Charge would:

1. vest the Litigation Funder with excessive control over the proceedings;

2. interfere with the relationship between Fortress and its lawyers;

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1 Omni Bridgeway (Fund 5) Canada Investments Limited (**Litigation Funder** or **Omni**).
2 Fortress Global Enterprises Inc., Fortress Specialty, Fortress Bioenergy Ltd., Fortress Xylitol Inc. and 9217-6536 Québec Inc. (Collectively: **Fortress**).
3 R.S.C., 1985, c. C-36.
4 Goulds Pumps Canada Inc. and Goulds Pump Inc. (Collectively: **Goulds**)
5 Exhibits A-2 (unredacted-under seal), A-5 (redacted version).
6 Caïn Lamarre LLP, lawyers representing Fortress in the Litigation Proceedings (**Lawyers**).

3. secure the payment of pre-filing obligations of Fortress, which the CCAA prohibits;

4. not secure the payment of an adverse costs award, if Fortress is unsuccessful.

[7] The Monitor also requests that the litigation proceedings between Goulds and Fortress be transferred to the Commercial Division of the Superior Court and be incorporated in the current CCAA proceedings to ensure a final resolution, hopefully before Fortress emerges from the CCAA restructuring. Goulds is reluctant to such request and argues that such measures would not be necessary to efficiently advance the litigation.

[8] This Application therefore raises several issues relating to litigation funding agreements and case management; to which the Court answers as follows in view of the specific circumstances of this case:

1. The LFA and Litigation Financing Charge

   a. Standing

      The Court holds that Goulds has standing to participate to the debate on the approval of the LFA.

      Goulds' right are directly at stake, as the order sought would affect its right to the payment of cost award against Fortress.

      Also, the debate raises issues relating to the integrity of the administration of justice. IN this regard, Goulds' participation is useful and obviated the need to appoint an amicus to fill an adversarial void in the approval process.

   b. Criteria for approval

      The Court holds that in the specific context of this case, the LFA does not meet all the applicable requirements for approval.

      More particularly, the limits to Omni's obligation to honor an eventual adverse costs award discredits the administration of justice, given the role and purpose of costs awards.

   c. Disclosure

      The Court holds that no further disclosure is necessary.

      Some of the information redacted was not privileged and would not have provided Goulds with an undue strategic advantage over its opponent in the litigation. Therefore, several redacted portions should have been shared with Goulds in advance of the hearing. However, after the testimony

of the Monitor at trial, Goulds was able to knowingly and intelligibly participate to the debate.

2. The Transfer of the litigation proceedings to the Commercial Division and incorporation to the CCAA restructuring process

This discussion is moot, in view of the conclusion above. However, the Court holds that given the stage of the proceedings, there would have been better means of expediting the process. The incorporation of the litigation proceedings to the CCAA restructuring could even have had the opposite effect.

ANALYSIS

[9] The issues relating to the standing of Goulds to participate to the debate on the approval of the LFA and of the Litigation Financing Charge (Section 1.1.), to the criteria for the approval of same (Section 1.2), to the disclosure of redacted portion of the agreement (Section 1.3) and to the transfer requested to the commercial division (Section 2) arise in the following factual context.

[10] Since December 16, 2019, Fortress is undergoing a CCAA restructuring.

[11] In proceedings filed in 2014, long before the current CCAA restructuring, Fortress Specialty claims $17 million[7] against Goulds for restitution of the purchase price and for damages in relation to the alleged defect of two boiler feedwater pumps manufactured and sold by Goulds (**Fortress' Claim**).[8]

[12] Goulds[9] also claims $0.5 million[10] from Fortress for allegedly unpaid invoices (**Goulds' Claim**).[11]

[13] On February 27, 2020, in connection with Goulds' Claim, Goulds filed a proof of claim for $0.5 million[12] in the current CCAA proceedings (**Goulds' Proof of Claim**).[13]

[14] The Fortress' Claim and the Goulds' Claim are consolidated (**Litigation Proceedings**) and are to be heard together in the same trial.

[15] The Litigation Proceedings were suspended as a result of the CCAA filing. Goulds and Fortress nevertheless pursued in their efforts to settle out of court, to no avail. They

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7 $17,363,683.38.
8 Court file number 500-17-082483-143. Application before the Québec Superior Court (Civil Division).
9 Goulds Pumps Canada Inc. and ITT Goulds Pumps Inc.
10 $508,717.09.
11 500-17-094108-167. Application before the Québec Superior Court (Civil Division).
12 $594,047.33.
13 Exhibit A-4.

now find themselves at the crossroads, as Fortress does not have the liquidities to move forward with the Litigation Proceedings.

