



BRITISH COLUMBIA  
**LAW INSTITUTE**  
ESTABLISHED 1997



# STUDY PAPER ON FINANCING LITIGATION

# **Study Paper on Financing Litigation**

## Disclaimer

The information and commentary in this publication is not offered as legal advice. It refers only to the law at the currency date, and the law may have since changed. BCLI does not undertake to continually update or revise each of its publications to reflect post-publication changes in the law.

The British Columbia Law Institute and its division, the Canadian Centre for Elder Law, disclaim any and all responsibility for damage or loss of any nature whatsoever that any person or entity may incur as a result of relying upon information or commentary in this publication.

You should not rely on information in this publication in dealing with an actual legal problem that affects you or anyone else. Instead, you should obtain advice from a qualified legal professional concerning the particular circumstances of your situation.

---

© 2017 British Columbia Law Institute

The British Columbia Law Institute claims copyright in this publication. You may copy, download, distribute, display, and otherwise deal freely with this publication, but only if you comply with the following conditions:

1. You must acknowledge the source of this publication;
2. You may not modify this publication or any portion of it;
3. You must not use this publication for any commercial purpose without the prior written permission of the British Columbia Law Institute.

These materials contain information that has been derived from information originally made available by the Province of British Columbia at: <http://www.bclaws.ca/> and this information is being used in accordance with the Queen's Printer License—British Columbia available at: [http://www.bclaws.ca/standards/2014/QP-License\\_1.0.html](http://www.bclaws.ca/standards/2014/QP-License_1.0.html). They have not, however, been produced in affiliation with, or with the endorsement of, the Province of British Columbia and **THESE MATERIALS ARE NOT AN OFFICIAL VERSION.**

**Currency Date: 28 June 2017. All URLs are current as at 29 September 2017.**

# British Columbia Law Institute

1822 East Mall, University of British Columbia, Vancouver, BC, Canada V6T 1Z1

Voice: (604) 822-0142 Fax: (604) 822-0144 E-mail: [bcli@bcli.org](mailto:bcli@bcli.org)  
WWW: <http://www.bcli.org>

-----

The British Columbia Law Institute was created in 1997 by incorporation under the provincial *Society Act*. Its strategic 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.
- 

The members of the Institute are:

Lisa A. Peters, QC (Chair)  
Prof. Joost Blom, QC (Treasurer)  
R. C. (Tino) Di Bella  
Mathew P. Good  
Frances M. Kelly  
Margaret H. Mason  
Brent B. Olthuis  
Andrea L. Rolls

Thomas L. Spraggs (Vice-chair)  
Jan Christiansen  
Oliver A. Fleck  
Prof. Robert G. Howell  
Hon. Kenneth C. Mackenzie, QC  
Susan M. Mercer  
Dr. Richard F. Oppong  
Dr. Prof. Janis Sarra

The members emeritus of the Institute are:

Arthur L. Close, QC

D. Peter Ramsay, QC

-----

***This project was made possible with the sustaining financial support of the Law Foundation of British Columbia and the Ministry of Justice for British Columbia. The Institute gratefully acknowledges the support of the Law Foundation and the Ministry for its work.***

-----

# Introductory Note

## Study Paper on Financing Litigation

This study paper is the culmination of the Financing Litigation Legal Research Project that began 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.

Access to the justice system is becoming increasingly difficult for many Canadians. The cost of litigation is an important factor that can determine how much and how often people can pay a lawyer for legal advice and representation. While some disputes can be resolved outside the courtroom, litigation is often the only means to achieve an equitable result. Commencing and participating in the litigation process is expensive and many people lack the financial resources to take on the full cost of bringing their matter to court. This can lead to potentially meritorious cases being barred from access to a just resolution.

This study paper examines the traditional and alternative methods litigants use to pay for litigation. It reviews five financing models that have emerged both in Canada and internationally: 1) unbundled legal services, 2) third-party litigation funding, 3) alternative fee arrangements, 4) crowdfunding, 5) legal expense insurance, and 6) publicly funded litigation funds. The paper identifies 18 opportunities and ideas to consider for structural, systemic or legal change in order to enhance the use of each financing option in British Columbia. It also briefly discusses five alternative ideas that could mitigate the rising cost of legal services, and improve access to justice generally.

On behalf of the board of directors of the British Columbia Law Institute, I want to thank the consultation participants of the Financing Litigation Legal Research Project, and the BCLI project staff, for their hard work over the course of this project. The BCLI fully supports the content of this study paper.



Lisa A. Peters, QC  
Chair,  
British Columbia Law Institute

October 2017

# TABLE OF CONTENTS

<b>LIST OF FIGURES .....</b>	<b>xii</b>
<b>LIST OF TABLES.....</b>	<b>xiii</b>
<b>ACKNOWLEDGMENTS .....</b>	<b>xiv</b>
<b>EXECUTIVE SUMMARY .....</b>	<b>xv</b>

## Part I

<b>CHAPTER 1. INTRODUCTION: THE SCOPE AND PURPOSE OF THE FINANCING LITIGATION LEGAL RESEARCH PROJECT .....</b>	<b>1</b>
A history of the development of this project.....	1
The emergence of third-party litigation funding in Canada .....	1
The common-law rules of champerty and maintenance .....	2
Judicial narrowing of the scope of the law of champerty and maintenance.....	2
The rise of the self-represented litigant .....	3
Project goal and objectives .....	5
Study methodology .....	6
Structure of this paper .....	7
<b>CHAPTER 2. A ROADMAP TO LITIGATION .....</b>	<b>9</b>
Litigation defined .....	9
The cost of legal problems .....	10
Anatomy of a lawsuit .....	11
Stage 1: Becoming a litigant .....	11
Stage 2: Legal advice and representation .....	12
Stage 3: Commence litigation .....	15
Stage 4: Case planning conference .....	21
Stage 5: The discovery process.....	22
Stage 6: Trial .....	23
Stage 7: Judgment and costs .....	24
Summary .....	25
<b>CHAPTER 3. TERMINOLOGY .....</b>	<b>27</b>
Key terms and concepts .....	27
Summary .....	29

**CHAPTER 4. ACCESS TO JUSTICE AND FINANCING LITIGATION.....31**

The roots of access .....	31
The rule of law .....	31
The jurisprudence .....	31
Addressing the access-to-justice challenge .....	34
Legal aid.....	34
Pro bono and public advocacy services .....	37
Contingency agreements.....	38
Class proceedings .....	38
Access to justice and the self-represented litigant .....	39
The costs of justice .....	42
Financial costs.....	42
Personal costs .....	45
Summary .....	46

**CHAPTER 5. THE CONSULTATION PROCESS .....47**

Consultation sessions.....	47
The research process.....	47
Traditional models.....	48
Lack of eligibility for legal services among various groups .....	48
Stigma of low-cost legal services .....	50
Pro bono requirements.....	51
Scope creep .....	51
Ethics and professional responsibility .....	52
Summary .....	52

**Part II**

**CHAPTER 6. UNBUNDLED LEGAL SERVICES.....53**

Breaking with tradition .....	53
What are unbundled legal services? .....	54
Development of unbundled legal services in British Columbia .....	55
The Law Society of British Columbia .....	55
BC Code .....	57
BC Family Unbundled Legal Services Project.....	58
Access to Justice BC .....	61
Canadian Bar Association—BC Branch.....	61
Law firms.....	62
Community legal organizations.....	62
Unbundled legal services across Canada .....	63
Canadian Bar Association—Code of Professional Conduct.....	64

## Study Paper on Financing Litigation

---

Federation of Law Societies of Canada.....	65
Alberta.....	68
Manitoba.....	69
Newfoundland and Labrador .....	69
Nunavut .....	69
Ontario .....	69
Prince Edward Island.....	70
Québec.....	71
The development of unbundled legal services internationally.....	71
United States.....	71
United Kingdom .....	73
Optimal uses.....	73
Advantages.....	74
Financial predictability .....	74
Clear client expectations .....	75
Simplicity of tasks.....	75
Flexible for the client and the lawyer .....	76
Efficiency of judicial and extrajudicial processes .....	77
Better settlement and case outcomes.....	80
Disadvantages and potential complications.....	81
Lack of continuity .....	81
Scope creep .....	84
Potential for limited application .....	85
Ethics and professional responsibility considerations.....	85
Professional negligence .....	85
The lawyer-client relationship .....	91
Systemic, structural, or legal changes to consider.....	92
Enhancing the BC Code to address scope concerns.....	92
Develop practice resources.....	93
Opening the lines of communication between counsel .....	94
Professional development and annual practice declaration reporting .....	94
Legal coaches.....	95
Highlights from Chapter 6—Unbundled Legal Services.....	97
<b>CHAPTER 7. THIRD-PARTY LITIGATION FUNDING .....</b>	<b>99</b>
What is third-party litigation funding?.....	99
Private .....	100
Public .....	100
The law on private third-party litigation funding.....	100
Private lenders.....	108
The United States and Australia.....	120
Optimal uses .....	124

---



## Study Paper on Financing Litigation

---

Advantages.....	125
Improved accessibility to cases not traditionally taken on contingency .....	125
Enhance application in jurisdictions with two-way cost regimes.....	126
Diversifying risk.....	126
Improves client ability to pay for necessary disbursements.....	126
Coverage for out-of-pocket litigation expenses .....	127
Disadvantages and potential complications.....	127
Litigation privilege and disclosure issues.....	128
Lack of regulation.....	130
Potential undue influence and power imbalances.....	131
Potential to advance unmeritorious cases.....	133
A form of insurance .....	134
Ethics and professional responsibility considerations.....	137
Complications from lawyer self-financing.....	137
Threats to the independence of plaintiffs and counsel .....	138
Limited applicability to other areas of the law .....	139
Systemic, structural, or legal changes to consider.....	139
Regulations for third-party litigation funding agreements.....	139
Greater judicial oversight.....	143
Expansion to arbitration matters .....	145
Highlights from Chapter 7—Third-party Litigation Funding .....	147
<b>CHAPTER 8. ALTERNATIVE FEE ARRANGEMENTS .....</b>	<b>149</b>
What are alternative fee arrangements (AFAs)?.....	149
The traditional fee arrangement—billable hour.....	149
The formula.....	150
The billable hour in practice.....	150
A break from tradition .....	151
The alternative fee arrangement.....	153
Alternative fee arrangements in practice .....	155
British Columbia .....	155
Alberta .....	161
Ontario .....	161
Quebec.....	164
Nova Scotia.....	166
United States.....	166
United Kingdom .....	168
Optimal uses.....	170
Advantages.....	171
Mitigate unpredictable costs .....	171
Meeting client expectations .....	171
Pipeline to unbundled legal services .....	172

---

## Study Paper on Financing Litigation

---

Building long-term client relationships.....	172
Disadvantages and potential complications.....	173
Limited application to large or complex cases .....	173
Negative client expectations.....	173
Flat fee reviews by courts.....	174
Administrative costs to develop a new model.....	174
Burden on the client.....	175
Other considerations.....	175
Notes on contingency agreements.....	176
Limited application.....	176
Fee reviews .....	176
Additional clarifications from the common law.....	178
Systemic, structural, or legal changes to consider.....	179
Sliding scale fees for civil litigation mediation .....	179
Litigation budgets.....	180
Client value adjustments .....	180
Highlights from Chapter 8—Alternative Fee Arrangements .....	183
<b>CHAPTER 9. CROWDFUNDING.....</b>	<b>185</b>
What is crowdfunding?.....	185
Donation crowdfunding.....	186
Securities crowdfunding.....	186
What is security- or equity-based crowdfunding?.....	187
Crowdfunding to Finance Litigation .....	189
Canada .....	189
United States.....	192
United Kingdom .....	195
Optimal uses .....	196
Advantages.....	197
Funding important cases.....	197
Control of the case.....	197
Disadvantages and potential complications.....	198
Potential conflicts of interest and other ethical concerns .....	198
Potential for excessive fees .....	199
The need for legal advice and representation.....	199
Notes on crowdfunding regulation.....	200
Uncertainty caused by legislative gaps .....	200
Unpredictability and risk .....	202
Costs .....	202
Structural, systemic, or legal changes to consider.....	202
Enhanced regulations and guidelines.....	202
Development of a practitioner database .....	203

---

## Study Paper on Financing Litigation

---

Highlights from Chapter 9—Crowdfunding .....	205
<b>CHAPTER 10. LEGAL EXPENSE INSURANCE .....</b>	<b>207</b>
What is legal expense insurance?.....	207
The roots of legal expense insurance .....	207
Legal expense insurance—Canada .....	208
Legal expense insurance—United States.....	217
Legal expense insurance on the international stage.....	218
Optimal uses .....	219
Advantages.....	220
Addressing service gaps for middle-income clients.....	220
Affordability.....	221
Disadvantages.....	221
Potential loss of control .....	221
Lack of full coverage—costs and range of services .....	222
Potential conflicts of interest.....	223
Structural, systemic, or legal changes to consider.....	224
Increase public awareness .....	224
Financial ombudsperson .....	224
Expanded regulations.....	226
Highlights from Chapter 10—Legal Expense Insurance .....	229
<b>CHAPTER 11. PUBLICLY FUNDED LITIGATION FUNDS .....</b>	<b>231</b>
What are publicly funded litigation funds?.....	231
Ontario Class Proceedings Fund.....	231
Fonds d’aide aux recours collectifs of Québec.....	234
Court Challenges Program of Canada .....	234
Optimal Uses .....	236
Advantages.....	237
Helps to fill service gaps .....	237
Expanding the role of small law firms .....	238
Disadvantages and potential complications.....	239
Administrative challenges .....	239
Discouraging funding structure .....	239
Structural, systemic, or legal changes to consider.....	240
Class Proceedings Fund in British Columbia .....	240
Lawyers funding public interest litigation .....	241
Highlights from Chapter 11—Publicly Funded Litigation Funds.....	243
<b>CHAPTER 12. ALTERNATIVE METHODS OF IMPROVING ACCESS TO JUSTICE.....</b>	<b>245</b>
Increased use of alternative dispute resolution processes.....	245

---

## Study Paper on Financing Litigation

---

Alternative Dispute Resolution .....	245
Civil Resolution Tribunal.....	246
Quebec PARLe .....	248
Expanding legal aid: Legal services tax and property liens—a new approach .....	249
Legal services tax.....	250
Property liens.....	250
A new approach.....	252
The promotion of cy-près orders .....	253
Community Contribution Companies.....	255
New business models .....	257
Highlights from Chapter 12—Alternative Methods of Improving Access to Justice...	259
<b>CHAPTER 13. CONCLUSION.....</b>	<b>261</b>
<b>APPENDIX A .....</b>	<b>262</b>
<b>PRINCIPAL FUNDERS IN 2016 .....</b>	<b>265</b>

## LIST OF FIGURES

Figure 1—Average National Hourly Rates (Based on Year of Call) .....	43
Figure 2—Average Hourly Rates for Western Canada (Based on Year of Call).....	44
Figure 3—CBA Lawyer Referral Services by Area of Law (2015–2016).....	76

## LIST OF TABLES

Table 1—Examples of Litigation Expenses .....	13
Table 2—Commencing Litigation in Provincial (Small Claims) Court .....	16
Table 3—Pre-Trial Options in Provincial (Small Claims) Court.....	17
Table 4—Process to Commence Litigation in BC Supreme Court .....	20
Table 5—The Discovery Process—BC Supreme Court .....	22
Table 6—2016 Western Canada Fee Ranges for Civil and Family Litigation .....	24
Table 7—Pro Bono and Public Advocacy Organizations in British Columbia.....	37
Table 8—2016-2017 CLAS Statistics on Unbundled Legal Services .....	63
Table 9—Provincial Law Society Provisions on Unbundled Legal Services .....	67
Table 10—Law Society of BC and Legal Profession Act Provisions for Contingency Fee Agreements .....	104
Table 11—Options to Review Contingency Fee Agreements in British Columbia...	105
Table 12—BridgePoint Financial Services-Settlement/Litigation Loan Terms.....	110
Table 13—Excerpts from OTLA Policy for litigation loan companies .....	142
Table 14—CBA Definitions for AFAs in Canada .....	154
Table 15—Mediate BC Sliding Scale Family Mediation Project .....	156
Table 16—LSS BC Guidelines for Calculating Monthly Net Income .....	159
Table 17—Legal Aid Ontario Sliding Scale to Calculate Monthly Repayment Amounts for Contribution Agreement Clients .....	164

## ACKNOWLEDGMENTS

The British Columbia Law Institute (BCLI) thanks all participants in the consultation sessions for the Financing Litigation Legal Research Project. Consultation participants freely gave their time to share their experience and expertise with how people finance litigation, the law and policy on financing models used by members of the legal community and other organizations, and the challenges that can arise through the application of each model. The consultation participants were a valuable resource to BCLI staff, and their expertise greatly assisted in developing this study paper.

This project was made possible by funding from the Law Foundation of British Columbia. BCLI is grateful for the ongoing support the Law Foundation provides for its work.

Finally, BCLI also acknowledges the contributions of present and former staff members to the design, management and completion of this study paper. Jim Emmerton (executive director to June 2015) and Kathleen Cunningham (executive director June 2015 to present) provided executive planning and management of the project. Kevin Zakreski (staff lawyer) acted as project manager. Valerie Le Blanc (research lawyer) acted as lead researcher and writer of the study paper. And the following staff members also contributed to the research and administration for this study paper: Alexandre Blondin (research lawyer), Allison Curley (research assistant), Sebastian Ennis (research assistant), Sergio Ortega Huerta (University of Victoria Law Co-op student) and Elizabeth Pinsent (office administrator).

# EXECUTIVE SUMMARY

## 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.<sup>1</sup>

---

<sup>1</sup> For a complete list of consultation participants to the Financing Litigation Legal Research Project, see Appendix A.



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.

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. Except where otherwise noted within the text or footnote content, all research for this study is current as of 28 June 2017 (URLs are current as at 29 September 2017).



# CHAPTER 1. INTRODUCTION: THE SCOPE AND PURPOSE OF THE FINANCING LITIGATION LEGAL RESEARCH PROJECT

## A history of the development of this project

An open and accessible justice system is one of the cornerstones of the rule of law. But access to the justice system is becoming increasingly difficult for many Canadians. This problem has grown more acute over the last decade. Studies highlight that court delays, lengthy procedures, and complex processes are some of the key factors barring access to justice in our society.<sup>2</sup> The cost of litigation has also been identified as a significant barrier to accessing the justice system.

While some disputes can be resolved outside the courtroom, litigation is often the only means to achieve an equitable result. However, a litigants’<sup>3</sup> ability to pay for the legal fees and expenses that come with litigation become a concern before, or during, the process. Taking a legal dispute to trial is expensive. Many litigants lack the financial resources to take on the risk of an unsuccessful case.

The relationship between access to justice and how people finance their participation in the justice system was the starting point for this study paper. Two developments in recent years helped shape the goals of this study paper—the emergence of third-party litigation funding, and the rise of the self-represented litigant.

