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Backgrounder

Study Paper on Financing Litigation

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Introduction

This study paper is the culmination of the Financing Litigation Legal Research Project. The BCLI began this project in September 2015. The project examines how people pay for litigation in British Columbia. The project's overarching goal is to review existing financing models, and to explore potential opportunities for structural, systemic, or legal changes to improve financing options for litigants in British Columbia.

The purpose of this study paper is to:

- Examine the public and private options for how people pay for litigation in British Columbia (apart from publicly funded legal aid), and compare them with other similar financing options available across Canada and, where applicable, internationally;
- Examine the laws, policies, programs or market conditions that support each financing option in British Columbia;
- Examine legal and structural constraints that may limit access to each financing option—such as potential constraints posed by existing laws against champerty and maintenance, or by professional conduct rules;
- Examine the common law to identify trends of litigants using (or attempting to use) alternative forms of financing litigation; and
- Identify and examine ideas for structural, systemic or legal changes to facilitate increased access to alternative forms of financing litigation.

The Financing Litigation Project was made possible by a generous grant from the Law Foundation of British Columbia.

Study methodology

The initial research phase for the project consisted of consultation sessions with experts that work closely with individuals who have difficulty paying for legal services in British Columbia. Consultation participants included legal and private sector finance professionals, and executive staff from various not-for-profit agencies throughout the province.[1]

Five consultation sessions were held between October 2015 and July 2016. In those sessions, consultation participants discussed some of the common methods of financing litigation, such as third-party litigation funding, publicly funded litigation funds, and legal expense insurance. Other issues flagged during consultation sessions, and from the research, include unbundled legal services, alternative fee arrangements, and crowdfunding.

During the consultation sessions, the BCLI gathered information, feedback and comments on the following:

1. Experience with litigants seeking to finance legal services and, more specifically, litigation;
2. The financing options that should be examined within the scope of this project; and
3. The advantages, disadvantages, and optimal uses for the financing options reviewed in this project.

Content of the study paper

Introduction

This study paper examines how litigants pay for litigation. The study paper contains 13 chapters (including its concluding chapter) and is structured in two parts. Part I contains five introductory chapters. Part II contains the substantive chapters on the different options available to finance litigation. It also includes a chapter on alternative ideas to improve access to justice.

This paper examines the concepts of both financing litigation and litigation financing. Financing litigation is a descriptive term developed by BCLI project staff. The term is used to describe how litigants (a party to a lawsuit, or one engaged in litigation) pay for legal services. This includes both traditional methods of paying for litigation, as well as alternative financing options available today. Some of the alternatives fall under what is more broadly categorized as litigation financing, where outside parties provide funding to individuals to pay for the litigation.

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[1] For a complete list of consultation participants to the Financing Litigation Legal Research Project, see Appendix A of the study paper.

The consultation sessions for this study revealed that there are many ways people pay for litigation. BCLI used the information gathered from the consultation sessions and the project's research to define the scope of study for this project. This study paper examines the following six ways to finance litigation:

- Unbundled Legal Services
- Third-Party Litigation Funding
- Alternative Fee Arrangements
- Crowdfunding
- Legal Expense Insurance
- Publicly Funded Litigation Funds

The substantive chapters in Part II illustrate how each financing option is used in British Columbia, elsewhere in Canada and, where applicable, internationally. Each chapter includes an examination of the advantages, disadvantages and professional or ethical issues to consider. The chapter then discusses opportunities for structural, systemic or legal changes to enhance the use of each financing option.

Before embarking on a closer look at each financing model, Part I of the study paper introduces the reader to the overall topic of financing litigation.

Part I

The scope and purpose of the Financing Litigation Legal Research Project

The introductory chapter provides a history of the development of the project. The chapter explains how the project proposal evolved from a narrow focus on third-party litigation funding to a broader examination of how litigants pay for litigation generally.

The chapter starts by introducing the reader to the relationship between access to justice and how people pay for litigation. BCLI noted an emerging trend of more and more litigants turning to outside parties, who were unconnected to the legal issues, for financial support to pay for litigation. This practice raised important questions. Of interest to BCLI was whether litigants seeking to finance their claims in this manner could be legally barred by laws seen to restrict access to protect the administration of justice from misuse.

The chapter examines the doctrines of champerty and maintenance in the context of how people pay for litigation. Generally, these rules were intended to prevent frivolous litigation from making its way into the courts, and to protect the justice system from would-be financial supporters who may seek to abuse the justice system for financial gain. Despite good intentions, an unintended consequence of these two doctrines was that they could

prohibit legitimate cases from being heard because litigants may struggle to pay the cost of litigation on their own.

