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FINANCING LITIGATION PROJECT

Financing Litigation Project Project Background

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INTRODUCTION

The British Columbia Law Institute is starting a new project on litigation financing to explore the public, private, and third-party funding opportunities which could be used in British Columbia, by comparing similar systems across Canada, and in other commonwealth jurisdictions. The project will explore potential opportunities for structural, systemic, or legal changes that could improve the financing options for litigants in British Columbia.

This project has been made possible through a generous grant from the Law Foundation of British Columbia.

LEGAL BACKGROUND

The number of self-represented litigants in British Columbia's courts has been steadily increasing, and public confidence in the justice system is declining.¹ Access to justice continues to be a large and multifaceted subject of study by legal academics in Canada. In its 2013 report on the topic, the Canadian Bar Association found that many factors contributed to unequal access to justice, including a lack of trust in the justice system, a feeling that legal rights are "just on paper", an evaluation of the justice system as being too difficult to navigate, and a belief that "justice" is person-dependent.²

Compounding these concerns, the Canadian Bar Association notes that finances play a crucial role in differentiating between access to or a lack of access to justice, and that this was "unfair and unacceptable".³ In her 2013 report, University of Windsor Faculty of Law professor Dr.

¹ Canadian Bar Association, "Envisioning Equal Justice Project (Final Report)" (November 2013) Canadian Bar Association, at 14; online at < http://www.cba.org/cba/equaljustice/secure_pdf/EqualJusticeFinalReport-eng.pdf >

² *Ibid.*, at 15-21.

³ *Ibid.*, at 24.

Julie MacFarlane also found that the inability to afford legal counsel is the most consistently-cited reason for self-representation and a lack of access to justice.⁴

Improving access to justice is a broad and ambitious goal that must be approached from a range of interdisciplinary angles. One facet, as highlighted by the Canadian Bar Association and by Dr. MacFarlane, is improving the ability of litigants to pay for legal services. By improving access to litigation financing, litigants can find ways to afford legal representation and have guidance through the justice system. This would address a significant dimension of the unequal access to justice raised by the Canadian Bar Association.

PROJECT GOALS AND OBJECTIVES

The BCLI *Financing Litigation Project* is planned as an 18-month legal research project aided by the advice of volunteer experts. The project has four specific objectives:

- Examine who is providing public, private, and third-party financing for litigation (apart from publicly-funded Legal Aid), the factors that support the provision of litigation financing, and compare the options available in British Columbia to those in other jurisdictions with more developed litigation financing options.
- Examine legal and structural constraints that may be limiting access to private financing of litigation – such as the potential constraints posed by existing laws against champerty⁵ and maintenance.⁶
- Examine the common law to identify trends of litigants using (or attempting to use) alternative forms of litigation financing.
- Identify and examine options for structural or legal changes that could facilitate increased access to alternative forms of litigation financing.

The goal of the project is to provide a comprehensive review of the issues related to the financing of litigation in British Columbia by examining the availability of, utility of, and obstacles to a range of financing options. Initial research has identified several topics which will likely be given further consideration over the consultative phase of this project, including, but not limited to:

⁴ Dr. Julie MacFarlane, “National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants” (May 2013), Convocation – Treasurer’s Advisory Group on Access to Justice, at 39; online at < http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2014/Self-represented_project.pdf >.

⁵ **Champerty:** an agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant’s claim as consideration for receiving part of any judgment proceeds; specif., an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim (*Black’s Law Dictionary*, 10th ed, *sub verbo* “champerty”).

⁶ **Maintenance:** (8.) improper assistance in prosecuting or defending a lawsuit given to a litigant by someone who has no *bona fide* interest in the case; meddling with someone else’s litigation (*Black’s Law Dictionary*, 10th ed, *sub verbo* “maintenance”).

- Third-party financing
- Publicly-funded class action funds
- Litigation insurance
- Unbundled legal services

Other issues flagged during consultation events will also be considered for research and discussion to provide a fuller portrait of the litigation financing landscape in British Columbia.

The project will release a Study Paper examining the policies and structural, systemic, or legal changes necessary to facilitate the use of alternative methods of litigation financing, reflecting on the concerns regarding the affordability of legal services and access to justice.

RESEARCH TOPICS

The *Financing Litigation Project* has identified several topics which will likely be given further consideration over the consultative phase of this project, including, but not limited to, the following options for public, private, and third-party litigation financing:

1. Third-party financing

Third-party financing represents a financing option where a third-party pays the cost of litigation in return for a percentage of any settlement or judgment funds. It is distinct from traditional contingency agreements in that the third-party firm is often not representing the litigating client, but instead only providing the funding for representation. This alternative form of litigation financing has been growing around the world, but within Canada, it has been bound by strict rules regarding class action certification and funding, and laws against champerty and maintenance, and thus has been slow to develop.

