OMNI BRIDGEWAY

Maintenance and Champerty in Canada

Discussions about third-party funding often raise questions about the common law doctrines of maintenance and champerty. This article sets out how third-party funding fits into the Canadian legal landscape, in light of the history and evolution of maintenance and champerty. As set out in the article, the principles of maintenance and champerty do not prohibit third-party funding, which has been accepted by Canadian courts in both single-party and class action cases.

Origins of the Doctrines

As the Ontario Court of Appeal has explained, "[m]aintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation"[1].

The prohibitions against maintenance and champerty emerged in the medieval era and were designed to prevent influential nobles from lending their good names and wealth to frivolous lawsuits.

Champerty and maintenance were crimes in Canada until the abolition of common law crimes in 1953[2]. They remain torts in the common law jurisdictions of Canada, although they are most often invoked as a "shield" against the enforcement of an agreement, rather than as a "sword"[3].

Early Judicial Interpretation in Canada

From the earliest reported cases in Canada, courts were reluctant to apply the doctrines of maintenance and champerty strictly. Courts have long relied on the requirement of an "improper motive" on the part of the funder to relax the prohibitions in appropriate cases.

Beginning in 1907, in *Newswander v Giegerich*[4], the Supreme Court of Canada emphasized that maintenance and champerty were confined to cases of improper motive where the third party was "stirring up strife." The Court noted that in many instances, meritorious cases would not be advanced without help from outsider:

It would indeed at the present day be a startling proposition to put forward that every one was guilty of the crime of maintenance who assisted another in bringing or maintaining an action, irrespective of the results or merits of such action and whether the courts sustained it or not. Many grasping, rich men and soulless corporations would greedily welcome such a determination of the law, because it would enable them successfully to ignore and refuse the claims of every poor man who had not sufficient means himself to prosecute his case in the courts.

Three decades later in *Goodman v R*[5], Goodman was charged with champerty after agreeing to assist a poor man injured by a streetcar in exchange for a share of any proceeds. Goodman's assistance consisted of locating witnesses to the event, and the plaintiff had consulted a lawyer before Goodman became involved. The Supreme Court of Canada quashed his conviction and held that his conduct did not amount to "officious intermeddling" as he had not "stirred up strife."

An important development occurred with the decision of the Ontario Court of Appeal in *Buday v Locator of Missing Heirs Inc*[6]. That case recognized that a bona fide business arrangement that did not "stir up" litigation was not necessarily champertous. In other words, a commercial motive was not necessarily an "improper motive."

The Approval of Contingency Fee Arrangements

The prohibitions against maintenance and champerty had long restricted lawyers from acting on a contingency fee basis. In the seminal case of *McIntyre Estate*[7], the Ontario Court of Appeal held that a contingency fee arrangement was not per se champertous. In so doing, the court endorsed a flexible approach to maintenance and champerty:

[L]awyers' contingency fee agreements are not per se prohibited by the *Champerty Act*. However, in my view, that does not end the analysis that is required to determine if a particular agreement is champertous. It remains to be decided whether the lawyer had an improper motive in entering into the allegedly champertous agreement. In assessing the lawyer's motive, a court should consider, among other things, the reasonableness and fairness of the fee structure in the contingency fee agreement.[8] Ontario subsequently passed the *Contingency Fee Regulations*[9], pursuant to which lawyers' contingency fees are capped at 50%, although it can be higher with leave of the Court.[10]

Third-Party Funding of Class Action Litigation

Courts turned again to the principles underlying maintenance and champerty in a series of decisions regarding third-party funding of class actions.[11] In these cases, the funders provided an adverse costs indemnity, and a small amount of disbursement funding, in exchange for a portion of any recovery (for further details on these cases, see "case law").

Under this line of authority, the Court expanded upon the analysis from *McIntyre Estate*, and concluded that:

- Third-party funding is not maintenance and champerty per se;
- The Court must consider the specific terms of an agreement to determine if it is champertous;
- Third-party funding can provide access to justice for plaintiffs;
- It is not necessary for a plaintiff to be impecunious in order to seek funding, as funding is a rational means of mitigating risk; and
- Third-party funding also ensures that the defendant knows its costs will be paid.

The Courts here noted that certain terms in an agreement, including provisions about control and the funder's recovery, could signal an improper motive, which remains the harbinger of a champertous agreement. Nonetheless, third-party funding of class actions was approved in accordance with these guidelines.

Single-party commercial litigation: *Schenk v. Valeant*

In May 2015, the Ontario Superior Court extended the principles developed in the class action context to single-party commercial litigation.[12] In *Schenk v. Valeant*, Justice McEwen considered whether the rules against maintenance and champerty prohibited a plaintiff of limited means from contracting with a U.K. funder, who would cover all legal fees and disbursements in exchange for a portion of the recovery. The agreement was conditional upon court approval, which the defendant opposed.

Justice McEwen held that such an agreement was not per se champertous, and there was "no reason why such funding would be inappropriate in the field of commercial litigation."[13] However, Justice McEwen expressed concern about two specific provisions of the agreement. First, the terms gave the funder an open-ended and uncertain recovery, such that the plaintiff could not understand what the ultimate cost would be. Second, under the agreement, the funder could have received "lion's share" or even all of the recovery. Justice McEwen allowed the plaintiff and the funder to revise the agreement to change these aspects of it, and subsequently approved the amended agreement.

Reconciling Maintenance and Champerty Laws with Litigation Funding Today

The case law regarding maintenance and champerty has resulted out the following guiding principles:

1. It remains champertous for a third party to "stir up" litigation. Therefore, in Canada a litigation funder cannot instigate litigation or solicit plaintiffs.
2. A funding agreement will be champertous if it grants the funder too much control over the litigation. However, a funder can provide advice about strategy, and preserve the right to terminate the agreement under enumerated circumstances.
3. The returns to a funder should not be "excessive," but can reflect the risk that a funder is bearing. At times, such an agreement may result in a "windfall" for the funder, but a large return is not necessarily excessive in light of the inherent uncertainty and risk of litigation.

As the case law regarding third party funding, and its relationship to maintenance and champerty, continues to develop, we will update this analysis.

supra, 362-363

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1. *McIntyre Estate v Ontario* (Attorney General) (2002), 61 O.R. (3d) 257 at para 26.
2. *Criminal Code*, s. 9.
3. The unenforceability of champertous agreements is codified in Ontario in *An Act Respecting Champerty*, RSO 1897, c 327.
4. [1907] 39 SCR 354.
5. [1939] SCR 446.
6. (1993) 16 OR (3d) 257
7. (2002), 61 O.R. (3d) 257
8. *McIntyre Estate* at para 3.
9. O. Reg. 195/04, s. 7.
10. *Solicitors Act*, RSO 1990, c S.15, s. 28.1(6).
11. *Meltzler v. Gildan Activewear*, [2009] O.J. No. 3315 (S.C.J.); *Dugal v. Manulife Financial Corp*. (2011), 105 O.R. (3d) 364 (S.C.J.); *Fehr v. Sun Life Assurance Company*, 2012 ONSC 2715; *Labourers' Pension Fund v. Sino-Forest*, 2012 ONSC 2937; *Bayens v. Kinross Gold*, 2013 ONSC 4974.
12. *Schenk v. Valeant*, 2015 ONSC 3215

13. *Schenk v. Valeant* at para. 8.