

Third Party Litigation Funding: Plaintiff Identity and Other Vexing Issues

Introduction

Third party litigation funding arises in both private arrangements and in public (statutory) models of subsidization or support. Third party litigation funding, whether private or public, may give rise to complicated issues such as the identity of the “real” litigant, as well as the consequences of costs awards when the status of the nominal litigant as the “real” party may be in doubt. When the source of funding is public, policy issues may arise about the appropriate scope of the funding.

This paper will examine Canadian cases illustrating how courts determine the validity of private third party litigation funding and the issue of who is the “real” party to litigation when such funding arrangements exist. The traditional common law and policy reasons against private third party litigation funding will be assessed, and contrasted with the most significant justification for such funding: promoting access to justice.

This paper will also compare private third party litigation funding with statutory funding available in subrogated or vested rights (such as personal injury litigation undertaken by workers’ compensation boards with respect to injured claimants) and statutory funding available from provincial class proceeding funds, government legal aid plans, and workers’ compensation free advisory/advocacy services. Some of the advantages and problems in both private funding and public funding schemes will be assessed, with a look at the factors that influence decision-makers in reaching conclusions about the identity of parties to litigation, as well as what types of costs may be awarded and who bears (or should bear) the obligation for payment of those costs.¹

Private litigation funding by third parties as a business transaction

In situations where a private third party is funding either legal fees and/or litigation disbursements, the third party funder's identity as the "real" litigant may be an issue when maintenance and champerty are raised as defenses in the litigation. The concepts of maintenance and champerty may also be raised as justification by plaintiffs who refuse to repay the third party funder under the funding agreement, or when a defendant denies its obligation to pay costs awards related to disbursements that ultimately result in reimbursement, at least in part, to such funders.

Generally under English common law maintenance and champerty were torts. Originally these torts were defined in wide terms so to discourage the promotion of unnecessary litigation and to protect the administration of justice from abuse. Virtually any assistance to a litigant who was not a relative could be interpreted as maintenance while champerty, a form of maintenance, covered most agreements to finance lawsuits in exchange for a share in the proceeds. However soon these torts required more than just third party participation in litigation: there needed to be evidence of an improper motive by the third party seeking to encourage the litigation. Thus the torts required an element of officious interference. In 1979 the British Columbia Supreme Court observed as follows in *Wiegand v. Huberman et al*²:

The old English cases indicate that the courts used to seek to discourage litigation. In Canada, while the courts do not seek to encourage litigation, they do not want to place any obstacles in the way of an aggrieved citizen bringing a lawsuit which on legal advice he wishes to bring. Given the costs of litigation, it may be necessary to obtain such assistance; in fact, it is commonplace in this province for lawyers to undertake litigation on behalf of clients with limited or no means on the understanding that if the suit is successful the lawyer will receive an agreed share of the proceeds. Are such agreements unlawful and unenforceable? I cannot imagine that they are.

In the *Wiegand* case, the defendants were a married couple who had borrowed \$26,000.00 from the plaintiff to finance a lawsuit. The loan agreement between the plaintiff and the defendants required the defendants to pay the plaintiff \$32,000.00 plus 10 per cent of the proceeds of the litigation. Ultimately the defendants chose not to

proceed with the litigation and they did not pay the plaintiff anything. Thus the plaintiff brought an action in contract against the defendants. They defended on the basis of maintenance, arguing that the purpose of the loan was to maintain a lawsuit. They also argued that the loan agreement was champertous because it involved an agreement to share in the proceeds of a lawsuit.

In finding for the plaintiff, the Court noted the traditional public policy justifications prohibiting maintenance and champerty but found the plaintiff had not encouraged the defendants to initiate their lawsuit, nor had he “stirred it up”. Rather, he had financed it at their request. It is notable that the Court emphasized that the defendants had no funds and would not have been able to pursue their lawsuit without financial assistance:

It would be unjust to say that anyone who lent money to the defendants in these circumstances would have no right under the law to get his money back if the litigation failed or to insist upon his share of the proceeds if it succeeded.³

It is clear, therefore, that the Court considered access to justice an important consideration in determining the validity of third party litigation funding.

A more recent illustration of judicial emphasis favouring access to justice is seen in the 2009 decision of *Bourgoin v. Ouellette et al*⁴, in the context of a personal injury action which had been settled, with the Court assessing disbursements to be paid by defendants. The Court ordered the defendants to pay the interest (approximately \$4,000) charged by a lender who had financed the plaintiff’s disbursements. (The plaintiff’s lawyer had taken the case on a contingency fee basis). The lender was a private company providing temporary financing to personal injury victims awaiting insurance claim settlements, allowing them to keep their house, vehicle and to continue caring for their families. Financing also applied to legal costs and disbursements in lawsuits pending a settlement. At the time of the motor vehicle accident which caused his injury, the plaintiff was a first year university student and the accident interrupted his studies.

The Court noted that the interest rate charged by the lender was very high when compared to market rates or to the rate allowed on judgments under the Rules of Court. The Court observed, however, that neither the plaintiff nor his family could afford to fund the personal injury action which involved considerable expenses including the cost of an expert actuarial report of over \$17,000. Thus apart from legal fees, disbursements in this case were well beyond the plaintiff's ability to pay. Further, a Canadian bank had turned down the plaintiff's application for a loan to finance the personal injury action. In concluding that the interest owed by the plaintiff to the lender was a necessary and reasonable expense and an allowable disbursement recoverable by the plaintiff from the defendants, the Court placed considerable emphasis on the principle of access to justice, stating:

The only option which seemed to be open to him [the plaintiff] in order to have access to justice, claim his rights and obtain such a considerable settlement, was to get a loan from a financial institution able to support his allowable disbursements for the duration of the action. Seahold Investments Inc. was the institution which agreed to do it, at a very high interest rate, but also at an elevated risk to itself. It must be noted that the Bank of Nova Scotia did not want to take on this risk for a lesser amount.⁵

This emphasis on the principle of access to justice resulted in the defendants bearing the expense of a high interest rate that was characterized as a legitimate loss of the plaintiff resulting from the personal injury tort.⁶

Also in 2009, however, in *Metzler Investment GMBH v. Gildan Activewear et al*⁷, the Ontario Superior Court of Justice refused to approve a costs indemnification agreement (IA) between a plaintiff in a proposed class action proceeding and an Irish company, Claims Funding International (CFI), whose main line of business was litigation funding. The proposed class of members in the proceeding involved all those persons who had suffered losses as a result of purchasing the defendants' shares at allegedly inflated prices. The terms of the IA were that in exchange for a 7% commission of any "resolution sum" (settlement or court award in the plaintiff's favour, less legal fees, disbursements and administrative expenses), CFI would pay any adverse award of

costs against the plaintiff.⁸ The IA required the plaintiff to seek court approval of the agreement. The plaintiff also sought an order approving the contingent expense created by the IA as a reasonable disbursement, and an order that the IA should be binding on all class members should the proceeding be certified as a class proceeding.

