



# Litigation Funding Comparative Guide



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## 1. Commercial legal finance basics

### 1. 1. How is commercial legal finance defined in your jurisdiction?

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‘Commercial legal finance’ is understood to be the provision of non-recourse investment capital from a funder to a party advancing litigation or arbitration for a business claim, in exchange for which a return to the funder is paid from the proceeds of the successful outcome.

Legal finance is increasingly recognised as including the funding of portfolios of claims, either directly with a corporate client or a firm. The monetisation of judgments and provision of funding for enforcement of unpaid judgments and awards are also understood to form a part of legal finance.

### 1. 2. How does commercial legal finance differ from consumer litigation finance and contingency agreements?

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In the Canadian market, consumer litigation finance is primarily made available in the personal injury space and is sometimes considered to encompass settlement loans for parties with personal injury claims.

Commercial legal finance, on the other hand, is directed to the funding of business disputes and generally entails the funding of a corporate party or small business owner/founder.

Contingency agreements involve arrangements directly between lawyers and their clients. In a contingency agreement, rather than receiving regular payments for hours worked, counsel are paid by way of a share in the litigation proceeds on success. In those arrangements, the lawyers must typically pay out-of-pocket expenses (including travel, expert reports and other expenses), during the case and are reimbursed upon success. In this sense, their compensation is contingent on the outcome of the claim. Contingency agreements may be used in Canada in both commercial and personal injury matters.

### 1. 3. What are the major legal finance products/solutions in your jurisdiction? (a) Single case fees and expenses; (b) Portfolio fees and expenses; (c) Monetisation of claims; (d) Monetisation of judgments and awards and (e) Other

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All of the above forms of legal finance are available and in use in Canada. The most common arrangements are single case fees and expenses and portfolio fees and expenses. Most single case funding arrangements involve legal fees, costs and protection for exposure to adverse cost orders.

1. 4. In what areas of law is litigation finance most prevalent in your jurisdiction (eg, competition, insolvency, patents, contracts)?

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While case law concerning the funding of class actions and insolvent debtors could create the impression that these are the most abundant instances of litigation finance, this perception is influenced by the fact that litigation funding agreements in these areas generally require court approval in Canada. In fact, funders have supported claims in all areas of law, including commercial contract disputes, torts and IP litigation, as well as investor/state arbitration.

1. 5. Who are the major players in the industry (eg, pure players, multi-strategy firms, start-ups)?

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Prior to 2016, funding was generally made available by funders operating remotely. Case funding was provided by a mix of dedicated litigation funders and investment firms. In 2016, Omni Bridgeway established offices in Canada; it has subsequently been joined by other international funders. Additionally, a small number of locally founded parties offer legal finance.

## 2. Legal framework

2. 1. How mature is the market for legal finance in your jurisdiction? What types of commercial litigations and/or arbitrations may be funded by a third party?

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The market is maturing. The growing status of legal finance in Canada is reflected in the variety of commercial litigation and arbitration in which funding has been sought and investment made accordingly. These include:

- conventional contract disputes;
- securities litigation;
- IP disputes;
- insolvency litigation; and
- class actions.

Funding is also provided for domestic and international private arbitrations and treaty arbitrations. Moreover, legal finance for the enforcement of judgments and awards, as well as monetisation, is being offered in Canada.

2. 2. Is there a dedicated legal finance regime in your jurisdiction? What other laws and regulations have relevance to legal finance in your jurisdiction?

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No.

2. 3. Which public sector bodies and authorities are responsible for enforcing the applicable laws and regulations? What powers do they have?

Canada

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The courts are the main source of oversight of legal finance arrangements. In circumstances where court approval of funding agreements is required (ie, class actions and insolvency-related litigation), the courts can influence the terms which govern an agreement by withholding approval where they deem this appropriate.

No organisations are directly responsible for the regulation of legal finance. However, a number of regulators are seized of issues that may have implications for providers and users of legal finance, including:

- law societies;
- insurance regulators;
- regulators of financial service providers; and
- securities regulators.

