

# Litigation Funding 2021

Contributing editors  
**Steven Friel and Jonathan Barnes**  
*Woodsford*





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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Litigation Funding*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Belgium, Canada, France, Russia and Thailand.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Steven Friel and Jonathan Barnes of Woodsford, for their continued assistance with this volume.



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## REGULATION

### Overview

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

Third-party litigation funding is permitted in Canada, and Canadian courts are increasingly favourable of litigation funding. Over the past decade, the law has confirmed the suitability of third-party litigation funding in the context of class proceedings, insolvency cases and single-case commercial litigation, subject to certain requirements.

In Canada, case law on third-party funding in domestic arbitration is lacking. There have not been any reported decisions, either from courts or public arbitral awards, that discuss this matter. Also, Canadian domestic arbitral legislation does not mention third-party funding.

### Restrictions on funding fees

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

Whereas there is no explicit provisions or regulations, the ongoing case law provides some clarity as to the limit on funder's fees and interest within the scope of a litigation funding agreement (LFA).

In a class proceeding context, the Ontario Superior Court (ONSC) provided in *Houle v St Jude Medical Inc* that whether a particular LFA is fair and reasonable to the parties will depend on the circumstances of the litigation, and the commercial terms within the LFA must not over-compensate the third-party litigation funder.

Elaborating on what would constitute an overcompensation, in *Dugal v Manulife Financial Corp*, the court approved an LFA where the funder provides an indemnity to the representative plaintiff for a commission of 5–10 per cent of the total amount recovered, provided that the amount is capped. In *Metzler Investment GmbH v Gildan Activewear Incan* LFA that allows for unlimited recovery – not subject to any cap – declared to be not reasonable. In *Musicians' Pension Fund of Canada (Trustee of) v Kinross Gold Corp*, it has been decided that the 10 per cent levy on recovery imposed by a successful applicant to the Class Proceeding Fund may operate as a de facto upper limit on the commission that can be claimed by a funder.

In a commercial litigation context, the courts stated in *Schenk v Valeant Pharmaceuticals International Inc* that 30–50 per cent returns may be commercially reasonable.

### Specific rules for litigation funding

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

Class Proceedings Act 1992, S01992 (the Act) c 6 regulates LFAs within the context of class proceedings in Ontario.

Section 33.1 of the Act codifies that a plaintiff who has entered into a LFA must receive court approval. The court will approve the LFA if (1) the agreement is fair and reasonable, (2) the agreement does not diminish the rights of the representative plaintiff to instruct counsel and control the litigation, (3) the funder is able to satisfy the adverse costs awards, and (4) the funder meets any other prescribed requirements. The Court will also consider whether the representative plaintiff received independent legal advice with respect to the agreement.

The Act also codifies that defendants can recover any costs awarded against the representative plaintiff directly from the funder, to the extent of the indemnity provided by the funder under an approved LFA. The defendant is also entitled to obtain security for costs from the funder, again subject to the terms of the LFA, if, (1) the funder is ordinarily resident outside of Ontario, (2) the defendant has an order against the funder that remains unpaid in whole or in part, and (3) there is good reason to believe that the funder has insufficient assets in Ontario to pay the costs.

### Legal advice

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

No specific rule applies to lawyers advising clients in relation to third-party litigation funding. That being said, lawyers have a duty of candour to their clients on matters relevant to the retainer (for example, see Law Society of Ontario, Rules of Professional Conduct, Chapter 3). This duty involves the duty to inform the client in relation to third-party litigation funding.

### Regulators

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

No public authority regulates the industry. The funders, however, must be diligent, as the comparison between LFAs and insurance contracts may cause ancillary problems, particularly where the LFA is structured as an indemnity against an adverse costs award. The Superintendent of Financial Institutions of British Columbia and Ontario (as it then was) had issued interim cease and desist orders against one company for operating an unregistered insurance business. At the time of writing, it was not clear whether litigation funders operating in Canada should obtain a licence for LFAs containing only an indemnity. It is advisable for the funders to apply to the Financial Regulatory Services Authority and have a declaration that their funding is not an insurance.