### *The emergence of third-party litigation funding in Canada*

In 2011, BCLI noted that litigants were increasingly seeking financial support from third-parties, unconnected to the legal matter, to advance their claims. To finance their participation in litigation, litigants would enter into agreements with third-party funders, in exchange for a percentage of the settlement funds received.<sup>4</sup> 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.

---

<sup>2</sup> For a sample of studies, see text accompanying notes 12, 14, 23, 25, 59, and 98.

<sup>3</sup> *Black’s Law Dictionary*, 10th ed, *sub verbo* “litigant” is a party to a lawsuit, or one engaged in litigation.

<sup>4</sup> For further discussion on third-party litigation funding, see Chapter 7 of this study paper.

The rationale for third-party litigation funding is that it facilitates a plaintiff's access to justice by providing financial support to a litigant who might otherwise not be able to pursue a claim. However, the agreements also appeared to run contrary to the common-law doctrines of champerty and maintenance. These rules seek to preserve the integrity of the justice system by restricting those who provide financial support for litigation to individuals personally connected to the matter.

### *The common-law rules of champerty and maintenance*

Rooted in old English common law, the laws of champerty and maintenance have been reviewed by Canadian courts in the context of when outside financial support could be provided to litigants.

Maintenance occurs when an individual helps a litigant to further their legal action when that individual has “no valuable interest, or in which he acts from any improper motive.”<sup>5</sup> Champerty occurs when the party financing the litigation strikes a bargain to secure a share or portion of the proceeds of that claim.<sup>6</sup>

The public policy reasons for why the laws of champerty and maintenance have historically rendered financial agreements between a litigant and their funder unlawful are two-fold. First, the rules made it illegal for someone to finance a legal action for financial or personal gain. The purpose of this rule was to prevent unnecessary litigation from entering the courts. Second, prohibiting individuals who were not personally connected to the litigation from either promoting, or profiting, from it would serve to protect the administration of justice from misuse.

### *Judicial narrowing of the scope of the law of champerty and maintenance*

The doctrines of champerty and maintenance were meant to protect both the justice system and litigants from outside parties benefitting from litigation. However, an unintended consequence was that these rules could prohibit access to the courts to litigants with legitimate claims in need of adjudication, but who otherwise could not afford to bring them forward.

Maintenance, in its traditional sense, created a broad restriction by prohibiting anyone not personally connected to a legal matter from providing financial support to a litigant. Over time the rule has evolved as the Canadian courts began to identify occasions when financial support from sources not connected to the litigation could

---

<sup>5</sup> *Black's Law Dictionary*, 10th ed, *sub verbo* “maintenance”.

<sup>6</sup> *Black's Law Dictionary*, 10th ed, *sub verbo* “champerty”.

---

legitimately be provided. An early step in this direction was taken by the Supreme Court of Canada in *Goodman v The King*.<sup>7</sup>

The *Goodman* case opened the door for courts to narrow the definition of maintenance. It soon required more than simply the act of an outside party providing financial support to a litigant to render an agreement unlawful. Rather, one must show that the person maintaining the litigation “intervened officiously or improperly” by either encouraging, or stirring up, the litigation to move forward.<sup>8</sup> The British Columbia Court of Appeal went on to extend this requirement to the doctrine of champerty in *Monteith v Calladine*.<sup>9</sup>

While the intent of the common-law rules of champerty and maintenance was to protect the administration of justice, it was not intended to prohibit litigants from pursuing legitimate claims in court for resolution.<sup>10</sup> The cost of litigation alone often necessitated support from outside parties. Unless an improper motive is driving the litigation forward, such financial support is akin to lawyers accepting a client’s case on agreement for payment of a percentage fee from settlement funds. While a lawyer receives a share of the profits from the case, the motive is to promote access to justice for the client. To suggest this arrangement is champertous, and therefore unenforceable, is difficult to accept.<sup>11</sup>

### *The rise of the self-represented litigant*

It is undisputed that the law pervades the everyday lives of individuals across the country. People engage with the law daily. Interactions can be subtle, such as a handshake between friends for a loan to buy a car. Others are more obvious, such as when someone is injured in a motor vehicle accident, or when a decision is required as to which parent will have primary custody of a child. These examples represent only some of the endless ways people can intersect with the law. While some matters

---

<sup>7</sup> [1939] SCR 446, 1939 CanLII 21 (SCC) [*Goodman*].

<sup>8</sup> *Ibid.*

<sup>9</sup> (1964), 49 WWR 641 at 652, 47 DLR (2d) 332 (BCCA).

<sup>10</sup> See *Wiegand v Huberman* (1979), 108 DLR (3d) 450, 18 BCLR 102 (BCSC) [*Wiegand*].

<sup>11</sup> *Ibid* at para 11. This practice is known as a contingency fee agreement or arrangement. The BC Branch of the Canadian Bar Association, “Lawyers’ Fees” (February 2016) provides the following definition: “Contingency fees depend (or are contingent) on whether you win your case. If you win, you pay your lawyer part of the money you get. If you lose, you don’t pay your lawyer any fee, but you still pay expenses, such as medical reports and court filing fees”, online:

<<https://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Lawyers-Legal-Services-and-Courts/438>> [CBA Lawyers’ Fees]. For more information on contingency fees, see Chapter 3—Terminology, Chapter 4—Access to Justice and Financing Litigation, and Chapter 8—Alternative Fee Arrangements.

are resolved informally, and without the need for assistance from lawyers or the courts, many require access to the justice system to reach a fair resolution.

While studies show many factors contribute to unequal access, the Canadian Bar Association found that finances play a critical role in fostering, or prohibiting, access to justice.<sup>12</sup> The same study highlights that, over the course of three years, 45% of Canadians will encounter what is known as a justiciable event.<sup>13</sup> People seeking assistance from the courts to resolve their legal matter are thrust into a tug of war between a right to a fair outcome, and the ability to finance the litigation needed to achieve it. Unless the financial challenge is overcome, the choice for many is to either abandon the claim, or navigate the waters of the justice system alone.

In May 2013, University of Windsor Faculty of Law Professor Dr. Julie Macfarlane published a landmark study on the proliferation of self-represented litigants in Canada.<sup>14</sup> The Macfarlane Report states the primary barrier to access to the justice system is the inability to pay for (or to keep paying for) legal counsel.<sup>15</sup> Dr. Macfarlane's research concludes that while a majority of litigants *want* to be represented by a lawyer, their inability to finance representation forces them to either represent themselves, or abandon their case.

Financing litigation is an important element of the access-to-justice discussion in British Columbia, and more broadly across Canada. Most notably, the Supreme Court of Canada in *Hryniak v Mauldin* saw the unaffordability of litigation as not only barring access, but more seriously hindering the development of the common law.<sup>16</sup> The court states that timely and affordable access depends on simplifying court processes, and using technology to promote access.<sup>17</sup> The court in *Hryniak* suggests improving access to justice means looking at developing tools and resources to clear a path for litigants.

---

<sup>12</sup> Canadian Bar Association, Access to Justice Committee, "Reaching Equal Justice Report: An Invitation to Envision and Act—Equal Justice: Balancing the Scales" (Ottawa: Canadian Bar Association, November 2013) at 15–21 [CBA, "Reaching"].

<sup>13</sup> *Ibid* at 34. Dame Hazel Genn, "Paths to Justice: What people do and think about going to law" (Oxford: Hart Publishing, 1999) (*ibid* at 34), defines a justiciable event as "a matter experienced by a respondent which raised legal issues whether or not it was recognized by the respondent as being 'legal' and whether any action taken by the respondent to deal with the event involved the use of any part of the civil justice system."

<sup>14</sup> Dr. Julie Macfarlane, "National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants—Final Report" (May 2013), online: <[representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf](http://representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf)> [Macfarlane Report].

<sup>15</sup> *Ibid* at 39.

<sup>16</sup> 2014 SCC 7 at para 1, [2014] 1 SCR 87 [*Hryniak*].

<sup>17</sup> *Ibid* at para 2.

In an earlier project, BCLI specifically examined the use of technology as an option to improve access to justice.<sup>18</sup>

There are many ways to examine the issue of improving access to the justice system. One option is to prioritize, divert towards, or improve access to low-cost alternatives to traditional judicial proceedings. Other options include development of tools and methods that individuals who cannot afford legal representation can use to best represent themselves in their quest for justice. Resolving the access-to-justice challenges in the Canadian legal system requires an interdisciplinary approach.

As BCLI considered this need, it recognized that a focus on the doctrines of champerty and maintenance in the context of third-party litigation funding was too narrow. Other funding models should also be considered to identify whether the common law, legislation, policy, or practice were inhibiting the effective use of these options and standing in the way of increasing access to the justice system. This project examines the options available to litigants to pay for legal services through all stages of the litigation process. It considers the systemic, structural, and legal changes that may be required to ensure the options are effectively implemented to address this access-to-justice challenge.

### Project goal and objectives

The overarching goal of the Financing Litigation Legal Research Project (hereinafter referred to as the Financing Litigation Project) is to explore opportunities and ideas for structural, systemic, or legal changes to improve financing options for litigants in British Columbia. In support of this goal, the project's four main objectives are 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, policy, 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;

---

<sup>18</sup> British Columbia Law Institute, *Technology-Assisted and Remote Evidence Presentation: A Practice Resource for BC Lawyers*, BCLI Study Paper no 7, (Vancouver: The Institute, 2014), online: <[https://www.bcli.org/wordpress/wp-content/uploads/2014/11/technology-assisted-and-remote-evidence-presentation-practice-resource\\_study-paper-7-+-cover.pdf](https://www.bcli.org/wordpress/wp-content/uploads/2014/11/technology-assisted-and-remote-evidence-presentation-practice-resource_study-paper-7-+-cover.pdf)>.

---



## Study Paper on Financing Litigation

---

- Examine the common law to identify trends of litigants using (or attempting to use) alternative forms of financing litigation; and
- Identify and examine opportunities 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.

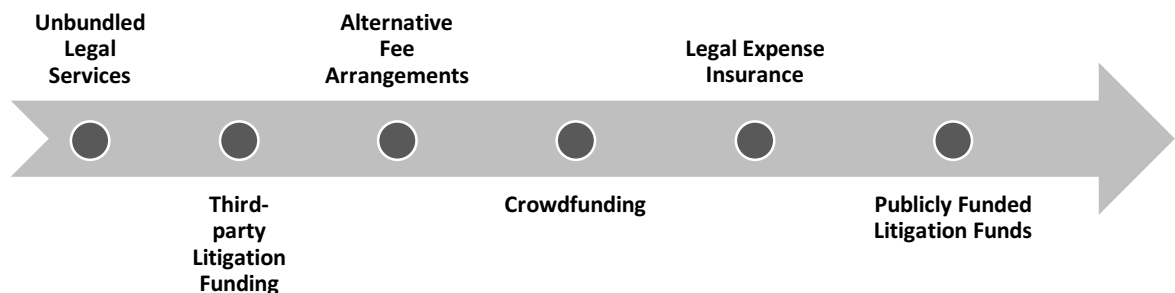
### Study methodology

The initial research phase for the Financing Litigation Project consisted of a series of consultations with experts who 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.<sup>19</sup>

During consultation sessions, 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.

The information collected was reviewed, and the following financing options were selected for study in this paper:



---

<sup>19</sup> For a complete list of consultation participants to the Financing Litigation Project, see Appendix A.

---

### Structure of this paper

The chapters in this study paper illustrate how each financing option is used in British Columbia, elsewhere in Canada and, where applicable, internationally.

This introductory chapter has outlined the development of the Financing Litigation Project, and summarized the research and consultation process. Chapter 2 details the litigation process, from the tasks involved prior to initiating a legal action through to considerations following a judgment in court. The purpose is to provide an overview for the reader to set the context for discussion in each chapter. This includes an outline of the steps to commence legal proceedings and enforce the outcomes from a settlement of those actions. Collectively, these steps create many financial obstacles for litigants today.

Chapter 3 introduces key terms and concepts that arise throughout the study paper to assist readers with the content of the substantive chapters. Chapter 4 summarizes the access-to-justice challenge from leading studies in this area, including some of the main causes identified. It also highlights statistics on how the rising cost of legal representation and litigation creates a steady increase in the number of self-represented litigants. The chapter then discusses the overall impact this shift has on the delivery of justice for litigants, lawyers, the judiciary, and court services.

Chapter 5 offers more background on the consultation process, including some of the key points raised by the consultation participants, such as important ethical, practice management, and public policy considerations.

The substantive chapters covering each financing option follow a similar internal structure. Each begins with a definition, followed by an outline of how the option is applied, or still 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 be headed in the future. The chapter then includes discussion of optimal uses that were identified by either consultation participants, BCLI, or in the research. An analysis is made to explore the advantages and disadvantages, followed by discussion around opportunities for structural, systemic, or legal changes to improve the availability of each option for litigants. Each chapter concludes with a list of highlights and key points extracted from the chapter for the reader.

Finally, some chapters include sample scenarios set off in text boxes. The text is used to illustrate the issues in a concrete, accessible manner. They are composites of material found in research and discussions at consultation sessions. They are not

intended to be interpreted as factual, nor to reflect statements of any particular participant in a consultation session.

## CHAPTER 2. A ROADMAP TO LITIGATION

Sometimes taking legal action to resolve a dispute is unavoidable. Litigation can be both complex and daunting for even the most experienced legal professionals, let alone litigants seeking to unravel its often-tangled web of rules and procedures. This chapter provides an overview of the litigation process, for both individuals and groups, within the courts and through alternative avenues for dispute resolution. Statistics on the different expenses incurred at each stage of the process are also provided. The information serves as a foundation for review of the different methods of financing litigation discussed later in this study paper.

### Litigation defined

Litigation is generally defined as the process of bringing a lawsuit or legal proceeding to court for resolution. Also called a lawsuit or claim, litigation covers proceedings for civil, criminal, and family law issues. This chapter focuses on the litigation process for civil, non-family matters, but does draw some statistical comparisons with family law proceedings.<sup>20</sup>

Civil litigation covers those non-criminal legal situations that arise for individuals or entities. Common categories are breach of contract and torts.<sup>21</sup> These causes of action can arise in many different situations, such as:

- Someone injured in a motor vehicle accident, or damage to property (can be intentional or unintentional);
- Failure to uphold a term of an employment agreement (breach of contract); or

---

<sup>20</sup> For resources on the criminal and family law processes, see Provincial Court of British Columbia, “Resources for Criminal Cases”, online: <[www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/links](http://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/links)>; Provincial Court of British Columbia, “Family Cases”, online: <[www.provincialcourt.bc.ca/types-of-cases/family-matters](http://www.provincialcourt.bc.ca/types-of-cases/family-matters)>.

<sup>21</sup> *Black’s Law Dictionary*, 10th ed, *sub verbo* “tort” means “a civil wrong, other than breach of contract, for which a remedy may be obtained, usu. In the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another. Tortious conduct is typically one of four types: (1) a culpable or intentional act resulting in harm; (2) an act involving culpable and unlawful conduct causing unintentional harm; (3) a culpable act of inadvertence involving an unreasonable risk of harm; and (4) a nonculpable act resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability despite the absence of fault.” For further review of the different types of torts in Canadian law, see Philip H. Osborne, *The Law of Torts*, 5<sup>th</sup> ed (Toronto: Irwin Law Inc., 2015).

- Failure by an individual or company to take reasonable care in an activity such as the production or distribution of a product or service, resulting in harm to an individual or group (known as negligence).<sup>22</sup>

The Canadian Forum on Civil Justice defines an everyday legal problem as one “arising out of the normal activities of people’s daily lives that has a legal aspect and has a potential legal solution.”<sup>23</sup> The examples listed above are only a few of the ways legal problems permeate the lives of many individuals in society. It is easy to see how disputes over what was agreed to, what is owed, or who has what entitlement or obligation can arise. The mere existence of a legal problem does not necessarily mean legal action will be required to solve it.<sup>24</sup> Often people reach agreement on their own. However, when this cannot happen, unless a person is prepared to abandon the claim altogether, litigation may be necessary to resolve the dispute.

### The cost of legal problems

Statistics on the prevalence of legal problems in Canada offer insight into how often individuals are likely to experience a legal problem, and the relative costs they may face in search of a resolution. The focus of this study paper is to look specifically at how litigants pay for litigation in British Columbia, and comparatively across Canada. This chapter provides a sample of some of the actual costs associated with the litigation process, including how those costs change when legal advice and representation is used to achieve resolution.

---

<sup>22</sup> *Black’s Law Dictionary*, 10th ed, *sub verbo* “negligence”, defined as the omission or failure of a reasonable person to use care to protect others from unreasonable risk of harm, also characterized as thoughtlessness, recklessness, or inattention. See also *Donoghue v Stevenson*, [1931] UKHL 3, [1932] AC 562. A case out of Scotland, a manufacturer of a bottle of ginger beer was found careless for allowing a snail to crawl into one of its bottles. The snail subsequently decomposed, which caused the woman who purchased and consumed the drink to become ill. This case established the neighbour principle, and the legal obligation that everyone must take reasonable care to ensure others are not injured because of careless conduct. Anyone to whom a defendant owes a duty of care, if it can be shown the defendant failed to take reasonable care to fulfill that duty such that a person can show they suffered harm or injury because of that failure, is entitled to compensation for the harm suffered.

<sup>23</sup> Canadian Forum on Civil Justice, The Cost of Justice Project, “Everyday Legal Problems and the Cost of Justice in Canada: Overview Report” (Toronto: Canadian Forum on Civil Justice, 2016) at 5. The study notes the most commonly cited areas where legal problems occur are consumer, debt, and employment, followed by neighbor, discrimination, and family disputes.

<sup>24</sup> Philip Lewis, “Unmet Legal Needs” in Pauline Morris, Richard White & Philip Lewis, eds, *Social Needs and Legal Action* (London: Martin Robertson, 1973) at 79, cited in Dr. Ab Currie, “The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians” (Ottawa: Department of Justice Canada, 2009) at 5.

---

A 2014 survey reports that 48.4 percent of Canadians will experience at least one legal problem in a three-year period.<sup>25</sup> Of the 3,263 respondents, 43 percent (or 4.4 million Canadians for the population) report having to incur a financial cost to resolve it.<sup>26</sup> In dollar figures, this means 15 percent say they spent more than \$10,000 to resolve a single legal matter, or approximately \$7.7 billion annually for the entire population.<sup>27</sup>

The cost of resolving a legal problem, both within and outside the court system, will depend on several factors. Some costs can be influenced by things like the complexity of the issue, whether legal advice or representation is used, if a settlement is achieved prior to starting litigation, or the length of time to reach an outcome.

### **Anatomy of a lawsuit**

When facing a legal problem, deciding whether to pursue litigation will depend on many factors. The relative strength of one's case, the extent of harm or wrong suffered, and the relationship of the parties involved are only some of the considerations that come into play. The decision may also depend on how quickly a solution is needed, or involve other personal, social, or economic considerations. Litigation can be both lengthy and costly for those involved. From court filing fees, examinations for discovery, expert reports, preparation for trial, and the trial itself, many costs can arise on the road to a resolution. Add to the list fees for legal advice or representation, and the amount only increases.