2. 4. Do the rules and codes of any self-regulatory organisations or professional associations have relevance to legal finance in your jurisdiction? What powers do such organisations and associations have?

Canada

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Most directly, the professional bodies responsible for overseeing lawyers' conduct are of greatest relevance to the legal finance industry. These provincial law societies are responsible for introducing and overseeing the enforcement of rules and regulations that govern the conduct of the legal profession. The codes of professional conduct promulgated by the law societies address considerations such as:

- fee splitting;
- conflicts of interest; and
- duties of confidentiality.

2. 5. What is the general attitude towards legal finance in your jurisdiction among the courts and other relevant bodies?

Canada

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The courts and other relevant bodies are generally accepting of legal finance. The case law makes clear that litigation funding arrangements are not *per se* subject to restrictions under the ancient doctrines of champerty and maintenance. Rather, the courts have expressly acknowledged the value of legal finance as a tool to facilitate access to justice.

2. 6. Is legal finance considered consumer credit and is it captured by the relevant protective regulations in your jurisdiction?

Canada

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No. Commercial litigation finance, provided on a non-recourse basis, does not constitute consumer credit or traditional lending and does not fall under consumer credit regulation.

### 3. Other risk-sharing models available to litigants and law firms

3. 1. Are conditional (contingent or success) fee agreements permitted in your jurisdiction? In what circumstances are they typically used? What are the advantages and disadvantages for clients and for law firms?

Canada

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Yes. Contingency fees are permitted with only narrow exceptions, such as in connection with certain contested family law matters. Contingency fees have been a common feature of the plaintiff personal injury bar for decades and have made it feasible for claimants to seek redress absent sufficient funds to confront defendants and their insurers. They have also provided an economic incentive for lawyers to make services available to such claimants and a large personal injury bar has developed, facilitating access to counsel. Concerns around conflicts of interest are sometimes levelled against lawyers operating under a contingency arrangement (although counsel who are paid on an hourly fee basis must likewise contend with similar types of conflict considerations).

3. 2. What is the maximum contingency that is permitted (ie, up to 100% of hourly fees or something less)? Is there a cap on the amount of success fees lawyers can receive under such arrangements?

Canada

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In general, provided that clients are properly informed about the operation of the contingency arrangement, there is no maximum amount or cap on a contingency fee which is otherwise 'fair and reasonable'. In Ontario, 'fair and reasonable' is treated as no more than 50% of the net recovery. The use of contingency fee arrangements in class actions is the norm, where counsel fees are subject to ultimate approval by the court. Some courts have come to accept a presumptive validity of 33% for class counsel's contingency fee entitlements in class actions.

3. 3. Are damages-based agreements permitted in your jurisdiction? In what circumstances are they typically used? What are the advantages and disadvantages for clients and for law firms?

Canada

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There are no restrictions on damages-based agreements in Canada, beyond those that would apply to any form of contingency fee agreement.

3. 4. What other funding and/or risk-sharing options are available to litigants in your jurisdiction? In what circumstances are they typically used? What are the advantages and disadvantages for clients and for law firms?

Canada

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A variety of alternative fee arrangements are used in Canada. Common examples include standalone or blended versions of the following:

- fixed fees;
- flat fees;
- capped fees;
- blended fees;
- success bonus or performance incentives; and
- sliding scale pricing.

To the extent that any of these depart from the standard hourly fee retainers, they may reflect situations whereby lawyers are functionally providing financing to clients.

3. 5. Are law firms in your jurisdiction allowed to have non-lawyer owners or non-lawyer shareholders?

Canada

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In Quebec, non-lawyer ownership is permitted. In other provinces, how legal regulators treat non-lawyer ownership remains uncertain.

3. 6. How do the available funding and risk-sharing options impact on the attitudes of corporate litigants about affirmative recovery programmes or the pursuit of high-value commercial claims more generally?

Canada

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It is now customary for any corporate litigant looking to advance a high-value claim to discuss alternative fee arrangements with its counsel. Similarly, where multiple law firms are responding to requests for proposals for corporate client work, the inclusion of funding and risk-sharing solutions is increasingly common.