## FUNDERS' RIGHTS

### Choice of counsel

#### 6 | May third-party funders insist on their choice of counsel?

No. Third-party litigation funders cannot insist on their choice of counsel, intermeddle in the conduct of the litigation, nor exercise control over the litigation, as to do so would harm the principles of maintenance and champerty and cause the litigation funding agreement (LFA) to be unenforceable.

### Participation in proceedings

#### 7 | May funders attend or participate in hearings and settlement proceedings?

Funders should not exercise control over strategy and day-to-day litigation decisions. In *Metzler*, the Court considered the principles of maintenance and champerty when approving an LFA and decided that the litigation funder should not be 'involved' in settlement negotiations, which means the acceptance or rejection of a settlement offer remain within the client's control throughout the litigation.

Typical clauses in LFAs would include a provision that requires the plaintiff to share important developments with the litigation funder, including the ones related to the settlement of a claim. Therefore, as long as the plaintiff controls the conduct of the litigation, funder's representatives should be welcome to attend the hearings, and other settlement discussions.

### Veto of settlements

#### 8 | Do funders have veto rights in respect of settlements?

No. To comply with the existing rules of maintenance and champerty, the LFA must not diminish the plaintiff's right to instruct counsel. Exercising a veto right will result in a finding that the LFA is unreasonable and therefore champertous.

Funders will typically ask to be informed of settlement negotiations and may offer their opinion. Acceptance or rejection of a settlement offer remains with the client. Funders have the ability to protect themselves against situations where a client may refuse a commercially reasonable settlement by inserting a contractual safeguard into the LFA (for example, the parties engage in good faith negotiations on settlement offers).

### Termination of funding

#### 9 | In what circumstances may a funder terminate funding?

In the commercial litigation context, courts established that reasonable termination rights of the funder within the LFA would not weaken the plaintiff's conduct over the litigation. In *Schenk v Valeant Pharmaceuticals*, for instance, ONSC decided that the funder's right to terminate the LFA where it reasonably ceases to be satisfied about the merits or commercial viability of the case did not restrict the plaintiff's ability to remain in the control of the litigation.

In class proceedings where courts approve LFAs, the funder's right to unilaterally terminate the LFA would render the agreement unenforceable, as it would give the funder an excessive power vis-à-vis the plaintiff.

### Other permitted activities

#### 10 | In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Although litigation funders are expected not to be involved in the conduct of the litigation, and the principles of maintenance and champerty aim to

limit funder's contribution to the litigation, it is generally accepted by the legal industry that funders conduct extensive due diligence processes before investing in cases. They can also bring their expertise to the litigation.

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

#### 11 | May litigation lawyers enter into conditional or contingency fee agreements?

Yes, except in family law or criminal or quasi-criminal matters, conditional or contingency fee agreements (or arrangements) are permitted. A lawyer may enter into a written agreement in accordance with the Solicitors Act and agree that his or her fees are contingent, in whole or in part, on the successful disposition or completion of the matter for which he or she is retained.

### Other funding options

#### 12 | What other funding options are available to litigants?

In the class proceedings context, litigants have several options in seeking funding: (1) self-help fundraising; (2) funding from public funds (eg, for plaintiffs in Ontario) funding from the Class Proceedings Fund from the Law Foundation of Ontario; or in Quebec, funding from a public fund named *le Fonds d'aide aux actions collectives*; or (3) indemnity agreements between class counsel and the representative plaintiff.

## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

#### 13 | How long does a commercial claim usually take to reach a decision at first instance?

According to Statistics Canada's 2018/2019 Civil Court Survey, commercial cases usually takes over one year (16 months) to reach first disposition, depending on complexity of the issues in the case and the case-load of the court in question.

### Time frame for appeals

#### 14 | What proportion of first-instance judgments are appealed? How long do appeals usually take?

The most recent data retrieved by Statistics Canada show that about half of first-instance judgments are appealed, and half of the appealed judgments are successful. Usually an appeal takes at least one and a half year, depending on complexity of the issues brought to appeal.

### Enforcement

#### 15 | What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no data on the proportion of judgments requiring contentious enforcement proceedings.

The legislation for the enforcement of domestic judgments or orders obtained in a province or territory will depend on the jurisdiction and the type of judgment or order being enforced. The procedures for enforcing judgments or orders are set out in the rules governing civil procedure for a province or territory.

Monetary judgments are typically enforced by any of the following:

- writ of seizure and sale;
- garnishment;
- a writ of sequestration; and

- the appointment of a receiver.