#### ***Stage 1: Becoming a litigant***

Unless someone is aware a legal problem exists, becoming a litigant can happen unexpectedly. A person's role in the litigation depends on whether they are the one seeking legal recourse, or the one accused of causing the legal problem. A person could be a plaintiff—someone who brings a proceeding forward to seek compensation for an injury, or to enforce a right against another person.<sup>28</sup> Or a person could be a defendant—someone who is denying or defending against the plaintiff's claim.

---

<sup>25</sup> Dr. Ab Currie, The Cost of Justice Project, "Nudging the Paradigm Shift, Everyday Legal Problems in Canada" (Toronto: Canadian Forum on Civil Justice, 2016) at 3.

<sup>26</sup> *Ibid* at 24.

<sup>27</sup> *Ibid* at 25.

<sup>28</sup> *Black's Law Dictionary*, 10th ed, *sub verbo* "person" means not only individuals, but includes labour organizations, partnerships, associations, corporations, legal representatives, trustees, and trustees in bankruptcy.

### *Stage 2: Legal advice and representation*

#### INITIAL CONSULTATION

If someone seeks advice from a lawyer, the first step will be an initial consultation. The lawyer gathers information, and offers preliminary advice on the legal rights and options available to the client. The meeting covers matters such as:

- the litigation process, including steps to commence a proceeding;
- litigation expenses including, but not limited to, legal fees, disbursements; and costs a client must pay to the other party if the case is unsuccessful;
- settlement options, including initial assessment of the case, and relative risks in pursuing litigation;<sup>29</sup>
- options for alternative dispute resolution;
- whether a legal action has already been commenced; and
- any statutory limitations.<sup>30</sup>

Table 1 provides a sample of the types of litigation expenses a client can expect to pay for when retaining a lawyer.

---

<sup>29</sup> The Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, 2013, r 2.1-3(a) [BC Code] states, “A lawyer should obtain sufficient knowledge of the relevant facts and give adequate consideration to the applicable law before advising a client, and give an open and undisguised opinion of the merits and probable results of the client’s cause. The lawyer should be wary of bold and confident assurances to the client, especially where the lawyer’s employment may depend on such assurances. The lawyer should bear in mind that seldom are all the law and facts on the client’s side, and that *audi alteram partem* (hear the other side) is a safe rule to follow.”

<sup>30</sup> Most cases are governed by the new provincial *Limitation Act*, SBC 2012, c 13, in effect June 1, 2013 [Limitation Act]. The *Limitation Act* sets out the timelines for litigants seeking court resolution of their legal matter. These timelines depend on when the cause (or event) giving rise to the action occurred, and whether an action has already been commenced. For more information, including an overview of key changes under the new statute, see Government of British Columbia, “Limitation Act”, online: <[www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/limitation-act](http://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/limitation-act)>. Although some limitation periods can be postponed with court approval (see for example, *Levitt v Carr* (1992), 66 BCLR (2d) 58, [1992] 4 WWR 160 (BCCA)), s 21 of the *Limitation Act* imposes an ultimate limitation period of 15 years.

---

**Table 1—Examples of Litigation Expenses**

<b>Disbursements</b> (expenses paid, on a client's behalf, to a third-party by the lawyer or firm)	<b>Legal Fees</b> (charges to a client for lawyer services)
Examples include: <ul style="list-style-type: none"><li>• Out of office photocopying or printing</li><li>• Faxes</li><li>• Long-distance phone charges</li><li>• Postage or courier expenses</li><li>• Process Server charges</li><li>• Court or discovery transcripts</li><li>• Medical and expert reports</li><li>• Court or tribunal filing fees, etc.</li></ul>	Lawyer's time to perform tasks such as: <ul style="list-style-type: none"><li>• Initial consultation</li><li>• File review and document preparation</li><li>• Communications (verbal and written) with opposing counsel, settlement or negotiation</li><li>• Attend discovery or court proceedings</li><li>• Witness interviews</li><li>• Court preparation and hearings</li><li>• Enforce a judgment, etc.</li></ul>

Depending on the requirements of the case, other expenses may include hourly rates for junior lawyers, paralegals, legal researchers, articulated student fees, and in-house photocopying and fax charges.

**Cost:** Whether a fee is charged for an initial consultation depends on the lawyer or law firm policy. If the consultation is not free, the standard practice is to charge a fixed rate equal to, or below, a lawyer's standard hourly rate. On occasion, a lawyer may offer to apply the amount paid towards future legal work if the client retains the lawyer (or firm).

### INITIAL SERVICES (INCLUDING SETTLEMENT EFFORTS)

Before going to court, a lawyer can offer many initial services. For example, if an individual is terminated from their job, and he or she feels entitled to compensation, the lawyer may draft a demand letter to the employer.<sup>31</sup> If a compensation offer has been made, the initial service may involve reviewing the offer, and entering settlement discussions with opposing counsel. These services are generally charged at an hourly rate.

---

<sup>31</sup> A demand letter is "a formal notice that demands the other person (or corporation) performs a legal obligation, such as fixing a problem, paying a sum of money or honouring a contractual agreement. The letter gives the recipient a chance to perform the obligation without being taken to court, if the action is taken according to specific terms and within a specified time," see Small Claims BC, "Online Help Guide", online: <[www.smallclaimsbcc.ca/](http://www.smallclaimsbcc.ca/)>.



The *BC Code* requires lawyers to charge fees that are both fair and reasonable.<sup>32</sup> However, there is no fee schedule for lawyers' services, apart from how much a lawyer can charge on contingency.<sup>33</sup> As such, fees for initial services can vary.

**Cost:** Statistics from the 2016 lawyers' fees survey are useful to illustrate what some of the up-front costs might be.<sup>34</sup> Of note is that a person can expect a more experienced lawyer to charge a higher hourly rate. Lawyers generally measure experience by referring to their year of call to the bar—that is, the date they became eligible to practice as a lawyer. The 2016 average hourly rate in Western Canada was \$214 for a one-year call, \$288 for a five-year call, \$357 for a 10-year call, and \$445 for a 20-year call.<sup>35</sup> Although a one-year called lawyer may do initial work on a case, a more complex legal issue may require a senior lawyer to assist, or take over completely.

The time and cost involved for initial services can depend on the complexity of the case, and whether the matters are contested. A relatively simple matter can easily become more complex or lengthy if no quick resolution can be achieved. An example of the exponential growth in up-front litigation expenses can be seen in divorce cases. Although court filing fees are relatively low (\$200 to file, plus \$10 for a Registration of Divorce and \$80 for the final application),<sup>36</sup> the cost for legal representation in an uncontested divorce ranged from \$2,085 to \$3,085.<sup>37</sup> Compare this to a contested divorce proceeding, and the range goes from \$16,507 to \$57,484.<sup>38</sup> Over and above the total fees are the disbursements and other charges incurred by the firm for completing each task, including taxes on those amounts.<sup>39</sup>

---

<sup>32</sup> *BC Code*, *supra* note 29 at r 3.6-1.

<sup>33</sup> *Ibid.* Fees charged by a lawyer on contingency are paid to the lawyer only if the client's case is successful. For further discussion on contingency fees, see the Law Society of BC, "Lawyers' Fees: Common Billing Practices", online: <<https://www.lawsociety.bc.ca/working-with-lawyers/lawyers-fees>>. For examination of the role contingency fees play in financing litigation, see Chapter 8—Alternative Fee Arrangements.

<sup>34</sup> Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* 40:6 (June 2016) 49 [McKiernan]. For this study paper, figures used to calculate the hourly rates are based on the 2016 survey results. For statistics from the 2017 survey, see Mallory Hendry, "The Going Rate", *Canadian Lawyer Magazine* 41:6 (June 2017) 32.

<sup>35</sup> *Ibid* at 51. Western Canada covers Alberta, British Columbia, Manitoba, the North, and Saskatchewan.

<sup>36</sup> *Supreme Court Family Rules*, BC Reg 169/2009, Appendix C—Fees, Schedule 1—Fees Payable to the Crown.

<sup>37</sup> McKiernan, *supra* note 34 at 53.

<sup>38</sup> *Ibid.*

<sup>39</sup> Lawyers must charge GST and PST on all legal fees and most disbursements. See the Law Society of BC, "Common Billing Practices", *supra* note 33.

## Study Paper on Financing Litigation

---

The Legal Services Society of British Columbia (LSS BC) provides a breakdown of the basic steps to obtain an uncontested divorce as follows:

- Gather and review relevant documents;
- Obtain agreement on parenting, child support, and/or property with the spouse;
- Prepare and file court forms, including supporting documents;
- Complete a Registration of Divorce;
- Prepare and swear/affirm Affidavits;
- Prepare the Requisition, Certificate of Pleadings, and a draft Final order;
- Prepare and file the final application; and
- Order a Certificate of Divorce (optional).<sup>40</sup>

A contested divorce not only requires similar steps to those listed above, but will also involve dealing with responses from the spouse disputing some or all the claims. With added efforts to reach a settlement over the contested issues, both the time and cost to reach a settlement increases, as shown in the figures above.

### *Stage 3: Commence litigation*

When initial efforts to settle a claim fail, the next step is to commence litigation. The legal issues in dispute determine which level of court can decide the matter. The three levels of court in British Columbia are: Provincial Court, Supreme Court, and Court of Appeal. There is also the federally-administered Federal Court Trial Division, and the Supreme Court of Canada.<sup>41</sup> This chapter focuses on Provincial (Small Claims) and Supreme Court proceedings.

#### WHERE TO FILE

##### **Provincial Court**

The provincial court established by the *Provincial Court Act*<sup>42</sup> has jurisdiction over disputes in the following categories: 1) criminal law; 2) family law; 3) youth court matters; 4) small claims; and 5) traffic and bylaw matters.<sup>43</sup>

The types of cases heard in Small Claims Court include actions for debt, damage, recovery of personal property, and performance of a contract term (personal

---

<sup>40</sup> Legal Services Society of BC, “How to do your own undefended (uncontested) divorce”, Family Law in British Columbia, online: <[www.familylaw.lss.bc.ca/guides/divorce/divJoint\\_step2.php](http://www.familylaw.lss.bc.ca/guides/divorce/divJoint_step2.php)>.

<sup>41</sup> For more information on the types of cases heard at the Federal Court, including the application process and associated fees, see Federal Court, “Information for Litigants”, online: <[cas-cdc-wwww02.cas-satj.gc.ca/portal/page/portal/fc\\_cf\\_en/Litigants](http://cas-cdc-wwww02.cas-satj.gc.ca/portal/page/portal/fc_cf_en/Litigants)>. For information on the Supreme Court of Canada, see Supreme Court of Canada, online: <[www.scc-csc.ca/court-cour/role-eng.aspx](http://www.scc-csc.ca/court-cour/role-eng.aspx)>.

<sup>42</sup> RSBC 1996, c 379.

<sup>43</sup> For more information on the different types of cases listed here, see Provincial Court of British Columbia, “Types of Cases”, online: <[www.provincialcourt.bc.ca/types-of-cases](http://www.provincialcourt.bc.ca/types-of-cases)>.

## Study Paper on Financing Litigation

property or service).<sup>44</sup> The maximum amount that can be recovered is \$35,000.<sup>45</sup> Table 2 outlines the steps and associated expenses of commencing a proceeding in Provincial (Small Claims) Court.

**Table 2—Commencing Litigation in Provincial (Small Claims) Court<sup>46</sup>**

Step	Responsible Party	Service Requirements <sup>47</sup>	Fees <sup>48</sup>	Notice/Waiting Period
Notice of Claim	Plaintiff	Yes—within 12 months from date of filing (unless renewed) <sup>49</sup> by leaving copy with defendant, or registered mail	\$100 (claims up to and including \$3 000) \$156 (claims over \$3,000) \$100 for service (by Sheriff) <sup>50</sup>	Defendant has 14 days to file Reply
Reply	Defendant	Yes—done by court within 21 days of filing	\$26 or \$50 (per above claim amounts); \$100 or \$156 if filing counterclaim	Plaintiff must file Reply to Counterclaim within 14 days
Reply to Counterclaim	Plaintiff	Yes—done by court within 21 days of filing	\$26 or \$50 (per above claim amounts)	Defendant can accept by filing payment order

**Cost:** Although the Provincial (Small Claims) process enables litigants to participate without a lawyer, there are occasions when litigants choose to have a lawyer assist

<sup>44</sup> *Small Claims Act*, RSBC 1996, c 430, s 3(1) [*Small Claims Act*]. See also *Civil Resolution Tribunal Act*, SBC 2012, c 25. In July 2016, BC's Civil Resolution Tribunal (CRT) began early intake of strata property disputes. In December 2016, the CRT launched its Solution Explorer to beta test small claims issues. For more information on the CRT, visit its website: <<https://www.civilresolutionbc.ca/>>.

<sup>45</sup> On June 1, 2017, the Provincial Court increased the upper limit for civil claims from \$25,000 to \$35,000. For claims of up to \$5,000, these matters are now required to seek resolution from the CRT, *ibid*. If a claim is for more than \$35,000, a litigant can choose to abandon part of the claim so that the balance can be heard in Small Claims court, *Small Claims Rules*, BC Reg 261/93, Rule 1(4) [*Small Claims Rules*]. For more information on the changes, visit the Provincial Court of British Columbia website: <[www.provincialcourt.bc.ca/types-of-cases/small-claims-matters](http://www.provincialcourt.bc.ca/types-of-cases/small-claims-matters)>.

<sup>46</sup> Table 2 reflects the processes for a single plaintiff and defendant claim up to close of pleadings. For additional information see the Small Claims BC "Online Help Guide", online: <[www.smallclaimsbcc.ca](http://www.smallclaimsbcc.ca)>.

<sup>47</sup> *Small Claims Rules*, *supra* note 45.

<sup>48</sup> *Ibid* at Schedule A.

<sup>49</sup> *Small Claims Rules*, *supra* note 45 at r 2(7).

<sup>50</sup> For more fee information on Sheriff Services in Small Claims see *Small Claims Rules*, *supra* note 45 at Schedule A, items 15–22.

## Study Paper on Financing Litigation

with some of the steps, or provide full representation.<sup>51</sup> If a lawyer prepares the documents, or represents a litigant at a pre-trial process, or the trial itself, fees may be charged at the lawyer's hourly rate.<sup>52</sup> Table 3 outlines pre-trial options for settlement and trial for Provincial (Small Claims) matters.

**Table 3—Pre-Trial Options in Provincial (Small Claims) Court<sup>53</sup>**

Type of Process and What it Covers	Who Decides	Length of Time (approx.)	Amount Recoverable
<b>Summary Trial</b> —debt from loaning money/extending credit (e.g., credit card debt, overdue loans, overdraft)	Judge	Under 30 minutes	\$5,001 to \$35,000
<b>Simplified Trial</b> —claims not related to financial debt or personal injury	Justice of the Peace (Lawyer)	One hour (in the evening) <sup>54</sup>	\$5,001 to \$10,000 <sup>55</sup>
<b>Mediation</b> —for disputes between individuals with ongoing relationships, all personal injury claims <sup>56</sup>	Parties (with help from mediator)	Two hours	Over \$5,001
<b>Trial Conference</b> <sup>57</sup> —all cases not resolved in a previous process. Used to determine the amount of time needed for trial	Judge	30-minutes	Over \$5,001
<b>Trial</b> —all Small Claims Court cases not resolved in a previous process	Judge (binding decision)	Up to two hours	Over \$5,001

<sup>51</sup> The 2015/16 Annual Report notes that 69% of self-representation is in Small Claims courts: Provincial Court of British Columbia, "Annual Report 2015/16", (Vancouver: Provincial Court of British Columbia, 2015/2016) at 50, online: <[www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2015-2016.pdf](http://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2015-2016.pdf)>.

<sup>52</sup> Or on a percentage of the total settlement of the case for contingency matters. See McKiernan, *supra* note 34.

<sup>53</sup> Availability of a listed pre-trial process may depend on which courthouse a matter is heard in. For more information, visit the Provincial (Small Claims) BC website: <[www.smallclaimsbcc.ca](http://www.smallclaimsbcc.ca)>.

<sup>54</sup> Only offered at Vancouver (Robson Square) Courthouse. Timing of simplified trial at other courthouses will vary.

<sup>55</sup> Claims under \$5,001 must fall outside CRT jurisdiction to be heard at simplified trial (includes post-CRT claims where Notice of Objection is filed).

<sup>56</sup> In Vancouver, mediation is required for almost all cases over \$5,001, including personal injury claims. Another option available to litigants in court locations other than Vancouver (Robson Square) is the Settlement Conference. Generally scheduled for 30-minutes to one hour, parties meet with a judge to review the legal dispute, and obtain a non-binding assessment on potential for success at trial. For more information, see *Small Claims Rules*, *supra* note 45, r 7—The Settlement Conference.

<sup>57</sup> For information on the types of orders made, see Small Claims BC, "Vancouver (Robson Square) Trial Conference", online: <[www.smallclaimsbcc.ca/conferences/trial-conference](http://www.smallclaimsbcc.ca/conferences/trial-conference)>.

**Cost:** The cost for a lawyer to prepare for, and attend, pre-trial proceedings depends on the hourly rate charged, and the disbursements for each process. If successful, the plaintiff may need to take additional steps to collect on the debt owed if the defendant fails to pay. This may or may not require assistance from a lawyer.<sup>58</sup>

**Timeline:** Recent statistics show that, on average, it takes approximately 5.7 months to get to a 1–2-day trial, six months for a trial up to four days, and seven months for trials above five days.<sup>59</sup> The steps leading to trial, with or without a lawyer, include reviewing both the plaintiff's and defendant's documents and evidence, preparing witnesses, and a review of leading cases on the issues in dispute. With average hourly rates set at a minimum of \$214, even Small Claims litigation can be costly depending on how much assistance is required or sought. Some expenses are recoverable if the claim succeeds, as the *Small Claims Rules* permit judges to order an unsuccessful party to reimburse a litigant's filing fees, reasonable fees paid for service of documents, and other charges or expenses related directly to the matter, excluding lawyer fees.<sup>60</sup>

### TRIBUNALS, BOARDS AND COMMISSIONS

Disputes over the application of policies and rules in regulatory offices and government agencies are heard by a board, commission, or tribunal. These bodies are established by the provincial government, and are governed by the *Administrative Tribunals Appointment and Administration Act*, SBC 2003, c 47.

Examples include:

- Human Rights Tribunal
- Employment Standards Tribunal
- Workers' Compensation Board
- Financial Institutions Commission

### Supreme Court

The superior trial court in the province is the Supreme Court of British Columbia. The BC Supreme Court has jurisdiction to hear any civil and criminal matter, including civil

---

<sup>58</sup> For details on options to enforce payment of a judgment, see the *Small Claims Rules*, *supra* note 45, r 11—Payment of the Judgment.