The application of funding is particularly intuitive for corporate litigants when pursuing debt recovery, fraud cases and judgment enforcement.

3. 7. How do the range of funding and risk-sharing options available impact on the attitudes of law firms about their own business?

Canada

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There have further been some expressions of readiness by the well-established, large law firms to take on more claimant work – including both corporate claims work and plaintiff-side class action mandates – in light of increased access to funding and risk-sharing tools.

#### 4. Collective actions

4. 1. Is it possible to bring collective actions in your jurisdiction? If so, can they be funded by third parties? In those circumstances, how is the amount of the funder's return determined? Are there caps or other restrictions? Do such agreements require court approval?

Canada

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Class actions are a common feature in Canada. Litigation funding is permitted in Canada. In all provinces except Quebec, advance court approval of a litigation funding agreement is expected. In Ontario, the Class Proceedings Act has been amended to include provisions on what a litigation funding agreement should include. These are as follows:

- A third-party funding agreement is subject to court approval.
- The agreement must be provided to the defendant, subject to the permission to redact such information



- that may reasonably be considered to confer a tactical advantage on the defendant.
- In order to approve an agreement, the court must be satisfied that:
    - the agreement – including indemnity for costs and amounts payable to the funder under the agreement – is fair and reasonable;
    - the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship;
    - the funder can financially satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement; and
    - any prescribed requirements and other relevant requirements are met.
  - It is a term of the agreement that the funder will be subject to:
    - the same confidentiality requirements in respect of confidential or privileged information in the proceeding to which the representative plaintiff would be subject; and
    - the deemed undertaking rules set out under the rules of court, as if the funder were a party to the proceeding.
  - In determining whether a third-party funding agreement meets the above requirements, the court will consider whether the representative plaintiff received independent legal advice with respect to the agreement.
  - If costs are ordered to be paid by the representative plaintiff, the defendant must have the right to recover the costs directly from the funder, to the extent of the indemnity provided under an approved third-party funding agreement.
  - The defendant is entitled, on motion, to obtain from the funder security for costs to the extent of the indemnity provided under an approved third-party funding agreement if:
    - the funder is ordinarily resident outside Ontario;
    - the defendant has an order against the funder for costs in the same or another proceeding that remain unpaid in whole or in part; or
    - there is good reason to believe that the funder has insufficient assets in Ontario to pay the costs.
  - The representative plaintiff must give notice to the court and to the defendant if:
    - an approved third-party funding agreement is terminated; or
    - the funder becomes insolvent.

#### 4. 2. How significant is the funding of collective actions in your jurisdiction relative to the use of legal finance by individual commercial litigants?

##### Canada

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Litigation funding is a common and important part of the class action landscape. Because of the requirement to seek court approval of litigation funding agreements, there is a wealth of judicial consideration of funding in this context. Class action counsel turn to funding in order to assist with fees, disbursements and adverse cost exposure borne by the representative plaintiff.

One interesting feature in Ontario and Quebec is the public funds made available to support class actions. In Ontario, the Class Proceedings Fund provides protection for cost exposure and a limited amount of disbursement funding where cases meet the requirements of the fund. A public fund in Quebec provides similar, though more limited support for class action counsel.

Due to the necessity of court approval for funding agreements in class actions (and insolvency-related litigation funding), but not for individual commercial litigation funding, some in the market have a misperception that litigation funding is primarily a tool used in the class action context. However, it is clear from reporting by funders and lawyers in the market that litigation funding is broadly used in private commercial disputes.

## 5. Securing financing

5. 1. What factors will a funder generally consider when evaluating whether to fund a case?

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- The merits of the case and whether there is a clear evidentiary and legal basis for the case;
- The quantum of anticipated damages;
- The cost of pursuing a claim (ie, the size of investment required);
- The ability of the defendant to satisfy a judgment/award;
- The anticipated time to resolution;
- The potential scope of adverse cost exposure; and
- The counsel involved on both sides of the matter.

5. 2. What should a litigant or litigant's counsel look for in a legal finance partner?