The defendants submitted that costs indemnification agreements generally are contrary to public policy as champertous, while the plaintiff argued that the IA in this case overcame the potential for adverse costs which would discourage the class action proceeding. The plaintiff also noted that the 7% commission referred to in the IA was less than the 10% commission required by the province's statutory Class Proceedings Fund, and that the IA was negotiated much more quickly than an application to the Class Proceedings Fund could have been processed.

The plaintiff relied on the principle of access to justice as an important policy reason to approve the IA despite the evidence that it was a sophisticated investor pursuing a number of securities class actions, that it was not impecunious and that the IA was not necessarily required to ensure it could proceed with the class action. The plaintiff argued that private third party funding was desirable to facilitate (rather than ensure) access to justice for class actions. It was clear that the plaintiff was not eligible for funding under the statutory Class Proceedings Fund because one factor in granting such funding was the extent to which a class action would affect the public interest – the proposed class action in this case involved private financial interests. The plaintiff further pointed out that it would not be in the best interests of class members if class counsel had the risk of having to pay the defendants' costs if unsuccessful in addition to absorbing the risk of paying all disbursements; thus the IA form of third-party funding leveled the playing field by removing the financial risk to class counsel. By contrast, the defendants argued that the IA was simply insurance to plaintiff's counsel and class members ought not to be required to pay for that insurance. The defendants said that the IA allowed CFI, a stranger to the proposed class action, to participate in the litigation for the sole purpose of profit, and that this situation contravened public policy in the proper administration of justice.

The Court was not prepared to declare that the IA would bind class members because the class action was not yet certified and therefore class members had no opportunity to have their views about the IA presented. In assessing whether to approve the IA between CFI and the plaintiff, the Court found that although the plaintiff had the financial means to pursue litigation, it was proper for the plaintiff to be concerned about its exposure to costs and to try to reduce such risk to which a class proceeding exposed it. The Court also found the plaintiff to be a “real plaintiff” because the IA did not restrict the plaintiff’s responsibilities to initiate, organize and manage the litigation. In that regard, the Court recommended several deletions and amendments to the IA (such as the ability of a CFI representative to attend settlement discussions) to ensure that while CFI had a right to be informed about the progress of litigation, it had no right to instruct class counsel or otherwise control the litigation.

Ultimately, however, the Court concluded that it could not, at that time, declare that the IA was not a form of maintenance or champerty. The Court observed that a champertous agreement has two essential elements: (1) the third party involvement must be spurred by an improper motive and (2) the result of that involvement must enable the third party to potentially gain following the disposition of the litigation. There was no disagreement that under the IA, CFI would profit from the plaintiffs’ success in the class action. Thus the characterization of CFI’s motivation was critical. The Court found that at that stage in the litigation, it could not determine the propriety of CFI’s motive because it could not determine whether the potential profit for CFI under the IA would be reasonable and fair. Any recovery that would be excessive, amounting to over-compensation and taking advantage of class members, would constitute an improper motive, thus rendering the IA champertous. The Court’s reasons in this regard were similar to comments that have since been made in other decisions about lawyers’ contingency fee agreements and the need to consider the reasonableness and fairness of a fee structure, particularly where an agreement has no cap or upper limit on the amount of ultimate recovery.⁹

The plaintiff viewed the reasonableness of CFI's commission under the IA as a matter of business judgment for the plaintiff to assess, not the Court. The Court disagreed, stating as follows:

[70]...That would be so if the plaintiff or class counsel was assuming the liability for the commission payable to CFI, however, that is not the case here. Rather, it is intended that CFI's commission will be in all practical terms a first charge, after legal and administrative expenses, on the monies recovered for the Class Members if this proceeding is certified. It seems to me that is why the plaintiff, as required by CFI, is seeking the court's approval of this Agreement, which requires an assessment of the fairness and reasonableness of a compensation payable to CFI. That assessment cannot now be undertaken. It is not enough to compare the proposed commission to the 10 per cent levy paid to the Class Proceedings Fund.

[71]...Here....the compensation to be paid to CFI is completely related to the amount of money that is ultimately recovered. It has no relationship to the amount of money paid by CFI, the period of time during which those monies are outstanding, the degree of risk assumed by CFI or the extent of its exposure to costs. There is no cap on the amount of compensation payable to CFI.

[72] It is impossible to conclude that this Agreement will not amount to "over compensation" to the extent that it is unreasonable and unfair to those who will bear its expense.

[73] For the foregoing reasons, in these circumstances, this court cannot now declare that the Indemnification Agreement does not engage maintenance or champerty.¹⁰

Thus in this case, the principle of access to justice was trumped by judicial concern about potential injustice to prospective class members who were vulnerable by not having notice of the IA and an opportunity to have their views about the IA presented to the Court. Although the 7% commission referred to in the IA was less than the 10% required to replenish the statutory Class Proceeding Fund, the Court was concerned about the integrity of the litigation process, particularly in a situation where no future class members would have any say in determining whether the CFI's recovery under a successful class action was unfair and unreasonable "over-compensation".

Just two years later, in the decision *Dugal v. Manulife Financial Corporation*¹¹ the Ontario Court of Justice considered a similar litigation funding agreement (IA) in which CFI again was the private third party funder for a proposed class proceeding against the defendant for allegedly artificially inflating the value of its stock. Under the IA, CFI agreed to indemnify the plaintiffs against their exposure to the defendants' costs in return for a 7% share of the proceeds of any recovery in the class action. In this case, however, the Court gave interim reasons indicating its decision to approve the IA subject to changes made to address two concerns.¹² By this time the plaintiffs had absorbed the lessons from the earlier *Metzler* decision. Under this IA, CFI's 7% commission was subject to express upper limits. The plaintiffs also provided prior notice of the proposed IA, and an opportunity to comment on its terms, to approximately one hundred potential class members which included large investment firms as well as sophisticated public investors. The evidence was that there was no opposition to the IA from any of the persons notified.