BCLI's research revealed that much more than the mere act of providing financial support to a litigant is required to prove an abuse has occurred. It must be clear that the financial supporter is driven by an improper motive to move the litigation forward. In the absence of this, the courts have declared that litigants must be able to obtain the financial support needed to ensure they have a fair opportunity for a just resolution of their claim.

A roadmap to litigation

This chapter is for readers not familiar with the litigation process and is offered to provide context for the substantive chapters in Part II of the study paper. It provides an overview of the litigation process, for both individuals and groups, within the courts and through alternative avenues for dispute resolution. Its purpose is to illustrate the steps involved in the litigation process, and statistics on the costs associated with completing each one. The chapter begins with commencing legal proceedings through to enforcement of the outcomes from settlements of those actions, which collectively create financial obstacles for many litigants today.

Terminology

Chapter three introduces key terms and concepts that arise throughout the study paper to assist readers with the content of the substantive chapters.

Access to justice and financing litigation

Chapter four summarizes the access-to-justice challenge. Leading Canadian studies are reviewed, including some of the main causes of the access-to-justice issue. It also highlights statistics on how the rising cost of legal representation, and correspondingly litigation, has led to a steady increase in the number of self-represented litigants. The chapter then reviews the overall impact this rise in self-representation has on the delivery of justice for litigants, lawyers, the judiciary, and court services.

The consultation process

Chapter five offers background on the consultation process, including the key points raised by the consultation participants, such as important ethical, practice management, and public policy considerations.

Part II

The substantive chapters review each financing model. Each chapter begins with a definition, followed by an outline of how the financing option is currently used, or developing, in British Columbia and, where applicable, other Canadian and international jurisdictions. Case law and statutes are used to illustrate the evolution of each option, and where it may lead to in the future. The chapter then highlights key features and optimal uses through review of the commentary from the consultation participants and research. A comparative analysis is then applied to outline the advantages and disadvantages, followed by discussion of opportunities for structural, systemic or legal changes to improve the availability of each financing option for litigants. Each chapter concludes with a one-page summary of the chapter highlights.

Unbundled legal services

Unbundled legal services are essentially discrete, limited legal services that a client can pay a lawyer to perform, whether on a retainer, hourly or by using some other fee arrangement. Examples of unbundled legal services include advice on legal issues or settlement offers, research on relevant cases, drafting letters or court documents, and legal coaching for court appearances. In British Columbia and across Canada, unbundled legal services are commonly used for family law matters and solicitor-type work (e.g. drafting documents). Public interest advocacy organizations also reported using unbundled legal services to offer advice and representation for low- to mid-income clients.

Because unbundled legal services enable a client to select which tasks the lawyer will complete, they can offer greater financial predictability and establish clearer client expectations. They can also help self-represented litigants become better-equipped to effectively bring their matter to court. This may help to reduce cost and delay for all parties involved. But the inherent nature of unbundled legal services can lead to a lack of continuity if a client uses more than one lawyer or firm at different times throughout their case. They can also create ethical and professional responsibility challenges for lawyers.

Consultation participants and research identified five ideas for structural, systemic or legal changes to enhance the use of unbundled legal services in British Columbia. These ideas include:

- **Enhance the BC *Code of Professional Conduct*.** There is an opportunity to provide more direction to lawyers on how to draft limited-scope retainer agreements for unbundled legal services. This could address concerns raised around potential scope creep, and enable lawyers to better manage client expectations.

- **Develop practice resources.** Much of the practice resources currently available for unbundled legal services are limited to family law matters. Additional materials could

also be developed for other practice areas, such as wills and estates, real estate, corporate and commercial litigation matters.

- **Professional development and annual practice declaration reporting.** There is an opportunity to offer large-scale conferences, provincially or nationally, to educate lawyers about unbundled legal services. Furthermore, adding a category on the annual practice declaration that records time spent offering unbundled legal services may help enhance their use in British Columbia.

Third-party litigation funding

Third-party litigation funding is the practice of an outside party, who has no personal interest in the litigation, offering financial support to a litigant. Funding can derive from private and public sources. Private third-party litigation funding involves a third-party funder entering into a litigation funding agreement with a plaintiff, lawyer or law firm to finance legal fees and disbursements. Examples include contingency fee agreements, litigation loans, and adverse cost insurance. Public third-party litigation funding is collected and distributed to litigants through statutory mechanisms. These are designed to allocate federal and provincial funding to both individual and groups of litigants. Examples include provincial class proceedings funds, legal aid plans, and workers' compensation advocacy services.

