Federal Court

Cour fédérale

Date: 20240207

Docket: T-855-22

Citation: 2024 FC 152

Montréal, Quebec, February 7, 2024

PRESENT: Mr. Justice Gascon

PROPOSED CLASS PROCEEDING

BETWEEN:

JOHN PAUL INGARRA,
KYLE PINNELL,
PAUL TANTALO,
and 5046013 ONTARIO INC.

Plaintiffs

and

DYE & DURHAM LIMITED,
OMERS INFRASTRUCTURE MANAGEMENT INC.,
and DOPROCESS LP

Defendants

PUBLIC ORDER AND REASONS

(Amended Confidential Order and Reasons issued on February 7, 2024)

I. Overview

[1] The Plaintiffs, Mr. John Paul Ingarra, Mr. Kyle David Pinnell, Mr. Paul Anthony Tantalo, and 5046013 Ontario Inc., bring a motion pursuant to Rule 369 of the *Federal Courts Rules*, SOR/98-106 [Rules] seeking the approval of a third party litigation funding agreement [Funding Motion]. This Funding Motion arises in the context of a proposed class proceeding against the Defendants, Dye & Durham Limited [Dye & Durham], OMERS Infrastructure Management Inc. [OMERS], and DoProcess LP [DoProcess], concerning an alleged conspiracy to fix, maintain, increase, or control the price for the supply of conveyancing software in the Canadian real-estate market, contrary to section 45 of the *Competition Act*, RSC 1985, c C-34 [Competition Act]. The proposed class proceeding follows the acquisition of DoProcess (an Ontario-based provider of real-estate conveyancing software) from OMERS (which had controlled DoProcess through its general partner) by Dye & Durham (a provider of cloud-based software solutions), and the alleged anti-competitive increase in the per-use price of conveyancing software since the acquisition.

[2] As a means of ensuring the financing of the proposed class proceeding — which, say the Plaintiffs, will require the expenditure of significant sums of money —, and given the lack of means and financial resources of the Plaintiffs to cover such upfront costs themselves, counsel for the Plaintiffs sought third party funding to cover incurred legal costs and disbursements related to the proceeding. To this effect, the Plaintiffs (in their capacity as the proposed class representatives) concluded a litigation funding agreement [LFA] with Bench Walk 21V, LP [Bench Walk or Funder], a Delaware-based limited partnership, on January 13, 2023. This LFA forms the basis of the Funding Motion before this Court.

[3] For the reasons that follow, the Funding Motion will be dismissed. Further to my review of the applicable case law and the contents of the LFA itself, I am not persuaded that it is in the best interests of justice to approve the agreement. More specifically, I conclude that the LFA is not fair and reasonable to the proposed class members and is not appropriate to provide access to justice.

II. Background

A. *The LFA*

[4] In the early days of this proposed class proceeding, counsel for the Plaintiffs determined that funding of several millions of dollars in disbursements, expert fees, and other costs would be required to prosecute this case though trial, and that the Plaintiffs did not have the means to pay these disbursements upfront. As such, counsel hired Exton Advisors Ltd. [Exton], a UK-based litigation-financing firm that specializes in raising litigation finance for class proceedings and proposed class actions by connecting class representatives with potential finance providers. In the context of the proposed class proceeding, Exton assisted counsel for the Plaintiffs in seeking litigation funding and assessing proposals submitted by potential funders.

[5] Ultimately, counsel for the Plaintiffs concluded that the proposal submitted by Bench Walk provided the required funding and that the terms of the funding proposal were favourable and in the best interest of the proposed class members.

[6] The Plaintiffs subsequently hired independent counsel to review the LFA before they agreed to its terms as the class representatives. Upon consulting independent counsel and counsel for the Plaintiffs in the matter at hand, the class representatives considered themselves informed

as to the nature of the LFA and deemed that granting of the Funding Motion would be in their best interest.

[7] The LFA provides that the Funder will fund disbursements and certain legal costs for the prosecution of this class proceeding up to the stipulated capital outlay of ██████, as well as provide an indemnity with respect to any adverse cost awards in this matter. In exchange, the Funder will be entitled to receive a scaled and capped share of any potential proceeds that arise out of the Plaintiffs' claim, whether such proceeds result from a settlement or a judgment of the Court. Counsel for the Plaintiffs considers that the stipulated sums and indemnity are sufficient to cover the expenses as well as any eventual adverse cost awards that might reasonably be expected to be incurred in the prosecution of the proposed class proceeding through trial.

