CANADIAN Lawyer
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OPINION

Why you should understand litigation finance

Civil litigators must know what products exist, how agreements with funders and clients are structured and the risks and pitfalls

THERE IS no question that litigation finance is now part of the legal landscape in Canada. The Supreme Court of Canada recently gave it an implicit (if not explicit) blessing in the *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10 case.

In this world of products and opportunities, it is becoming more important that Canadian lawyers, and especially civil litigators, understand what products exist, how agreements with funders and clients are negotiated and structured and what risks and pitfalls they face.

There is now a good number of litigation funders active in Canada, including both directly and those funding in groups through administration agreements under a lead funder. There are funding brokers. There are insurers providing products in the nature of insurance against adverse cost awards and for "own cost" in defending pending actions. There are funders providing financing opportunities for law firms against a portfolio of cases (on a non-recourse basis) and other funders providing deferred financing for disbursements to law firms on a recourse basis.

In my practice, I have learned a significant amount over the past five years. Litigation financing has brought a new dynamic to dispute resolution, which overall is a very good thing, providing access to justice and the value of experienced teams on the funder end that provide invaluable advice to litigants and their counsel.

However, funding introduces a new category of players in litigation. We as lawyers are still learning how to interact with our clients and funders in this context, and they can have very different levels of involvement in cases. Lawyers should be equipped to raise the new class of products available to litigants, particularly while we are seeing a rise in litigation stemming from the COVID-19 pandemic. Law firms that find themselves in situations where cases go over budget may find themselves working for free or having to pay certain amounts as disbursements in order to get a case over the line to trial.

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Another open question is whether funders could find themselves liable for adverse cost consequences in failed litigation. While not currently the law in Canada, it is an issue in the U.K. In the *Arkin v Borchard Lines* [2005] EWCA Civ 655 decision of the Court of Appeal for England and Wales, the court found that litigation funders could be liable up to the amount funded for a case. A more recent decision in *ChapelGate Credit Opportunity Master Fund Ltd v James Money* [2020] EWCA Civ 246 found that a funder could potentially be liable for the full amount of an adverse costs award.

Funders largely appreciate that this risk exists in Canada, and they increasingly are either funding security for costs or are building in the cost of ATE (after the event) insurance to deal with this risk. I think it is important that they do so to maintain the integrity of the litigation funding system; otherwise, we may find Canada following suit and imposing this risk on funders.

My hope is that the litigation funding ecosystem in Canada will self-regulate if market participants all work to:

- ensure that adverse cost awards are paid;
- avoid the temptation that may exist around overselling the merits of cases to secure funding;
- ensure that clients are appropriately advised about the availability of funding products and insurance;
- avoid financial risks to law firms through careful budgeting; and
- avoid conflicts of interest that could arise given the new class of players in the market.

To date, law societies in Canada have been largely silent about litigation finance. There is limited jurisprudence in the area outside of the class action context. Currently, it seems that players in the market are trying to do things the right way. It is certainly the Canadian way to do things.

If we all act fairly and responsibly, litigation finance will be a good thing for lawyers: More fees will be paid with less need to enter into contingency agreements. It will be a good thing for claimants: more access to justice. It will also be a good thing for defendants: more likelihood of being paid out on any adverse cost awards and more eyes on large claims to ensure that they are meritorious and being advanced by appropriate counsel with the right expertise. CL

Matthew Diskin is a partner in Dentons Canada's Litigation and Dispute Resolution group, where litigation funding is part of his practice. His main foci are entertainment and intellectual property disputes.