## COLLECTIVE ACTIONS

### Funding of collective actions

- 16 | Are class actions or group actions permitted? May they be funded by third parties?

Yes, class proceedings are a well-established form of litigation in Canada. They are considered as a tool to access to justice by the plaintiffs, as the costs of the proceedings are shared among the class members, and the risk is limited as the costs of an unsuccessful litigation are often born by the plaintiffs' law firm. As the result in the case binds all class members and prevent them from pursuing subsequent and separate claims, defendants find class proceedings beneficial too.

Class proceedings can be funded by third-parties. The first and most common third-party is the class counsel. Following the approval of the contingency fee arrangements, class counsels started to act on a contingent fee basis and bear all disbursements. They also agreed to indemnify the plaintiffs against an adverse costs award.

Over the past decade, many professional litigation funders entered into the Canadian legal landscape. They shared the risk with the class counsel by providing an indemnity to the class against an adverse costs award and bearing expenses. In fact, Canadian courts have considered third-party litigation funding for the first time in the context of class proceedings.

## COSTS AND INSURANCE

### Award of costs

- 17 | May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

The rules regarding costs are specific to each province's legislation and rules of practice. In Ontario, usually the 'loser pays' system applies, meaning that the successful party in the litigation is entitled to be indemnified by the unsuccessful party for the legal fees and disbursements it incurred. However, the court may decide that the case concerns a novel point of law or a matter of public interest and deter from the usual rule. In class proceedings, only the representative plaintiff (class representative) is responsible for the payment of costs. Saskatchewan, Alberta, New Brunswick, Nova Scotia and the territories have adopted the 'loser pays' rule similar to Ontario.

In Quebec, 'loser pays' rule applies; however, the tariffs of costs payable in class proceedings are significantly reduced.

British Columbia applies 'no costs' rule to class proceedings. No costs are awarded to either party, in relation to the certification, the common issues trial or appeals. Similar to British Columbia, Newfoundland and Manitoba have adopted the 'no costs' rule.

There is currently no case law establishing that the unsuccessful party to pay the litigation funding costs of the successful party.

### Liability for costs

- 18 | Can a third-party litigation funder be held liable for adverse costs?

Yes. While there are no decisions to date on that point in other provinces, defendants in class proceedings in Ontario can recover any costs awarded against the representative plaintiff directly from the funder, to the extent of the indemnity provided by the funder under an approved litigation funding agreement (LFA).

### Security for costs

- 19 | May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Yes, courts may exercise their discretion to allow a claimant or a third-party litigation funder to provide security for costs.

In Ontario, Class Proceedings Act specifically provides that the defendant is entitled to obtain security for costs from the funder, subject to the terms of the LFA, if, (1) the funder is ordinarily resident outside of Ontario, (2) the defendant has an order against the funder that remains unpaid in whole or in part, and (3) there is good reason to believe that the funder has insufficient assets in Ontario to pay the costs.

Within the context of private commercial litigation, Rule 56.01 of the Ontario Rules of Civil Procedure enumerates the circumstances under which such a defendant can bring a motion for security for costs. The motion is available where:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere;
- the defendant has an order against the plaintiff for costs in the same or another proceeding that remains unpaid in whole or in part;
- the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant;
- there is good reason to believe that the action is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant; or
- a statute entitles the defendant to security for costs.

The order is discretionary. Having met one of the enumerated grounds in Rule 56, defendants are not necessarily entitled to security for costs. Generally, a plaintiff is able to resist a motion for security for costs if can show that it has sufficient assets in Ontario, or that is impecunious and that an injustice would result if it were not allowed to proceed with its claim.

The amount and form of security and the time for paying into court or otherwise giving the required security is determined by the court. In addition to cash, there are other forms of security that have been ordered by the courts, such as security in the form of a letter of credit, a charge on a property owned by a plaintiff in favour of the defendant, and a bond of an insurer licensed under the Insurance Act.

- 20 | If a claim is funded by a third party, does this influence the court's decision on security for costs?

The fact that a claim is funded or not, is not a decisive factor for the courts to order security for costs. Courts are exercising their discretion where the third-party funder is a non-resident with assets in foreign jurisdictions.