<sup>59</sup> The Provincial Court of British Columbia, "The Semi-Annual Time to Trial Report of the Provincial Court of British Columbia", (30 September 2016), at 9, Figure 7—Weighted Provincial Time to Small Claims Trials, online: <[www.provincialcourt.bc.ca/news-reports/court-reports](http://www.provincialcourt.bc.ca/news-reports/court-reports)>. For a recent report on court delays and access to justice, see The Standing Senate Committee on Legal and Constitutional Affairs, Senate Canada, "Delaying Justice is Denying Justice: An Urgent Need to Address Lengthy Court Delays in Canada", (Ottawa: June 2017), online: <[https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court\\_Delays\\_Final\\_Report\\_e.pdf](https://sencanada.ca/content/sen/committee/421/LCJC/reports/Court_Delays_Final_Report_e.pdf)>.

<sup>60</sup> *Small Claims Rules*, *supra* note 45, r 20. See also British Columbia Ministry of Justice, "What is Small Claims Court Guide", online: <[www.ag.gov.bc.ca/courts/small\\_claims/info/guides/what\\_is.htm#sccsc](http://www.ag.gov.bc.ca/courts/small_claims/info/guides/what_is.htm#sccsc)>.

claims with recovery amounts that fall within the jurisdiction of the Provincial Small Claims Court.<sup>61</sup> The BC Supreme Court also hears matters that fall outside the jurisdiction of the Provincial Court,<sup>62</sup> and appeals from Small Claims Court or tribunals. The BC Supreme Court is governed by the *Supreme Court Act*,<sup>63</sup> with the civil processes outlined in the *Supreme Court Civil Rules*.<sup>64</sup> At the BC Supreme Court, both individuals and groups can file a claim with no limits on the monetary amounts sought. Table 4 outlines the process for a single plaintiff and defendant action in the BC Supreme Court.

---

<sup>61</sup> Note the BC Supreme Court has jurisdiction to award costs to the successful party as partial reimbursement for legal fees, time spent, and out-of-pocket expenses for commencing or defending the action. Pursuant to Rule 9-1(7) of the *Supreme Court Civil Rules*, BC Reg 168/2009, if a Supreme Court matter settles for an amount within the jurisdiction of the Provincial (Small Claims) Court, and unless the court is satisfied there was sufficient reason for the matter to be brought to Supreme Court, a plaintiff will only receive costs for disbursements.

<sup>62</sup> *Small Claims Act*, *supra* note 44 at s 3.

<sup>63</sup> RSBC 1996, c 443.

<sup>64</sup> *Supreme Court Civil Rules*, *supra* note 61. Matters not dealt with at the BC Supreme Court include those governed by special government agencies or tribunals (e.g., residential tenancy disputes, workers' compensation, or labour law matters), or by federal legislation (e.g., immigration and tax issues). See text box at 18.

**Table 4—Process to Commence Litigation in BC Supreme Court**

Step	Responsible Party	Service Requirements	Fees	Notice/Waiting Period
Notice of Civil Claim <sup>65</sup>	Plaintiff	Within 12 months from date of filing (unless renewed) <sup>66</sup> by personally leaving a copy with the defendant	\$200 <sup>67</sup> \$100 for service (by Sheriff)	Defendant has 21 days to file response (in Canada) <sup>68</sup>
Response to Civil Claim	Defendant	Ordinary service by mail, fax or email	\$25 or \$200 if filing a counterclaim	Plaintiff has 21 days to file response (in Canada)
Response to Counterclaim	Plaintiff	Ordinary service by mail, fax or email	\$25	n/a

### **Class Proceedings**

The *Class Proceedings Act* sets out the process whereby one or more persons, either on their own behalf, or on behalf of a group of persons, can initiate a lawsuit in Supreme Court.<sup>69</sup> This process allows groups of individuals, who are claiming financial compensation for breach of a common issue,<sup>70</sup> to obtain a fair and just resolution for all members of the group. The *Class Proceedings Act* requires a representative plaintiff to apply to the court for an order certifying the action as a class proceeding.<sup>71</sup> In considering whether to grant certification, the court must,

<sup>65</sup> Disputes involving wills and estates, guardianship, adoption, bankruptcy and foreclosure require a petitioner to file a Petition to start the proceeding, at the same fee. See *Supreme Court Civil Rules*, *supra* note 61, r 2–1(2). Also, in very special cases, a party can file by requisition for an order from the court without notification to the other party. See also *Supreme Court Civil Rules*, *supra* note 61, r 17–1.

<sup>66</sup> *Supreme Court Civil Rules*, *supra* note 61 at r 3–2(1).

<sup>67</sup> *Ibid* at Appendix C—Fees.

<sup>68</sup> For other timelines for defendants served outside Canada, see Supreme Court of BC, “Defending an Action Started by a Notice of Civil Claim”, at 2, online: <[www.supremecourtbc.ca/sites/default/files/web/Defending-an-Action-Started-by-a-Notice-of-Civil-Claim.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Defending-an-Action-Started-by-a-Notice-of-Civil-Claim.pdf)>.

<sup>69</sup> RSBC 1996, c 50 [*Class Proceedings Act*]. Other Canadian jurisdictions with class-proceedings legislation: Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, and Québec.

<sup>70</sup> *Class Proceedings Act*, *ibid*, s 1 defines “common issues” as (a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

<sup>71</sup> *Class Proceedings Act*, *ibid* s 2(1). For a list of certified class actions filed in Canada after January 1, 2007, see the Canadian Bar Association, “Class Action Database”, online: <[www.cba.org/Publications-](http://www.cba.org/Publications-)

under section 4(1)(c) of the *Class Proceedings Act*, consider whether the common issues advanced by the group prevail over the individual issues.

Due to the complexity of the certification process, most individuals applying to be a representative plaintiff will seek legal advice, and the lawyer will oversee the litigation, beginning with the application. A lawyer hired by the representative plaintiff becomes counsel for the class as well. Given the complexity of class proceedings, the certification process, and the work required to represent a group of individuals, there can be relatively high up-front costs to commence a class proceeding.

The representative plaintiff must also inform other potential class members. The method used to inform potential class members is by approval of the court. If there are decisions on any common issues or settlement for the class, the representative plaintiff must also provide notification as such. In British Columbia, once a matter is certified as a class proceeding, other individual plaintiffs can opt-in or opt-out as members of the class.<sup>72</sup> As a class member, individual plaintiffs can share in the proceeds of a settlement or judgment on a common issue without having to contribute out of their own pocket to sustain the proceeding.

### *Stage 4: Case planning conference*

A case planning conference gives parties an opportunity to plan how litigation will proceed. The plan may address dispute resolution options, dates for exchanging documents, and the length of trial. Notice of the conference must be given to the other party at least 35 days prior to the date set for trial, and the cost to file is \$80.<sup>73</sup> If a party wishes to be exempt from attending a case planning conference, they must apply to the court.<sup>74</sup>

---

Resources/Class-Action-Database/About>. Since registration in the database is voluntary, the website notes a warning that it does not represent a comprehensive listing of all class action lawsuits.

<sup>72</sup> *Class Proceedings Act*, *supra* note 69 at s 16. A resident of British Columbia is automatically opted into a class proceeding unless he or she decides to opt out. Non-residents of British Columbia have the option to opt into the class proceeding, pursuant to s 16(2), which states “Subject to subsection (4), a person who is not a resident of British Columbia may, in the manner and within the time specified in the certification order made in respect of a class proceeding, opt in to that class proceeding if the person would be, but for not being a resident of British Columbia, a member of the class involved in the class proceeding.”

<sup>73</sup> *Supreme Court Civil Rules*, *supra* note 61 at r 5-1(3). For more information on the Case Planning Conference, see Supreme Court of BC Guidebook, “The Case Planning Conference”, online: <[www.supremecourtbc.ca/sites/default/files/web/The-Case-Planning-Conference.pdf](http://www.supremecourtbc.ca/sites/default/files/web/The-Case-Planning-Conference.pdf)>.

<sup>74</sup> An application for exemption is made by way of a requisition. For criteria used to consider applications for exemptions, see *Supreme Court Civil Rules*, *supra* note 61 at r 5-2(2). If no exemption is granted, and a party fails to attend, the conference may proceed as scheduled, be adjourned, or the absent party may be ordered to pay the costs of the other party for their participation.

---



### *Stage 5: The discovery process*

The discovery process allows litigants to learn about the other parties' position in a case. Information and evidence is gathered at each stage to help parties identify areas where there is agreement, or develop arguments for settlement discussions or use at trial. Table 5 briefly outlines the different stages, and approximate time and associated expenses.

**Table 5—The Discovery Process—BC Supreme Court<sup>75</sup>**

Process Type	Method	Procedural Requirements	Timelines	Fees
Discovery of Documents	List of documents	Rule 7-1 (includes opportunity for parties to review the documents)	Served on all parties within 35 days after pleadings close	Legal fees for list preparation review. Photocopying costs.
Examination for Discovery	Fact-finding meeting with opposing party to assess strengths and weaknesses of case	Rule 7-2	Seven hours of examination time per party (unless court orders more time)	\$100 per day room rental. \$20 witness fee, including travel, meal and accommodation. <sup>76</sup> If lawyer attends, minimum \$1,498 for seven hours. <sup>77</sup> Transcript fees.
Interrogatories	Written questions	Special permission per Rule 7-3. Rule 7-3(7) permits court to order further answers if initial ones are deficient.	21 days to provide written answers, by affidavit. If additional answers required, could be another affidavit, or examination for discovery.	Lawyer fees to prepare questions, including cost to swear affidavit. If done by examination, similar fees for lawyer attendance
Pre-trial Examination of Witnesses	List of witnesses <sup>78</sup>	Rule 7-4	28 days before trial	Lawyer and room fees

<sup>75</sup> For more detailed information on each stage of discovery, see the Supreme Court of British Columbia Guidebook, "The Discovery Process", online: <[www.supremecourtbc.ca/sites/default/files/web/The-Discovery-Process.pdf](http://www.supremecourtbc.ca/sites/default/files/web/The-Discovery-Process.pdf)>.

<sup>76</sup> *Supreme Court Civil Rules*, *supra* note 61 at Appendix C—Fees, Schedule 1—Fees Payable to the Crown, Fees Applicable to the Supreme Court, Item 11.

<sup>77</sup> Based on average hourly rate for one-year call at \$214, McKiernan, *supra* note 34 at 51.

<sup>78</sup> If a witness has material evidence useful to the action, the court can order the witness be examined. The examining party pays the reasonable lawyer's costs for the person relating to the application and examination, *Supreme Court Civil Rules*, *supra* note 61 at r 7-5(1).

### FAST TRACK LITIGATION

Under Rule 15–1 of the *Supreme Court Civil Rules*, a plaintiff or defendant can decide whether to proceed by way of Fast Track Litigation. This process shortens the length of time for trial (to three days or less) for claims up to \$100,000. The parties can agree to remove the case from the fast track process or, if they do not consent, one of the parties can apply to the court to have it removed.<sup>79</sup>

The Fast Track Litigation process can be a useful option for actions for money, real property, builders liens, personal property, or amounts claimed by a plaintiff for financial loss (e.g., future loss of income-earning capacity in personal injury cases). If the parties apply for a trial date within four months of choosing this process, then Rule 15–1(13) requires the registrar to set a trial date that starts within four months from the date the parties apply for it. The parties must also conduct a Case Planning or Trial Management Conference<sup>80</sup> before any other applications or affidavits are filed, per Rule 15–1(7).

**Cost:** While the same document discovery procedure explained above applies, examinations for discovery are limited to two hours combined (unless the court orders, or the parties consent otherwise), regardless of how many parties there are.

### *Stage 6: Trial*

The trial is the final stage for an action commenced with a Notice of Civil Claim, governed by Part 12 of the *Supreme Court Civil Rules*.<sup>81</sup> One of the parties to the action must file a Notice of Trial to set a date for trial. In 2016, “dates for a five-day family

---

<sup>79</sup> For more information on the Fast Track Litigation process, see the Supreme Court of BC Guidebook, “Fast Track Litigation”, online: <[www.supremecourtbc.ca/sites/default/files/web/Fast-Track-Litigation.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Fast-Track-Litigation.pdf)>.

<sup>80</sup> For information on Trial Management Conferences, see the Supreme Court of BC Guidebook, “Trials in the Supreme Court”, online: <[www.supremecourtbc.ca/sites/default/files/web/Trials-in-Supreme-Court.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Trials-in-Supreme-Court.pdf)>.

<sup>81</sup> Also of note is the Summary Trial process, available pursuant to *Supreme Court Civil Rules*, *supra* note 61 at r 9–7. Summary Trials are used to get a final judgment from a judge without having to participate in a standard trial. These trials are best suited for cases when the facts can be delivered with written documents only, and where oral testimony or cross-examination is not likely to be needed. For more information on the Summary Trial process, see the Supreme Court of BC Guidebook, “Resolving Your Case Before Trial”, online: <[www.supremecourtbc.ca/sites/default/files/web/Resolving-Your-Case-Before-Trial.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Resolving-Your-Case-Before-Trial.pdf)>.

---

trial were generally available within 5 to 6 months while for non-MVA [*Motor Vehicle Act*] civil trials, the wait for available dates was approximately 18 months.”<sup>82</sup>

**Cost:** The costs to participate in a civil trial can be high. The steps prior to trial often include preparation of documents and trial briefs, witnesses, securing expert opinions (for example, in a personal injury case), and attending the trial. Litigants must also compile relevant cases and legal principles, and other evidence to support the case. Table 6 provides recent statistics on fees for civil and family matters.

**Table 6—2016 Western Canada Fee Ranges for Civil and Family Litigation**<sup>83</sup>

Type of Action and Length	Minimum Fees (\$)	Maximum Fees (\$)
Civil Action (up to two-day trial)	12,342	31,381
Civil Action (up to five-day trial)	26,313	71,174
Civil Action (up to seven-day trial)	34,324	74,529
Family Trial (up to two-days)	10,808	25,194
Family Trial (up to five-days)	20,058	51,694

### *Stage 7: Judgment and costs*

In the Supreme Court of British Columbia, costs are awarded as follows:

The court may award costs to compensate, at least in part, the successful party for disbursements (out-of-pocket expenses) paid during the action, plus time spent, or legal fees relating to the action. They are called “party and party” costs. Therefore, if you are a party to a Supreme Court action and are successful on a chambers application or at trial, you may request that the other party pay your costs.<sup>84</sup>

Appendix B of the *Supreme Court Civil Rules* set out the amounts allocated for each of these costs, referred to as tariffs. The tariffs limit the fees and expenses that can be recovered. If a party intends to seek costs from the other party, this must be set out in the pleadings.<sup>85</sup>

---

<sup>82</sup> Supreme Court of British Columbia, “2016 Annual Report”, at 3, online:

<[www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/annual\\_reports/2016\\_SC\\_Annual\\_Report.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/annual_reports/2016_SC_Annual_Report.pdf)>.

<sup>83</sup> McKiernan, *supra* note 34 at 53.

<sup>84</sup> Supreme Court of British Columbia, Guidebook, “Costs in the Supreme Court,” online:

<[www.supremecourtbc.ca/sites/default/files/web/Costs-in-Supreme-Court.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Costs-in-Supreme-Court.pdf)>.

<sup>85</sup> A plaintiff must claim for costs in the Notice of Civil Claim, Notice of Application, or chambers application. A defendant must claim for costs in the Response or Response to chambers application.

### COSTS IN FAST TRACK LITIGATION

Costs awarded in Fast Track Litigation are restricted to the following amounts, unless otherwise ordered by the court under Rule 15–1(6):

- Trials one day or less—\$8,000;
- Trials 2 days or less, but more than one day—\$9,500;
- Trials more than 2 days—\$11,000.<sup>86</sup>

### COSTS FOR CLASS PROCEEDINGS

The size and complexity of class proceedings tend to result in high costs awards. The approach taken by each jurisdiction in terms of how cost awards are handled will vary.

British Columbia is referred to as a “no cost” jurisdiction. Part 5 of the *Class Proceedings Act* prohibits parties from claiming costs awards, except in very limited circumstances under section 37(2). A “no-cost” provision enables members of a class proceeding to participate without risking a high cost payment should the case be unsuccessful. Other Canadian no-cost jurisdictions are Manitoba, Newfoundland and Labrador, and the Federal Court. In Ontario and Saskatchewan, the court has discretion to award costs if a class proceeding is a test case, raises a novel point of law, or involves a matter of public interest.<sup>87</sup>

## Summary

The overall costs incurred throughout the litigation process will depend on several factors, including whether legal counsel assists in all or part of the process. The total cost for legal fees and disbursements has significant implications for potential litigants. The access-to-justice challenge arises when the costs of financing litigation become a barrier to obtaining a just and fair resolution of a legal matter.

---

<sup>86</sup> Supreme Court of BC Guidebook, *supra* note 84 at 3.

<sup>87</sup> *Class Proceedings Act*, 1992, SO 1992, c 6 at s 31(1); Saskatchewan *Class Actions Act*, SS 2001, c. C-12.01 at s 40. The Law Commission of Ontario published a study entitled, “Law Commission of Ontario, “Review of Class Actions in Ontario—Issues to be Considered”, Law Commission of Ontario (November 2013), online: <[www.lco-cdo.org/wp-content/uploads/2014/01/class-actions-issues-to-be-considered.pdf](http://www.lco-cdo.org/wp-content/uploads/2014/01/class-actions-issues-to-be-considered.pdf)>, to examine whether Ontario should move to a no-cost regime for class actions. As of June 28 2017, the website indicates the project is on hold pending review: Law Commission of Ontario, “Class Actions”, online: <[www.lco-cdo.org/en/class-actions](http://www.lco-cdo.org/en/class-actions)>.



## CHAPTER 3. TERMINOLOGY

People pay for litigation in many ways. Some rely on traditional forms of payment, while others look to new and alternative options. Before taking a closer look at each financing option, this chapter describes some key terms and concepts used throughout the study paper.

### Key terms and concepts

This paper explores several options to pay for litigation. The terminology used to identify each one reflects a distinct meaning and context. The list of definitions in this chapter is not exhaustive, but is meant to serve as a useful background for the reader.

- **Contingency Fee:** The fee paid for a case that depends (or is contingent) on whether the case succeeds.<sup>88</sup> If the case is successful, whether in court or by negotiated settlement, the client agrees to pay the lawyer a portion (or percentage) of the award or settlement to cover the lawyer's fees.<sup>89</sup> This amount is discussed and agreed upon at the start of the case, and must be set out in a written agreement. If the case is unsuccessful, then the client does not pay any portion of the lawyer's fees. However, the client is required to pay any disbursements incurred by the lawyer or firm on behalf of the client throughout their case (see definition below).<sup>90</sup> Contingency fee agreements are commonly used in personal injury and medical malpractice cases.
- **Disbursements:** In addition to paying lawyer's fees, a client must pay expenses borne by the lawyer (or firm) on the client's behalf. These include, but are not limited to, costs for photocopying, faxes, long-distance phone charges, postage and courier expenses, medical and expert reports, court transcripts, process server charges to serve court documents, and court or

---

<sup>88</sup> *Legal Profession Act*, SBC 1998, c 9, Part 8—Lawyers' Fees, s 64(1).