This time the Court exercised its supervisory jurisdiction in the proceeding, binding prospective class members although the proceeding had not yet been certified as a class. The Court found it was entitled to put itself in the shoes of prospective class members and determine on their behalf whether the IA was fair and reasonable. (The advance notice of the IA and invitation to comment on its terms given to numerous potential class members likely influenced judicial determination of this point).

In determining that the IA was not champertous, the Court in *Dugal* noted that an essential goal of class proceedings is to give access to justice to large groups of people who would not be able to realistically pursue their claims individually. Further, because the rules about costs apply to class proceedings just as they do to ordinary actions, with the loser of the litigation paying costs, no one would accept the role of representative plaintiff if to do so would put them at risk of losing everything they own. For example, no one would risk an adverse costs award of millions of dollars to recover a modest claim amounting to much less. Statutory class proceedings funds respond to this situation by offering financial support for disbursements and indemnity against costs, but such funds do not accept all applications and when they do, fees are a rigid 10 per

cent of the litigation recovery. The other response is that indemnities by class legal counsel may be given, but they impose difficult financial burdens on legal counsel and also may pose a risk to the independence of legal counsel. Thus if a plaintiff does not meet the criteria for financial assistance from a class proceeding fund, and if class legal counsel is not prepared to accept the risk of an adverse costs award, a plaintiff must either abandon the class action or seek financial assistance elsewhere. It is unfair that persons be discouraged from bringing potentially meritorious actions because of their inability to withstand the risk of loss.

With this in mind, the Court observed that the IA provided access to justice for the plaintiff and prospective class action members, and thus in that sense the IA benefitted the proper administration of justice. This access to justice criterion was a corner-stone of the Court's decision to approve the IA. However, in determining the IA to be fair, reasonable and not a champertous contract, the Court also took into account these other factors:

- there was no evidence that CFI had initiated, "stirred up" or provoked the litigation;
- control of the litigation remained in the hands of the representative plaintiffs, merely allowing CFI to receive appropriate information about the progress of the litigation;
- the 7% commission under the AI was within the commission (10%) that would be payable under the statutory class proceedings fund;
- there was a cap on CFI's commission that was fair and reasonable when viewed with the potential downside risk facing CFI in costs;
- the representative plaintiffs were sophisticated investors who found the commission under the AI to be acceptable;
- the plaintiffs were represented by experienced and reputable legal counsel who could be expected to discharge their professional duties without being influenced by the third party funder;
- and finally, there would be court supervision of the parties to the agreement.

With respect to the prospect that CFI might be unfairly overcompensated under the AI in the event of a successful class action, a prospect that the Court in *Metzler* would not impose on vulnerable prospective class action members, the Court in *Dugal* had this to say:

While it is true that one may not be able to say, with absolute certainty, that there is no possibility that the funding agreement might result in a “windfall” recovery to CFI, the possibility of such a recovery, when balanced against the probability of protracted litigation and a somewhat speculative result, is a factor that a commercial risk-taker must take into account in determining the amount of its compensation. The assessment of the risk can always be defined with greater precision when more information is available, but the fact of the matter is that the plaintiff asks for a decision now. When an insurer sets a life insurance premium, it does not say to the assured, “We’ll wait and see how you are doing in a couple of years.” It fixes the premium based on the current state of knowledge, recognizing that the applicant may die the next day or live to be 101.¹³

There appears to be a trend in Canadian jurisprudence for courts to be inclined to accept and approve the existence of private third party litigation funding when it is clear that to do so will further the goal of facilitating access to justice. However, it is clear that access to justice will not be the sole criterion, albeit that it is a significant justification for the existence of third party litigation funding. The case law makes it clear that courts will examine the circumstances of each case as a whole to determine whether the funding agreement is valid or instead, an improper arrangement amounting to maintenance or champerty. By way of summary, the factors a court may consider in analyzing the totality of a situation will likely include the following:

- Are the plaintiff and the third-party funder relatively equal in sophistication and bargaining power, or is there evidence that the third party dominates the weaker plaintiff, lending doubt to the legitimacy of their agreement as an arms’ length business transaction?
- Did the plaintiff initiate or at least seriously contemplate the litigation before the involvement of the third party funder?

- What are the merits of the plaintiff's case and the risks of loss, in relation to the type and amount of assistance provided by the third party funder?
- Is there potential for ultimate financial recovery by the third party funder that is exorbitant, amounting to unfair overcompensation for the risks it has accepted, and constituting an unfair disadvantage to the plaintiff?
- How does the rate of recovery (that is, the funder's commission) compare to prevailing interest for funding from other institutions such as banks or statutory class action funds?
- Is there evidence that the third party funder provoked, stirred up or aggravated the litigation?
- Who has control of the litigation – the plaintiff or the third party funder (or do both have the potential to exert some degree of control)? A court will carefully examine the terms of a funding agreement to ensure that the funder does not have the ability to intermeddle or otherwise interfere in the conduct of the litigation, although it is appropriate for the funder to receive adequate information about the progress of the litigation in order to manage its own financial affairs.
- Related to the previous factor, is legal counsel for the plaintiff answerable to the plaintiff for instructions or is the independent position of legal counsel compromised by duties to the third party funder?
- Is the motive of the third party funder purely one of profit or is there another motive (such as charitable assistance to an impecunious plaintiff)? The courts may view a purely charitable loan as a proper motive but scrutinize more closely funding given for the goal of pure financial profit.

If the entire circumstances of a private third party funding arrangement indicate that the goal of facilitating access to justice is met and the rights of the plaintiff as the controlling mind of the litigation remain intact, predictably a court will find that the plaintiff is the "real" litigant and uphold the validity of the arrangement. This makes sense, given the public interest in promoting access to justice.

It also makes sense because public (statutory) litigation financing has its weaknesses, too. For example, in some circumstances, a party to litigation who does not receive

funding assistance may perceive unfairness when the other party obtains assistance in litigation funding. In public funding regimes, issues may still arise about the identity of the “real” party to the litigation, and in some cases there may also be questions about who should bear the responsibility of paying costs, and what types of costs should be recoverable. Thus it would seem there is room for both private third party funding of litigation and public statutory regimes to provide financial assistance for litigants.

