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Case Law Report: The Law on Litigation Funding in Canada

On May 8, 2020, the Supreme Court of Canada issued its reasons in *9354-9186 Québec Inc v Callidus Capital Corp* (*"Bluberi"*) after unanimously allowing the appeal from the bench in January 2020. Bluberi marks the first time the Supreme Court has considered litigation funding. This article summarizes the Court's decision, and places the case in the context of the other jurisprudence on dispute finance across Canada. Full details on these cases and links to the decisions can be found here.

***9354-9186 Québec Inc v Callidus Capital Corp* (Supreme Court of Canada, 2020)**

The debtor company, Bluberi, was undergoing proceedings pursuant to the CCAA and liquidated substantially all of its assets. The only remaining asset was a claim for damages against Bluberi's secured creditor, Callidus, which allegedly caused Bluberi's demise through a "loan to own" strategy. Bluberi lacked the funds to advance that claim and entered into a litigation funding agreement (LFA) with Omni Bridgeway (then Bentham IMF). Under the LFA, Omni Bridgeway agreed, subject to CCAA Court approval, to pay Bluberi's legal fees and disbursements, in exchange for a portion of any proceeds of the litigation. The court-appointed monitor EY supported the funding arrangement and Bluberi moved for the CCAA Court's approval of the LFA.

The CCAA judge approved the LFA as interim financing, and held that the secured creditor should not be permitted to vote on the LFA, as it was acting with an improper purpose. On appeal, the Quebec Court of Appeal set aside the CCAA judge's order. The Supreme Court unanimously allowed the appeal from the bench, and reinstated the CCAA judge's order. In so doing, the Court held:

- Where there is a litigation asset that could be monetized for the benefit of creditors, the objective of maximizing creditor recovery takes centre stage and litigation funding furthers the basic purpose of interim financing, allowing the debtor to realize on the value of its assets;
- LFAs are not *per se* plans of arrangement; and
- LFAs can be approved without a plan of arrangement

being presented to creditors.

The decision confirms that litigation financing is another tool in debtors' toolboxes to maximize the recovery from their assets.

***Schenk v Valeant Pharmaceuticals International Inc* (*"Schenk"*) (Ontario Superior Court, 2015)**

Five years before *Bluberi*, *Schenk* opened the door to litigation funding in commercial matters; the jurisprudence prior to this case had focused on class actions. In *Schenk*, a plaintiff of modest means wished to pursue a breach of contract claim against a well-funded defendant. He did not have the resources to do so, and entered into an LFA with a UK funder, subject to court approval.

The Court held that there was "no reason why such funding would be inappropriate in the field of commercial litigation." The Court also set out guidelines for such funding arrangements, including that a return of up to 50% – in line with the applicable contingency fee regulations – was acceptable. The Court did not approve the agreement as initially proposed, but the funder and client revised the agreement, and it was subsequently approved.

***Seedlings Life Science Ventures v Pfizer Canada* (Federal Court, 2017)**

In the first consideration of dispute finance at the Federal Court, Seedlings entered into an LFA with Omni Bridgeway (then Bentham IMF) to enable it to enforce a patent against Pfizer. Under the LFA, Omni Bridgeway agreed to pay a portion of Seedlings' legal fees and disbursements on a non-recourse basis. Seedlings and Omni Bridgeway brought a motion, on notice to the defendant, for approval of their LFA.

The approval motion was dismissed, without costs, on the basis that the Federal Court did not have jurisdiction to grant such a remedy or make such a determination. Prothonotary Tabib reasoned that, unlike in class actions where courts must help protect vulnerable class members, "the legal, procedural and policy imperatives … of submitting LFAs to prior court approval … do not exist in the context of private litigation. There is no legal or logical basis to extend the requirement of pre-approval outside of class proceedings."

The Court noted that "the manner in which Seedlings chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant… The Defendant has no legitimate interest in enquiring into the reasonability, legality or validity of Seedlings' [funding] arrangements … because they do not affect or determine the validity of the rights asserted by

Seedlings in this action."

***B & M Walker Ltd v TDL Group* (Ontario Superior Court, 2019)**

This case brought together a long line of jurisprudence about litigation funding for class actions, where court approval of an LFA is required. This case was novel because the funder paid legal fees as the case progressed, in addition to disbursements and costs protection. That is, it was a departure from most class actions, where counsel act on a contingency fee basis, and seek funding for disbursements and costs awards.

The Court approved the LFA, and recognized that the funding would "ensure that the Plaintiffs and the putative class of franchisees are able to achieve access to justice" and deter wrongdoing. The Court also held that the funding agreement "protect[ed] the financial and human capital of class counsel while seeing to it that the Plaintiffs and class have adequately resourced legal representation." This has opened the door to more creative funding arrangements in the class action space.

What's Next?

The law is now settled that litigation funding is not only permissible, but is a valuable means of accessing justice and monetizing assets. Strategic clients are increasingly turning to dispute finance as a tool to manage cost and mitigate risk, with the benefit of clear and supportive jurisprudence.

About the Author

Thanks to Naomi Loewith of Omni Bridgeway for this article. Omni Bridgeway is a global leader in dispute resolution finance, with expertise in civil and common law legal and recovery systems. It is a publicly traded funder (ASX: OBL) and has funded disputes and enforcement proceedings around the world since 1986. To learn more about dispute finance, contact Naomi at nloewith@omnibridgeway.com or visit www.omnibridgeway.com.