<sup>89</sup> The Law Society of British Columbia, *Law Society Rules 2015*, online:

<<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/law-society-rules/>> [Law Society Rules]. Law societies across Canada regulate the amount, or percentage, a lawyer can charge to a client under a contingency fee agreement. The British Columbia Law Society Rules 2015 (updated May 2017), Part 8, Rule 8-2(1) state that, unless a court otherwise orders a higher remuneration, a lawyer cannot claim more than 33 1/3% of the amount received for any personal injury matter brought to trial (including wrongful death by motor vehicle), and no more than 40% in any other claim for personal injury or wrongful death. For further information on the structure and content of contingency agreements, see Law Society Rules 8-3 and 8-4. See also *ibid*.

<sup>90</sup> The Canadian Bar Association, "Lawyers' Fees", *supra* note 11.

tribunal filing fees.<sup>91</sup> These expenses are often ongoing costs for a file, and can reach relatively high amounts in a short period.

- **Fixed Fee:** Commonly used for more routine legal services, and for which a lawyer can estimate a fixed amount of time and work required to complete a task. Fixed fees are often used for preparation of a will and other personal planning documents, or for the sale of a home. Other areas include uncontested divorce or impaired driving matters.<sup>92</sup> Under a fixed fee arrangement, the lawyer provides a quote for a task or service, at a fixed rate, regardless of how much time is spent to perform the work.
- **Hourly Rate:** Perhaps the most common method of paying for legal services is by setting an hourly rate for work done by a lawyer on a file. Work may include, but is not limited to, time spent on the phone discussing the legal matter, conducting research, document preparation, preparation for and attendance at meetings, and court appearances. Lawyers must keep detailed records of all time spent on a file, including a breakdown of the number of hours spent on each task. This total is then multiplied by the lawyer's hourly rate to generate a total fee for the completed tasks.<sup>93</sup> When setting hourly rates, lawyers and firms often consider a lawyer's skills and years of experience.
- **Lump-sum fees:** Unlike a fixed fee, which is set by the lawyer based on his or her assessment of time required to complete a task, a lump sum fee involves the client and lawyer agreeing on a lump sum they feel accurately reflects the time spent on a file.<sup>94</sup>

---

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Section 69(4) of the *Legal Profession Act*, SBC 1998, c 9 states that a lawyer's bill is sufficient if it contains a reasonable description of the services, with a lump sum charge, and a breakdown of the additional expenses incurred for a case.

<sup>94</sup> CBA Lawyers' Fees, *supra* note 11. Of note is that clients and lawyers can tax a lawyer's account through the Registrar of the Supreme Court, or the Law Society of BC, if they cannot agree on a lump sum.

---

- **Retainer:** An amount of money a client pays to the lawyer as a deposit to begin work on a file. The funds are held in a trust account until the lawyer issues a bill for services. The lawyer draws retainer funds out of the trust account to pay for services rendered. Any unused funds are paid back to the client when work on a file is complete.<sup>95</sup> If a retainer is depleted before completion of work on a file, a lawyer can request the client pay an additional retainer amount to cover future work. Canadian law societies set strict rules that lawyers must adhere to in managing retainer funds.<sup>96</sup>
- **Scope Creep:** Scope creep is a project management term that describes situations when new opportunities, ideas, alternatives, or other information arise during a project. When this occurs, the scope of a project expands beyond its original parameters.<sup>97</sup> In the context of legal service agreements, scope creep describes the very real possibility that the scope of a retainer or financing agreement can easily expand as a case evolves to require additional work, resources, or court appearances.
- **Sliding-scale fees:** Sliding scale fees are set by the lawyer, based upon a client's ability to pay. They are often determined after a review of a client's income and expenses.

### RETAINER VS. RETAINER

The term "retainer" is used to describe two types of arrangements between a lawyer and client. The first, as outlined in this chapter, relates to the amount paid by a client to a lawyer as a deposit for legal services. The term "retainer" is also used to describe the overall agreement between a lawyer and client for legal services, regardless of whether a fee is paid at the time. In this context, the term is used to establish the solicitor-client relationship which, depending on the circumstances, may or may not be outlined in a written retainer agreement.

## Summary

The above list of key terms and concepts is by no means exhaustive. Rather, it can be used as a guide for the reader to approach the substantive chapters to better understand how these terms relate to each option discussed.

---

<sup>95</sup> Law Society Rules, *supra* note 89, Part 3—Protection of the Public, Division 7—Trust Accounts and Other Client Property.

<sup>96</sup> *Ibid.* See also *Legal Profession Act*, *supra* note 88 at s 62.

<sup>97</sup> Tom Kendrick, *Identifying and Managing Project Risk: Essential Tools for Failure-Proofing Your Project*, 3rd ed (United States of America: AMACOM Div American Mgmt Assn, 2015) at 52.

---





## CHAPTER 4. ACCESS TO JUSTICE AND FINANCING LITIGATION

### The roots of access

As Chief Justice McLachlin aptly states, “[a]s long as justice has existed, there have been those who struggled to access it.”<sup>98</sup> The origin of access to the legal system in Canada can be traced back to both the rule of law and the courts. What is meant by “access”, and how it became a challenge for litigants seeking a just resolution to their legal matters, is explored in this chapter.

#### *The rule of law*

In Canada, people are governed by the laws of the country, regardless of their station in government or society.<sup>99</sup> The rule of law creates a basic protection against government or individuals from doing anything not otherwise permitted under the law, and has long been recognized by the courts as the foundation for the constitution, government, and the legal system as a whole.<sup>100</sup> This principle soon found an important expression in the *Canadian Charter of Rights and Freedoms*.<sup>101</sup> Under the *Charter*, Canadians are guaranteed protection over fundamental freedoms, democratic and mobility rights, aboriginal and language rights, and legal and equality rights that inform how people live their lives.<sup>102</sup>

#### *The jurisprudence*

### ACCESS TO THE COURTS

Canadians whose rights or freedoms are infringed have a right to seek recourse to enforce those rights through the courts.<sup>103</sup> The constitutional right of access to the

---

<sup>98</sup> Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil and Family Justice: A Roadmap for Change”, (Ottawa: October 2013) at i, online: <[www.cfcj-fcjc.org/sites/default/files/docs/2013/AC\\_Report\\_English\\_Final.pdf](http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf)> [2013 Cromwell Report].

<sup>99</sup> Senator Eugene A. Forsey, *How Canadians Govern Themselves*, (Ottawa: Parliament of Canada, 1980) at Chapter 5—The Rule of Law and the Courts, online: <[lop.parl.gc.ca/about/parliament/senatoreugeneforsey/book/preface-e.html](http://lop.parl.gc.ca/about/parliament/senatoreugeneforsey/book/preface-e.html)>.

<sup>100</sup> See, for example, *Roncarelli v Duplessis*, [1959] SCR 121, 16 DLR (2d) 689 (SCC); *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1 (SCC); *Reference re Secession of Québec*, [1998] 2 SCR 217, 161 DLR (4th) 385 (SCC).

<sup>101</sup> Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act*, 1982 (UK), 1982, c 11 [Charter].

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid* at s 24(1).

courts was established by the Supreme Court of Canada in *BCGEU v British Columbia (Attorney General)*.<sup>104</sup> The appellants, British Columbia Government Employees Union, were picketing the entrances of the courts in Vancouver and across the province. All courts were in session during the strike, which included both criminal and civil jury trial matters.

On the issue of whether prohibiting a union from picketing outside a courthouse infringed the union's *Charter* rights and freedoms, Chief Justice Dickson examined the relationship between the principle of protection from the rule of law, and one's ability to access the courts to obtain that protection. Dickson C.J. found that with the *Charter* directing the courts to provide a remedy when rights and freedoms are infringed, a fundamental need arises for individuals to have unimpeded access to the courts to secure that remedy.<sup>105</sup> The act of picketing outside a courthouse, which encourages individuals to avoid entry except by permission of the picketers, effectively prohibits access.<sup>106</sup> Dickson C.J. concluded that unless access to the courts also became a constitutionally-protected right, the value of the rights and freedoms entrenched in the *Charter* would "become merely illusory, the entire *Charter* undermined."<sup>107</sup>

### ACCESS TO JUSTICE

The *BCGEU* case deals specifically with a right of physical access to the courts. However, the principles inherent in the *BCGEU* case also relate to the broader issue of access to justice generally, which includes financial access to the courts.

While the courts have long held that "access to justice is compromised where legal advice is unavailable,"<sup>108</sup> the constitution only supports a right to legal advice and representation on a case-by-case basis, and in limited circumstances.<sup>109</sup> Whether

---

<sup>104</sup> [1988] 2 SCR 214, [1988] 6 WWR 577 (SCC) [*BCGEU* cited to SCR]. See also *Newfoundland (Attorney General) v NAPE*, [1988] 2 SCR 204, 53 DLR (4th) 39 (SCC) [*NAPE* cited to SCR]. *NAPE* preceded *BCGEU* on the constitutionality of picketing outside a courthouse, and disciplining court staff who crossed it. The court held at para 16 that, "Any action taken to prevent, impede or obstruct access to the courts runs counter to the rule of law and constitutes a criminal contempt. The rule of law, enshrined in our Constitution, can only be maintained if persons have unimpeded, uninhibited access to the courts of this country."

<sup>105</sup> *BCGEU*, *ibid* at para 24.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid*.

<sup>108</sup> *R v Campbell*, [1999] 1 SCR 565 at para 49, 43 OR (3d) 256 (SCC) [*Campbell* cited to SCR].

<sup>109</sup> Section 10(b) of the *Charter* grants everyone a right to retain and instruct counsel upon arrest or detention. The court in *R v Grant*, [2009] 2 SCR 353, 97 OR (3d) 318 (SCC) [*Grant* cited to SCR] defines "detention" at para 44 as "suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply." The *Grant* case also

there ought to be a right in all cases, to ensure effective access to justice is achieved, was considered by the court in *British Columbia (Attorney General) v Christie*.<sup>110</sup>

In *Christie*, the respondent argued that effective access to the courts required access to legal counsel,<sup>111</sup> and the tax on legal services rendered them unaffordable for litigants with limited financial resources.<sup>112</sup> To find a tax on legal services unconstitutional, the court must agree that access to justice is a constitutionally-protected right. To support this proposition, the court would also need to expand the *Charter* right to legal counsel to capture all matters before the court and tribunals.<sup>113</sup> The court rejected this claim because it would require a legal aid scheme to cover all legal proceedings, imposing significant financial and structural demands on both society and the legal system.<sup>114</sup>

In refusing to make a right to counsel absolute, the court referred to section 92(14) of the *Constitution Act*, which enabled “the province to impose at least some conditions on how and when people have a right to access the courts.”<sup>115</sup> The court held it was not the intent of the constitution to allow complete and open access to the courts. To create an absolute right of access to legal services would effectively nullify the *Charter* provisions that limit when a right to counsel can be invoked.<sup>116</sup> Furthermore, and until a causal link between the tax on legal services and access to justice can be shown through expert, economic evidence, the court cannot find the tax unconstitutional.<sup>117</sup>

The court declared in the *Hryniak* case (cited earlier) that “without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.”<sup>118</sup> By tying preservation of the rule of law to a basic need for unfettered access to justice, the courts considered whether constitutional protection needed to go beyond access to the courts. In the same year as *Hryniak*, the court recognized that if the constitution protects the rule of law

---

provides a list of factors for courts to consider in determining whether an individual was deprived of their right to liberty under section 9 and 10 of the *Charter*.

<sup>110</sup> 2007 SCC 21, [2007] 1 SCR 873 [*Christie*].

<sup>111</sup> *Ibid* at para 10.

<sup>112</sup> *Ibid* at para 5. In 1993, British Columbia introduced a 7% tax on legal services through the *Social Service Tax Amendment Act (No. 2)*, 1993, SBC 1993, c 24. Today, legal services are subject to the same 7% tax under section 20 of the *Provincial Sales Tax Act*, SBC 2012, c 35. For more information on how PST applies to legal services, as well as those fees and charges that are not subject to PST, see the Province of British Columbia, “Provincial Sales Tax (PST) Bulletin”, (February 2014).

<sup>113</sup> *Christie*, *supra* note 110 at para 13.

<sup>114</sup> *Ibid* at paras 13–14.

<sup>115</sup> *Ibid* at para 17.

<sup>116</sup> *Ibid* at paras 24–25.

<sup>117</sup> *Ibid* at para 28.

<sup>118</sup> *Hryniak*, *supra* note 16 at para 26.

through the courts, some level of constitutional protection over access to justice is needed.<sup>119</sup> In the *Trial Lawyers Association of British Columbia* case, the court examined the economics of access to justice in the role court fees play in providing, or hindering, access to the courts. McLachlin C.J. held that, "when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court."<sup>120</sup> Not all court hearing fees will be found unconstitutional, since some serve to prevent frivolous claims from entering the courts. However, if the fee bars a legitimate claim because a litigant cannot afford it, the constitution needs to provide some level of protection to uphold the rule of law.

### Addressing the access-to-justice challenge

The cases above show that a constitutional right of access to the courts does not on its own guarantee effective access to justice. Rather, access must also be meaningful and affordable for litigants. While the constitution seeks to ensure equal access for everyone, not all litigants are created equal. Some will have more financial resources than others to finance their case. Others may face legal challenges that are rights-based, which may or may not mean a financial settlement or award at the end of the day. Whether access is affordable depends on a litigant's ability to shoulder the cost of litigation. If the cost is too high, then a litigant may be forced to abandon their claim. While McLachlin C.J. recognizes the loss of both frivolous and vexatious claims will likely "increase efficiency and overall access to justice," the rule of law is compromised if litigants are financially impeded from bringing legitimate claims to court.<sup>121</sup>

#### *Legal aid*

Efforts to facilitate access to justice in Canada for litigants with limited financial resources began long before the *Trial Lawyers Association of British Columbia* decision, and were modeled after steps taken in the United Kingdom after the Second World War.<sup>122</sup> The movement to establish a publicly funded legal aid system began in

---

<sup>119</sup> 2014 SCC 59 at para 39, [2014] 3 SCR 31.

<sup>120</sup> *Ibid* at para 45.

<sup>121</sup> *Ibid* at para 47.

<sup>122</sup> Richard I Morgan, "The Introduction of Civil Legal Aid in England and Wales, 1914–1949" (1994) 5:1 *Twentieth Century British History* 38 at 38–76. In 1949, the British Parliament enacted *The Legal Aid and Advice Act*, 1949 12 & 13 Geo VI, c 51.

---

Ontario in 1951.<sup>123</sup> After Ontario passed legislation confirming a statutory right to legal aid for those who qualified, other provinces followed suit.<sup>124</sup>

In the 1960s, legal aid in British Columbia was a pro bono service, with lawyers volunteering their time to provide advice and representation.<sup>125</sup> In 1972, the federal and provincial governments agreed on a cost-sharing approach to fund legal aid for criminal matters under the *Federal-Provincial Agreement on Legal Aid in Criminal Matters*.<sup>126</sup> Soon after, a statutory provision for publicly-funded legal services was made in 1979 with the enactment of the *Legal Services Society Act*.<sup>127</sup> This resulted in the establishment of what is now known as the Legal Services Society of British Columbia (LSS BC).

The LSS BC offers legal aid services to low-income individuals, with the overall mandate to facilitate access to justice in British Columbia.<sup>128</sup> The LSS BC provides three main services: 1) information; 2) advice; and 3) representation. While the legal information is free, qualifying for legal representation requires an individual to:

- have a legal problem covered by the LSS BC;
- be financially eligible for services (i.e., net monthly household income and assets fall at or below the financial guidelines); and
- have no other means of securing legal help.<sup>129</sup>

---

<sup>123</sup> Dr. Melina Buckley, “Moving Forward on Legal Aid: Research on Needs and Innovative Approaches” (Ottawa: Report for the Canadian Bar Association, June 2010) at 31 [Dr. Buckley]. For more information on the history of legal aid in Ontario, see Ontario Ministry of the Attorney General, “Chapter 2: Development of the Legal Aid System in Ontario”, online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/olar/ch2.php>>.

<sup>124</sup> Dr. Buckley, *supra* note 123 at 31.

<sup>125</sup> Leonard T Doust, QC, “Foundation for Change: Report of the Public Commission on Legal Aid in British Columbia” (Vancouver: March 2011) at 6, online: <[www.publiccommission.org/media/PDF/pcla\\_report\\_03\\_08\\_11.pdf](http://www.publiccommission.org/media/PDF/pcla_report_03_08_11.pdf)>. For additional resources on legal aid in British Columbia, see Public Commission on Legal Aid, “Resources”, online: <[www.publiccommission.org/resources/main/default.aspx](http://www.publiccommission.org/resources/main/default.aspx)>.

<sup>126</sup> Department of Justice Canada, “Legal Aid Program Evaluation: Final Report” (Ottawa: Evaluation Division, Office of Strategic Planning and Performance Management, January 2012) at 10. Of note is, in the 1990s, the federal government modified its cost-sharing approach, and moved to a general transfer of funds to provincial governments through the Canada Social Transfer to enable the provinces to manage the funds for civil legal aid—see *ibid* at 40.

<sup>127</sup> RSBC 1996, c 256. This Act was repealed by the *Legal Services Society Act*, SBC 2002, c 30, s 28, effective May 9, 2002, which remains in effect today [*Legal Services Society Act*].

<sup>128</sup> *Legal Services Society Act*, *ibid* at s 9(1).

<sup>129</sup> Areas which may be covered by LSS BC services: criminal charges, mental health and prison issues, serious family law problems, child protection, and immigration matters. For more information, see Legal Services Society of BC, “Legal representation by a lawyer”, online: <[www.lss.bc.ca/legal\\_aid/legalRepresentation.php](http://www.lss.bc.ca/legal_aid/legalRepresentation.php)>. See also Legal Services Society of British

Advice for both criminal and immigration<sup>130</sup> matters is available without a financial eligibility test, whereas advice on family law matters requires passing a test. The LSS BC measures financial eligibility by comparing household size and monthly net income. For example, to qualify for advice and representation as a single individual, one's net household income cannot exceed \$1,550 per month, or over \$18,600 per year.<sup>131</sup>

To fulfill its mandate, the LSS BC relies on three main sources of funding: the provincial government, the Law Foundation of British Columbia, and the Notary Foundation of British Columbia.<sup>132</sup> For a variety of reasons, funding from all sources has fluctuated over the years, with the first round of cuts dating back to 1990.<sup>133</sup> Since that time, with the exception of funding for larger cases, there has been only marginal incremental funding.<sup>134</sup> Consequently, the scope and amount of services has always been dependent on how much money was received each year.

