WOODSFORD
LITIGATION FUNDING

Litigation Funding in Canada (Ontario)

Woodsford Litigation Funding Insight

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It is hard to miss the fact that litigation funding is undergoing exponential growth internationally and now constitutes a multi-billion dollar global industry. In the United Kingdom, Australia and the United States funding of both individual claims and class or ‘group’ actions is now commonplace. Increasing liberalization of both civil litigation and arbitration regimes in other jurisdictions (such as Singapore (in respect of arbitration and litigation related to arbitration) and Hong Kong (in respect of arbitration)) continues to open a greater number of jurisdictions to the possibility of funding. Coupled with greater awareness of the many advantages of funding amongst both attorneys and clients, and combined with a greater number of sophisticated providers of litigation finance, litigation funding is now part of the discussion around how proceedings should be financed in many cases. Canada is no exception to this trend; judicial treatment of funding is increasingly favorable and contingency fee arrangements are being used by the Canadian bar with greater frequency, paving the way to greater access to justice for all Canadian plaintiffs.

What are the Advantages of Litigation Funding?

As we have seen over the last several years in the United States, litigation funding can be applied to a catalog of varied commercial matters, and its economic and strategic advantages can be substantial for both plaintiffs and lawyers alike. The first is that litigation finance provides access to justice for plaintiffs with meritorious claims but limited means to prosecute litigation, or those facing insolvency. This is particularly true in "David v Goliath" cases where individuals or a smaller corporate takes on a bigger, well-resourced corporate defendant, which may attempt to delay proceedings to drain the plaintiff's financial resources and exhaust their appetite and ability to pursue the claim. Partnering with a well-capitalized funder like Woodsford counters this imbalance and substantially levels the playing field by allowing a proper claim to proceed and survive solely on its merits.

Increasingly, litigation funding is also being utilized by plaintiffs who are choosing to take advantage of litigation finance not because of financial constraints but to transfer to, or share with, a third party, the risk of ongoing legal costs and contingent liabilities of the claim. Chief Financial Officers and their General Counsel are also recognizing the accounting and budget benefits of third-party funding, as it shifts ongoing litigation expenses off a company's balance sheet.

The utilization of litigation funding has also demonstratively led to better settlement outcomes in certain scenarios by providing strategic options to claimholders and their counsel. Knowing that they have the financial support to fully pursue a dispute provides clients with better leverage in settlement discussions as they will not be forced to accept a low offer based on capital constraints or aversion to risk. Furthermore, if and when the plaintiff's attorneys feel it is strategically optimal, the defendants can receive a powerful signal that a sophisticated and reputable litigation funder such as Woodsford, with substantial litigation expertise, believes strongly enough in the merits of the underlying claim to put their own capital at risk, having carried out a thorough due diligence exercise on the plaintiff's claims.

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Finally, it should be emphasized that most reputable litigation funders are completely passive investors who do not exercise any control over the funded matter. Although a litigation funder like Woodsford, staffed with expert litigators possessing decades of international law firm experience, can prove to be a valuable resource to claimholders and their attorneys, all decisions regarding the litigation and potential settlement

remain firmly in the hands of the attorneys and their client. That detachment will be important to the courts when reviewing the appropriateness of funding agreements. In Ontario, the Ontario Trial Lawyers' Association has developed a policy to outline standards for interactions with litigation financiers that reflect some of the aims of the UK's Code of Conduct promulgated by the Association of Litigation Funders (of which Woodsford is a founder member).

What forms can Litigation Funding take?

Most attorneys are now familiar with the fundamentals of litigation funding - a third party, which is otherwise unrelated to the litigation, agrees to fund all or part of the plaintiff's costs of the litigation (be that attorney's fees and/or other disbursements such as experts' fees) and may also indemnify the plaintiff against the risk of any adverse costs (be that through the litigation funder providing an indemnity or through the funder providing the funds to purchase an after-the-event insurance policy ("ATE")). Funding of this kind is non-recourse (in that it is not repayable if the case does not succeed), with the funder obtaining a return on its investment only in the event of success, with such return comprising a proportion of the damages and/or costs recovered by the plaintiff.