Public litigation funding with a statutory basis – government legal aid plans

Public legal aid funding involves governments and public bodies assisting persons with very limited financial means to access the justice system, generally by providing free legal counsel for defense in criminal proceedings, and in increasingly restricted scope, legal counsel for civil matters such as matrimonial and custody disputes. The big weakness of public legal aid is the restricted funding: it assists only those who are very poor, and there is often no assistance for civil matters such as contract or tort actions.

In a family dispute that is the subject of litigation, there may exist the potential in some cases for the recipient of legal aid to resist settlement or give legal counsel instructions that ultimately prolong the litigation, behavior which might have been deterred if the party had been required to self-fund the fees of legal counsel. While this falls short of frivolous or vexatious litigation, it can nevertheless give rise to the other party to the litigation perceiving unfairness, particularly if that party is not impecunious and is paying the fees of its legal counsel.

Generally there is no doubt as to the identity of the “real” litigants in cases funded by legal aid. However, there may be perceptions of unfairness when a party awarded costs against a legal aid client who has lost the litigation, effectively has no way of ever collecting those costs because of the legally aided party’s poor financial situation.

Public litigation funding with a statutory basis - Class proceedings funds

Statutory class proceeding funds are public funds designed to subsidize the costs of class action litigation. Again, there is usually no doubt as to the identity of the “real” litigants in class action litigation partially subsidized by statutory class proceedings funds. However, these funds are of limited assistance because they do not fund legal

fees but rather help the plaintiff class pay disbursements and costs if the class action does not succeed. If the class action succeeds or there is a settlement, the plaintiffs reimburse the fund with a fixed percentage of the settlement or award recovered. Another disadvantage of such funding is that it is not open to all plaintiffs in class actions. Specific criteria must be met in order to receive financial assistance from the fund, including an assessment of the merits of the action and whether the outcome of litigation would benefit the public interest.

Public litigation funding with a statutory basis - Subrogated or vested rights of a workers' compensation tribunal

Workers' compensation laws were established in response to the 19th century's harsh working conditions. There were few remedies available to workers injured at the workplace and to dependants of workers killed in workplace accidents. At common law the only remedies available to an injured worker or the dependants of a deceased worker were litigation outcomes from successfully proving the worker had been killed or injured as a result of the employer's negligence. But there were no guarantees of any remedy even where there was negligence on the part of the employer. At common law it was a term of the contract of service that a worker assumed the risks incidental to his or her employment, and this risk included injury caused by a co-worker. Therefore an employer would not be found liable for injury or death caused by a co-worker or that was caused by unavoidable risks associated with the job the worker had consented to do. Further, an employer's liability could be greatly reduced if a worker's own negligence had contributed to his or her injury or death. In many cases, in practical terms, it might not be financially or logistically worthwhile to initiate legal proceedings to obtain damages for workplace injuries or for a wrongful death.

In terms of ability to initiate legal proceedings, a worker disabled by a workplace injury, or the dependants of a deceased worker killed in a workplace accident, were often financially unable to fund a tort action for damages. The workplace accident would be an event causing extreme financial and emotional stress on the worker and his or her

family who would be facing a struggle to survive, let alone facing the prospect of protracted and expensive legal proceedings in tort action.

The foundation of workers' compensation systems in Canada is a concept known as the "historic compromise" or "historic trade-off". The trade-off establishes a statutory regime whereby workers (and dependants of deceased workers), have the right to claim compensation for workplace injuries from a workers' compensation tribunal, but give up the right to sue employers¹⁴ for such injuries. In exchange, employers agree to contribute assessment "premiums" for an accident fund from which the tribunal would pay compensation benefits to injured workers and to the dependants of workers killed in workplace accidents, without consideration of fault.

Workers' compensation legislation also contains provisions whereby, on a worker or dependants electing to claim compensation from the workers' compensation tribunal, in respect of any legal rights of action they have against the party allegedly liable, the tribunal is "subrogated to" or "vested" with those rights and may maintain a legal action in its name or the name of the worker or dependants.¹⁵ The statutory provisions generally provide that if the workers' compensation tribunal recovers or collects more than the amount of compensation to which the worker or dependant is entitled under the statutory regime, the amount of that excess (less costs and administration charges) must be paid to the worker or dependant. Often the statutory provisions expressly indicate that the tribunal has exclusive jurisdiction to determine whether to maintain a legal action or compromise the right of action, with its decision on that matter being final and conclusive.¹⁶

The benefits of workers' compensation systems are obvious. In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*¹⁷, the Supreme Court of Canada referred to the basic principles upon which workers' compensation is founded. Injured workers benefit from security of payment, and the compensation scheme and adjudication of claims are dealt with by an independent administrative agency, the workers' compensation tribunal. When a claim is accepted, a workers' compensation

tribunal pays wage loss and health care benefits promptly, very soon after the workplace accident, without regard to fault and whether or not the workplace employer is solvent. Injured workers and dependants of deceased workers are not at the mercy of the uncertainties, expense and delays involved in commencing legal action in tort.

In *Pasiechnyk*, the Court observed that the principal disadvantage of workers' compensation systems is that some workers may recover more from a legal action in tort than they would in receiving statutory workers' compensation benefits. However, speaking for the majority of the Court, Mr. Justice Sopinka said in that regard:

I would add that this so-called negative feature is a *necessary* feature. The bar to actions against employers is central to the workers' compensation scheme....it is the other half of the trade-off. It would be unfair to allow actions to proceed against employers where there was a chance of the injured workers obtaining greater compensation, and yet still to force employers to contribute to a no-fault insurance scheme.¹⁸

When a workers' compensation tribunal acts pursuant to its statutory rights of "vesting" or "subrogation" to maintain a tort action in the name of a worker or dependant against another party, it does so in order to recover damages for wage loss and health care compensation benefits it has paid out under the worker's claim, and also to recover damages for pain and suffering that it can then pay to the worker as the excess of the monies it recovers from the legal action as compensation it has paid under the worker's claim. Arguably, in this sense, a workers' compensation system is a form of statutory funding of litigation that seeks to benefit an injured worker or the dependants of a deceased worker.