[16] After numerous approaches and discussions, Omni, the lawyers representing Fortress in the Litigation Proceedings and the Monitor reached an agreement, along the terms of the LFA, to finance the resumption and the pursuit of the Litigation Proceedings. The LFA is conditional upon Court's approval. In essence, the LFA:

1. provides for funds on a non-recourse basis to finance the legal fees and disbursements of Fortress in respect of the Litigation Proceedings and any appeal;

2. provides for the payment of a success fee to Omni and to the Lawyers which is based on a multiple of the committed capital or a percentage of the proceeds to be received as a result of a judgment or a settlement (**Litigation Proceeds**);

3. provides that the advances under the LFA are without interest;

4. is conditional upon the creation of a $6 million first ranking charge in favour of Omni and thereafter of the Lawyers over the Litigation Proceeds.

1. THE LFA AND THE LITIGATION FINANCING CHARGE

1.1 Goulds' standing to challenge the LFA and the Litigation Financing charge

[17] The Court rejects the position that Goulds would not have the required status or legal interest to participate to the debate.

[18] The Monitor, Omni and IQ claim that as a defendant in the Litigation Proceedings, Goulds would have no standing and no credibility, as it has no interest other than ensuring that Fortress will not have the means to finance the litigation. According to them, as a creditor in the restructuring of Fortress, Goulds would also have no interest in the debate on the approval of the LFA. More particularly, as explained below,[14] IQ is the only creditor with a potential financial interest in the returns of the Litigation Proceedings. Finally, section 11.2 of the CCAA provides that prior notice shall be given to secured creditors, which Goulds is not.

> **11.2 (1) [Interim financing]** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard

[14] Pars. [52] to [57] of the present judgment.

> to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> [Emphasis added]

[19] The Court sees these arguments as advancing an overly restrictive view of the scope and object of the approval of a litigation funding agreement and charge. More particularly, the approval of third party litigation funding lies in part on preoccupations relating to the administration and integrity of the justice system, on the manner in which it is used or instrumented. It also rests on findings relating to the proper pursuance of the remedial objectives of the CCAA.[15]

[20] Such broad and fundamental questionings do not vest any one on the street with the proper interest to participate to such a debate. However, in the specific circumstances of this case, Goulds was in a position, as a defendant and as a creditor, to provide the Court with useful guidance. Goulds' input assisted in advancing the analysis of the Court, even bearing mind Gould's down-to-earth ultimate interest to end up with a resourceless plaintiff.

[21] The Monitor highlights that under section 38 of the *Bankruptcy and Insolvency Act* (**BIA**),[16] when a creditor seeks court approval to take proceedings which the Trustee refuses to initiate, the defendant to such proceedings has no standing to challenge the authorization sought.[17]

> **38 (1) [Proceeding by creditor when trustee refuses to act]** Where a creditor requests the trustee to take any proceeding that in his opinion would be for the benefit of the estate of a bankrupt and the trustee refuses or neglects to take the proceeding, the creditor may obtain from the court an order authorizing him to take the proceeding in his own name and at his own expense and risk, on notice being given the other creditors of the contemplated proceeding, and on such other terms and conditions as the court may direct.
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> **(2) [Transfer to creditor]** On an order under subsection (1) being made, the trustee shall assign and transfer to the creditor all his right, title and interest in the chose in action or subject-matter of the proceeding, including any document in support thereof.
>
> [Emphasis added]

[22] Although interesting, the analogy is imperfect. The authorization under article 38 of the BIA is a procedural order.[18] In a CCAA restructuring, a litigation funding agreement

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15 Pars. [28] to [45] of the present judgment.
16 R.S.C. 1985, c. B-3.
17 *Syndic de Harco Québec inc*, 2017 QCCS 4403 at par. 43-44.
18 *Shaw Estate* v. *Nicol Island Development Incorporated,* 2009 ONCA 276, par. 43, 44; *Re GCI Environnement*, 2013 QCCS 508.

and charge are in the nature of the interim financing agreement and charge.[19] The approval of interim financing and charge under the CCAA bears significant consequences and is never a mere procedural matter.

[23] Interestingly also, in many instances, the defendant to the proceedings regarding which the approval of a litigation funding agreement was sought participated to the approval debate, without any discussion on their status.[20]

[24] As the Supreme Court of Canada held in *Ruby*, "the circumstances in which a court will accept submissions *ex parte* are exceptional and limited to those situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given. For instance, temporary injunctions are often issued *ex parte* in order to preserve the *status quo* for a short period of time before both parties can be heard (to prevent the demolition of a building, for example)".[21]

[25] Such is not the case here.

[26] To the contrary, given the important issues at stake, if Goulds had not been present, it might have been "necessary to appoint an amicus to fill the adversarial void and to assist the court in making a determination".[22]

[27] Finally, we shall not overlook that Goulds' rights are directly affected by the order sought, as the LFA would significantly limit or eliminate their right to recover costs in the event of an adverse costs award.[23]

1.2 Criteria for the approval of the LFA and of the Litigation Financing Charge

1.2.1 Legal principles

[28] Third party litigation funding involves a third party, otherwise unconnected to the litigation, agreeing to pay some or all of a party's litigation costs, in exchange for a participation in a party's recovery in damages or costs.[24] When a third party, who otherwise has no interest in a litigation, offers to step in and to provide the financing to pursue it, prudence is in order.

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19 *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 84, 85, 97.