As well as providing non-recourse finance to plaintiffs to meet their legal fees and/or disbursements in respect of a single litigation or arbitration, funding can also be advanced to plaintiffs in respect of a 'portfolio' of claims. Take for example, a construction company that is involved in a series of disputes over various projects. Litigation funding can be provided to fund all of those disputes. The advantage for the plaintiff is that such finance can, on the whole, be provided at a better rate and the funder will often be able to apply a lighter touch to due diligence, saving management time. For the funder, the risk of loss is lessened, since the funder's collateral includes proceeds generated from any of the cases.

As the use of contingency fees in Ontario (and Canada more widely) is on the increase, and the costs of litigation rise (especially in the class action context), law firms are finding it harder to bear the burden of funding these contingency arrangements from their own resources. There is a gap growing between the capacity of law firms to take on contingent fee work and the appetite of plaintiffs for such arrangements.

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There is also the potential for conflicts to develop in full-service firms, with the litigation group often having to persuade non-litigators to support their contingent fee portfolio. Litigation funding can step in to meet this demand and solve the inherent conflicts that might develop over securing internal resources.

As well as providing finance on the single case basis, litigation funders such as Woodsford can also offer structured non-recourse financing facilities directly to

law firms providing economic support to their contingency practices and a boost to both the firm's day-to-day cash-flow and its overall financial position. Law firm finance, where a funder enters into a funding facility directly with a law firm cross-collateralized against a portfolio of the firm's contingency cases, can mitigate cash flow challenges for the firm, providing a certainty that overheads including salaries and legal invoices will be timely paid and enabling the partners to focus on the practice of law. These law-firm side arrangements are also a vehicle to allow a firm to expand by on-boarding new clients and offering more flexible arrangements to existing business relationships with ongoing engagements.

Developments in Ontario

Class actions

Third party funding for class actions has received court approval in several instances and is a growing trend. The approved class action funding agreements have on the whole provided for the funding party to commit to pay disbursements, to advance security for costs as ordered by the court and to meet adverse costs. The funder receives a return based upon a percentage of any settlement or judgment obtained on behalf of the class. Such arrangements continue to receive judicial endorsement in Ontario as promoting access to justice, where the terms of such funding are fair and reasonable.

A recent example is that of the 2018 case of *David v Loblaw*, in which the court set out the factors which it took into account in making such an assessment:

- The plaintiffs' rights to instruct lawyers and direct the litigation was not fettered;
- the plaintiffs had received independent legal advice on the terms of the funding;
- the funding agreement could only be terminated by the funder with the leave of the court (with the funder paying costs up to the date of termination);
- the court was satisfied that the funder's obligations were sufficient to cover any adverse cost orders; and
- no assignment of the funding agreement could take place without court approval and notice to all parties.

While the Class Proceedings Fund does provide some public funding for class proceedings in Ontario, the fund covers only disbursements (including experts' fees) and indemnifies plaintiffs against adverse costs awards, but it does not provide funding for the plaintiffs' attorney's fees. Further, cases seeking public funding must engage the public interest, which may not be the case in many class actions. Here, litigation funding from a reputable third-party funder such as Woodsford can help achieve access to justice for claims which do not obtain such public funding.

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Single commercial case funding