Private third-party litigation funding is often used for more complex litigation. It helps to create a balance of power between plaintiffs and larger, well-funded defendants. Public third-party litigation funding helps facilitate access to justice for groups of litigants with relatively small-value claims on their own but, when filed within a larger class of litigants, stand to secure a high payout if successful. Benefits include risk diversification for lawyers and firms. This kind of funding model enables lawyers to take on more complex litigation, and increases the capacity of clients to shoulder the cost of disbursements and other litigation expenses. But outside financial support from third-parties can create complications over how the litigation is managed, and may give rise to undue influence or power imbalances between litigants.

Consultation participants and research identified three ideas for structural, systemic or legal changes to enhance the use of third-party litigation funding in British Columbia. These ideas include:

- **Regulations for third-party litigation funding agreements.** One option to consider is development of a licensing program or official code of conduct to regulate the use of third-party litigation funding agreements.

- **Greater judicial oversight.** Until regulations or official policies are developed to help manage this practice, lawyers and clients may need to rely more heavily on guidance from the judiciary on how to ensure litigation funding agreements are both reasonable and fair in the circumstances.

Alternative fee arrangements

While no universal definition exists to describe what an alternative fee arrangement is, they represent an alternative method for clients to pay for legal services. Examples of alternative fee arrangements include blended rates, fixed or flat fees, and sliding-scale fees.

In British Columbia, research revealed that alternative fee arrangements are commonly used for wills and estate planning, mediation and for representation and other services available from public interest advocacy organizations. They have broader application elsewhere in Canada, including corporate and commercial matters, labour and employment law, real estate and small claims matters. Consultation participants noted that alternative fee arrangements help to mitigate the potential for unpredictable costs in litigation by offering more flexibility to the lawyer and client to decide how much time to assign to a given task, and at what cost. Alternative fee arrangements can also foster long-term client relationships because clients may be more encouraged to return for additional services if they know they can participate in the financial planning of the case.

Because alternative fee arrangements use a similar model to unbundled legal services, not all alternative fee arrangements will be useful for more complex litigation that has less predictable patterns and checkpoints for discrete tasks. Alternative fee arrangements may also pose challenges for lawyers who struggle to accurately predict the amount of work required for a task or set of tasks. This could lead to potential fee reviews by the courts, among other challenges.

Consultation participants and research identified three ideas for structural, systemic or legal changes to enhance the use of alternative fee arrangements in British Columbia. These ideas include:

- **Litigation budgets.** Lawyers and firms could work with clients to take a budgetary approach to managing litigation files by negotiating how much time should be spent on each task, based upon a client's overall budget for the case.

- **Client value adjustments.** There is an opportunity to allow clients to apply a value-based adjustment to their fees for legal services, based on their own observations and assessment of the value the service provided to the case. To avoid a completely subjective valuation, courts have suggested lawyers and clients can work together to

assess what was accomplished on a case or task, factoring in any complications or challenges that arose in the process, to arrive at an agreeable fee.

Crowdfunding

In practice, crowdfunding involves litigants collecting smaller amounts of money from a large number of people to pay for litigation. In Canada, the two common forms of crowdfunding are donation- and securities-based. Donation crowdfunding enables people to offer financial support to litigants without the expectation of a financial or other reward in return. Securities- or equity-based crowdfunding for litigation uses an investor-type model where funding is provided to litigants in exchange for a portion of the awards or settlement in the litigation.

Donation-based crowdfunding can be a useful alternative financing option for public advocacy organizations, or for cases with relatively low awards. Equity-based crowdfunding can work well for larger, more complex litigation with potential for higher-value settlements or judgments. Crowdfunding generally can help to ensure important litigation receives necessary funding to move forward, such as public interest cases. However, consultation participants and research revealed that crowdfunding litigation could raise ethical and professional responsibility issues, such as conflicts of interest, potential for excessive fees, and a risk of over-sharing of information by self-represented litigants through online crowdfunding sites. Due to its relatively new application in Canada, there may be insufficient guidance to litigants who are attempting to use this alternative financing option to pay for litigation.

Consultation participants and research identified two ideas for structural, systemic or legal changes to enhance the use of crowdfunding for litigation in British Columbia:

- **Enhanced regulations and guidelines.** There is an opportunity for development of practice guidelines to help support lawyers and law firms who intend to use crowdfunding to fund a client's case.