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- Experience and track record;
- Sufficient financial resources to support funding commitments;
- Responsiveness and the ability to process applications in a timely manner;
- The capacity to provide strategic assistance (eg, knowledge of litigation landscape, judgment enforcement capabilities); and
- Confidence in the ability to enjoy a commercially sound, trust-based working relationship.

5. 3. What is the typical process for concluding the legal finance agreement?

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- An initial high-level assessment;
- A non-binding term sheet with the economics of the proposed funding;
- Deep-dive due diligence by the funder, subject to an exclusivity period;
- Approval of the investment; and
- Execution of the funding agreement.

#### 5. 4. What terms does the legal finance agreement typically include?

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- Economic terms, including the return and payment waterfall;
- A description of the litigation or arbitration and the scope of the funding obligations;
- Provisions on adverse costs orders and security for costs;
- Varying levels of reporting expectations; and
- Termination provisions.

#### 5. 5. Do any caps apply to the funder's fees?

Canada

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A cap may be negotiated as part of a funding arrangement. Such terms may present a challenge where the parties to the funding agreement have divergent views on what constitutes a reasonable return to the funder for the risk assumed.

#### 5. 6. Can the funder terminate the legal finance agreement before the litigation has ended? If so, under what circumstances and what are the implications?

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Yes. Termination mechanics are standard provisions in legal finance agreements. Generally, these will have different implications for funder-elected termination events versus event-triggered termination events. In the former case, a funder will generally retain an entitlement to reimbursement for its deployment funding in the event of eventual success in the funded litigation/arbitration, but will lose the opportunity to receive a return on the investment. In the latter case, while the funder may cease to provide further funding, it will generally continue to be entitled to a return of its deployed capital and the contractual return.

#### 5. 7. Under what circumstances (if any) must funding be approved by the court in advance?

Canada

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In class actions and litigation relating to insolvency matters. The operative principle is that the court will review a funding agreement when it affects the interests of parties that did not sign the agreement (eg, class members or creditors). Conversely, when the only parties affected by a funding agreement are the parties to the agreement, as with other contractual arrangements, the courts will not become involved.

5. 8. Have there been notable disputes arising from legal finance agreements, and if so, what can a litigant or counsel do to avoid such disputes?

Canada

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While not in the context of commercial litigation, one case before the courts concerns the extent to which litigation lenders in relation to a personal injury matter have responsibility for an adverse cost order against a claimant. To avoid such situations, it should be clear as between a client, counsel and funder who is responsible for adverse cost orders and what the terms are in connection with any such responsibility.

5. 9. Is the funder bound to fund any counterclaims arising from the funded litigation?

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There is no legal precedent pursuant to which a funder has been bound by a counterclaim in a funded claim. Whether counterclaims are a component of a funder's obligations is generally a question of what is agreed in the funding arrangement between the client and funder. It is thus matter and engagement specific.

## 6. Purchasing a litigation claim, judgment or award

6. 1. Can the funder purchase legal claims?

Canada

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The capacity for a funder to purchase a legal claim remains particular to the circumstances of the claim. Broadly, concerns with maintenance and champerty could be an obstacle to such transactions. However, parties and courts have shown a readiness to question the application and relevance of champerty and maintenance in various circumstances.

6. 2. How does a funder purchase a claim out of an insolvency?

Canada

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Typically, a funder will provide funding for the legal fees to advance the claim of the insolvent entity's estate and will be granted a priority over the proceeds to be recovered. The extent of the funding will vary: it can be limited to fees or contemplate a partial or full monetisation of the anticipated rewards – an outcome most akin to outright purchasing a claim.

6. 3. Are final judgments and/or mere causes of action assignable in your jurisdiction and is there a regulatory framework governing this?

Canada

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Final judgments may be purchased. The ability to assign a bare cause of action and the applicable framework remain questions to be resolved in Canada.

## 7. Role of the funder

### 7. 1. Can the funder influence the litigant's choice of counsel?

Canada

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Counsel are selected by the client. The identity of counsel, however, is a factor that funders consider in making their investment decisions.