20 S*chenk v. Valeant Pharmaceuticals International Inc*., 2015 ONSC 3215; *JMX Contracting Inc. (Re*), 2021 ONSC 5142; *Stanway* v. *Wyeth Canada Inc*., 2013 BCSC 1585.

21 *Ruby v. Canada (Solicitor General),* [2002] 4 S.C.R. 3, par. 25.

22 *Fehr* v. *Sun Life Assurance Company of Canada,* 2012 ONSC 2715, par. 9, 10, par. 110.

23 Par. [79] to [94] of the present judgment.

24 *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 95.

[29] Courts in Québec and in Common Law jurisdictions have historically approached such involvement with varying degrees of suspicion.[25] Such reluctance is driven by the underlying preoccupation that even though Champerty is no longer a crime in Canada, our justice system shall not serve a as speculation tool. First and foremost, our justice system is an essential component of our democracy, which seeks to ensure that the Rule of Law prevails. It is not meant to be instrumented as a mere means of generating profits.

[30] At the same time, third party litigation funding is contemplated as a means of enhancing access to justice, another core preoccupation of our justice system.

[31] Hence, the approval of third party funding turns on two fundamental preoccupations, irrespective of the area of law. On the one hand, the courts will want to prevent the justice system from being diverted from its true mission. On the other hand, the courts will want to ensure that the justice system remains accessible to pursue the recognition and enforcement of rights as per the Rule of Law.

[32] Discussions around the court approval of such agreements now commonly arise in the context of class actions, where a third party offers to finance the proceedings on behalf of the class representative, to the eventual benefit of the class members. In such instances, the Courts have proven to be mindful to the fact that such agreements often represent an unescapable means of access to justice.

[33] In class action proceedings, two main underlying concerns usually drive the reflection around the approval of litigation funding agreements: (1) the need to protect the vulnerable interests of the proposed class members; and (2) the preservation of the interests of the administration of justice, as an institution. To that end, the following factors are generally considered:

i. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?

ii. Is third party funding necessary to facilitate meaningful access to justice?

iii. Is the LFA champertous?

iv. Is the LFA fair and reasonable to current and prospective class members as a group?

v. Will the LFA make a meaningful contribution to deterring wrongdoing?

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[25] *Montgrain* c. *Banque Nationale du Canada*, 2006 QCCA 557, par. 44-49; *Kuczer* c. *Mendel*, 2001 CanLII 11322, par. 44 (QC CA); *Proposition de Pharmaceutiques Peloton Inc.*, 2018 QCCS 5015, par. 58; *Deutsche Bank A.G., Canada Branch* c. *Hariz*, 2003 CanLII 553, par. 27 (QC CS); *Houle* v. *St. Jude Medical Inc.,* 2018 ONSC 6352, par. 4; Michael ABRAMOVITCZ, « On the Alienability of Legal Claims », (2004) 114 Yale Law Journal, 697-780.

vi. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

vii. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?

viii. Does the LFA protect the legitimate interests of the defendants? [26]

[34] The use of litigation funding agreements is spreading to commercial matters, more recently in insolvency matters with respect to claims of debtors under the protection of the CCAA.[27]

[35] In the context of a CCAA restructuring, Court approval of a litigation funding agreement is required. The guidelines to such approval are found in sections 11 and 11.2 of the CCAA.

[36] More precisely, section 11 of the CCAA vests the Court with broad discretionary powers to make any order which it deems appropriate in a given case:

> **11 [General power of court]** Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.
>
> [Emphasis added]

[37] Appropriateness, good faith and due diligence are the three baseline requirements to meet for an order to be considered "appropriate in the circumstances".

[38] In addition, to qualify as "appropriate" within the meaning of section 11 of the CCAA, the order sought must advance the policy and remedial objectives of the CCAA.[28] The array of overarching remedial objectives which the CCAA pursues, and which the LFA must serve, include:[29]

1. providing for timely, efficient and impartial resolution of a debtor's insolvency;

2. preserving and maximizing the value of a debtor's assets;

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[26] *Difederico* v. *Amazon.com, Inc.,* 2021 FC 311, par. 36. See also: *Houle* v. *St. Jude Medical Inc.,* 2018 ONSC 6352, par. 3, 6, 27-29, 51; *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937, par. 15.

[27] *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10; *JMX Contracting Inc. (Re*), 2021 ONSC 5142.

[28] *Canada v. Canada North Group Inc*., 2021 SCC 30, par. 21; *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 48-51.

[29] *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 40.

3. ensuring fair and equitable treatment of the claims against a debtor;

4. protecting the public interest; and

5. in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company.

[39] The Supreme Court of Canada recently held that the other provisions of the CCAA, dealing with specific orders which the courts can issue, do not restrict the general language and power of section 11.[30]

[40] Litigation funding agreements almost unavoidably include a security charge in favor of the litigation funder. Therefore, section 11.2 of the CCAA, which deals with interim financing charge, also comes into play.

