

Innovation or interference?

Third-party litigation funding offers access to justice — but is the ethical price too high?

By Pablo Fuchs

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**Charles Wright, Siskinds LLP,
London, Ontario**

There's perhaps no greater source of frustration for a litigator than having a client with a legitimate claim, but with no way to pay the legal fees involved.

Sure, there are contingency fee arrangements in which the lawyer's fee is tied directly to the outcome of the case. But such an arrangement requires the lawyer to take on all the risk, and to defer payment until the case is either settled or won, which can be years down the road. If the lawyer is representing a class action, there's always the Class Proceedings Fund, but that too comes with hassles and limitations.

So when it comes to middle-class clients who can't afford legal fees or don't qualify for legal aid, there are very limited choices in accessing the justice system. But that might be starting to change now, as third-party funding for litigation is promising to deliver a cure to these ills.

The concept is simple: if a client can't shoulder the costs, a private company steps in and funds the action if it considers that the claim and the lawyer involved are reliable. The funder receives a sizeable cut of the claim if successful; if not, the funder takes all the financial

downside and the client owes nothing.

It's a trend that has built momentum in Australia, the U.K. and the U.S., but third-party litigation funding is still gaining traction in Canada. Yet the debate over its ethicality, and whether it serves the best interests of clients, is just starting. For its proponents, the main battleground is access to justice.



“Chief Justice Beverley McLachlin has come out publicly and said the legal system is shutting out those who can’t afford it,” says John Rossos, principal of Toronto-based BridgePoint Financial Services Inc., a firm that funds personal injury cases and is preparing to tackle full-blown commercial claims. “So if there’s not a proper funding mechanism in place, it denies access to justice to many. Third-party funding provides such access to justice.”

But renowned litigator Earl Cherniak of Lerner LLP in Toronto thinks the cost is too high. “This is completely inconsistent with the ethical obligations of a lawyer, which is to the client,” he says. “When you have a third party involved, then the people providing the funding will say they want to call all the shots. But this is the client’s case; it doesn’t belong to the people putting up the money.”

Who calls the shots?

Rossos, a lawyer by training, takes pains to stress that under no circumstances does a third-party funder interfere during a lawsuit. He compares litigation financiers to capital markets investors who don’t try to run the companies in which they invest.

“We don’t want to compromise an action when investing or financing it,” he says. “We look for quality counsel, [because] the success [of a case] is dependent on the quality of the lawyer. We don’t want to step in and substitute the judgment of counsel. We recognize that we don’t have the final decision. We’re not looking to take control of litigation or to impose our views.”

But he adds: “There might be situations in which a lawyer may be advising a client to take a settlement; and sometimes, that settlement is too low. If we’re involved, we can be an effective voice, willing to be a buffer between counsel and client. We’ll provide sober second thought to a client and assurance to counsel that funding and resources are there to proceed in such cases.”

Charles Wright, a partner with Siskinds LLP in London, Ont., finds favour with the access to justice that third-party financing could provide. “A plaintiff facing large legal costs would not take on the risk of going to trial,” he says. “But with third-party financing, it would see more people step forward as plaintiffs — and there’ll be a greater number of class actions.”

But Wright also shares Cherniak’s ethical concerns. He says that if he worked on a case in which a client used the services of a third-party financier, he would require that the funding arrangement leave all the power with the client. “The funder needs to analyze the case on the front end, and then step aside. I wouldn’t get involved if the funder had a say.”

The money question

While everyone supports access to justice, it’s a fact that litigation financiers get involved in this area to make a profit. Some third-party financiers in the U.K., for example, have done so well that they are now starting to finance defendants, offering cost containment for defendants and high-risk, high-reward investments for funders.

The defendants pay a fee to the financiers for taking on a percentage of the risk. If the defendants are successful, the funder retains the fee; if the defence fails, the financier is liable for a percentage of the damages. “If the defendant has exposure and is trying to minimize it, and the best way to do that is to go through external sources, I would have no

qualms with that,” says Rossos.

Although no one expects third-party litigation to sweep the Canadian legal landscape anytime soon, the question remains: is this a fad destined to flare out, or a real innovation with traction? Cherniak, who chaired a Law Society of Upper Canada report on multi-disciplinary practices (MDPs) in the late 1990s, says this reminds him a lot of that trend.

At the time, MDPs were the talk in jurisdictions such as Australia, the U.K. and the U.S. But Cherniak opposed their introduction to Canada, because he believed they would compromise the role of a lawyer. In the event, not only did MDPs not come here, they soon withered elsewhere. “I’ve been practising law for more than 40 years, and the changes I’ve seen in that time are dramatic; the profession is barely recognizable,” he says. “But there are certain ethical precepts that have to be abided by if law is to survive as a profession, not solely as a business.”

But Wright, who focuses mostly on class actions, thinks “the day is coming where we’ll be looking at [third-party litigation funding] in a few cases.” He says that class actions as complex as *Kerr v. Danier Leather Inc.* will have no choice but to use such funding mechanisms in the future.

“People see what’s happening in Australia, the U.K., the U.S.,” Rossos says. “Their common-law systems are evolving; ours will as well — and it will help improve access to justice. This will all be for the betterment of society. You’re living in a dream if you believe you can provide access to justice and not provide the funding for it.” ■

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OFFICIAL NOTICE



2008 James H. Bocking Award

The National Competition Law Section’s 2008 James H. Bocking Memorial Award has been given to Paul-Erik Veel of Toronto, for his paper “Private Party Access to the Competition Tribunal: A Critical Evaluation of the S. 103.1 Experiment.” The \$1,000 prize was accompanied by complimentary registration for the Section’s annual conference, held in September.

The Competition Law Section established the award in memory of James H. Bocking, former Assistant Deputy Director of Investigation and Research at the Competition Bureau. It recognizes his contribution to Canadian competition law and policy during many years as an official of the Bureau. The award is presented annually for the best scholarly paper submitted to the Section on a subject directly relating to Canadian competition law or policy.

The deadline for entries for the 2009 Bocking Award is **June 30, 2009**. All full-time students, or lawyers within two years of their call to the Bar as of June 30, 2009, are eligible to enter. Papers should specifically address competition law and policy, rather than more general law or economics topic.

For more information, visit http://www.cba.org/CBA/Awards/jamesh_bocking/.