[8] The Schedule to the LFA outlines how the profit sharing of any potential proceeds will be calculated. According to the terms of the LFA, the Funder will be entitled to receive a maximum profit share of $16 million. This $16 million cap will be distributed in accordance with the following parameters:

a. 35% of any proceeds up to $30 million;

b. 25% of any proceeds between $30 million and $60 million; and

c. 15% of any proceeds in excess of $60 million.

[9] Furthermore, as per the LFA, the Funder will be entitled to the reimbursement of all payments made in the funding of this proposed class proceeding (such payments being limited to the maximum capital outlay of ██████) and Exton will receive a brokerage fee equal to 1% of all proceeds (capped at $1 million).

[10] In addition to the Funder's recoveries from any potential proceeds, counsel for the Plaintiffs will receive a fee for their legal services equal to 25% of all proceeds as per a contingency fee agreement they concluded with the Plaintiffs in connection with the proposed class action, subject to this Court's approval of such counsel fees.

[11] Pursuant to the Schedule of the LFA, any potential proceeds from the proposed class proceeding will be distributed as follows. First, the Funder will receive a full return of its capital outlay. Second, the Funder will receive its profit share in accordance with the criteria outlined above and subject to the cap of $16 million. Third, Exton will receive its brokerage fees in accordance with the conditions outlined above and subject to the cap of $1 million. Fourth, counsel for the Plaintiffs will receive their counsel fees based on the flat rate of 25% of total proceeds, as outlined in their retainer agreement and subject to the Court's approval. Finally, any residual proceeds will be distributed amongst the class members.

[12] I pause to underline that, in their submissions on this Funding Motion and in their Amended Statement of Claim, the Plaintiffs claim damages or compensation in the total amount of $200 million or such additional or other sum as is determined at trial for the alleged breach of the Competition Act they are relying on. In other words, the Plaintiffs estimate that a total recovery further to their class action would result in proceeds of some $200 million.

B. *Submissions of the parties*

[13] The Plaintiffs argue that this proposed class proceeding requires third party funding to ensure their access to justice — which would otherwise be foreclosed on pecuniary grounds without such funding. They claim that the LFA is necessary to minimize the risk of class action

litigation and to maximize access to justice. According to the Plaintiffs, the terms of the LFA are similar to the ones previously approved by the courts and the LFA complies with the jurisprudentially grounded approval criteria that have been advanced by this Court in previous judgments. As such, they argue that the Court should approve the LFA.

[14] The Defendants do not raise any firm objections to the approval of the LFA. However, in their responding motion record, the Defendants highlighted two important considerations for the Court.

[15] First, the Defendants note that subsection 9.2(e) of the LFA permits the Funder to withdraw from or modify the agreement if counsel for the Plaintiffs, Cartel & Bui LLP, is disqualified from the proposed class proceeding. This is relevant to the case at bar since the Defendants sought to have Cartel & Bui LLP removed as counsel of record for the Plaintiffs. The Defendants alleged that counsel was in a conflict of interest resulting from their relationship with a Mr. Calvin Goldman, the former counsel of record for one of the Defendants (Dye & Durham). On July 31, 2023, this Court dismissed the motion to have Cartel & Bui LLP removed as the counsel of record for the Plaintiffs (*Ingara et al v Dye & Durham Limited et al*, 2023 FC 1046). The Defendants are currently appealing this Court's order before the Federal Court of Appeal. Given that the proceeding surrounding the conflict of interest is still underway, the Defendants raise the concern that subsection 9.2(e) of the LFA might lead to some uncertainty as to the viability of the agreement for the Court and for the class members should Cartel & Bui LLP be disqualified as counsel for the Plaintiffs.

[16] Second, the Defendants note that, in *Difederico v Amazon.com Inc*, 2021 FC 311 at paras 55, 61, 74 [*Difederico*], Chief Justice Crampton evaluated the reasonableness of the funding

agreement's recovery potential with the potential recoveries that would result from a similar funding agreement with the Ontario Class Proceedings Fund [Ontario CP Fund] — which caps the return on advanced funds to 10% of total proceeds. This was considered to assess whether the proposed funding agreement was champertous or fair and reasonable, despite the fact that the Ontario CP Fund is not available for class action proceedings before this Court.