### 7. 2. Can the funder attend and/or participate in the court proceedings?

Canada

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The open court principle applies. As such, a funder should generally be permitted to attend proceedings, as would any member of the public. Funder participation in a proceeding will generally be limited to situations in which the funder:

- has become a direct party;
- can provide important contributions on an issue before the court; or
- has direct interests which are otherwise at issue.

### 7. 3. Can the funder influence the acceptance or terms of a proposed settlement agreement?

Canada

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As in many jurisdictions, there is a tension as to what constitutes control over the conduct of the litigation and what may be agreed to be reasonable commercial involvement. As a general proposition, it is recommended that funders, clients and their counsel have a clear understanding as to reasonable settlement expectations at the outset of a matter.

### 7. 4. In what other ways can the funder participate in, and exert influence on, the litigation?

Canada

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Funders that have large teams or expertise in particular areas can often provide strategic insights and advice to clients and counsel.

## 8. Ethical considerations

8. 1. In what circumstances (if any) is it necessary to disclose a legal finance agreement to the court or to the opposition? What specific information must be disclosed?

Canada

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In class actions and insolvency litigation, where funding agreements require court approval, there is an expectation in most provinces that a redacted funding agreement will be disclosed to a defendant. As noted in question 4.1, the class action legislation in Ontario stipulates that a funding agreement may be redacted to the extent that the information being redacted might confer a strategic advantage to the defendant.

8. 2. Are communications between the parties to the legal finance agreement subject to privilege in your jurisdiction?

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Yes.

8. 3. Does the rule of attorney work product apply to documents generated for the purposes of securing legal finance in your jurisdiction?

Canada

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Yes. The applicable Canadian concepts of privilege are known as ‘solicitor-client privilege’ and ‘litigation privilege’.

8. 4. In what circumstances (if any) do rules about fee-splitting impact on the use and practice of legal finance?

Canada

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The rule against fee splitting will presumptively apply to any litigation funding arrangement where a portion of counsel’s fees are being shared directly with a funder. The rationale for applying this rule to such an arrangement is thought by many to be unwarranted and out of date.

## 8. 5. Do the doctrines of champerty and maintenance apply in your jurisdiction?

Canada

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Yes, except in Quebec. As in other countries, considerations such as access to justice have assumed prominence over earlier sensitivities relating to champerty and maintenance. While some ambivalence remains as to the relevance of champerty and maintenance, it is uncommon to find reasoned arguments in support of these doctrines.

## 8. 6. Are there any types of proceedings (family, private prosecutions) for which funding is not permitted?

Canada

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Any types of proceedings – such as family law, criminal and quasi-criminal matters – in which a contingency arrangement is not permitted may, by analogy, be areas in which funding would also be restricted.

## 9.Proceedings

### 9. 1. What is the typical timeframe for first-instance proceedings in your jurisdiction?

Canada

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This question is highly dependent on the nature of the proceedings (eg, commercial dispute, class action, family law matter) and the jurisdiction. The Canadian courts are working through a backlog of cases delayed by the COVID-19 pandemic. As a rough guide, a commercial dispute could expect to get to trial within three to six years.

### 9. 2. What are the opportunities in the litigation process for a case to be struck out prior to a trial?

Canada

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Yes. Motions to dismiss or for summary judgment can be brought to strike claims that are frivolous or that have no basis in law.

### 9. 3. How much party discovery of evidence is permitted in your jurisdiction? Are there procedures for seeking or compelling evidence from non-parties?

Canada

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The scope of discovery in Canada is quite broad. Claimants and defendants are entitled to receive documents relevant to the litigation, subject to materials that are subject to privilege. Similarly, oral discovery offers the parties broad latitude to ask questions that relate to matters in issue in the litigation. The two principal restrictions on the scope of discovery concern:

- whether the subject of the enquiry is relevant; and
- whether the benefit of the discovery sought is proportional to the cost and effort required.

There are provisions within the rules of procedure to seek evidence from non-parties, though they are relatively limited. Experts are not deposed in advance of trial.

#### 9. 4. Are interlocutory appeals (appeals of non-final judgments) permitted during proceedings in the first instance?

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Yes.