In this type of statutory funding of litigation, generally the "real" identity of the plaintiff does not become an issue. It did become a serious issue, however, in the 2001 Manitoba Court of Appeal decision of *Kowalchuk v. Adduri*¹⁹. In that case the Court dealt with the issue of whether the Manitoba Workers' Compensation Board (Board)

was liable to the defendants for party/party costs of almost \$200,000 in an action that the worker plaintiff had unsuccessfully brought against the defendants.

The worker had injured his leg in a workplace accident and claimed workers' compensation benefits from the Board, which accepted his claim, paying compensation benefits. The worker underwent surgery for his workplace injury and the surgery did not go well; his leg became infected and was amputated. Without notice to the Board, the worker hired a lawyer and commenced a legal action against the physicians who had treated him, alleging professional negligence. The worker's lawyer advised the Board about the legal action approximately one month after filing suit.

The Board did nothing for a couple of years, and then decided that it would not assume control over the litigation but would allow the worker to continue with the proceedings, on the basis that if the worker was successful, he would reimburse the Board for the compensation it had paid out under his claim. An agreement was later reached whereby the legal action would continue to proceed with the worker named as plaintiff, and the Board retaining the worker's legal counsel under a contingency agreement to be paid after recovery of compensation that the Board had paid out on the worker's claim. The Board was actively involved in the litigation, assisting in providing expert witnesses and consulting with the worker's lawyer regarding settlement negotiations and offers. The Board was not named as a party in the legal action, with the worker only named as the plaintiff.

After a lengthy trial, the worker's action was unsuccessful. The worker did not have the financial resources to pay the costs awarded to the defendants, and the defendants moved to have the Board joined as a party and for an order declaring the Board liable for the taxable costs. The Manitoba Court of Appeal upheld the lower court's order holding the Board responsible for the costs.

The Board's position was that its enabling statute did not remove a worker's independent right to sue a third party in negligence, but that under the "historic compromise", both the worker and the Board had concurrent, but independent, rights of

action. The Board characterized its position as having one of subrogated rights of action to initiate a legal action in respect of personal injury to worker in respect of which the Board had accepted a claim and paid workers' compensation benefits. On that basis the Board submitted that it should be responsible for only a rateable proportion of taxable costs rather than the entire amount.

The Court disagreed, noting that the case law relied on by the Board referred to statutes in other provinces wherein the statutory provisions expressly gave the workers' compensation tribunals "subrogation" rights. The relevant Manitoba statutory provision, however, used the term "vested", as follows:

Where a workman or dependant makes application to the board claiming compensation under this Part, which claim is thereafter approved by the board, any right of action for or in respect of a personal injury to, or the death of, the workman which the workman, or his legal representative or dependant, may have been entitled to maintain against a person other than his employer under subsection (1), immediately on approval of the claim by the board, **becomes vested in the board**; and the board may enter action in its name or in the name of the injured person, or his legal personal representative or dependant, or jointly with the injured person, or his legal personal representative or dependant, against the other person for the whole or any outstanding part of the claim of the workman, or his legal personal representative or dependant, against the other person for or in respect of the personal injury to, or the death of, the workman.²⁰

The Court's interpretation of this statutory provision emphasized that the term "vested" as well as other provisions requiring the Board to pay an injured worker funds in excess of the compensation paid under the claim, from monies recovered in a successful legal action, illustrated that the Board's interest was not limited to a subrogation right. Rather, the worker's claim was "wholly owned" by the Board. The Court found that the legislature intended that when a worker applied for and received compensation, any right of action pertaining to the payment of the compensation claim would be owned by the Board in absolute terms. The worker had no authority to proceed with a third party claim other than with the consent of the Board.

The Court was also undoubtedly influenced by the evidence in this case that the Board became an active participant in the litigation, agreeing with the lower court that the Board was “the proprietor of the action and by any standard of measurement was the real litigant.”²¹

The Court observed that there is no problem in identifying the “real litigant” in a case where a worker sustains a single workplace injury which could give rise to either an application for workers’ compensation to the Board or a legal action against a third party. It gave the example of a bus driver injured in a collision caused by the negligence of a third party motorist not covered by workers’ compensation legislation at the time of the collision as either a worker or an employer under the legislation. The bus driver, injured in the course of his employment, would have a right of election to either apply for workers compensation benefits (and forego his right to sue, with his cause of action becoming vested in the Board with the Board the “real litigant”) or to forego workers’ compensation benefits and initiate his own legal action as the “real plaintiff”.

Identifying the “real” litigant in workers’ compensation cases becomes more difficult, however, in situations when an initial work-related injury is allegedly made worse by negligent medical treatment, or where there are two injuries at issue. In that regard, the Court in *Kowalchuk* referred to the unreported Manitoba Queen’s Bench decision in *Kelly v. Hollenberg*²² which dealt with a defendant physician’s attempt to raise section 7(5) of the Manitoba workers’ compensation legislation as a bar to a legal action in tort initiated by the plaintiff Kelly relating to surgery for a knee problem. Some years before the surgery, the plaintiff Kelly had received compensation benefits from the Board for a knee injury, and he was continuing to receive such benefits while pursuing his legal action. He initiated legal action without the authorization or consent of the Board. The defendant physician argued that the provisions of section 7(5) barred and precluded the plaintiff Kelly from claiming damages in the legal action, at least to the extent he had received workers’ compensation benefits for his knee problem. In other words, the

Board was the only entity entitled to be the “real” plaintiff in a cause of action against the defendant.

The outcome was that the defendant could not rely on section 7(5) to shield him from liability. The court found that the plaintiff Kelly’s action in negligence was separate and distinct from his compensation claim to the Board with respect to his workplace injury, and that therefore his legal action did not “vest” in the Board. See also *Pauluik v. Paraiso and Hart*²³ for another example of the complexities in identifying the “real” plaintiff which arise when there is one work-related injury for which a worker claims and receives workers’ compensation benefits, and allegedly another injury for which the worker seeks damages as a plaintiff in a tort action.

It is clear that identity of the “real” plaintiff in the context of workers’ compensation benefits paid to a worker plaintiff taking legal action in his or her own name and independently of the workers’ compensation tribunal, can become a significant issue. It may well be relevant if the plaintiff’s legal action is unsuccessful and the defendants seek costs. If the workers’ compensation tribunal is not the “real” plaintiff, the defendants must look only to the nominal plaintiff for cost recovery. In the *Kowalchuk* case, the defendants’ successful motion to have the Court identify the Board as the “real” plaintiff allowed them cost recovery that they were unable to seek from the impecunious nominal plaintiff.