[17] The Defendants submit that there is a marked difference in the recovery for the class members between the LFA with the Funder and a hypothetical funding agreement under the Ontario CP Fund, in the majority of the various possible proceeds. The difference is particularly significant at the lower end of the spectrum of potential outcomes, where the proceeds resulting from the Plaintiffs' claim would be lower. It is only towards the very high end of the spectrum (i.e., at assumed proceeds of $200 million — namely, the maximum proceeds amount expected to be obtained as per the Plaintiffs' submissions) that the Bench Walk LFA provides a slightly better recovery for the class members than the Ontario CP Fund would.

[18] In response to the Defendants' considerations, the Plaintiffs first argue that the risk of the LFA being terminated should Cartel & Bui LLP be disqualified as counsel is mitigated by the fact that the Funder must, in any event, apply to the Court to modify or terminate the LFA. In an instance where Cartel & Bui LLP is removed as counsel, the LFA would therefore still stand, barring the Court's approval to terminate it.

[19] With respect to the comparison with a hypothetical funding by the Ontario CP Fund, the Plaintiffs submit that the LFA with the Funder is fair and reasonable to current and prospective class members despite the figures advanced by the Defendants. In essence, they maintain that the Funder's recovery is within an acceptable range and that the Court's authority to approve counsel

fees will ensure there is no overcompensation. Furthermore, they argue that the assumptions made by the Defendants with regard to Plaintiffs' counsel's legal fees are without merit given that it is the Court's role to approve legal fees in class actions as per section 334.4 of the Rules, and that the Court could therefore depart from the original retainer at the time of approval (*Difederico* at para 29). In other words, they submit that, at the time the Court is tasked with approving counsel's fees, it could then reassess or revisit the fairness and reasonableness of the combined recovery to class counsel and the Funder.

III. Analysis

A. *Test for approval of a LFA*

[20] In *Difederico*, Chief Justice Crampton outlined the general test for the approval of litigation funding agreements, drawing from pan-Canadian jurisprudence as well as case law from this Court in laying out this framework. The crux of the test stems from the principle that a litigation funding agreement "should not be champertous or illegal and […] must be a fair and reasonable agreement that facilitates access to justice while protecting the interests of the defendants" (*Difederico* at para 34, citing *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at para 71 [*Houle*]).

[21] Accordingly, Chief Justice Crampton enumerated the following factors that must be considered by the Court in approving a litigation funding agreement (*Difederico* at para 36, citing *Jensen v Samsung*, (Court File T-809-18, February 7, 2019) at para 6; *Houle* at paras 73–88; *Flying E Ranche Ltd v Canada (Attorney General)*, 2020 ONSC 8076 at paras 28–34; *JB & M Walker Ltd v TDL Group Corp*, 2019 ONSC 999 at para 6; *Drynan v Bausch Health*

Companies Inc, 2020 ONSC 4379 at para 17; *Dugal v Manulife Financial Corporation*, 2011 ONSC 1785 at para 33; *Stanway v Wyeth Canada Inc*, 2013 BCSC 1585 at para 15; *David v Loblaw*, 2018 ONSC 6469 at para 12):

a. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?
b. Is third party funding necessary to facilitate meaningful access to justice?
c. Is the LFA champertous?
d. Is the LFA fair and reasonable to current and prospective class members as a group?
e. Will the LFA make a meaningful contribution to deterring wrongdoing?
f. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?
g. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?
h. Does the LFA protect the legitimate interests of the defendants?

[22] A negative response to any of the questions above can be fatal to the approval of a litigation funding agreement (*Difederico* at para 37; *Eaton v Teva Canada Limited*, 2021 FC 968 at para 21 [*Eaton*]). As such, each criteria must be assessed independently. At the end of the day, the Court must be satisfied that "it is in the best interest of justice to approve the [litigation funding agreement]" (*Difederico* at para 35).

[23] As Chief Justice Crampton also pointed out, it is important to remember that the Court is vested with a general supervisory role in class proceedings that requires it to be mindful of the best interests of class members as a whole (*Difederico* at para 29, citing *Frame v Riddle*, 2018

FCA 204 at para 24, and *Ottawa v McLean*, 2019 FCA 309 at para 13). This includes the best interests of prospective class members, whose interests may not be entirely aligned with those of the representative plaintiffs, class counsel, or third parties who are prepared to fund all or part of the proceeding (*Houle v St Jude Medical Inc*, 2018 ONSC 6352 at paras 22, 41). Accordingly, litigation funding agreements entered into in relation to proposed class proceedings before the Court must be approved by the Court, even when they have been executed by the representative plaintiffs after having received the advice of independent legal counsel (*Difederico* at para 29; *Houle* at paras 63–70).