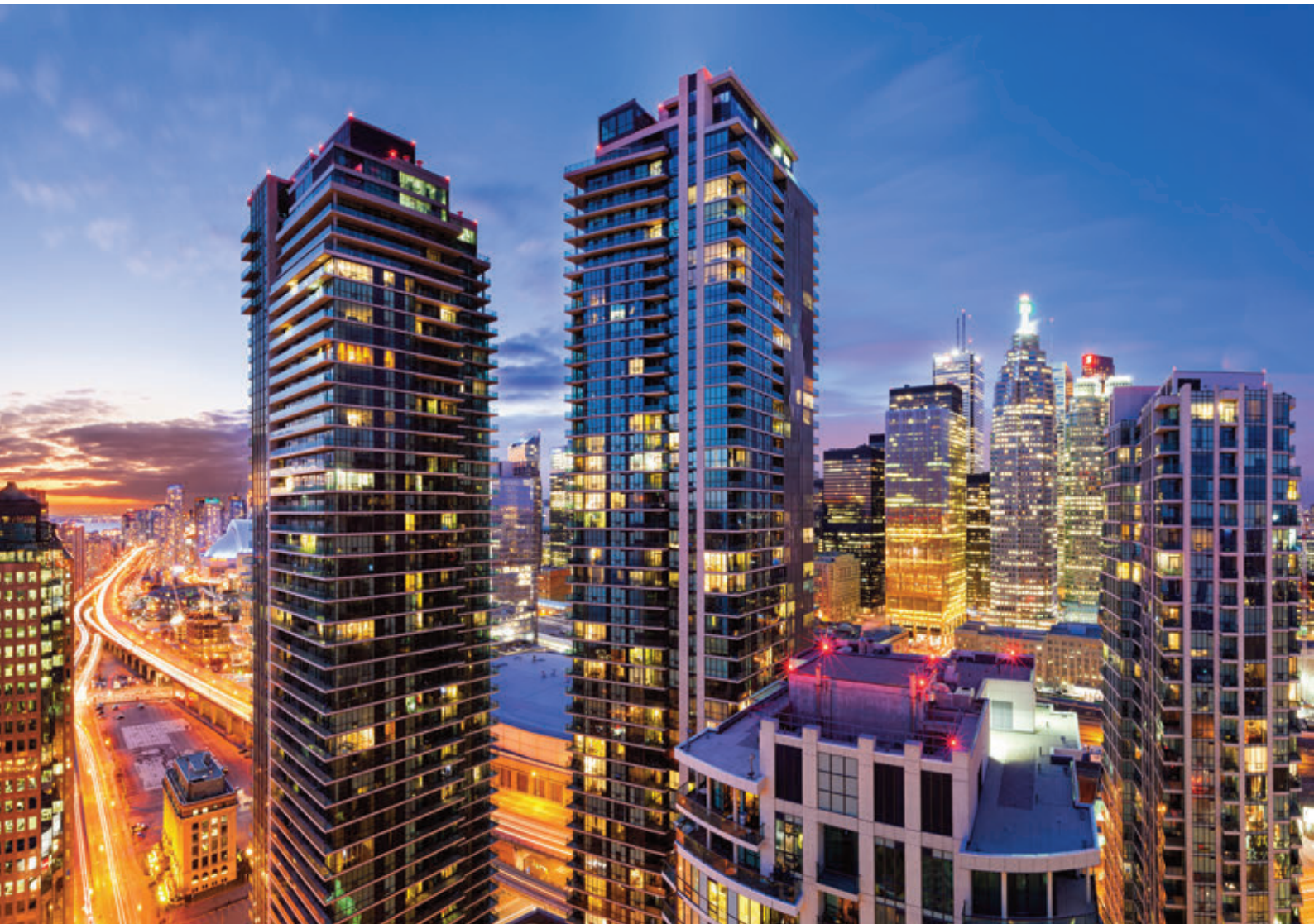
While much of the discussion around third party funding is focused on funding for class actions, and in relation to claims by insolvent parties, funding for solvent claimants on a single case basis in Ontario is increasingly gaining traction. The costs of disputes is rising and recognition is increasing that claims must not only be sufficiently legally meritorious to warrant being commenced, but must also be economically viable to be assets worthy of incurring the costs and risks of litigation. The commercial reality is that plaintiffs may need or want to share the risks and rewards of litigation. The courts of Ontario have recognized this reality. In *Schenk v. Valeant Pharmaceuticals International Inc.* 2015 ONSC 3215, the Ontario Superior Court commented that "[t]ypically, [third party funding] agreements have arisen in class proceedings. […] This being said, I see no reason why such funding would be inappropriate in the field of commercial litigation." The court dismissed the motion for approval of the funding agreement in this case, but granted the plaintiff the opportunity to revise the agreement, which confirmed that third-party funding agreements can exist in the single party commercial litigation context.