- **Development of a practitioner database.** A provincial or national database of lawyers who have, or are willing to take on, crowdfunded cases may facilitate access to legal services for otherwise self-represented litigants. It may also help to mitigate potential ethical or professional responsibility concerns.

Legal expense insurance

Legal expense insurance offers coverage for legal services. Depending on the policy, individuals pay an annual insurance premium to the legal expense insurance provider in exchange for legal information, advice and representation. Typically, legal expense insurance

falls under two categories, *before-the-event* and *after-the-event*. Before-the-event insurance offers protection against potential litigation and other legal issues that can arise following a hypothetical future event (includes disbursements and fees). After-the-event insurance is purchased after litigation has commenced (e.g. for an injury or a dismissal) as protection against part or all of the risk of paying an adverse costs award, as well as an individual's own expenses.

Individuals and commercial business owners can benefit from legal expense insurance as it offers protection against common personal and business legal issues. It is also used to provide coverage to union members (and their eligible family members) as part of an overall benefits package, either fully covered by the plan, or at discounted rates. Legal expense insurance may help address service gaps for middle-income clients who often do not qualify for legal aid or advocacy services, but are also not wealthy enough to retain (or continue to retain) a lawyer. However, and like third-party litigation funding, relying on an insurance provider to finance litigation could raise potential for loss of control of the case. Also, and depending on the scope of coverage under a legal expense insurance plan, clients may find they lack coverage for necessary disbursements or other litigation expenses.

Consultation participants and research identified three ideas for structural, systemic or legal changes to enhance the use of legal expense insurance in British Columbia. These ideas include:

- **Increase public awareness.** Development of additional resources and information could enhance public awareness of legal expense insurance. One option to consider is a website that contains information and resources to educate the public on this type of alternative financing model.

- **Financial ombudsperson.** Further examination into the feasibility of an office such as a financial ombudsperson used elsewhere could be considered. Such an office could help manage potential concerns by plan holders against legal expense insurance providers. This could also increase accountability for legal expense insurance providers to ensure the products and services offered can meet a client's litigation needs.

Publicly funded litigation funds

Publicly funded litigation funds are self-sustained and offer litigants access to ongoing and continuous funds to pay the cost of litigation. Across Canada, two such funds are currently in place—the Ontario Class Proceedings Fund, and the Québec *Fonds d'aide aux actions collectifs*. In 2017, the federal government reinstated the Court Challenges Program, which is designed to finance litigation of test cases that have national significance.

Publicly funded litigation funds enable class proceeding litigation to move forward, offering access to justice for a larger group of litigants. It also presents a promising alternative financing model to bring forward important public interest litigation, the outcome of which could have important implications for society. Examples could include human rights and *Charter* cases. Consultation participants noted that a well-funded, well-implemented litigation fund could be used to finance cases that would otherwise be unlikely to meet the profitability threshold for private third-party litigation funding. Because they are statutory bodies, publicly funded litigation funds are subject to greater oversight, which can pose operational and administrative challenges.

Consultation participants and research identified two ideas for structural, systemic or legal changes to enhance the use of publicly funded litigation funds in British Columbia:

- **Develop publicly funded litigation fund.** A public fund in British Columbia could help support long, complex, and expensive class proceedings or important public interest cases.

- **Lawyers funding public interest litigation.** There is an opportunity to offer the option to lawyers and firms to make annual financial contributions to a public interest litigation fund as an alternative to providing more direct pro bono legal services. Funds collected could be used to pay for legal costs and disbursements of public interest cases.

Alternative methods of improving access to justice

Chapter 12 of the study paper identifies and briefly discusses five alternative ideas raised by consultation participants to reduce the costs of legal services, and improve access to justice generally:

1. Increased use of alternative dispute resolution processes;
2. Expansion of legal aid;
3. Promotion of *cy-près* orders;
4. Community Contribution Companies; and
5. New business models.

While these ideas fell outside the scope of the substantive content for the project, the study paper includes a brief discussion on each idea to give the reader some food-for-thought over what other opportunities may exist to continue examining how people pay for litigation.

Conclusion

This study paper represents a brief introduction to each alternative financing option. The substantive content, research, case law, and other materials are not intended to be interpreted as an exhaustive representation of the information and resources available for study in this area. Research, law, policy and initiatives continue to develop as more and more opportunities arise to further explore this area.