Public litigation funding with a statutory basis – free advisory/advocacy services

Another type of public litigation funding is found in the statutory provision of free advice and advocacy services for reviews and appeals in proceedings before administrative tribunals. One example is section 94 of the British Columbia *Workers Compensation Act*²⁴ (Act) which provides for workers’ advisers and employers’ advisers to be appointed as provincial government employees.

The mandate of workers’ advisers is to assist a worker or a dependant of a worker having “a claim under the” statute, including appearing before the British Columbia

Workers' Compensation Board (Board) and the Workers' Compensation Appeal Tribunal (WCAT) on their behalf where the adviser considers such assistance is needed. Section 94(2)(a) provides that a workers' adviser must give assistance to a worker or to a dependant having a claim under the statute, except where the adviser thinks the claim has no merit. Section 94(2)(c) provides that a workers' adviser must advise workers and dependants with regard to the interpretation and administration of the statute or any regulations or decisions made under it.

The mandate of employers' advisers is to assist an employer respecting "any claim" under the statute of a worker or a dependant of a worker, including appearing before the Board and WCAT on an employer's behalf where the adviser considers such assistance is required. Section 94(3)(a) provides that an employers' adviser must give assistance to any employer respecting any claim under the statute, except where the adviser thinks the claim has no merit. Under section 94(3)(c), an employers' adviser must advise employers with regard to the interpretation and administration of the statute or any regulations or decisions made under it.

Neither the statute nor the regulations provide for any financial means test for workers or employers to qualify for assistance from the advisers.

Employers' advisers and workers' advisers need not be lawyers or legally trained, although many do have such qualifications. Section 94.1 of the Act expressly permits lay advocates to give advice respecting the interpretation or administration of the Act and regulations as well as Board policies and orders or decisions. It also permits lay advocates to act on behalf of a person in communicating with the Board or by appearing before the Board and WCAT in administrative, review and appeal proceedings.

While the salaries of workers' advisers and employers' advisers and administration costs associated with their programs are initially paid by the provincial government, under section 94 of the Act the Board must reimburse the government for all reasonable expenses properly incurred in operating the programs. The source of this

reimbursement is the accident fund, which employers in the province pay for through their assessment premiums as registered employers under the Act.

In this system where it is clear that no lawyers are needed to advance a claim, review or appeal proceedings, the Act, its regulations and Board policy significantly restrict the jurisdiction of the Board and WCAT to award costs in disputed matters. Section 100 of the Act provides that the Board may award a sum it considers reasonable to the successful party to a contested claim for compensation or other contested matter, to meet the expenses the party has been put to by reason of the matter. But binding Board policy (more in the nature of a legal regulation than a policy) provides that in matters of compensation claims, no expenses are payable to or for any advocate.²⁵ Thus reimbursement of disbursements is possible, apart from reimbursement for legal fees. In certain unjust discrimination matters, however, Board policy may permit the Board to order one party to pay the legal costs of another party but only in exceptional circumstances.²⁶

Sections 6 and 7 of the *Workers Compensation Act Appeal Regulation* (Appeal Regulation)²⁷ place similar restrictions on WCAT, the appeal tribunal. Under section 6 of the Appeal Regulation, WCAT may award costs to be paid to a party in an appeal only in one of three situations: (a) if WCAT determines that the other party caused costs to be incurred without reasonable cause, or caused costs to be wasted through delay, neglect or some other fault; (b) if WCAT determines that the conduct of the other party has been vexatious, frivolous or abusive, or (c) there are exceptional circumstances that make it unjust to deprive the successful party of costs.

Under section 7(1) of the Appeal Regulation, WCAT may order the Board to reimburse a party to an appeal for expenses associated with attending an oral hearing or otherwise participating in a proceeding (if travel to the hearing or proceeding is required), and the expenses associated with obtaining or producing evidence to WCAT, including the cost of medical examinations. However under section 7(2) of the Appeal Regulation, WCAT may not order the Board to reimburse a party's expenses arising

from a person representing the party or the attendance or a representative of the party at a hearing or other proceeding related to the appeal. In an appeal proceeding, therefore, WCAT cannot order the Board to pay the legal costs of a successful party, and only in the exceptional circumstances referred to in Section 6 of the Appeal Regulation may WCAT order one party to an appeal to pay the costs of another party. (The Board is not a “party” in an appeal proceeding before WCAT.)

As with government legal aid plans, one problem with these statutory advisory/advocacy services is that they are not necessarily available to everyone who seeks their services. As earlier noted, section 94 of the Act provides that assistance must be given except where the advisors think the cases have no merit. However, although the Act states that assistance “must” be given when advisers perceive that there is merit, the practical reality is that there is a limit to which the government can fund the programs. The teams of workers’ advisers and employers’ advisers can only handle so much of a caseload, and therefore the assistance that may end up being given to some prospective clients may necessarily be minimal, as only very basic advice.

There are two types of situations in which British Columbia employers may feel compelled to participate in litigation before the Board and WCAT, although arguably the expense of the litigation outweighs what initially appears to be the monetary “damages on the merits”. These are cases in which an employer will proceed with litigation to protect its reputation in the community and/or its way of doing business. The decision to litigate may often be an attempt to avoid serious long-term damages to its business, although the apparent or nominal amount of damages, in dollar terms, may appear relatively small. These cases involve either (a) defending a complaint of “unjust discrimination” brought by a worker against an employer under section 151 of the Act, or (b) challenging quasi-criminal administrative penalties imposed by the Board under section 196 of the Act for alleged violation of occupational health and safety rules under the Act and its occupational health and safety regulations. I will briefly examine each type of case in turn.