B. *Application of the test to the case at bar*

[24] Turning to the case at bar, I find that the proposed LFA fails to meet the crucial component of the test articulated in *Difederico*, namely, the fairness and reasonableness of the agreement to the class members. I accept that the LFA satisfies the requirements of several factors listed above. This is the case for the following: 1) the basic procedural and evidentiary requirements for the Court's consideration of the LFA; 2) the fact that the LFA does not interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding; 3) the protection of relevant legal privileges and of the confidentiality of the parties' information; and 4) the protection of the legitimate interests of the Defendants. I am also mindful of the fact that, to some extent, the funding provided by the LFA is necessary to facilitate meaningful access to justice (because of the Plaintiffs' lack of resources) and that, assuming it allows the proposed class proceeding to go forward, it could make a meaningful contribution to deterring wrongdoing.

[25] However, the contribution of litigation funding agreements to deterring wrongdoing or providing access to justice cannot be at any cost for class members. In this case, I conclude that the terms and conditions of the LFA offer highly disproportionate benefits to the Funder, and thus become unfair and unreasonable to current and prospective class members. This is sufficient to deny the approval of the Funding Motion.

(1) The LFA is unfair and unreasonable to current and prospective class members

[26] In my view, the profit sharing regime found in the LFA is unfair and unreasonable when juxtaposed with the standard profit sharing regime found within Ontario CP Fund litigation funding agreements, and legal precedents having approved litigation funding agreements.

[27] The following two tables summarize the situation before the Court. Table 1 describes the distribution of the potential recoveries to the Funder, Class Counsel, and the class members further to the terms and conditions of the LFA, under different hypothetical scenarios ranging from proceeds of $30 million to $200 million. Echoing what was done in *Difederico*, Table 2 provides a summary of the potential recoveries of the Funder, Class Counsel, and the class members under a hypothetical agreement providing the same amount of financing support as per the Ontario CP Fund conditions. This allows us to compare the Bench Walk scenario in Table 1 with the Ontario CP Fund scenario in Table 2.

Table 1: Bench Walk Scenario

	(millions $)					
Hypothetical Proceeds	30	45	60	90	160	200
Funder's Capital Outlay						
Funder's Profit Share						
Proceeds up to $30M (at 35%)	10.5	10.5	10.5	10.5	10.5	10.5
Proceeds from $30M to $60M (at 25%)	0	3.75	7.5	7.5	7.5	7.5
Proceeds over $60M (at 15%)	0	0	0	4.5	15	21
Funder's Total Profit Share	10.5	14.25	18	22.5	33	39
Funder's Total Profit Share (adjusted for $16M cap)	10.5	14.25	16	16	16	16
Funder's Total Profit Share as % of Proceeds	35.0%	31.7%	26.7%	17.8%	10.0%	8.0%
Funder's Capital Outlay + Total Profit Share						
Funder's Capital Outlay + Total Profit Share as % of Proceeds						
Exton Brokerage Fees at 1% (adjusted for $1M cap)	0.3	0.45	0.6	0.9	1	1
Plaintiffs' Counsel Fees (at 25% of Proceeds)	7.5	11.25	15	22.5	40	50
Total Funder Profit Share + Exton + Counsel	18.3	25.95	31.6	39.4	57	67
Total Funder Profit Share + Exton + Counsel as % of Proceeds	61.0%	57.7%	52.7%	43.8%	35.6%	33.5%
Total Funder Capital Outlay and Profit Share + Exton + Counsel						
Total Funder Capital Outlay and Profit Share + Exton + Counsel as % of Proceeds						
Remainder for Class Members	7.7	15.05	24.4	46.6	99	129
Class Members' Recovery as % of Proceeds	25.7%	33.4%	40.7%	51.8%	61.9%	64.5%