[41] In fact, interim financing is a means to provide debtors with immediate operating capital. Given the remedial objectives of the CCAA, it can also be a means to preserve and realize the value of a debtor's assets. The Supreme Court of Canada held in *Callidus* that Interim financing is a "flexible tool that may take on a range of forms", including third-party litigation funding.[31] The Court can thus approve litigation funding agreements as interim financing pursuant to section 11.2 of the CCAA, which reads:

> **11.2 (1) [Interim financing]** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
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> **(2) [Priority — secured creditors]** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
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> **(3) [Priority — other orders]** The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.
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> **(4) [Factors to be considered]** In deciding whether to make an order, the court is to consider, among other things,
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> > **(a)** the period during which the company is expected to be subject to proceedings under this Act;

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30 *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 23.

31 *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 84, 85, 97.

> **(b)** how the company's business and financial affairs are to be managed during the proceedings;
>
> **(c)** whether the company's management has the confidence of its major creditors;
>
> **(d)** whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> **(e)** the nature and value of the company's property;
>
> **(f)** whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> **(g)** the monitor's report referred to in paragraph 23(1)(b), if any.

[Emphasis added]

[42] Therefore, a litigation funding agreement, with a corresponding litigation financing charge, can be approved if such are fair and appropriate, having regard to the objectives of the CCAA and to the factors listed in section 11.2(4) of the CCAA. This requires a case-specific analysis for which the Court may also draw guidance from the parameters considered in relation to the approval of third-party litigation funding in other areas of law, namely in class action matter.[32]

[43] Finally, the *Civil Code of Québec* provides that when litigious rights are sold, the person against whom such a litigious claim is made will be completely discharged if it reimburses to the buyer the price paid to acquire the litigious claim. This mechanics, known a "right of withdrawal", is articulated in article 1784 of the *Civil Code of Québec.*

> **1784.** Where litigious rights are sold, the person from whom they are claimed is fully discharged by paying to the buyer the sale price, the costs and the interest on the price computed from the day payment was made.
>
> This right of withdrawal may not be exercised where the sale is made to a creditor in payment of what is due to him, to a coheir or co-owner of the rights sold or to the possessor of the property subject to the right. Nor may it be exercised where a court has rendered a judgment affirming the rights sold or where the rights have been established and the case is ready for judgment.

[44] The right of withdrawal aims to discourage the sale of litigious rights and to avoid speculation over trial process. It stems from the certain amount of mistrust which Quebec

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[32] *9354-9186 Québec inc* v *Callidus Capital Corp*, 2020 SCC 10, par. 105.

civil law[33] and Common Law[34] jurisdictions have historically displayed around this type of contract and speculation.

[45] The sale of litigious rights appears to be a more forthright tool to allow a third party to finance a litigation. However, no rule of public order forbids the use of alternative solutions to that end. In a CCAA context more particularly, a third party may bring the necessary financing to a litigation and seek to secure returns on the eventual proceeds of a litigation through other means, namely a litigation funding agreement. Such agreement will be approved or not after due consideration of the criteria highlighted above, in view of the specific circumstances.

1.2.2 Discussion

[46] Of all the factors applying pursuant to sections 11 and 11.2(4) of the CCAA, and with the inspiration taken from the factors considered in class action cases, the following questions warrant specific attention here:

[47] Do the LFA and the Litigation Financing Charge:

47.1. Meaningfully facilitate access to justice?

47.2. Materially advance the policy objectives underlying the CCAA?

47.3. Enhance the prospect of a viable CCAA Plan of arrangement?

47.4. Secure an obligation that existed before the present order?

47.5. Preserve the solicitor-client relationship and the Monitor's autonomy as the genuine Plaintiff?

47.6. Protect the administration of justice from abuse?

1.2.2.1 Meaningful facilitation of access to justice

[48] This factor favors the approval of the LFA and of the Litigation Financing Charge, as it is clear that Fortress is unable to pursue the Litigation Proceedings without such financing.

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[33] *Montgrain* c. *Banque Nationale du Canada*, 2006 QCCA 557, par. 44-49; *Kuczer* c. *Mendel*, 2001 CanLII 11322, par. 44 (QC CA); *Proposition de Pharmaceutiques Peloton Inc.*, 2018 QCCS 5015, par. 58; *Deutsche Bank A.G., Canada Branch* c. *Hariz*, 2003 CanLII 553, par. 27 (QC CS).

[34] *Houle* v. *St. Jude Medical Inc.,* 2018 ONSC 6352, par.4; Michael ABRAMOVITCZ, « On the Alienability of Legal Claims », (2004) 114 Yale Law Journal, 697-780.

1.2.2.2 Material advancement of the CCAA policy objectives

[49] This criteria also favors of the approval sought.

[50] To borrow the words of the Monitor at the hearing on the present Application, the goal of the LFA and of the Litigation Financing Charge is to recover the only significant asset remaining in the patrimony of Fortress. As such, the LFA and the Litigation Financing Charge purport to maximize the value of Fortress' assets, which is in line with one of the remedial objectives of the CCAA.

[51] However, attention to the particular circumstances of the current restructuring is necessary.