Defending a complaint of unjust discrimination: Sections 150 through 153 of the Act, with corresponding Board policy²⁸, provide important protection to workers who raise occupational health and safety concerns in a workplace context or otherwise exercise their rights under the Act. These provisions came into effect in 1999, and prohibit employers and trade unions from taking “discriminatory action” against workers. By way of very brief and general summary, workers who raise safety issues are protected from reprisal by trade unions and employers. Board policy and WCAT jurisprudence have applied a “taint” principle, similar to the principle reflected in unfair labour cases in labour relations jurisprudence: if any part of the motivation of an employer or trade union’s actions against a worker is due to anti-safety mindset, a worker’s complaint will succeed. The Act has a broad definition of “discriminatory action” which includes suspension, lay-off, employment dismissal, demotion or loss of job opportunity for promotion, transfer of duties, change of workplace location, coercion or intimidation, imposition of discipline, and reprimand or penalty.

Further, section 152(3) of the Act provides that the burden of proving there has not been a violation of the prohibition against unjust discrimination is on the employer or trade union, as applicable. This is a reverse onus provision, again similar to the principles of unfair labour practice law.

Monetary stakes can be high because Board policy²⁹ and the case law³⁰ indicate that the Act’s remedies for unjust discrimination incorporate a “make whole” approach akin to remedies in human rights, not restricted to common law or employment standards approaches to remedies for wrongful dismissal/job termination. Under the make whole approach to remedies, a worker is to be put back into the position he or she would have been in had the unlawful discrimination not occurred. While it would be wrong to state that “the sky is the limit” with respect to damages in this area, it is fair to say that that monetary amount of damages can be significantly higher than a complainant might expect from wrongful dismissal litigation or employment standards remedies. Further, job reinstatement is a potential remedy for a worker who initiates an unjust discrimination complaint under the Act against his or her former employer.

With respect to cost recovery, Board policy D6-153-2 in the *Prevention Manual* makes it clear that respondents in unjust discrimination complaints are generally expected to meet their own costs, including legal costs, of proving they did not violate the Act. In WCAT appeals, section 6 of the Appeal Regulation makes recovery of legal costs possible only in exceptional circumstances.

With this background in mind, an employer respondent to an unjust discrimination complaint under the Act may be faced with the following challenge:

- The prospect of harm to its business reputation by the allegation, if substantiated by the Board and confirmed by WCAT through the appeal process;
- A worker who self-represents or is represented *gratis* by the workers' advisers program, so that the worker incurs little, if any, cost of proceeding with the complaint;
- The statutory reverse onus of proving that it did not commit the unjust discrimination charged in the complaint;
- Satisfying the taint theory that in no part whatsoever was its motivation for discipline/termination influenced by the worker having raised safety concerns;
- If the worker's complaint succeeds, the prospect of very high monetary damages and/or other significant remedies available through a "make whole" remedy, much broader in scope than remedies available under common law wrongful dismissal law or employment standards provisions;
- If the worker's complaint fails, the unlikely prospect that the employer will be able to recover its legal expenses or other costs in defending the complaint in the administrative proceedings, including at the WCAT appellate level. This is so even if the worker has sufficient financial resources to pay an award of costs, because the restrictive jurisdiction to make an award of costs.

Given that the statutory mandate of workers' advisers and employers' advisers is to communicate with or appear before the Board and WCAT only on "claims matters", it is debatable whether they have authority to act as advocates in unjust discrimination matters. Arguably it is a very broad interpretation of a "claims matter" to include an unjust discrimination complaint within that scope. Workers' advisers have acted as advocates for workers in pursuing these complaints at the WCAT appeal level, however. Employers may also have a choice of free representation from the employers' advisers, if "claim" is interpreted broadly to include an unjust discrimination complaint by a worker. Again, the statute does not require a financial means test to qualify for this public advocacy assistance.

Although employers have the option of seeking assistance from an employers' adviser to defend a complaint of unjust discrimination, they often seek representation from private legal counsel. Due to the significant business stakes at issue when such complaints are made, many employers prefer to hire private legal counsel with expertise in employment and human rights law. Even if an employer is successful in defending such a complaint, and even if a respondent is financially able to pay a costs award, the prospect of recovery of legal costs is very low. Arguably there may be a flaw in this system of public funding of litigation by way of free advice and advocacy services.

Challenging quasi-criminal administrative penalties:

The British Columbia Board has a statutory mandate to encourage workplace safety. As part of that mandate, the Board regularly inspects workplaces for safety violations. In certain circumstances, when the Board finds that an employer has violated safety regulations or otherwise has failed to maintain a safe workplace, the Board has jurisdiction under section 196 of the Act to impose an administrative penalty against the employer. An administrative penalty is in the nature of a fine for a quasi-criminal offence.

Where a work-related accident results in a fatality, the Board will conduct an accident investigation and may find safety violations that prompt the Board to impose an administrative penalty against the accident employer. The basic quantum of penalty is based on factors referred to in Board *Prevention Manual* policy such as the size of the employer's assessable payroll, whether the violation involved a high risk of serious injury or death, or whether the violation was willful or with reckless disregard. There are also a variety of policy factors for the Board to consider in determining whether it will lower or raise the basic amount of an administrative penalty. There are special provisions for the Board to impose a discretionary administrative penalty, to a maximum of \$250,000.

In the criminal law context, both the Crown and the accused person have a right of appeal from a court decision in a criminal proceeding. When there is a conviction for offences involving harm to a person, in sentencing proceedings the court may hear a victim's impact statement, including statements from family members of a victim. But the victim and/or victim's family do not have independent legal standing to challenge (appeal) a court decision on sentencing for the accused. They cannot appeal on the basis that a fine should be higher or that a jail sentence should be longer in duration; the Crown has those rights.

In the context of occupational health and safety in British Columbia, however, members of a deceased worker's family do have standing to challenge a Board administrative penalty imposed against the employer or employers whose workplaces were involved in the accident. They have full standing to participate in administrative review and appeal proceedings, to provide evidence, cross-examine witnesses and make submissions in support of a more severe penalty against the employer. Their standing is that of "persons who may be directly affected by" an occupational health and safety matter; section 241(3)(f) of the Act expressly refers to a "member of a deceased worker's family" as a person in that category.

In review and appeal proceedings of Board administrative penalty decisions, the Board is not a party. If an employer challenges an administrative penalty, a member of a deceased worker's family will have standing in the review and appeal proceedings as a party opposite in interest to that of the employer. Or a member of a deceased worker's family may initiate its own review and appeal proceedings if their view is that the Board imposed too low of a penalty against the employer; the employer may participate as a respondent.