The scope of legal advice and representation is restricted to cases that pose serious threats to liberty (e.g., incarceration or deportation), safety (e.g., child protection or denials of parenting time), or refugee matters. For litigants whose cases fall outside the scope of LSS BC coverage, or who earn too much to financially qualify for services, it may be necessary to consider other options to bring their matter to court.

---

Columbia, "What you need to know about legal aid work" (November 2016), online: <[www.lss.bc.ca/assets/lawyers/practiceResources/whatYouNeedToKnowAboutLegalAidWork.pdf](http://www.lss.bc.ca/assets/lawyers/practiceResources/whatYouNeedToKnowAboutLegalAidWork.pdf)>.

<sup>130</sup> In June 2017, the LSS BC announced that, as of August 1, 2017, it would no longer accept applications for immigration and refugee matters because of a lack of funding. On July 25, 2017, the LSS BC confirmed in a news release that the federal government will provide additional federal funding for immigration and refugee client services. According to the news release, this continued funding from the federal government will enable "LSS to maintain services until November 2017." The rules have been changing in 2017. Content in this section of the study paper is based on information as at August 25, 2017. For more information, visit the LSS BC website: <[www.lss.bc.ca/](http://www.lss.bc.ca/)>.

<sup>131</sup> *Ibid.*

<sup>132</sup> Mark Benton, QC, "Presentation to the Select Standing Committee on Finance and Government Services" (Kamloops: LSS BC, 20 September 2016) at 5, online: <[www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToCommitteeOnFinanceAndGovtServices2016.pdf](http://www.lss.bc.ca/assets/aboutUs/reports/submissions/submissionToCommitteeOnFinanceAndGovtServices2016.pdf)>.

<sup>133</sup> For a history on cuts to legal aid in BC, see Anne E Beveridge, "History of Social Justice (Poverty) Law Services Pre-2002" (December 2009), memo to the Coalition for Public Legal Services, online: <[https://www.cbabc.org/CBAMediaLibrary/cba\\_bc/pdf/ForThePublic/LegalAid/HistoryOfLegalAid/beveridge\\_memo\\_12\\_30\\_09.pdf](https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/ForThePublic/LegalAid/HistoryOfLegalAid/beveridge_memo_12_30_09.pdf)>.

<sup>134</sup> Legal Services Society BC, "Legal Aid in BC: Background and Statistics", (September 2016) at 8, online: <[https://www.lss.bc.ca/assets/aboutUs/reports/presentations/2016\\_09BackgroundAndStatistics.pdf](https://www.lss.bc.ca/assets/aboutUs/reports/presentations/2016_09BackgroundAndStatistics.pdf)>.

---

### *Pro bono and public advocacy services*

Table 7 offers a sample of public advocacy and pro bono legal clinics that offer legal advice and some legal representation services to clients.

**Table 7—Pro Bono and Public Advocacy Organizations in British Columbia**

Organization	Description
Access Pro Bono BC	Strives to increase access to justice for individuals and not-for-profit organizations by providing pro bono legal services. <sup>135</sup>
Seniors First BC (formerly BC Centre for Elder Advocacy and Support)	Offers legal services to people age 55 and over, who are not able to access legal help elsewhere due to low income or other barriers. <sup>136</sup>
Law Students Legal Advice Program	Students from the Peter A. Allard Law School, supervised by lawyers, provide legal advice and representation to low-income clients. <sup>137</sup>
Lawyer Referral Service	Funded by the Law Foundation and operated by CBABC, clients pay \$25 plus tax for a 30-minute consultation with a lawyer. <sup>138</sup>
Lawyers' Rights Watch Canada	An international human rights organization headquartered in British Columbia that supports and defends lawyers, judges, and advocates who defend human rights across the world. Lawyers' Rights Watch Canada is run by volunteers and funded solely by membership fees and donations. <sup>139</sup>
MyLawBC	Online platform developed by the Legal Services Society BC that "engages users to help them find solutions to common legal problems. Users can follow guided pathways that diagnose their legal problem, and then identify the next steps needed and resources and services available to help them resolve their legal issue." <sup>140</sup>
Rise Women's Legal Centre	Provides legal services in family law, child protection law, and wills drafting with the help of students from the Peter A. Allard Law School. <sup>141</sup>
TRU Community Legal Clinic	Students from the TRU Faculty of Law, supervised by lawyers, provide legal services on residential tenancy and housing issues. <sup>142</sup>
University of Victoria Law Centre	Law students from the University of Victoria, supervised by lawyers, provide legal services and representation in the Capital Regional District. Areas include criminal matters, human rights, divorces and other family law matters, and civil disputes. <sup>143</sup>

<sup>135</sup> Access Pro Bono, "About", online: <accessprobono.ca/about-apb>.

<sup>136</sup> Seniors First BC, "About Us", online: <seniorsfirstbc.ca/who-we-are/>.

<sup>137</sup> Law Students Legal Advice Program, "Who we can help", online: <www.lslap.bc.ca/who-we-can-help.html>.

<sup>138</sup> The Canadian Bar Association British Columbia Branch, "Lawyer Referral Service", online: <https://www.cbabc.org/For-the-Public/Lawyer-Referral-Service>.

<sup>139</sup> Lawyers' Rights Watch Canada, "About LRWC", online: <www.lrwc.org/about/>. See also David F Sutherland, QC, "Lawyers' Rights Watch Canada", *The Advocate* 75:3 (May 2017) at 397.

<sup>140</sup> MyLawBC, "Communication Kit," online: <mylawbc.com/assets/info/communicationKit.pdf>.

<sup>141</sup> Rise Women's Legal Centre, "About Us", online: <https://womenslegalcentre.ca/about/>.

<sup>142</sup> Thompson Rivers University, "Community Legal Clinic", online: <www.tru.ca/law/students/outreach/Legal\_Clinic.html>.

<sup>143</sup> The Law Centre, "Our Services", online: <thelawcentre.ca/our\_services>. Note the University of Victoria, Faculty of Law also runs the Environmental Law Centre Clinic, (www.uvic.ca/law/jd/lawclinics/environmentalclinic/index.php) and the Business Law Clinic, (www.uvic.ca/law/jd/lawclinics/businessclinic/index.php).



### BC COLLABORATIVE ROSTER SOCIETY

The BC Collaborative Roster Society hosts the Pro Bono Collaborative Divorce Project, a voluntary program that offers collaborative practice services for families going through separation or divorce.<sup>144</sup> To be eligible to participate in the program, both parties must: (1) have a combined gross annual income of less than \$75,000, and (2) have less than \$100,000 of equity in assets (excluding pension plans).<sup>145</sup> Eligible families receive services to assist reaching a resolution to their dispute. Collaborative Teams consist of two lawyers (one for each party), a divorce coach, and a neutral financial specialist (if needed).<sup>146</sup>

### *Contingency agreements*

Even if a case has potential for a high settlement award, the risk of shouldering the cost of litigation to find out can often only be borne by those with ample financial resources. To mitigate this risk, lawyers began using contingency fee arrangements to enable litigants to retain their services regardless of their income or assets. Under a contingency fee agreement, a lawyer is only paid at the end of a successful case, or when a settlement is reached. Thus, a client of limited financial means, but with an otherwise compelling case, may access the courts without suffering financial hardship to do so.

It took some time for contingency fee agreements to gain widespread use throughout the legal profession. Although they are well used in British Columbia for cases like personal injury, insurance, and medical malpractice, they are only viable when the awards are high enough to justify the lawyer taking on the costs of the litigation without a retainer or other fee payment schedule.<sup>147</sup>

### *Class proceedings*

For a lawyer to justify the risks associated with being retained on contingency, the case must have a probability of a high financial payout. Where contingency fee

---

<sup>144</sup> BC Collaborative Roster Society Pro Bono Project and the Pro Bono Collaborative Divorce Project, online: <[www.bccollaborativerostersociety.com/practice/probono/](http://www.bccollaborativerostersociety.com/practice/probono/)>.

<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> Note that some international jurisdictions have yet to adopt contingency fee agreements. For instance, the Victorian Law Reform Commission, “Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper July 2017” online: <[lawreform.vic.gov.au/sites/default/files/VLRC\\_Litigation\\_Funding\\_and\\_Group\\_Proceedings\\_Consultation\\_Paper\\_for\\_web.pdf](http://lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Consultation_Paper_for_web.pdf)> at 16 notes “In Australia, lawyers are prohibited from charging contingency fees. In Victoria, the Legal Profession Uniform Law states that any contravention of the prohibition will constitute professional misconduct and attract a civil penalty.” For more discussion on contingency fee agreements, see Chapter 8—Alternative Fee Arrangements.

agreements were beneficial to support cases like those listed above, there remained a need for cases with comparatively low prospects of financial success on their own to reach a fair adjudication through the courts. In the 2001 Supreme Court of Canada case of *Western Canada Shopping Centres Inc. v Dutton*, the court solidified the role that class proceedings could serve to meet this need.<sup>148</sup>

The court in *Dutton* identified three main advantages class proceedings offer to both litigants and the legal system. First, class proceedings avoid duplication of matters by joining claims with similar facts and legal issues.<sup>149</sup> They also ensure potential wrongdoers meet their obligations to the public because the high cost of litigation would no longer prohibit cases with smaller potential payouts from being litigated.<sup>150</sup> The third, and perhaps most significant, advantage is, in allowing multiple individual litigants with similar claims spread the cost of litigation across a larger group, it improves "access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually."<sup>151</sup>

Class proceedings are meant to ensure litigants with strong legal claims, but whose claim otherwise holds minimal financial value, can still bring their matter to court. However, and discussed in more detail later in this study paper, the overall cost, length and time involved for the lawyer or firm in class proceedings can sometimes thwart the intended benefits.

### Access to justice and the self-represented litigant

The issue of affordability of legal services to ensure meaningful access remains of great importance to the legal community.<sup>152</sup> In its 2013 report on the topic, the Canadian Bar Association found that many factors contribute to perceived and actual unequal access to justice, including a lack of trust in the justice system, a feeling that legal rights are "just on paper", that the justice system is too difficult to navigate, or a belief that "justice" is person-dependent.<sup>153</sup> Underlying these concerns is the overarching cost and affordability of legal services issue.<sup>154</sup>

---

<sup>148</sup> 2001 SCC 46, 201 DLR (4<sup>TH</sup>) 385 [*Dutton*]. The *Dutton* case was one in a trilogy of leading class action cases that same year. See also *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158; *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184.

<sup>149</sup> *Dutton*, *supra* note 148 at para 27.

<sup>150</sup> *Ibid* at para 29.

<sup>151</sup> *Ibid* at para 28.

<sup>152</sup> *Hryniak*, *supra* note 16 at para 2.

<sup>153</sup> CBA, "Reaching", *supra* note 12 at 15–21.

<sup>154</sup> *Ibid* at 36. See also Macfarlane Report, *supra* note 14 at 39.

The affordability problem is widespread among jurisdictions across Canada. For instance, in 2012, the Manitoba Law Reform Commission reported that access to the legal system was unaffordable for many.<sup>155</sup> The Law Society of Saskatchewan went on to report in 2013 that lawyers' fees and the overall cost of litigation leave many litigants attempting to navigate the legal system with little or no knowledge of their rights, the processes involved, or what is ultimately at stake in their case.<sup>156</sup>

Although the courts recognize the important, if not vital, role that lawyers play in securing access to justice for litigants,<sup>157</sup> in the absence of an absolute constitutional right to legal counsel, the costs associated with bringing a matter to court can impede access for those of limited financial resources. The corresponding trend has been an increase in the number of self-represented litigants in the courts.

In 2007, courts reported more than 44% of cases involved a self-represented litigant.<sup>158</sup> Fast forward to Dr. Macfarlane's 2013 report, and that number climbed to 60%.<sup>159</sup> Of the 259 participants in Dr. Macfarlane's study, British Columbia accounted for 32% percent of that number, with as many as 65% reporting they were self-represented for BC Supreme Court family matters.<sup>160</sup>

A closer look at British Columbia's courts over the past five years provides insight into how individuals navigate the justice system, and where the cost of justice is at its peak

---

<sup>155</sup> Manitoba Law Reform Commission, "Access to Justice—Issue Paper No 1" (8 March 2012) at 1, online: <[www.manitobalawreform.ca/pubs/pdf/additional/issue\\_paper\\_access\\_justice.pdf](http://www.manitobalawreform.ca/pubs/pdf/additional/issue_paper_access_justice.pdf)>. The Law Society of Upper Canada, "Listening to Ontarians: Report of the Ontario Civil Legal Needs Project" (Toronto: May 2010), online: <[www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)> states that survey participants cited the inability to afford lawyer fees as the most common access to justice impediment.

<sup>156</sup> Barbra Bailey, "Unbundled Legal Services", (The Law Society of Saskatchewan—Continuing Professional Development, Civil Litigation Ethics, 22 October 2013) at 3, online: <[library.lawsociety.sk.ca/inmagicgenie/documentfolder/CLE2A.PDF](http://library.lawsociety.sk.ca/inmagicgenie/documentfolder/CLE2A.PDF)>.

<sup>157</sup> For example, *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at paras 37–38, 34 BCLR (2d) 273, where McIntyre J. held "It is incontestable that the legal profession plays a very significant — in fact, a fundamentally important — role in the administration of justice, both in the criminal and the civil law...I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state". See also *Fortin v Chrétien*, 2001 SCC 45 at para 51, [2001] 2 SCR 500, which declared the lawyer a "custodian of the secrets of the law and procedure."

<sup>158</sup> Rt. Honourable Beverley McLachlin, P.C., Chief Justice of Canada, "The Challenges We Face" (Remarks delivered to the Empire Club of Canada, 8 March 2007), online: <[speeches.empireclub.org/62973/data](http://speeches.empireclub.org/62973/data)> [Rt. Honourable Beverley McLachlin C.J.].

<sup>159</sup> Macfarlane Report, *supra* note 14. This percentage reflects participants who appeared in family, provincial, or divorce court without representation (85% of Alberta family self-represented litigants in Queen's Bench, and 77% of Ontario family self-represented litigants in Superior Court).

<sup>160</sup> *Ibid* at 25.

for litigants. In its 2015–16 annual report, the Provincial Court of British Columbia notes a total of 135,663 self-represented litigants, “a 4% increase over the last fiscal year, and is the first increase in the past five years.”<sup>161</sup> The report shows that self-representation rates reached a plateau in 2013–14 and 2014–15, with 18% in criminal, and 41% in family law matters. In contrast in small claims court, which is intended for self-represented litigants, only 69% are self-represented, suggesting that 31% have representation.<sup>162</sup>

Self-represented litigants are not limited to appearances in provincial and Supreme courts. They also appear in appellate courts. The 2016 British Columbia Court of Appeal annual report states of the 623 civil appeals and applications for leave to appeal filed, 190 (or 30%) involved a self-represented litigant. In family appeals, the rate was 46%—a marked increase from 2014 (44%) and 2013 (38%).<sup>163</sup>

While numbers of self-represented litigants are not available for all tribunals, the 2015–2016 annual report of the BC Human Rights Tribunal reported that 70% of complaints at the time of initial filing were made by self-represented litigants.<sup>164</sup> Of those complaints, 95% were rejected during the first screening.<sup>165</sup> At the time of the hearing, 30% of complainants were self-represented, compared to the 10% of respondents appearing without counsel.<sup>166</sup> This is the first time the BC Human Rights Tribunal analyzed legal representation at the Tribunal, noting that access to legal representation could be a determining factor in the success of a complaint.<sup>167</sup>

---

<sup>161</sup> Provincial Court of British Columbia, “Annual Report 2015/16”, at 49, online: <[www.provincialcourt.bc.ca/news-reports/court-reports](http://www.provincialcourt.bc.ca/news-reports/court-reports)>. The data collected for the report only covers appearances, and excludes cases adjourned or cancelled prior to appearance, or for which no appearance duration was recorded.

<sup>162</sup> *Ibid.* “Small claims” includes motor vehicle accident cases. The report notes, at 50, that “The increase in small claims combined with the increase in new cases appears to have driven the increase in total selfrepresented appearances this year.”

<sup>163</sup> Court of Appeal of British Columbia, “Annual Report 2016”, (2016) at 14, online: <[http://www.courts.gov.bc.ca/Court\\_of\\_Appeal/about\\_the\\_court\\_of\\_appeal/annual\\_report/2016\\_CA\\_Annual\\_Report.pdf](http://www.courts.gov.bc.ca/Court_of_Appeal/about_the_court_of_appeal/annual_report/2016_CA_Annual_Report.pdf)>. The report states that, “Out of the 190 appeals filed, 81% were self-represented appellants and 19% self-represented respondents.”

<sup>164</sup> BC Human Rights Tribunal, “Annual Report 2015/2016” (Vancouver: June 2016) at 7, online: <[www.bchrt.bc.ca/shareddocs/annual\\_reports/2015-2016.pdf](http://www.bchrt.bc.ca/shareddocs/annual_reports/2015-2016.pdf)>.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid* at 8.

<sup>167</sup> *Ibid* at 4.

## The costs of justice

### *Financial costs*

The Macfarlane Report states the majority of individuals feel the role finances play in accessing justice is both “unfair and unacceptable.”<sup>168</sup> The inability to afford (or to continue to afford) legal counsel is “by far the most consistently-cited reason for self-representation”, and the subsequent lack of access to justice.<sup>169</sup> Over 90% of the study’s participants, across all provinces and levels of court, cited financial reasons for choosing to self-represent.<sup>170</sup>

Meanwhile, the cost of legal services remains high. This section examines the impact the cost of legal services has on access to justice. While the primary focus is on actual monetary expenses, some non-monetary costs are also discussed.<sup>171</sup> Figure 1 illustrates the change in lawyers’ fees across Canada over the years.<sup>172</sup>

---

<sup>168</sup> Macfarlane Report, *supra* note 14 at 24.

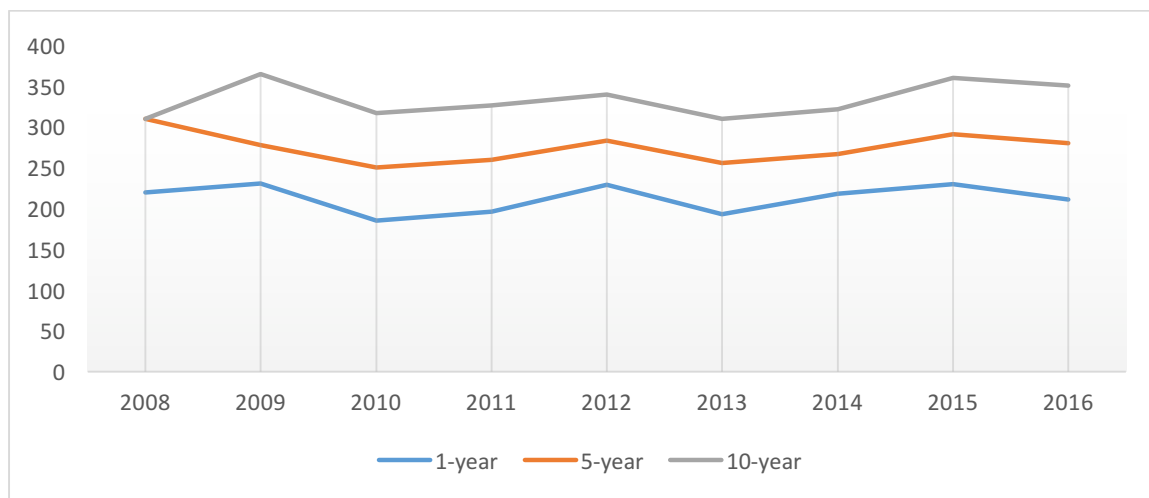
<sup>169</sup> *Ibid* at 8.