[52] If approved, the LFA and the Litigation Financing Charge will land in the financial scenery of a restructuring where the balance between the assets and the indebtedness of the Debtor is dramatically negative. More precisely, at the time of the CCAA filing, in December 2019, Fortress was indebted to its creditors for a total amount of approximately $274 million, approximately $175 million of which was owed to its secured creditors in pre-filing secured debts.[35]

[53] Since the inception of the CCAA restructuring, IQ advanced an additional $24 million[36] to Fortress in the form of a super-priority Interim Financing, thereby increasing the amount of secured debt of Fortress to close to $200 million.

[54] As a result, Fortress' Property is currently subject to the following super-priority charges:

1. Administration Charge of $0.6 million;
2. HQ Charge of $0.84 million;
3. IQ Interim Lender Charge of $28.8 million;
4. Intercompany Advance Charge of $3 million;
5. KERP Charge of $0.61 million;
6. D&O Charge of $0.5 million.

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[35] IQ and Fiera are the two main secured creditors of Fortress.
IQ had a pre-filing debt of $120,417,000 against Fortress. IQ's pre-fining debt is secured by first and second ranking security on the assets of Fortress.
The pre-filing secured debt of Fiera amounts to $31,811,000.

[36] On October 8, 2021, the Court authorised IQ to provide additional funding of $7,000,000 (to the $17,000,000 of interim funding already paid to date) to Fortress as Interim Lender and accordingly increased IQ's Interim Lender Charge from $20,400,000 to $28,800,000.

[55] The Court appreciates that IQ already has enough skin in the game and is not in the business of financing litigations. Although IQ is not interested in financing the Litigation Proceedings, IQ welcomes the financing by a third party and supports the approval of the LFA and of the Litigation Financing Charge.

[56] In view of the above numbers, in the idealistic scenario of Fortress recovering the full amount of Fortress' Claim, the Monitor would benefit from $17 million for distribution to Fortress' creditors. After payment of the $6 million Litigation Financing Charge to Omni, of the $0.6 million Administration Charge and of the $0.84 million HQ Charge, there would be $9.56 million left to apply against IQ's $28.8 million Interim Lender Charge. Even in this dream scenario, the recovery for IQ, the only interested creditor, would be modest to meaningless, particularly taking into account its overall debt against Fortress, which amounts to close to $145 million.

[57] Hence, IQ is the only truly interested creditor here. The Monitor states that materializing Fortress' Claim could only potentially affect the rights of IQ and that it would be unreasonable to relinquish an asset of such value, particularly as it is doubtful that the interim loan will be reimbursed in full.

[58] It would be ill-advised for the Court to run against the Monitor's recommendation or against IQ's position and hold that given the overall low potential return, IQ should forego the recovery of a few million dollars. The Court therefore holds that the proposed LFA and Litigation Financing Charge advance the objective of maximizing the debtor's assets, to the benefit of creditors, IQ in the case at hand.

[59] Admittedly, Omni would get a huge share of the litigation proceeds. However, given the above, we are not, at least theoretically, in a situation where the third-party financing would be to the sole benefit of the litigation funder. Such a scenario would raise preoccupations relating to unwanted speculation on litigation proceedings and would go to concerns of public interest. However, in view of the above, the Court cannot rule that we have crossed that line.

1.2.2.3 Enhancement of the prospect of a viable CCAA plan

[60] Ideally, the orders made in a CCAA restructuring should enhance the prospect of a viable CCAA plan. An order approving a litigation financing agreement and charge is in no way different.

[61] However, each restructuring has a background and a life of its own. The presentation of a viable plan of arrangement, with the view of continuing the operations of the debtor as a going concern, is not always the goal which the CCAA purports to achieve.

[62] Here, the eventual presentation of a viable plan of arrangement carries its fair load of challenges, to say the least. Still, the current restructuring process remains, to date, in

line with the policy objectives of the CCAA, particularly considering the role of Fortress in the forest industry, in the local economy and in the local supply of electricity.

[63] In this context, the approval of the LFA and Litigation Financing Charge is not incumbent on whether or not they advance the prospect of a viable CCAA plan for Fortress.

1.2.2.4 Non-coverage of pre-order obligations

[64] This factor, at first sight, prohibits the approval of the Litigation Financing Charge here. However, for the following reasons, this should not preclude the approval of the LFA and of the Litigation Funding Charge.

[65] Section 11.2 (1) of the CCAA explicitly prohibits interim charge orders to secure obligations which existed prior to such order.

> **11.2 (1) [Interim financing]** […] The security or charge may not secure an obligation that exists before the order is made.

[66] The ban is clear.