It is difficult for an employer in this type of situation to recover its legal costs for several reasons. First, there is restrictive jurisdiction for the Board and WCAT to order one party to pay the legal costs of another party. Perhaps more significantly, it would be the rare case indeed when any employer would want to seek costs from the member of a deceased worker's family where the worker died in an accident at the employer's workplace – the tragedy and high emotion involved in these cases make such a position untenable. Further, an employer could be met with the argument that it had the option of retaining the free services of an employers' adviser.

The quantum of administrative penalties can be very high, however. Further, even if an administrative penalty seems low, an employer may find it necessary to challenge a Board finding of a safety violation (forming the basis of a penalty) because it disagrees with the finding and seeks to defend an operational practice as valid. The employer may decide that despite the high cost of hiring legal counsel, it is essential to success in its case. Thus an employer may find itself litigating a very serious occupational health and safety issue, with the party adverse in interest having little or no expenses because of workers' adviser representation, and due to the personal interest in the tragedy, being prepared to pursue the matter as far as possible through the review and appeal processes. The employer will likely be able to recover the expenses of producing evidence for these proceedings (expert opinions and the like), but will not be able to recover the costs of legal representation. Generally in these types of cases employers do not even request reimbursement of their legal costs because they know such a remedy is realistically unavailable in the circumstances. See *WCAT-2010-00104*

(January 13, 2010)³¹, where after lengthy review and appeal proceedings, WCAT dismissed the appeal of a deceased worker's parents who challenged a Board administrative penalty of \$75,000 as too low. The employer respondent in that case was represented by legal counsel and the deceased worker's parents were represented by a workers' adviser. The employer did not seek legal costs against the worker's parents. See also *WCAT-2010-02037* (July 31, 2009)³².

It is undeniable that workers' advisers and employers' advisers provide excellent quality and much-needed services to the workers' compensation community. Their services enable many persons with poor financial resources to present their cases effectively. There are obviously special challenges, however, in a statutory system that offers free advice and advocacy services in a context that restricts recovery of legal costs while giving broad standing for parties in review and appeal proceedings and while not requiring a financial means test to qualify for free assistance. There are inherent weaknesses in the system that can make the cost of doing business an expensive undertaking for British Columbia employers.

Conclusion

Third party litigation funding, whether it be a private or public source of funding, is an important means of facilitating access to justice. In certain situations it may give rise to complex legal and social issues. These complexities, however, do not detract from the fact that given the high cost of litigation, there is an essential place in Canada for both private and public third party litigation funding.

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¹ Two helpful articles exploring these themes are: *Litigation Finance: Access to Justice at What Cost?*, Adam Howden-Duke and Alex Kask, *The Advocate*. Volume 69, Part 5 (September 2011) 717; and “*Financing of Litigation by Third Party Investors: A Share of Justice?*”, Poonam Puri, (1998) 36 *Osgoode Hall LJ* 515.

² (1979), 18 B.C.L.R. 102 at page 104

³ *Ibid.*

⁴ (2009), 343 N.B.R. (2d) 58 (Q.B)

⁵ *Ibid.* at paragraph 63, page 81

⁶ See also *Milne v. Clarke*, 2010 BCSC 317, in which interest charged by an MRI scan provider was found to be an appropriate disbursement for the plaintiff in a personal injury action, with the Court finding that because the cost of the MRI scan was an appropriate disbursement, the interest owing from the plaintiff’s inability to pay for the MRI scan invoice was also an appropriate disbursement.

⁷ 2009 Can LII 41540

⁸ This provision was arguably “insurance” for plaintiff’s class counsel who had provided an undertaking to the defendants to pay any cost order against the plaintiff not paid by the plaintiff within 60 days of the cost order being final. The undertaking was in consideration of the defendants not proceeding with a motion for security of costs against the plaintiff.

⁹ See *McIntyre Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, [2002] O.J. No. 3417 (C.A.) In that decision the Court of Appeal held that when a contingency fee agreement is structured so that the fees are based on a percentage of the litigation recovery, the question whether the fees are reasonable and fair usually has to await the outcome of litigation.

¹⁰ 2009 Can LII 41540 at paragraphs 70 - 73

¹¹ 2011 ONSC 1785 (February 8, 2011)

¹² The Court required CFI, an Irish company, to post security in the jurisdiction to satisfy any costs award that might be made in favour of the defendants. Further, the Court required the IA to be amended to ensure additional controls on the provision of information about the litigation to CFI.

¹³ *Supra*, note 8, at paragraph 33(g)

¹⁴ Employers registered with the workers’ compensation tribunal under the statute, as well as other workers in the course of their employment at the time of the accident that caused the injury in question.

¹⁵ The respondents are typically parties not covered by workers' compensation legislation as either registered employers or workers in the course of their employment at the time of the accident

¹⁶ For example, see section 10 of the *British Columbia Workers Compensation Act*, R.S.B.C. 1996, c. 492

¹⁷ [1997] S.C.J. No. 74, [1997] 2 S.C.R. 980 (S.C.C.)

¹⁸ *Ibid*, at paragraph 26

¹⁹ 2001 MBCA 7 (January 23, 2001) (C.A)

²⁰ *The Workmen's Compensation Act*, R.S.M. 1970, c. W200, section 7(5), bold emphasis added; note that the current provision is now section 9(5) of the *Workers Compensation Act*, R.S.M. 1987, c. W200, essentially the same but with gender neutral language.

²¹ *Supra*, at paragraph 29

²² Unreported, February 14, 1986, Man. Q.B., Docket No. 678/80

²³ (1994), 98 Man.R. (2d) 269 (Q.B.), *aff'd* (195) 107 Man.R. (2d) 145 (C.A.)

²⁴ R.S.B.C. 1996, c. 492

²⁵ See policy item #100.40 of Volume II of the Board's *Rehabilitation Services and Claims Manual* (RSCM II)

²⁶ See policy item D6-153-2 of the Board's *Prevention Manual*

²⁷ B.C. Regulation 321/2002

²⁸ See Items D6-150 through D6-153-2 of the Board's *Prevention Manual*

²⁹ See Item D6-153-2 of the *Prevention Manual*

³⁰ See *WCAT-2001-00152* (January 19, 2011), reported on the WCAT website www.wcat.bc.ca

³¹ Reported on the WCAT website www.wcat.bc.ca

³² Reported on the WCAT website www.wcat.bc.ca