However, recent common law developments have increasingly recognized corporate third-party financing as a viable option in class actions. Research into third-party litigation financing will be a primary consideration in this project, and will include corporate third-party funders such as those funding class actions, as well as crowdfunded litigation.

2. Publicly-funded public interest funds

British Columbia does not have a publicly-funded class action fund to assist low-income litigants who need financial assistance to start and certify a class action lawsuit. Such a fund would increase access to justice by providing financial support and indemnifying claimants against damages in class action proceedings. Ontario, which does have a publicly-funded class action fund, is one model of a class action fund that British Columbia might consider.

The Ontario class action fund allows claimants to pursue claims without being discouraged by the threat of overwhelming legal fees – a benefit that is particularly useful when the individual benefits to each class participant is small, but the costs and damages against them

could be significant if the lawsuit is unsuccessful. To that end, it may serve as an effective model for ensuring access to justice for claimants seeking to pursue a class action lawsuit.

BCLI will also examine broadening this concept to public interest litigation generally, and whether publicly-funded funds for public interest litigation would be useful as a way to provide financing for litigants in important cases.

3. Litigation insurance

Litigation insurance (also known as “pre-paid legal services”) is an insurance market that indemnifies clients against a range of legal issues. Typically, litigation insurance falls under two categories, *before-the-event* and *after-the-event*, defined as follows:

- **Before-the-Event Legal Expenses Indemnity:** insurance against potential litigation costs that could be incurred following a hypothetical future event – including costs, fees, and administrative costs.
- **After-the-Event Legal Expenses Indemnity:** insurance purchased after an event (such as an injury or a dismissal) has occurred against part or all of the risk of being required to pay a proportion of the winner’s costs, as well as their own costs, arising from the event.

In effect, litigation insurance often serves the dual purpose of indemnifying the litigants as well as the insurance companies themselves – who would otherwise need to defend themselves against actions by their clients should they refuse to cover the losses suffered.

Around the world, litigation insurance continues to be popular, however in British Columbia, knowledge and use of litigation insurance is not commonplace. Broader access and promotion of litigation insurance in British Columbia may serve as an effective way to mitigate costs related to litigation for those in high-risk situations or industries willing to pay small premiums over time to protect themselves against potential litigation down the road.

4. Unbundled legal services

The unbundling of legal services is a departure from the traditional billable retainer. Traditionally, clients are expected to provide a large up-front payment (a retainer), from which a lawyer will draw their payment in response to billed time doing any work related to the case. Often in this system, the client will not be able to see the work that has gone into their case until the end of a billing period, and may find that the retainer has been spent without any concrete results being achieved. They are then faced with the difficult decision of paying more money to top-up the retainer, or stop paying and leave the matter unfinished. By contrast, unbundled legal services eschew large retainers and instead allow lawyers to charge a fixed amount for a specific task, allowing the client to choose the services they want to pay for.

Under such an agreement, a lawyer may be hired for any or all of the work involved in litigation, such as legal research, writing pleadings and applications, providing representation in court or mediation, or generalized coaching to guide the client through the legal process. These services are typically offered at a flat rate fee that is attractive to clients, allows for simpler comparative shopping between lawyers, and makes it easier for litigants to plan ahead for total costs – something that is often difficult to do with the traditional system of hourly billing. Unbundled services may prove an important means by which litigants can proceed with their cases, whether self-represented, partially represented, coached, or fully represented in court by counsel hired exclusively for that purpose.

HOW THE BCLI PLANS TO CARRY OUT THE PROJECT

Methodology

The *Financing Litigation Project* will proceed in a manner that prioritizes consultation with experts who work closely with issues surrounding litigation financing. The project is planned as an 18-month legal research project.

BCLI will hold consultations with experts to collect information and feedback on the above list of research topics and any other similar options flagged for research. The information collected will be reviewed, and subsequent study of the highlighted subjects will be developed into a Study Paper that examines each financing option in detail and discusses the policies and structural, systemic, or legal changes that could improve the financing options for litigants in British Columbia.

Output

Following the consultation period taking place in late 2015 and early 2016. A final Study Paper will be published in early 2017.

ABOUT THE BRITISH COLUMBIA LAW INSTITUTE

The British Columbia Law Institute was incorporated in 1997 under the British Columbia *Society Act*. Its mission is to be a leader in law reform by carrying out the best in scholarly law-reform research and writing and the best in outreach relating to law reform.

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