Table 2: Ontario CP Fund Scenario

	(millions $)					
Hypothetical Proceeds	30	45	60	90	160	200
Ontario CP Fund's Capital Outlay						
Ontario CP Fund's Profit Share (at 10%)	3	4.5	6	9	16	20
Ontario CP Fund's Capital Outlay + Profits						
Ontario CP Fund's Capital Outlay + Profit Share as % of Proceeds						
Plaintiffs' Counsel Fees (at 25% of Proceeds)	7.5	11.25	15	22.5	40	50
Total Ontario Fund Profit Share + Counsel	10.5	15.75	21	31.5	56	70
Total Ontario Fund Profit Share + Counsel as % of Proceeds	35.0%	35.0%	35.0%	35.0%	35.0%	35.0%
Total Ontario Fund Capital Outlay and Profit Share + Counsel						
Total Ontario Fund Capital Outlay and Profit Share + Counsel as % of Proceeds						
Remainder for Class Members	15.5	25.25	35	54.5	100	126
Class Members' Recovery as % of Proceeds	51.7%	56.1%	58.3%	60.6%	62.5%	63.0%

[28] As illustrated in the calculations described in Tables 1 and 2, in almost all hypothetical outcomes of potential proceeds obtained by the Plaintiffs, the LFA with Bench Walk provides significantly less recovery to the class members than a hypothetical agreement with the Ontario CP Fund would.

[29] The Plaintiffs make two principal arguments in support of their submission that the LFA is fair and reasonable to the class members, and will not overcompensate Bench Walk. First, they assert that the level of the profit sharing fee to be received by the Funder reflects the very high risk that will be incurred by the Funder and the long period of time that it may have to wait

before being reimbursed the funds it advances and receiving any return on its investment. Second, they state that the profit sharing fee is reasonable having regard to other litigation funding agreements that have been approved by the courts, as well as to the return received by the Ontario CP Fund when it funds litigation proceedings. The Plaintiffs likewise note that there is a cap on the return that can be distributed to the Funder and claim that, in this regard, the LFA is reasonable when compared with other litigation funding agreements approved by the courts in other cases.

[30] With respect, I disagree with those propositions.

(a) *The LFA is at odds with legal precedents*

[31] Regarding the comparison with other litigation funding agreements, it is manifestly incorrect to state that the terms of the LFA in this case have any similarity to the ones previously approved by this Court or other courts. The determination of what is fair and reasonable is highly contextual (*Difederico* at para 57, citing *Houle* at para 81), and the current case is materially distinguishable from the factual matrix in the precedents cited by the Plaintiffs. In fact, the LFA presented to the Court by the Plaintiffs fails to meet, or even come close to, any of the benchmarks laid out in the jurisprudence.

[32] In *Difederico*, the litigation funder would not receive more than the 10% levy generally obtained by the Ontario CP Fund in 90% of possible scenarios going from a complete victory for the plaintiffs (in that case, a recovery of $12 billion) to a complete failure of the class proceeding (a zero recovery) (*Difederico* at para 61). So, in the vast majority of potential outcomes, the terms of the litigation funding agreement were more favourable to the class members than the

terms applicable when a proceeding is funded by the Ontario CP Fund. Moreover, the proportion to be received by the funder in that case would decrease from 10% to approximately 1%, as the recovered proceeds would approach the contemplated maximum of $12 billion.

[33] Similarly, in *Eaton*, the funding fees in that case were equal to 10% of the claim proceeds and were indeed within the range of similar fees that have been approved by Canadian courts (*Eaton* at para 30). The funding fees were well below 10% of total proceeds for more than 80% of potential outcomes in that proposed class proceeding, ranging between complete success (a recovery of $2.75 billion) and complete failure (a zero recovery). As in *Difederico*, the return to the funder would progressively decline from 10% to less than 2% of the recovery proceeds as the level of any settlement or court order rises above $450 million and approaches the maximum amount of $2.75 billion claimed in that proceeding (*Eaton* at para 41). In sum, the funding fee in that case compared favourably with the uncapped 10% levy to which the Ontario CP Fund is entitled in proceedings that it funds in Ontario.

[34] The same is true for other precedents in Ontario. I will mention three. In *Wasylyk v Lyft Inc*, 2023 ONSC 3597, the litigation funder was providing cost protection and disbursement funding up to a maximum that was deemed sufficient to carry the case through to completion. The court approved a funding agreement that provided the litigation funder with 8% to 10% of any proceeds to a maximum of $20 million on a sliding scale. This was found to be consistent with other funding agreements approved in Ontario, as the contemplated 8% to 10% fell within an acceptable margin.