[67] In some instances however, the CCAA authorizes charges to cover pre-filing debts. Such is the case for pre-order obligations towards a critical supplier, who would cease supporting the debtor if its pre-order debts are not secured and who would, as a result, jeopardize the restructuring efforts that are underway. In such situations, the benefit of securing a pre-order debt is found to outweigh the prejudice to the other creditors, who are temporarily left on the side line. Section 11.4 of the CCAA contemplates such a scenario:

> **11.4 (1) [Critical supplier]** On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.
>
> **(2) [Obligation to supply]** If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
>
> **(3) [Security or charge in favour of critical supplier]** If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

> **(4) [Priority]** The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> [Emphasis added]

[68] In the case at hand, the Litigation Proceedings have been pending since 2014, five years before the CCAA filing and seven years before the proposed LFA and the Litigation Funding Charge. The LFA purports to cover the litigation costs (lawyers, experts and potentially engineers) which Fortress incurred prior to the order sought in the present application.[37] These covered pre-litigation costs amount to approximately $175,000.

[69] In so doing, the ambit of the Litigation Funding Charge exceeds the boundaries set forth in section 11.2(1) of the CCAA and runs contrary to this prohibition. Also, the critical supplier exception is of no help here. Fortress is not in the business litigating claims and the financing of the Fortress' litigation is not crucial to the operations of Fortress.

[70] Be it as it may, the Court cannot ignore that the only creditor affected, IQ, is supportive of the proposed charge and agreement. IQ, the only creditor who could theoretically suffer from an illegal charge in favor of pre-order litigation costs, is in favor of such charge. In those circumstances, it would be illogical to bar the approval of the LFA and of the Litigation Financing Charge. IQ does not need to be protected against itself.

[71] As the Supreme Court of Canada held in *Canada North*,[38] the provisions dealing with specific orders (CCAA, s. 11.4 here) do not restrict the general language and power of section 11 of the CCAA, which vests the court with the necessary discretionary power to make any order considered "appropriate in the circumstances".

1.2.2.5 Preserving solicitor-client relationship and Monitor's autonomy as the genuine Plaintiff in the proceedings

[72] There is no real issue on this point. More particularly, the LFA provides that the Monitor, in consultation with IQ, will have the sole and exclusive right to direct the conduct of the litigation and settle the litigation.[39] Therefore control over the litigation will remain in the hands of the actual stakeholders.

[73] The LFA provides that at any time, acting reasonably, Omni can terminate the LTA if it ceases to be satisfied in relation to the merits of the Litigation or believes that the proceedings are no longer commercially viable.[40] Here, Fortress and Omni have a common interest in the merit of the litigation. Their interest is purely economic. They

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37 Exhibits A-2 (unredacted – under seal) and A-5 (redacted), p. A-8 "Prefunded Costs".
38 *Canada v. Canada North Group Inc.*, 2021 SCC 30, par. 23-24.
39 Exhibits A-2 (unredacted – under seal) and A-5 (redacted), art. 5.1.
40 Exhibits A-2 (unredacted – under seal) and A-5 (redacted), art. 10.1.5, 10.1.6.

both seek to maximize the litigation proceeds. In such a context, this right of termination does not offend the autonomy of the Monitor as the genuine plaintiff.

1.2.2.6 Protection of the administration of justice from abuse

[74] Goulds points to numerous issues which would go against the proper protection of the administration of justice and against the approval of the LFA and of the Litigation Financing Charge. The Court holds that only one of those is sufficiently disturbing to run in the way of the approval sought: the limits to Omni's obligation to fund an eventual adverse costs award.

[75] Here is how and why.

[76] Globally, the essence of the proposed LFA and Litigation Financing Charge is not worrisome and does not set the ground for abuse or discredit to the administration of justice.

[77] Firstly, even though the potential returns to IQ are uncertain and would be modest in the global picture, the LFA and the Litigation Financing Charge do not turn the Litigation Proceedings into a simple business opportunity to the sole benefit of a third party litigation funder. They neither promote the use of litigation or courts as a nuisance nor encourage the speculation over litigious proceedings. They rather stem from a modern perspective to access to justice. Given the actual potential benefit to IQ and the support of IQ, the Court holds that their core does not discredit the administration of justice in the case at hand.

[78] Secondly, the fact that Omni would not fund a condemnation for liability of Fortress is also not shocking. Any such obligation of Fortress would be a pre-filing obligation for which Goulds should not be treated differently from other creditors having same ranking claim against a debtor under CCAA protection. In such a scenario, the LFA provides that Omni would have no obligation to fund the amount which the court would order Fortress to pay, except the "Court Ordered Costs", as defined in the LTA.

[79] However, the definition of "Court Ordered Costs" and the limits to Omni's obligation to pay for an eventual adverse cost award, in view of the specific circumstances of the current matter, are serious barriers to the approval sought.

[80] More precisely, Omni's obligation to pay an eventual adverse costs award is limited to costs accrued while the LFA is in force.