As a result of Schenk, third-party litigation funding arrangements began to spread, but the procedural boundaries, particularly in regard to whether judicial approval of the funding agreement was required, were still unknown. In *Seedlings Life Science Ventures, LLC v Pfizer Canada Inc* 2017 FC 826, judicial treatment of third-party funding agreements was voluntarily sought by the funder and the plaintiff who wanted judicial confirmation that the agreement would not be held unenforceable as champertous. The court questioned why its approval would be necessary in the context of single party commercial litigation and confirmed that, in this context, a "[d]efendant has no legitimate interest in enquiring into the reasonability, legality or validity of [the plaintiff's] financial arrangements […] or the manner in which

[the plaintiff] chooses to allocate the risks and potential returns of the litigation". This decision marks a distinction between funding in the class proceedings context, where court approval of a funding agreement at the outset of litigation is required, and in the single party, commercial litigation context, where court approval is now arguably not required.

Conclusion

There are now more options available for plaintiffs in Ontario who wish to pursue their legal rights and manage the inherent risks of litigation. With litigation finance on the rise and continuously taking different forms, it makes sense for lawyers to educate themselves on funding and the numerous finance solutions that are available to their firms and clients. When clients require or may otherwise benefit from litigation finance, it is arguably incumbent upon the lawyer not only to have adequate knowledge of funding and the products available, but also to help the client in deciding which funders to approach and (more importantly) which ones to avoid. In this regard, lawyers should select only reputable and professional litigation finance providers, who are experienced in the practice of dispute resolution.



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About the authors

Simon Walsh is a Senior Investment Officer at Woodsford and has extensive experience in high value international commercial arbitration and cross-border litigation over a broad spectrum of sectors, having acted for clients in the telecoms, private equity, financial, maritime, offshore, power and aviation sectors including acting in some of the world's largest telecoms disputes.

Simon has a particular focus on Woodsford's investments in group and representative litigation in England & Wales (such as those brought under section 90 and 90A FSMA and collective actions before the Competition Appeal Tribunal) as well on class actions in the United States, Australia and Canada. Simon is a solicitor, admitted in England & Wales, and has acted in matters before the English courts (including the High Court, Court of Appeal, and Privy Council) and before international tribunals.

Prior to joining Woodsford, Simon practiced out of the London office of Skadden, Arps, Slate, Meagher & Flom, where he specialized in complex, high value international arbitration and cross-border litigation. Before joining Skadden, Simon helped to establish the international arbitration practice of the London office of US firm O'Melveny & Myers LLP. Simon holds a Masters Degree in International Trade and Maritime Law from the University of Southampton.

Mark Spiteri, Woodsford's Finance and Commercial Director is an economics graduate from the London School of Economics. He started his career in 1997 at Coopers & Lybrand (now Pricewaterhouse Coopers), where he trained as a management consultant and was admitted into the Chartered Institute of Management Accountants (CIMA).

Mark went on to become a manager in the Corporate Finance division of PwC, where he specialized in strategic M&A and outsourcing transactions. Major clients included Royal Mail, the NHS and a number of private equity firms.

About Woodsford Litigation Funding

Founded in 2010 and with offices in London, the USA, Tel-Aviv and Singapore, Woodsford Litigation Funding provides tailored litigation financing solutions for businesses, individuals, and law firms. This includes both single case and portfolio litigation funding and arbitration funding. Woodsford's Executive team blends extensive business experience with world-class legal expertise. Woodsford is a founder member of the Association of Litigation Funders of England and Wales.

For further information, visit **www.woodsfordlitigationfunding.com** or email **Mark** directly at **mspiteri@woodsfordlf.com**