[35] In *Gebien v Apotex Inc*, 2023 ONSC 4651, the return payable to the funding entity under the litigation funding agreement ranged between 9% and 11% of proceeds from the litigation.

Again, the court compared the agreement to the levy payable to the Ontario CP Fund, fixed at 10%, and found the amounts payable to the funder modest and reasonable. In *Baroch v Canada Cartage*, 2021 ONSC 7376 at para 28, the court accepted a litigation funding agreement where the funder agreed to cover a certain level of disbursements and adverse cost awards in return for a funder's fee, the repayment of the disbursements amount, and a return of 10% of the overall recovery out of the settlement.

[36] In the current case, the situation is materially different. This is not a case where the terms of the LFA are more favourable to the class members than the terms that would be applicable should the proceeding be funded by the Ontario CP Fund (*Eaton* at para 41). It instead reflects a near totally opposite situation, as illustrated in Tables 1 and 2.

[37] On the scale of potential proceeds ranging from a zero recovery to a total recovery of $200 million, the LFA provides a significantly lower recovery to the class when compared to the fees of litigation funding agreements governed by the Ontario CP Fund. As illustrated in Table 1, if the recovery proceeds are less than $160 million, the Funder stands to receive much more than the fixed 10% under the Ontario CP Fund: its share of recovery proceeds ranges from 17.8% at a $90 million outcome to 35% at a $30 million outcome. Such a profit share for a litigation funder would be unprecedented and truly disproportionate.

[38] In my view, this suffices to establish that, as currently drafted, the Bench Walk LFA is not fair or reasonable when compared to other potential litigation funding agreements governed by the Ontario CP Fund.

[39] I accept that the Ontario CP Fund criteria is simply a benchmark and not the sole reasonable criteria to assess the fairness and reasonability of litigation funding agreements. I also understand that the Plaintiffs raise many risks involved with the present case and posit that the LFA reflects the very high risk that will be incurred by Bench Walk. I also acknowledge that the risk of failure in these types of class action proceedings is significant and can occur at multiple stages, including the certification stage, trial, and appeal, for reasons related to the legal theory as well as the damages methodology. In fact, the Funder may not receive any return whatsoever on its investment, or even a return of the funding amounts it advances (*Eaton* at para 38; *Difederico* at para 59). This is compounded by the long period of time that the Funder is anticipated to wait before being reimbursed the funds it advances and by the possibility of not receiving any return on its funding of this proposed class proceedings.

[40] But the magnitude of the gap between the proposed LFA and a hypothetical funding agreement governed by the Ontario CP Fund is far more than significant. In the more modest outcomes at the lower end of the recovery proceeds scenario, the Funder would receive a proportion of proceeds that would be more than two or even three times the fixed 10% of total proceeds obtained in the Ontario CP Fund scenario.

[41] The proposed LFA also raises concerns from another perspective. In *Difederico*, the *amici curiae* represented to the Court that the jurisprudence has established a "presumptive range of validity" of 30% to 35% of the recovery proceeds, for a combined return to the litigation funder and class counsel (*Difederico* at para 65; see also *Eaton* at para 44). In both *Difederico* and *Eaton*, the proposed litigation funding agreement indeed fell well within that presumptive range of validity. In the current case, the contemplated combined return of the Funder and class

counsel (including the brokerage fees to be paid to Exton to find funders) largely exceeds the upper limit of this presumptive range of validity in all contemplated scenarios, as the Funder, Exton, and class counsel would receive far more than 35% of proceeds at almost all points along the spectrum of possible outcomes. The proportion of recovery proceeds ending up in the pockets of the Funder, Exton, and class counsel would reach a combined 43.8% at a $90 million outcome to a mammoth 61.0% at a $30 million outcome. If the amount of the capital outlay is added to the pot, the Funder, Exton, and class counsel stand to receive [redacted] of total recovery proceeds at a $30 million outcome, and [redacted] at a $90 million outcome.

[42] By any standards, this defies the rules of fairness and reasonableness to the class members. It is only if the Plaintiffs were entirely successful in their claim and obtain a full recovery of $200 million that the LFA would give the Funder, Exton, and class counsel a share just barely falling within the presumptive range of validity established in *Difederico* and *Eaton*.

