

At a glance: regulation of litigation funding in Canada

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Regulation

Overview

Is third-party litigation funding permitted? Is it commonly used?

Litigation funding is permitted across Canada, and the courts have demonstrated an openness to it, particularly where funding is seen to promote access to justice. This includes the Supreme Court of Canada, which recently considered a litigation funding agreement in *9354-9186 Québec Inc. v Callidus Capital Corp.*

For over a decade, litigation funding has been used to advance class actions, and more recently parties are making use of funding in commercial litigation and arbitration matters, including breach of contract, intellectual property and other business disputes. In the context of class actions and insolvency matters, court approval is generally required, but not where funding is employed for business disputes, where it has been considered a private commercial financial arrangement.

With respect to class actions, judicial approval of funding agreements has become relatively straightforward, and the practice is developing whereby funding is approved on the written record, without opposition.

There is increasing variety in the types of agreement approved. In the early years of class action funding, the funder provided an adverse costs indemnity and a minimal amount of disbursement funding (see, eg, *Dugal v Manulife Financial Corporation* and *Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation*). More recently, courts have approved far more significant funding amounts, of the magnitude required to advance complex and costly matters (see, eg, *David v Loblaw* and *Difederico v Amazon.com*).

Approved class action funding arrangements have also expanded to include legal fees (in addition to disbursements and costs protection). In the 2019 case, *JB & M Walker Ltd v TDL Group*, the funder paid all legal fees and disbursements as the case progressed. In 2020, in *Drynan v Bausch Health Companies Inc.*, the funder paid 80 per cent of the legal fees, as well as covering disbursements and the costs indemnity. In these cases, the court was principally concerned with the fairness of the total fee to be paid by the class – that is, the joint fee between the funder and the lawyers, at the conclusion of the case. In *Drynan*, the court initially expressed concern about the arrangement, but approved it once there was an aggregate cap of 33.3 per cent of the proceeds.

Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

As with other forms of investment finance, there are no legislative limits on the fees for litigation funding. Some Canadian courts have used the contingency fee regulations as a guideline for suitable fees where the courts have been required to consider a funding agreement. For example, in *Schenk v Valeant Pharmaceuticals*, the Ontario

Superior Court held that a funder could charge up to 50 per cent of the proceeds of the claim, which is consistent with the contingency fee regulations in Ontario.

Recourse funding with an interest component must avoid running afoul of provisions in the Criminal Code of Canada regarding criminal rates of interest, but most dispute finance is non-recourse and therefore not captured by lending regulations.

Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

For Ontario class actions, a third-party funding agreement is subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant. In order to be approved, the court must be satisfied that the agreement is fair and reasonable, will not impair the solicitor-client relationships, and that the funder is able to satisfy an adverse costs award. The process and criteria are set out in section 33.1 of the Class Proceedings Act.

There are no other specific legislative or regulatory provisions governing litigation funding, and this legislation reflects general principles from case law that would have relevance in other parts of Canada.

Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

No specific rule covers lawyers advising their clients about third-party funding. However, lawyers owe a duty of candour to their clients on matters relevant to the retainer, which would include potential fee arrangements. In the class action context and as part of section 33.1 of the Ontario Class Proceedings Act, courts consider that the representative plaintiff's receiving independent legal advice with respect to the funding agreement forms part of the basic procedural and evidentiary requirement that should be met.

Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No public body has expressed any particular interest in or oversight of litigation funding. However, to the degree that a litigation funder is also providing insurance to a client, insurance regulators such as Ontario's Financial Services Regulatory Authority or the Financial Institutions Commission of British Columbia may have oversight of the arrangement.

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