RECITALS

Whereas:

G. Omni will also fund Court-Ordered Costs;[41]

"Court ordered Costs": Any legal fees and disbursements that, in respect of the Litigation, a Court orders pursuant to the Code of Civil Procedure, C.Q.L.R. c. C-25.01, ss. 339-344, to be paid by Plaintiff to Defendants or into Court, provided that the applicable legal fees and disbursements incurred by Defendants were incurred during the term of this Agreement only. [42]

[…]

10.4 Consequences of Termination.

[…]

10.4.3 All obligations of Omni under the Agreement will cease on the date Termination becomes effective, other than obligations accrued prior to that date. Such accrued obligations include:

10.4.3.1 payment of any outstanding Litigation Costs required to be paid by Omni pursuant to the Agreement incurred up to the date the notice of termination becomes effective; and

10.4.3.2 payment of any quantified Court-Ordered Costs (which, for the avoidance of doubt, relates only to Defendants' legal fees and disbursements which arise in, or are attributed to, the period beginning on the date this Agreement comes into force and ending on the date the notice of termination becomes effective).[43]

[Emphasis added]

[81] Hence, Omni has no obligation to pay adverse costs awards relating to costs incurred prior to the approval of the LFA and after its termination.

[82] As for the legal costs incurred prior to the LFA, the Court notes that in the case at hand, the approval of the LFA is sought seven years after the litigation has started. The legal costs incurred to date are not insignificant. They amount to approximately $300,000. Therefore, a substantial portion of the costs which could form part of an adverse costs award against Fortress would fall into limbo, as a result of the terms of the LFA.

[83] As for the legal costs incurred after the termination of the LFA, Goulds expresses legitimate concerns that the LFA may be terminated in advance of an adverse costs

41 Exhibits A-2 (unredacted-under seal), A-5 (redacted), section G.
42 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. A-2.
43 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. A-20.

award, in the event that the Litigation Proceedings appear to slip toward an unfavourable outcome for Fortress. The LFA actually vests Omni with such discretionary power to terminate the agreement:

> **10. PART 10 - TERMINATION**
>
> **10.1 By Omni.** Omni will have the right to terminate its obligations under the Agreement upon ten (10) days' written notice to the Monitor and Lawyers from and after the occurrence of any of the following events, so long as such event (other than an event described in Clause 10.1.4) is continuing at the end of the ten (10) day period:
>
> […]
>
> 10.1.5 Omni, acting reasonably, ceases to be satisfied in relation to the merits of the Litigation; or
>
> 10.1.6 Omni, acting reasonably, believes the Litigation and the Claims (or either of them) are no longer commercially viable.
>
> [Emphasis added]

[84] Goulds' worries that Omni could terminate the LFA in advance of an adverse costs award and thereby limit (or avoid) any obligation to pay Court Ordered Costs is not ill-founded.

[85] Omni and the Monitor claim that doing so would amount to bad faith, which the Court could sanction pursuant to section 18.6(2) of the CCAA:

> **18.6 (1) [Good faith]** Any interested person in any proceedings under this Act shall act in good faith with respect to those proceedings.
>
> **(2) [Good faith — powers of court]** If the court is satisfied that an interested person fails to act in good faith, on application by an interested person, the court may make any order that it considers appropriate in the circumstances.

[86] However, it is difficult to hold that it would necessarily be bad faith on the part of a litigation funder to cease financing a litigation which turns out to be unpromising in its view.

[87] In light of the above, the asymmetry in the coverage of an eventual adverse costs award is disturbing.

[88] More particularly, in the event of an adverse costs award against Goulds, its obligation to pay same would not be altered as a result of the insolvency of Fortress.

[89] In contrast, in the event of an adverse costs award against Fortress, a significant portion of costs (costs incurred over the last seven years-prior to the approval of the LFA)

would not be covered. We may note here in passing that at the same time, Omni will pay all the expert fees which Fortress incurred to date. Also, the costs incurred after an adverse costs award could potentially not be covered, depending on Omni's exercise of its discretion to terminate the LFA.

[90] The provisions relating to the payment of costs ordered pursuant to sections 339 to 344 of the *Code of Civil Procedure* stem from preoccupations relating to access to justice and to the mindful use of judicial resources. More particularly, they are contemplated as a tool to enforce and remind the parties' duties to act in accordance with the guiding principles of the *Code of Civil Procedure*, such as the principle of proportionality, the duty to act in good faith and the duty to cooperate.[44]

[91] Hence, even though we are to presume that everyone will act in good faith,[45] it is difficult to accept in advance that one of the two parties to a litigation would be excused from having to bear the consequences of not abiding by the guiding principles of civil procedural rules. The fact that an adverse costs award against Fortress may be hypothetical and remote does not change anything.

[92] The obligation of a third party litigation funder to pay for an eventual adverse costs awards has raised concerns in jurisprudence, particularly in class action cases.[46] Such preoccupations may also form part of the analysis when third party litigation funding is considered in insolvency matters.[47]

[93] In the case at hand, for the reasons above, it does and the Court is unable to approve the LFA for that reason.

[94] The Court cannot authorize a party who is specifically in the business of financing litigations to litigate a matter, while at the same time pre-emptively excusing such a party from honoring an eventual adverse costs award. Such an imbalance in the obligations of the plaintiff and of the defendant towards the payment of adverse costs award discredits the administration of the justice, given the role and purpose of costs awards.

1.2.3 Conclusion on approval of the LFA and of the Litigation Financing Charge

[95] The Court cannot adjust the terms of the agreement which is submitted for approval and is left with one of the two following options: approve or refuse. Here, for the reasons above, the Court will refuse.