[43] Finally, another metric to be considered is the proportion of potential proceeds to be ultimately received by the class members. Here again, the LFA falls well short of an acceptable mark. At the low end of the spectrum of potential proceeds (i.e., assumed proceeds of $30 million), the class members would receive twice as much in terms of recovery under the Ontario CP Fund than they would receive under the terms of the LFA. For assumed proceeds of $45 million, the Ontario CP Fund would provide 68% more recovery than the LFA; for $60 million, it would be 43% more; and for $90 million, it would be 17% more. For amounts above $160 million, the LFA provides a marginally greater recovery for the class than the Ontario CP Fund would. Therefore, on the scale of potential proceeds ranging from zero recovery to a full recovery of $200 million, the LFA schedule provides significantly less of a recovery to the class

in approximately 80% of potential outcomes when compared to the fees of litigation funding agreements governed by the Ontario CP Fund. In all potential outcomes representing less than half of total recovery, the class members would end up receiving less than 50% of the expected proceeds of the class proceeding.

[44] This means that the rate of return for the Funder on its investment of a capital outlay of [redacted] would reach stratospheric levels. On recovery proceeds ranging from $30 million to $200 million, it would translate in profits ranging from $10.5 million to $16 million representing a return on investment varying between 162.5% and 300%.

[45] In light of the foregoing, I conclude that the LFA cannot be considered fair and reasonable to current and prospective class members and that the Funder would be significantly overcompensated for assuming the risk of financing the proposed class proceeding. In sum, no matter what metric is used to satisfy the fair and reasonable test, the proposed LFA does not meet any, and I am not ready to approve an LFA with terms and conditions that are markedly worse for the class members than other litigation funding agreements previously approved by this Court.

[46] I pause to underline that, on the record before me, no materials were presented demonstrating or even suggesting that the potential outcomes at the lower end of the spectrum were unlikely or much less likely than a full recovery. I further note that the Funder would not be exposed to reimburse costs awards against the Plaintiffs as, pursuant to Rule 334.39, class action proceedings before this Court are subject to a no-cost rule unless exceptional circumstances exist.

[47] In these circumstances, I give little weight to the fact that the proposed class representatives deem the LFA to be “fair, reasonable, and in the best interests of [themselves] and the other Class Members.” This statement is made without any support, and it is not enough to justify an agreement that departs so significantly from legal precedents and the Ontario CP Fund, and leaves very little for the class members.

(b) *The level of risk does not justify the contemplated return*

[48] The Plaintiffs also argue that the terms and conditions of the LFA are justified in light of the high level of risk allegedly assumed by Bench Walk in the current case. I do not find this argument convincing. It may be that there is higher risk of financing the contemplated class action in this matter, presumably because its chances of success are lower than in other contemplated class actions. But the higher risk does not justify the Court approving an LFA that grants an unreasonable and exorbitant rate of return to the litigation funder, and which has many attributes of what could otherwise be qualified as a loan shark agreement.

[49] The Plaintiffs state that, in the circumstances of this case, this LFA contains the best and most fair terms they have received and that there is no likely alternative to obtain funding. But the fact that a given litigation funding agreement may be the best available option does not mean that it has to be approved by the Court. Here, this best available option would of course be in the interest of the Funder, and of counsel for the Plaintiffs, who would stand to be the first in line in the distribution of any proceeds. But it would not be in the interest of the class members, who would essentially be used to provide benefits to the Funder and class counsel, nor is it in the interest of justice.

[50] The fundamental goals of class proceedings are access to justice, behaviour modification, and judicial economy. However, there is no access to justice for class members when a disproportionate amount of the recovery proceeds go to litigation funders and class counsel with marginal results and benefits for the class members. Class actions as a procedural vehicle were not designed to first enrich class counsel and funders, and then consider the actual class members as an afterthought.

[51] For all forms of financing or investment, the rate of return sought by an investor or a lender is a reflection of the expected level of risk. The greater the risk that an investment may lose money, the greater its potential for providing a substantial return. This principle is no different for litigation funding agreements in the context of class proceedings. At some point, if the risk of a contemplated class action not being successful is so high that litigation funding can only be available at a cost bordering extortion, one has to wonder whether allowing such actions to continue serves the interests of justice. True, the courts have recognized that, in class proceedings, fair returns to class counsel and lenders reflect the important role of entrepreneurial counsel who accept to take risks to provide access to justice for smaller litigants. However, when the risks presented by a class action proceeding are such that litigation funders or lawyers are only ready to undertake them at unreasonable, disproportionate, or predatory conditions, this is no longer the type of entrepreneurship that the class action procedural regime was meant to encourage.