<sup>170</sup> *Ibid* at 39. See also Bala N & Birnbaum R, “The Rise of Self-Representation in Canada’s Family Courts” (Halifax: paper prepared for the National Family Law Program, 2012). In 2015, the median family debt was 110% of after-tax income, with more than one-third of all Canadian families with debt amounting to at least 200% of after-tax income: see Statistics Canada, “Study: Changes in debt and assets of Canadian families, 1999 to 2012”, (29 April 2015), online: <[www.statcan.gc.ca/daily-quotidien/150429/dq150429b-eng.htm](http://www.statcan.gc.ca/daily-quotidien/150429/dq150429b-eng.htm)>.

<sup>171</sup> Noel Semple, “The Cost of Seeking Civil Justice in Canada” (2015) 93 *The Canadian Bar Review* 639 [Semple]. Semple examines the monetary, temporal, and psychological costs associated with pursuing civil justice in Canada, including costs borne by the public.

<sup>172</sup> “The Going Rate”, *Canadian Lawyer* (2008-2016), online: <[www.canadianlawyermag.com/](http://www.canadianlawyermag.com/)> [The Going Rate].

---



**Figure 1—Average National Hourly Rates (Based on Year of Call)**

A review of Figure 1 shows that, in 2009, the average national hourly rate reached its peak at \$365 per hour. The lowest reported average of \$310 occurred in both 2008 and 2013.<sup>173</sup> In 2016, that average rests at \$351.<sup>174</sup> Those working with a 5-year called lawyer could expect to pay as much as \$310 in 2008 (the same amount as a 10-year call that same year), but on average have paid approximately \$275 per hour over the past five years. The hourly rate for a newly called lawyer saw its shortest gap (and ironically its peak) from that of a 10-year call in 2009, when the hourly rate for services was \$231.<sup>175</sup> Today, that number has dropped to \$211 per hour.<sup>176</sup> Data from the last five years shows an average rate for a 10-year call at \$336 per hour, \$275 for a 5-year call, and \$216 for one year call.<sup>177</sup>

Although the annual survey moved away from province-specific reporting in 2009, average rates for Western Canada (British Columbia, Alberta, Saskatchewan, Manitoba and the North) have been markedly higher than the national average,

<sup>173</sup> *Ibid.*

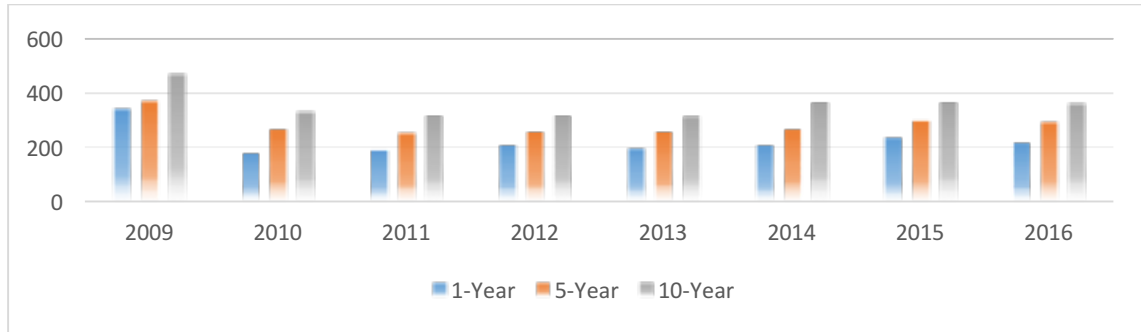
<sup>174</sup> McKiernan, *supra* note 34 at 51.

<sup>175</sup> Kelly Harris, “The Going Rate”, *Canadian Lawyer* (June 2009) at 33.

<sup>176</sup> McKiernan, *supra* note 34 at 51.

<sup>177</sup> The Going Rate, *supra* note 172. These figures are mean value averages calculated based on the figures gathered over the past 5 years of *Canadian Lawyer* ‘The Going Rate’ surveys.

ranking second highest compared to Ontario.<sup>178</sup> Figure 2 illustrates the shift in hourly rates in Canada since 2009.<sup>179</sup>



**Figure 2—Average Hourly Rates for Western Canada (Based on Year of Call)**

The spike in national hourly rates in 2009 had the same pattern for lawyers in Western Canada, including British Columbia. Although the sharp decline in 2010 remained steady through 2013, the last spike in 2015 for both one- and 5-year calls has slowed down, with rates dropping for both categories in 2016. The hourly rate for 10-year calls hasn't yet reached the height it had in 2009 at \$467. The 2016 survey notes 55 per cent of respondents intend to freeze fees over the next year, largely due to the recessive economic times.<sup>180</sup> It remains to be seen whether the upward trend of the past three years will lead litigants back to 2009 figures in years to come.<sup>181</sup>

The impact hourly rates have on the affordability issue is unsurprising. For example, the survey notes the national average for a contested divorce proceeding was \$15,306.<sup>182</sup> A five-day trial can cost as much as \$33,564.<sup>183</sup> In British Columbia, those numbers rise to \$16,507 and \$36,577, respectively. Even if Canadians could save enough money to finance these costs, it may not be enough to pay for a lawyer to represent them for the full duration of the case.

---

<sup>178</sup> *Ibid.* Both 2005 and 2008 annual fees surveys reported on individual rates in British Columbia, with Ontario and Alberta represented in 2008. Alberta, Saskatchewan and Manitoba were reported in the 2005 survey under the regional 'Prairies' descriptor, along with Atlantic/Québec region appearing in all but the 2005 survey.

<sup>179</sup> *Ibid.* Since the 2013 survey did not report on rates specific to Western Canada, the national average was used for this chart.

<sup>180</sup> McKiernan, *supra* note 34 at 49.

<sup>181</sup> Semple, *supra* note 171 at 653. For more information on standard hourly fees charged in the United States, see also Paul F Teich, "Are Lawyers Truly Greedy? An Analysis of Relevant Empirical Evidence" (2013) 19 Tex Wesleyan L Rev 837.

<sup>182</sup> The Going Rate, *supra* note 172, at 51.

<sup>183</sup> Michael McKiernan, "The Going Rate", *Canadian Lawyer Magazine* (June 2015) at 52.

---

Reasons cited for the shift in hourly rates varies over the years, with respondents commonly relying on changing economic conditions to support either a rate reduction or freeze. Conversely, respondents often cited inflation and higher overhead costs to justify increases. In 2008, real estate practitioners reported feeling pressured by realtors to reduce their fee quotes, despite seeing an increase in costs from third parties for such things as searches, taxes, and title insurance, to name a few.<sup>184</sup> Survey respondents also reported client perception as a driving force behind the decision to raise or reduce fees.

One need only recall the expenses listed in Chapter 2 to understand how the overall cost of litigation stretches beyond the expense of legal representation alone. As a case moves through the justice system, additional fees can accrue over and above what a litigant may budget for at the outset. Dr. Semple's research notes a litigant involved in a family trial in British Columbia can expect to pay \$500 for each day of trial beyond three days, and \$800 after 10 days.<sup>185</sup> Add the cost of expert evidence (e.g., in personal injury cases), and it is easy to see how access to justice can be impeded by how much one can, or is prepared, to pay for it.<sup>186</sup>

### *Personal costs*

A final point worth noting is that access to justice for the self-represented litigant is not only impacted by the financial cost of litigation. Rather, the various steps and associated timelines inherent in the litigation process for those without legal assistance can seem "interminable."<sup>187</sup> Dr. Macfarlane's study also notes the physical costs, which include stress, depression, weight loss, and anxiety, among others.<sup>188</sup> Simultaneously, courts and lawyers are charged to manage the additional time spent explaining process and procedure, whilst balancing the ethical obligation to ensure self-represented litigants understand the process without crossing the line of offering legal advice.

There are also non-monetary costs to consider. For instance, overall time spent by individuals as they participate in litigation can be overwhelming. Workload and hours spent completing tasks associated with different stages of a case simultaneously deplete a person's availability for activities he or she would otherwise engage in.<sup>189</sup> Other costs may include significant psychological challenges of reaching a just

---

<sup>184</sup> The Going Rate, *supra* note 172.

<sup>185</sup> Semple, *supra* note 171 at 647.

<sup>186</sup> *Ibid.*

<sup>187</sup> Macfarlane Report, *supra* note 14 at 54.

<sup>188</sup> *Ibid* at 108.

<sup>189</sup> Semple, *supra* note 171 at 661.



resolution that may be disproportionate to the outcome, or have long-standing effects that continue well after the litigation ends.<sup>190</sup>

### Summary

Addressing the financial costs of litigation to improve access to justice is a broad and ambitious goal. As the discussion in this chapter reveals, it needs to be addressed from many perspectives. The remainder of this study paper examines how litigation is being funded today, and where opportunities for structural, systemic, or legal changes exist to enhance access to legal services.

---

<sup>190</sup> *Ibid* at 662–68. Dr. Semple cites a study conducted by Martin Gramatikov, "A Framework for Measuring the Costs of Paths to Justice" (2009) 2 J Jurisprudence 111, to highlight that stress, damage to relationships, and negative emotions are but some of the psychological costs of litigation.

---

## CHAPTER 5. THE CONSULTATION PROCESS

A primary goal of the Financing Litigation Project is to better understand what financing options litigants use today, and to explore ideas on the availability of those options in the context of the access-to-justice challenge. BCLI held consultation events to draw upon the knowledge and expertise of the participants, and respond to overarching questions about how individuals finance litigation.<sup>191</sup> Consultation participants discussed their own experiences with litigants, focusing on the client's ability (or inability) to pay for legal services. Participants then examined common methods used by litigants to finance their case, including discussion of other options to explore. They were also asked to comment on professional ethics issues, advantages, disadvantages, and optimal uses for each financing option, and consider ideas on structural, systemic, or legal changes to improve access to financing for litigants going forward.

### Consultation sessions

Over the course of six months, BCLI consulted with people from a range of backgrounds to collect information on the needs of lawyers, clients, and the legal system. BCLI held five consultation sessions and two one-on-one interviews.

The first consultation was held with members of the Federation of Law Reform Agencies of Canada in October 2015. Participants provided feedback on BCLI's proposed topics of discussion, and shared their knowledge of the alternatives being studied. They also provided initial thoughts on the direction of the project. The group shared their law-reform expertise and gave advice on managing the scope of the project and the methods by which the discussion topics may be explored.

The next four consultation sessions took place in Vancouver in winter and spring 2016. In addition to reviewing a list of financing options, consultation participants also discussed private-practice and pro-bono services, alternative dispute resolution, law society policies, and public-interest and advocacy services. Finally, BCLI held conference call interviews with participations who could not attend the in-person consultation sessions.

### The research process

Consultation participants discussed the broad range of financing options available to litigants today. They identified some of the challenges faced in utilizing each option to

---

<sup>191</sup> For a complete list of consultation participants, see Appendix A.

pay for litigation, both within British Columbia, and across Canada. They commented on significant practical, ethical, and professional responsibility issues, and the impact on lawyers using different models in practice.

Below are key themes that arose during consultation sessions as areas for research and discussion in the study paper. The themes were then used to identify the structural, systemic, or legal changes to consider to enhance the use of each financing option in British Columbia.

### *Traditional models*

Early in the consultation process, participants commented on the benefits and drawbacks of traditional retainers and contingency fee agreements in accessing legal services. With retainers, consultation participants noted that while lawyers and firms may be more comfortable with this model, given its longstanding use in the legal profession, the relatively high up-front and ongoing costs to maintain litigation can present a challenge for clients with limited means of paying the amount required to either start, or continue, their case. Retainers can also be limited in their use to cases where the lawyer can more easily estimate the amount of work and time required, or in how much a client can expect to recover in a settlement.

Consultation participants commented that contingency fee agreements are often used for cases where there may be less certainty in the work required, but where a high settlement award is expected. Contingency fee agreements are often limited to only those cases where the claims are high enough to justify the risk taken on by the lawyer or firm. Areas of law where contingency fee agreements are less practical include family and human rights matters where there may be a lower (or absence of) financial award. A challenge arises to find a suitable financing option that facilitates access to legal services for this broader scope of legal matters.

### *Lack of eligibility for legal services among various groups*

#### LEGAL AID

One primary issue raised in consultations are the service gaps inherent in the legal aid model used in British Columbia. Consultation participants highlighted the impact on allocation of funding for legal aid, and eligibility requirements for legal aid services. Service gaps arise for reasons that relate to both finances and the type of legal issues at hand. Financially speaking, consultation participants commented that low-income individuals seeking representation must meet specific financial eligibility criteria. If a person's income lies above the guideline amounts, or if their assets are not liquid (such as assets tied in a matrimonial home), then they will be ineligible for publicly funded services. They may also have insufficient funds to afford private legal

representation.<sup>192</sup> Most individuals may earn too much to qualify for legal aid, but at the same time not enough to hire a private lawyer.

### ADVOCACY ORGANIZATIONS

Advocacy organizations often attempt to fill service gaps for matters not covered by legal aid. Individuals facing criminal and other legal issues that fall outside the scope of legal aid coverage,<sup>193</sup> despite their ability to meet the financial eligibility criteria, are left to look to other advocacy organizations for assistance. This is especially the case for individuals facing additional challenges due to age, disability, or other vulnerabilities.

Consultation participants commented that local advocacy organizations face limitations in their ability to fill service gaps. Metropolitan areas can more easily provide a range of services for low-income and vulnerable persons with legal issues. However, for those living in rural or isolated parts of British Columbia, services can be limited or non-existent. Consultation participants shared anecdotal experiences of litigants facing geographical isolation —such as criminal defendants unable to attend hearings due to prohibitive travel costs, and accepting guilty pleas rather than dealing with the consequences of failing to appear at trial.<sup>194</sup> Similar concerns exist for civil defendants who face default judgments if unable to pay the cost to travel to hearings.

---

<sup>192</sup> This complication often arises in family law where family assets cannot always be used to pay for legal costs, as they may diminish the family property meant to be divided. Instead, litigants must pay with their own income, credit, loans from family and friends, etc. It can be very difficult to obtain resources to pay for legal services when family assets are frozen. However, BC's *Family Law Act*, [SBC 2011] c 25, does make it easier to get advances on family property ("advanced interim distribution") to pay for alternative dispute resolution procedures where the parties consent to the funds being distributed from the family assets. For a discussion of the LSS BC income and asset test, see Chapter 4—Access to Justice and Financing Litigation, above.

<sup>193</sup> LSS BC, *supra* note 129 at 27. The Society offers legal aid representation services for criminal charges if, after a person is convicted, he or she would: 1) go to jail; 2) receive a conditional sentence severely limiting their liberty; 3) lose their method of earning income; or 4) face an immigration proceeding that could lead to deportation from Canada.

<sup>194</sup> For discussion on the impact of legal aid funding on guilty pleas, see the Law Society of BC, "A Vision for Publicly Funded Legal Aid in British Columbia" (3 March 2017), at 10, online: <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/LegalAidVision2017.pdf>>. The Law Society of BC notes "The increased cost to the system by rising self-representation before the courts, accused persons making inappropriate guilty pleas, delay – to name but a few factors – is apparent, if not yet measured in dollars."

### *Stigma of low-cost legal services*

Consultation participants also raised an issue faced by lawyers over the stigma of offering low-cost legal services. Unfortunately, new lawyers, or lawyers in rural communities, may feel pressure to charge high fees for services out of concern that charging lower rates gives potential (or existing) clients the impression of inferior services. This sentiment was also found to influence the decision to maintain or raise fees in the 2009 *Canadian Lawyer* annual fees survey.<sup>195</sup> When asked to explain, a survey participant noted, “some clients want and can pay for Cadillac service and get it, others want and can pay for something else,” suggesting that higher fees mean better service.<sup>196</sup>

Potential clients may perceive lawyers who charge lower rates as inexperienced or less skilled than lawyers who charge higher fees. Looking back at the 2008 average hourly rates from Chapter 4, when a 5-year called lawyer charges the same hourly rate as a 10-year call,<sup>197</sup> a client can no longer simply rely on years of experience to justify paying the higher rate. Consultation participants agreed that clients often have a misconception that lawyers are *supposed* to be expensive. The assumption for those who charge less is that something may be wrong with the service they are paying for.

Lawyers who offer lower fees may find themselves having to stick to traditional practices of hourly rates and up-front retainers to remain in business. Consultation participants commented that training for new lawyers, or for lawyers starting their own practices, is often focused on learning how to find and retain attractive clients—those with high income levels and who need ongoing or recurring legal services.

One way to address this is to supplement legal services billed at standard hourly rates with a selection of flat-fee alternatives. However, a hybrid approach that offers two different service delivery models can impose administrative burdens. It may also

### THE GOING RATE

Jeremy is a new lawyer in rural BC. As one of two lawyers in a small town, he runs a small solo practice focusing on simple legal documents and conveyancing. To promote his practice and attract new clients, he set lower fees than his competitor. However, he quickly found that local residents were reluctant to pay for his services, and began to lose clients. When he asked a departing client why they were changing lawyers, the client responded that they were worried about the lower rates, feeling this meant the services offered were not as thorough or professional as the town's other lawyer with higher fees. Fearing the loss of more clients, Jeremy raised his fees to match those of his competitor so that his clients could feel like they were “getting what they paid for.”

---

<sup>195</sup> Harris, *supra* note 175.

<sup>196</sup> *Ibid.*

<sup>197</sup> Kirsten McMahon, “The Going Rate”, *Canadian Lawyer* (July 2008).

require a steady stream of cases that generate higher fee amounts to balance the financial loss taken with lower-cost alternatives, which could create difficulties for new lawyers with few clients.

### *Pro bono requirements*

A third issue raised in consultation sessions is the pressure on lawyers to provide pro bono services alongside their regular practice. Consultation participants remarked that other professionals are typically not asked to volunteer time for unpaid work. There is increasing societal and institutional pressure for lawyers to offer pro bono services in response to the increasing costs of litigation. For lawyers offering pro bono services, a challenge can arise over how to find the right balance.