[96] Still, if the parties remain interested in presenting a LFA with the necessary adjustments to ensure that an eventual adverse costs award against Fortress in the

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44 Commentaires du ministre de la justice, C.C.P., art. 339, 341; C.C.P., art. 18, 19, 20.
45 C.C.Q., ss. 6, 7, 1375 and 2805.
46 *Houle* v. *St. Jude Medical Inc.,* 2018 ONSC 6352, par. 12, 25.
47 *JMX Contracting Inc. (Re*), 2021 ONSC 5142, par. 42, 45.

Litigation Proceedings would be honoured for all legal costs, incurred before and after the LFA, the Court would welcome further representations.

1.3 **Goulds' request for disclosure of redacted portions of the LFA**

[97] Without admission as to Goulds' standing to participate to the debate on the approval of the LFA, the Monitor shared a redacted version with Goulds.[48] The Court was however provided with an unredacted version.[49] As the Court was not at ease to rule, in a vacuum, on Goulds' request for a more extensive disclosure, it was decided to address the issue after the hearing, and to leave the door open for further evidence or representations if necessary.

[98] No such reopening is required here. Goulds was able to participate properly and to make efficient arguments to protect whatever interests it was allowed to put forward. However, the Court must share its findings on the redactions made.

[99] Most of the portions blanked in the version shared with Goulds were justifiably treated as information which would otherwise have provided Goulds "with a tactical advantage in how the litigation would be prosecuted or settled, and the very essence of what the litigation privilege is designed to protect"[50] such as, for instance, budget, strategy and trial stamina.

[100] However, section 2.6 (Maximum Limitation on Payment),[51] the definitions of "Appeal",[52] of "Litigation",[53] of "Prefunded Costs"[54] did not entirely warrant the extensive to full redactions made.

[101] The relevant information was finally obtained through cross-examination of the Monitor and Goulds was able to properly articulate its position. These heavy and unjustified redactions, in some instances, however turned the process into an unnecessary challenging guessing game for Goulds. They were tinted with the view that Goulds and anyone other than the Monitor, the litigation funder and the secured creditors should be kept away from the debate. As explained in paragraphs [17] to [26] of the present judgment, the Court does not share this opinion.

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48 Exhibit A-5.

49 Exhibit A-2 (unredacted-under seal).

50 *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc)*, 2018 QCCS 1040, rev'd 2019 QCCA 171, aff'd 2020 SCC 10, pars. 84-86. See also: *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, pars. 50-51; *Schneider* v *Royal Crown Gold Reserve Inc*, 2016 SKQB 278, 2016 SKQB 278, par. 10; *Fehr* v. *Sun Life Assurance Company of Canada,* 2012 ONSC 2715, par. 129 et 130, par. 212; Rachel A HOWIE and Geoff MOYSA, "Financing Disputes: Third-Party Funding in Litigation and Arbitration" (2019) 57-2 Alberta Law Review 465, at p. 483.

51 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. 3.

52 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. A-1.

53 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. A-5.

54 Exhibits A-2 (unredacted-under seal), A-5 (redacted), p. A-8.

2. THE TRANSFER TO COMMERCIAL DIVISION AND INCORPORATION TO THE CCAA PROCEEDINGS

[102] This issue is probably moot, given the refusal to approve the LFA and the Litigation Financing Charge. However, the Court takes the liberty of sharing its views on the transfer and incorporation sought.

[103] The Litigation Proceedings were filed before the Civil Division of the Quebec Superior Court. To date, all relevant proceedings have been filed in the Court record and the parties have communicated their undertakings as well as their expert reports. The only remaining step before the case can be set down for trial and judgment is the filing of the joint declaration, including the preparation of the list of witnesses and exhibits. All there is left to do for the Court, for the time being, would be to find trial dates to ensure that the matter is heard timely.

[104] In the event that the Litigation Proceedings continue, the Court holds that given the stage at which the proceedings are, there is no necessity, indication or advantage to transfer such proceedings to the commercial division or to have them heard by the judge supervising the Fortress CCAA restructuring process.

[105] The jurisdiction of the Superior Court of Québec is indivisible and the Commercial Division is an administrative, not a jurisdictional, division of the Superior Court. If the need arises, the undersigned, as the coordinating judge of the commercial division and judge supervising the CCAA restructuring of Fortress, or the Chief Justice of the Superior Court, would take the necessary steps to set the trial to proceed as early as possible, in response to a proper Notice for case management or Application to fix the case by preference.[55]

FOR THESE REASONS, THE COURT:

[106] **DISMISSES** the Application for the Issuance of an Order Approving: (i) a Litigation Funding Agreement; (ii) a Litigation Financing Charge; (iii) the Transfer of Certain Litigation Proceedings before the Superior Court (Commercial Division).

[107] **WITH COSTS.**

MARIE-ANNE PAQUETTE, J.S.C.

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[55] *Regulation of the Superior Court of Québec in civil matters*, CQLR, c. C-25.01, r. 0.2.1, art. 27.

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