(2) The LFA is champertous

[52] In light of the foregoing, I also must conclude that the LFA is champertous.

[53] In *Difederico*, the Court determined that the assessment of this factor should address two considerations. The first is whether there is any evidence of any actual improper motive, as opposed to one that may be deemed to be improper based on the quantum of the return contemplated by the LFA. The second consideration is whether the fees set forth in the LFA exceed the outer limit of what might possibly be considered reasonable, fair, or proportionate (*Difederico* at paras 54–55; *Eaton* at paras 29–30). Accordingly, this second consideration overlaps with the requirement that the LFA be fair and reasonable to current and prospective class members.

[54] As pointed out by Chief Justice Crampton in *Difederico*, the Court's approach in considering whether a litigation funding agreement providing for the payment of a contingency amount to the funder is champertous should be similar to the approach followed by the courts with respect to contingency fee arrangements between lawyers and their clients (*Difederico* at paras 50–51). The main principle is that contingency fee arrangements should not provide for a recovery that is disproportionate (*Difederico* at para 50, citing *Houle* at para 84).

[55] I agree with the Plaintiffs that there is no evidence of any improper motive by the Funder in this case. Here, neither party has flagged an improper motive related to Bench Walk's involvement in the case, nor can an improper motive be adduced from the terms of the LFA or the evidence before this Court. Furthermore, the process by which the funding was procured contributes to the finding that there is no improper motive. Counsel for the Plaintiffs solicited and reviewed multiple funding proposals and ultimately chose Bench Walk's. It is not as though Bench Walk approached the Plaintiffs specifically seeking to involve itself in the action to advance an agenda. The LFA is rather purely of a financial nature. The mere fact that a funder

may unreasonably profit from a funding agreement is not sufficient, in and of itself, to support a finding of improper motive or officious meddling (*McIntyre Estate v Ontario (Attorney General)* (2002), 61 OR (3d) 257 (Ont CA) at paras 26–28).

[56] However, the same cannot be said about the reasonableness and proportionality of the profits to be received by the Funder in the overall distribution of proceeds from the contemplated class action. As discussed in the previous section, there is no doubt that the proposed LFA provides for a recovery that is largely disproportionate and unreasonable, and significantly deviates from what has been deemed “fair” and “reasonable” in the past. Based on the principles set out in *Difederico*, the LFA in the present matter is therefore champertous.

IV. Conclusion

[57] For the above reasons, the Plaintiffs’ motion for approval of the LFA is dismissed with costs.

[58] I make one final remark. In their submissions, the Plaintiffs repeat the argument that the Court could give its blessing to the LFA now since, at the fee approval stage, the Court will have the ability to revise and revisit the quantum of counsel fees, should the overall compensation of class counsel and the Funder be too high and the proceeds available to the class members too low. I find this argument to be without merit. The fact that payment of fees to class counsel are subject to the Court’s approval pursuant to Rule 334.4 does not mean that the Court should turn a blind eye to unacceptable litigation funding agreements at the early stages of class action proceedings and refrain from intervening on the basis that it could do so later. On the contrary, when there are no reasons whatsoever to approve a litigation funding agreement at the time it is

presented to the Court, it is the Court’s duty, and in the interests of justice, to stop in its tracks an agreement that has no likelihood of being accepted.

[59] There is nothing preventing the Plaintiffs from returning to the Court to seek the approval of a new litigation funding agreement that would satisfy the approval thresholds discussed in these reasons.

ORDER in T-855-22

THIS COURT ORDERS that:

1. The motion is dismissed, without prejudice to the Plaintiffs coming back with a new litigation funding agreement for the Court's approval.

2. With costs to the Defendants.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-855-22
STYLE OF CAUSE:	JOHN PAUL INGARRA, KYLE PINNELL, PAUL TANTALO AND 5046013 ONTARIO INC. v DYE & DURHAM LIMITED, OMERS INFRASTRUCTURE MANAGEMENT INC., AND DOPROCESS LP

MOTION IN WRITING CONSIDERED AT MONTRÉAL, QUEBEC PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

PUBLIC ORDER AND REASONS:	GASCON J.
DATED:	FEBRUARY 7, 2024

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