#### 9. 5. Are first-instance decisions commonly appealed in your jurisdiction? What is the typical timeframe for appeal proceedings?

Canada  
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It is not uncommon for contentious proceedings to involve appeals of first-instance decisions. The timeframe for such appeals varies based on the provincial jurisdiction. It might be anticipated that an appeal from a decision of first instance will take place within a year of filing of the appeal.

#### 9. 6. How are decisions typically enforced in your jurisdiction? What is the typical timeframe for enforcement proceedings?

Canada  
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There is no typical timeframe for enforcement proceedings in Canada. Basic efforts to enforce a judgment can be expected to take at least half a year or more.

#### 9. 7. Is there an automatic stay on enforcement pending appeal or under what circumstances is one granted? Are appeals from first instance granted as of right?

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Whether an automatic stay applies on appeal depends on the applicable rules of civil procedure in a province, as well as statutes pertaining to the claim. In Ontario, an appeal generally serves to stay an order requiring the payment of money.

Where an automatic stay does not apply, the appellant may seek an order for a stay where:

- there is a serious issue to be tried;
- irreparable harm would follow if the stay were not granted; and
- the balance of convenience favours granting the stay.

Appeals of final judgments are generally as of right.

## 10. Costs and insurance

10. 1. Will the court order the losing party to pay the costs of the winning party? How else might costs be allocated between the parties and under what conditions?

Canada

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Yes. Most jurisdictions in Canada employ a 'loser pays' system of cost awards.

10. 2. Are some or all of the costs of funding recoverable by the winning party?

Canada

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We have yet to see developed case law on the ability for a funded party to recover the costs associated with such funding when successful.

10. 3. Can the court order costs against the litigation funder?

Canada

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Yes. It is common for funders to provide a cost indemnity in favour of funded clients. In the context of class actions in Ontario, the Class Proceedings Act specifies that a defendant which successfully resists a funded class action is entitled to seek costs directly from the litigation funder.

10. 4. Can the court order security for costs? If so, in what circumstances will it generally do so and how is this calculated and provided?

Canada

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While the rules vary in each province, orders to post security for costs are commonly available where a party:

- is non-resident in a jurisdiction;
- does not have assets within a jurisdiction; or
- is demonstrated to be impecunious.

#### 10. 5. Is security for costs commonly ordered in funded litigation?

Canada

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Security for costs orders are typically available in a funded litigation, unless the court can be satisfied that a funder is otherwise responsible for an adverse cost award and will honour the obligation.

#### 10. 6. Is after-the-event (ATE) insurance allowed in your jurisdiction? If so, how mature is the market?

Canada

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Yes.

#### 10. 7. In what circumstances is ATE insurance typically used? What are the advantages and disadvantages?

Canada

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Where a litigant only seeks protection from a potential adverse cost order, ATE policies can offer that protection. Litigation funders that provide adverse cost indemnities only, without a degree of funding, risk contravening insurance regulatory requirements.

#### 10. 8. What other types of insurance are available for litigants in your jurisdiction? In what circumstances are they typically used? What are the advantages and disadvantages?

Canada

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The litigation insurance market in Canada is generally aligned with other sophisticated markets.

### 11. Trends and predictions

11. 1. How would you describe the current legal finance landscape and prevailing trends in your jurisdiction?

Canada

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Legal finance is now a broadly accepted tool in the market. The perception among counsel that it can be used by well-resourced/solvent clients is increasing. Moreover, there is growing evidence of sophisticated corporate parties using legal finance as a risk transfer and cost management solution.

11. 2. Are any new developments anticipated in the next 12 months, including any proposed legislative reforms?

Canada

Omni Bridgeway Capital (Canada) Limited

No.

## 12. Tips and traps

12. 1. What would be your recommendations for the smooth progress of funded litigation in your jurisdiction and what potential pitfalls would you highlight?

Canada

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- Ensure clarity and a reasonable view on anticipated damages.
- Work with skilled counsel who are confident in their ability to effectively forecast a matters budget.
- Be prepared to share risk/have 'skin in the game' (this is relevant to both client and counsel).



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