### Insurance

- 21 | Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

Yes, ATE is permitted and it is being used in the market for almost ten years. A typical ATE policy covers the opponent's adverse costs and the plaintiff's own disbursement in the event of a loss.

The legal expense insurance market is growing in Canada too. Although it is relatively new in Ontario, it is well established in Quebec. Importantly, insurers aiming to provide legal expense insurance must obtain a licence from the relevant authority.

## DISCLOSURE AND PRIVILEGE

### Disclosure of funding

- 22 | Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

The issue of disclosure will depend on the type of dispute and its forum. Within the field of class proceedings and insolvency, the litigation funding agreement (LFA) must be approved by the court, and a motion to approve the LFA must be made with notice to the opposing party. The opposing party may appear and make submissions on the motions.

For LFAs in the private commercial litigation, there is no regulatory regime requiring the disclosure of the LFA to the court and opposite party. In *Schenk v Valeant Pharmaceuticals International Inc*, the court found it would be prejudicial to the plaintiff to compel production of the LFA to the defendant and that the plaintiff had a reasonable expectation of privacy over it.

### Privileged communications

- 23 | Are communications between litigants or their lawyers and funders protected by privilege?

Documents, discussions, and analyses shared with a funder by the litigant or the litigant's lawyer in relation with the litigation are considered to be under the scope of litigation privilege. However, as discussed in *Fehr v Sun Life Assurance Co of Canada*, LFAs are not privileged because they do not communicate legal advice.

To be approved, an LFA should provide that the funder agrees to abide by the implied undertaking rule regarding any confidential information that comes into its possession.

## DISPUTES AND OTHER ISSUES

### Disputes with funders

- 24 | Have there been any reported disputes between litigants and their funders?

It appears to be no dispute between litigants and their funders at the time of writing.

### Other issues

- 25 | Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

Litigants and their lawyers should be diligent about the funder's professional and financial capabilities, as no legislation regulates the industry currently.

## UPDATE AND TRENDS

### Current developments

- 26 | Are there any other current developments or emerging trends that should be noted?

The highly anticipated Bluberi decision of the Supreme Court of Canada gave boost to the litigation funding industry. The Court identified that litigation funding in class actions arose as a response to barriers such as adverse cost awards, which were stymieing litigants' access to justice. The Court also expressed that a litigation claim of an insolvent company is akin to a 'pot of gold' and litigation funding is the only potential recovery for the creditors.



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This decision made clear that litigation funding will be commonly used in insolvency proceedings, in addition to class proceedings and commercial litigation.

### Coronavirus

- 27 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The government of Canada is acting to minimise the impacts of the covid-19 pandemic. To that respect, the government enacted the Time Limits and Other Periods Act (COVID-19) to automatically suspend time limits established under federal legislation to start a civil legal proceeding or doing something in a civil legal proceeding.

The Ontario Court of Justice has significantly revised its procedures and schedules in response to the covid-19 pandemic. The Court adopted a reduced operational schedule beginning on 16 March 2020 and put in place restrictions and measures to prevent the spread of covid-19, including requirements for physical distancing and limits on the numbers of people permitted in courthouses and courtrooms.

Since March 2020, the Court has been working closely with its justice partners, including the Ministry of the Attorney General, to adopt technology that will allow participants to access justice and court-related services without the need for attending in person. Many court proceedings, which have traditionally taken place in person, are now taking place using remote access, such as videoconference or audioconference.

Due to the pandemic, it is reported that case complexity is increasing, together with overall number of litigations, and alternate avenues for dispute resolution are more commonly pursued. The litigation funding market, on the other hand, welcomes national and international funders, and there is some 'silent' competition coming from wealthy individuals or distressed-asset investors who fund litigation on an ad hoc basis. In this competitive litigation funding environment, it is advisable that the clients explore different funders and do business only with professional, regulated and properly capitalised funders.

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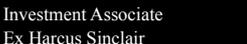
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Corporate Reorganisations	Insurance & Reinsurance	Private M&A	Trademarks
Cybersecurity	Insurance Litigation	Product Liability	Transfer Pricing
Data Protection & Privacy	Intellectual Property & Antitrust	Product Recall	Vertical Agreements
Debt Capital Markets		Project Finance	
Defence & Security Procurement			
Dispute Resolution			

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