### *Scope creep*

Another concern related to pro bono services, but also found with other financing models, is the risk of scope creep. For pro bono cases, consultation participants commented that lawyers fear clients will demand more services than originally agreed or committed to, that courts will pressure (or order) the lawyer to continue offering pro bono service in some situations, or opposing counsel will try to exhaust a pro bono lawyer into accepting a low settlement by dragging out a case. Consultation participants commented that supplementing a traditional practice with pro bono work is difficult, expensive, and time consuming and, as such, offering more pro bono services may not be the primary solution to increase access to justice. Rather, the underlying causes of unaffordability require further examination to explore what options can be used to mitigate this challenge.

Scope creep can arise when parties are required to participate in processes designed to divert litigants from litigation, but those processes fail and the litigation goes ahead. Scope creep in this context refers to the additional time and cost involved in attempting to avoid the litigation.

Consultation participants did not identify a clear way to address this ongoing issue. This remains an underlying systemic problem inherent in the way legal disputes are handled in an adversarial system. While some relief exists in the methods of paying

### FOR THE GREATER GOOD

Lucy is a junior associate at a large firm. She has a full workload, and works hard to meet her billable hours target each year. To brand themselves as a leader in access to justice, her firm recently encouraged all associates to complete at least 50 hours of unbilled pro bono work each year in addition to their ordinary billable hours. Lucy is upset, as she must now work even longer hours to meet this new target, otherwise she will slip in her professional performance and not advance her career. She also worries that her lack of enthusiasm for pro bono work, and her overworked schedule, will reflect on the services she ultimately provides.

for the rising costs of disbursements (such as third-party litigation funding), it may be that a fundamental change is needed to address the issue.

### *Ethics and professional responsibility*

Consultation participants frequently noted that anxieties about being in breach of professional conduct rules could limit the willingness of lawyers to offer alternative financing options to their clients. This study paper explores a range of alternative ways to pay for litigation, with attention paid to issues of ethics and professional responsibility for each.

## **Summary**

The above consultation themes highlight some overarching concerns about how people pay for litigation today. The themes and broader issues raised by consultation participants are meant to assist the reader in contemplating the advantages and disadvantages of each financing option in the chapters that follow. The discussion then moves on to highlight the ethical or professional responsibility issues raised both in the consultations and from the research. The chapter then focuses on opportunities for systemic, structural, or legal changes that could be made to improve both access to, and use of, each financing model.

## CHAPTER 6. UNBUNDLED LEGAL SERVICES

Research shows the cost of litigation is an important factor that impacts whether people can, or are willing to, pay a lawyer to assist on a case from start to finish.<sup>198</sup> Studies on self-representation reveal that the choice to self-represent is often determined by need, rather than desire. However, those who are financially prohibited from securing full-scope representation from a lawyer, but who otherwise do not qualify for legal aid, may have some financial capacity to pay for limited legal services.

This chapter explores an alternative model for providing legal services. The model unpacks the traditional full-scope retainer, to meet clients halfway between full representation and self-representation.<sup>199</sup> This chapter examines how this model enables people to better manage the costs of litigation, and its ability to improve access to justice. The chapter also reviews the development and use of this model in other Canadian and international jurisdictions to enhance its application in British Columbia.

### Breaking with tradition

The traditional agreement between lawyer and client has been for a single product, essentially a package of services from fact-finding to resolution, performed by the lawyer alone. This has been the accepted standard of practice for as long as lawyers have provided legal services. Under the *Code of Professional Conduct for British Columbia (BC Code)*, the lawyer not only recommends options for how to proceed on a file, but also implements a chosen course of action.<sup>200</sup> While the traditional full-scope retainer still works for clients unfettered by finances to hire a lawyer under this type of fee arrangement, it does not serve those who cannot afford the full-service package. A demand is emerging for legal services where a client can effectively choose, based on his or her financial means, the scope of legal services the lawyer will perform.

---

<sup>198</sup> Macfarlane Report, *supra* note 14 at 8; see also 2013 Cromwell Report, *supra* note 98; see also CBA, “Reaching”, *supra* note 12.

<sup>199</sup> Samreen Beg & Lorne Sossin, “Should Legal Services Be Unbundled?” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 197 at 202.

<sup>200</sup> *BC Code*, *supra* note 29 at r 3.1–1(c). The skills a lawyer is expected to use in implementing a necessary course of action include legal research, analysis, application of the law to the relevant facts, writing and drafting, negotiation, alternative dispute resolution, advocacy, and problem solving.

---



## What are unbundled legal services?

Just over 20 years ago, an attempt was made to introduce an alternative method of financing litigation that unpacked legal services from the full-scope model. Forrest S. Mosten,<sup>201</sup> known as the “father” of unbundling, defines this alternative model as a departure from the traditional full-scope retainer to enable clients to “be in charge of selecting from lawyers’ services only a portion of the full package and contracting with the lawyer accordingly.”<sup>202</sup> By “unbundling” legal services, the client is put in the driver’s seat to decide the scope of legal services the lawyer will perform. For Mosten, this was an opportunity to respond to the increasing demand from clients for more control over their legal matter because both the complexity and high cost of legal services posed challenges for people of low and moderate incomes.<sup>203</sup>

It is important to note that unbundled legal services do not do away with either the traditional form of an up-front retainer payment, or the use of hourly rates.<sup>204</sup> On the contrary, lawyers can and do still rely on hourly rate billing. However, by unbundling legal services into discrete, limited tasks chosen by the client, the lawyer can better estimate the time and overall cost for each service. Under a full-scope retainer, the number of tasks required, and correspondingly the amount of time necessary to complete them, can vary depending on a multitude of factors. This can make it difficult, if not impossible, to provide a reliable estimate of the cost to the client. While a client may still pay a lump sum retainer to cover the cost of an unbundled task, that amount may be significantly lower than a retainer for a full-scope service agreement because the tasks are smaller in scope and the time required to complete them is easier to predict.

Mosten initially grouped unbundled legal services into three main categories, namely: 1) legal counselor for self-represented litigants; 2) consulting lawyer for clients participating in mediation; and 3) preventive lawyering.<sup>205</sup> Mosten later created two overarching service models: vertical and horizontal unbundling.

---

<sup>201</sup> Forrest S Mosten is a Certified Family Law Specialist and Mediator based out of Los Angeles, California, and an adjunct professor at the University of California School of Law.

<sup>202</sup> Forrest S Mosten, “Unbundling of Legal Services and the Family Lawyer” (1994) 28 Fam LQ 421 at 423 [Mosten, “Unbundling”]. In his article, Mosten also refers to unbundled legal services as “discrete task representation” or “alternatives to full-time representation.”

<sup>203</sup> *Ibid* at 425.

<sup>204</sup> *Ibid*.

<sup>205</sup> *Ibid* at 427. Mosten describes “preventive lawyering” as lawyers taking a proactive role “to prevent the causes of conflict in the first instance so that disputes can be avoided and dispute resolution may never be necessary. Similarly, preventive lawyering is based on the premise that the lawyer’s role is to help a client recognize symptoms of legal trouble and utilize lawyers to maximize life’s opportunities not “win” a case or merely resolve a problem that has ripened into conflict” (*Ibid*

Vertical unbundling breaks down a lawyer's role into a list of limited legal services. The client then selects the services he or she needs the lawyer to complete.<sup>206</sup>

Examples of vertical unbundling are:

- Advice—either upon initial consultation or throughout a case;
- Research—client determines the scope, including whether the task is done solely by the lawyer, client, or jointly;
- Drafting—either drafting all letters or court pleadings, or review of client-prepared documents;
- Negotiation—lawyers provide negotiation techniques and training to clients;
- Court Appearances—includes appearance at hearings or mediation sessions.<sup>207</sup>

Horizontal unbundling occurs when the client pays a lawyer to manage a single issue on a file, but the client then represents him or herself, or hires another lawyer or representative to manage the other issues, including court processes or appearances at hearings.<sup>208</sup>

## Development of unbundled legal services in British Columbia

### *The Law Society of British Columbia*

Discussion about unbundled legal services in British Columbia began in 2004, when the Law Society of British Columbia (Law Society of BC) stated it would appoint a task force to study this alternative service delivery model.<sup>209</sup> The Law Society of BC acknowledged that access to even a limited scope of legal services was better than no access at all.<sup>210</sup> Unbundled legal services presented an opportunity for the legal

---

at 440). Mosten highlights the importance of ongoing relationships between lawyer and client beyond the resolution of a case, so that clients can make better decisions and plan to avoid legal conflicts. See also Louis M Brown, "Providing Preventive Legal Care in Prepaid Legal Service Plans: The Periodical Checkup" (1984) 2 Preventive L Rep 102.

<sup>206</sup> Forrest S Mosten, "Unbundled Legal Services Today and Predictions for the Future" (Fall 2012) 35 Family Advocate 14 at 14 [Mosten, "Today"].

<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Law Society of British Columbia, "Would unbundling legal services benefit the public?" (Bencher's Bulletin, No 5, November-December, 2004) at 6, online: <[https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB\\_04-12.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB_04-12.pdf)>.

<sup>210</sup> *Ibid.*

profession to open its doors to more clients by offering limited scope services that were less cost-prohibitive.<sup>211</sup>

In March 2005, the Law Society of BC launched the Unbundling of Legal Services Task Force (the “Task Force”). Consultations with lawyers, judges, government, and community organizations were held to identify what, when and how unbundled legal services were being offered, and some of the risks or challenges in practice.<sup>212</sup> The goal of the Task Force was to assess how unbundled legal services might enhance access to justice, and to develop recommendations for changes to existing regulations and procedures to facilitate wider application of this alternative service delivery model.

The Task Force published a report in 2008 that described the practice of unbundling as a lawyer providing “limited scope services to a client, rather than providing full scope legal services.”<sup>213</sup> The report noted that not only were unbundled legal services already being offered by lawyers, they also took many different forms.<sup>214</sup> The report also highlighted that the complexity of the litigation process, and the legal services associated with it, made it difficult for lawyers to integrate unbundling into practice.<sup>215</sup> The Task Force found that the rules governing lawyers in British Columbia at the time were not drafted with limited scope representation in mind. The extent of representation by a lawyer on a litigation matter was difficult to predict, so the general understanding was that any representation essentially meant full representation.<sup>216</sup>

The Task Force found that where unbundled legal services seemed to work best was for solicitor-type work, where time and scope expected to complete a task was easier to predict. The report went on to make several recommendations for reform to Law Society of BC policies and rules, court rules and practice procedures, public legal education materials, and communication practices between lawyers and their clients. The intent of the Task Force recommendations was to create more certainty and

---

<sup>211</sup> *Ibid.*

<sup>212</sup> Law Society of British Columbia, “Unbundling legal services: alternatives to full service representation” (Bencher’s Bulletin, No 5, November-December, 2006) at 18, online: <[https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/bb\\_06-12.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/bb_06-12.pdf)>.

<sup>213</sup> Doug Munro, “Report of the Unbundling Legal Services Task Force—Limited Retainers: Professionalism and Practice” (prepared on behalf of the Unbundling of Legal Services Task Force, The Law Society of British Columbia, 4 April 2008) at 3, online: <[https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LimitedRetainers\\_2008.pdf](https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/LimitedRetainers_2008.pdf)>.

<sup>214</sup> *Ibid.*

<sup>215</sup> *Ibid* at 12.

<sup>216</sup> *Ibid* at 12–13.

guidance on the application of unbundled legal services in different practice areas, and improve access to justice.

### *BC Code*

In September 2013, following adoption of the 2008 Task Force recommendations, the *BC Code* was amended to better define unbundled legal services, and provide guidance to lawyers on how to effectively implement this new model into practice.<sup>217</sup> Although the term “unbundling” does not appear in the *BC Code*, the concept is captured under “limited scope retainer” as “legal services for part, but not all, of a client’s legal matter by agreement with the client.”<sup>218</sup> The rule on limited scope retainers under the *BC Code* reads as follows:

#### **Limited Scope Retainers**

**Rule 3.2-1.1** - Before undertaking a limited scope retainer the lawyer must advise the client about the nature, extent and scope of the services that the lawyer can provide and must confirm in writing to the client as soon as practicable what services will be provided.<sup>219</sup>

A lawyer must perform two important tasks before agreeing to provide an unbundled legal service: 1) describe to the client the scope and depth of services to be performed;

---

<sup>217</sup> The Law Society of British Columbia, “Highlights of amendments to the BC Code”, online: <<https://www.lawsociety.bc.ca/support-and-resources-for-lawyers/act-rules-and-code/code-of-professional-conduct-for-british-columbia/highlights-of-amendments-to-the-bc-code/>>.

<sup>218</sup> *BC Code*, *supra* note 29, r 1.1–1, “limited scope retainer.” Note “limited scope retainer” is not to be confused with “short-term summary legal services” which cover advice or representation to a client under the auspices of a pro-bono or not-for-profit legal services provider with the expectation by the lawyer and the client that the lawyer will not provide continuing legal services in the matter. See rules 3.4–11.1 to 3.4–11.4 and commentary. The definition of limited scope retainer in BC is modeled after the Federation of Law Societies of Canada, “Model Code of Professional Conduct” (10 March 2016), online: <[flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf](http://flsc.ca/wp-content/uploads/2014/12/Model-Code-as-amended-march-2016-FINAL.pdf)> [Model Code]. As of June 2017, other jurisdictions using this definition are: New Brunswick, Newfoundland, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan, and Yukon. Alberta omits “by agreement with the client,” while Ontario uses “by agreement between client and lawyer” instead. Ontario also adds section 3.2–1A, “[b]efore providing legal services under a limited scope retainer, a lawyer shall advise the client honestly and candidly about the nature, extent and scope of the services that the lawyer can provide, and, where appropriate, whether the services can be provided within the financial means of the client.” There is no definition in Manitoba.

<sup>219</sup> All lawyers, whether engaged in full or limited scope retainers, are expected to comply with all rules and commentary under the *BC Code*. The provisions listed here are intended to highlight those 2013 amendments that relate specifically to limited scope retainers. For a detailed description of the amendments, see also the Law Society of British Columbia, “Practice Watch—Limited Scope Retainer Rules Added to *BC Code*” (Bencher’s Bulletin, No 4, Winter 2013) at 15-16, online: <[https://www.lawsociety.bc.ca/docs/bulletin/BB\\_2013-04-winter.pdf](https://www.lawsociety.bc.ca/docs/bulletin/BB_2013-04-winter.pdf)>.

and 2) document any agreement reached with the client in writing. This provision directs the lawyer and client to establish a clear understanding on both the limits and risks associated with entering an agreement for unbundled services.<sup>220</sup> The commentary to the rule provides guidance on how to manage limited scope retainers that involve court or tribunal appearances,<sup>221</sup> communications with opposing counsel,<sup>222</sup> and situations wherein the rule does not apply.<sup>223</sup> The lawyer must also ensure he or she does not act in a manner that would otherwise suggest to the client they are receiving full-scope legal services.<sup>224</sup>

Other provisions relating to limited scope retainers include a lawyer's obligation to assess their competence, skill, and knowledge prior to engaging in an agreement for this type of service. A limited scope retainer does not on its own absolve the lawyer from the duty to provide competent representation.<sup>225</sup> The *BC Code* rules 7.2-6 and -6.1 also provide direction on managing communication with opposing counsel, including when opposing counsel may, without consent of the lawyer, communicate directly with a client on a matter.

### *BC Family Unbundled Legal Services Project*

Participants in Dr. Macfarlane's 2013 study described fruitless searches for lawyers willing to offer unbundled legal services.<sup>226</sup> This was despite the Task Force report five years earlier confirming that lawyers were offering limited-scope retainers to clients across the province. Questions arose over how it was possible that, despite an obvious demand for unbundled legal services from the self-represented community, people reported finding a lawyer who offered this option were seemingly still "about as rare as a shooting star on a cloudy night."<sup>227</sup>

---

<sup>220</sup> *BC Code*, *supra* note 29, r 3.2-1.1, commentary [1]. See also obligations listed under r 3.2-1, 3.2-9, 7.2-6 and 7.2-6.1 and commentary.

<sup>221</sup> *Ibid*, commentary [3].

<sup>222</sup> *Ibid*, commentary [4].

<sup>223</sup> *Ibid*, commentary [5] where r 3.2-1.1 will not apply to summary legal advice (telephone hotline or duty counsel) nor to initial consultations which may lead to a client retaining the lawyer for services. For example, further information on the rules as they apply to "short-term summary legal services", see *BC Code*, *supra* note 29.

<sup>224</sup> *Ibid*, commentary [2]. See also rules 3.4-11.1 to 3.4-11.4 for conflict guidelines for lawyers providing "limited legal services," essentially summary advice or representation to a client as a not-for-profit organization, with the understanding that no continued representation will be provided.

<sup>225</sup> *BC Code*, *supra* note 29, r 3.1-2 and commentary [7.1].

<sup>226</sup> Macfarlane Report, *supra* note 14 at 92.

<sup>227</sup> National Self-Represented Litigants Project, "It's the Culture, Stupid! Why Lawyers Aren't Offering Unbundled Legal Services" (8 November 2014), *NSRLP* (blog), online: <representingyourselfcanada.com/its-the-culture-stupid-why-lawyers-arent-offering-unbundled-legal-services/>.

Mediate BC<sup>228</sup> reached out directly to the legal community to better understand the culture around unbundled legal services. In 2016, with funding from the Law Foundation of British Columbia, and supported by the BC Family Justice Innovation Lab,<sup>229</sup> the BC Family Unbundled Legal Services Project was launched to increase awareness, and encourage more lawyers to offer unbundled legal services to clients.<sup>230</sup> Mediate BC sought feedback from lawyers and clients on unbundled family legal services.<sup>231</sup> The surveys form part of the Mediate BC Project to serve as an evaluative tool to improve resources on unbundled legal services.<sup>232</sup>

In August 2016, the Mediate BC Project published the survey results that revealed, of the 45 survey participants, 76% offered unbundled legal services in their practice.<sup>233</sup> While the most common method of billing cited was still the hourly rate, other options included discounted hourly rates or flat fees. The types of services involve:

---

<sup>228</sup> Mediate BC is a not-for-profit organization that supports and assists individuals to use mediation and other dispute resolution processes in British Columbia. Mediate BC provides mediation services, education and training, as well as maintains a roster of mediators. For more information, visit Mediate BC website: <[www.mediatebc.com/](http://www.mediatebc.com/)>.

<sup>229</sup> BC Family Justice Innovation Lab was established in 2014 as a forum to support initiatives to assist families and children experiencing transition, such as during separation and divorce, have better access to the justice system. For more information, visit its website <[www.bcfamilyinnovationlab.ca/about/](http://www.bcfamilyinnovationlab.ca/about/)>. See also Ontario's Family Justice & Mental Health Social Lab: <<https://winklerinstitute.ca/projects/family-justice-mental-health-social-lab/>> and Alberta's Reforming the Family Justice System Initiative, online: <[www.rfjs.ca/theinitiative](http://www.rfjs.ca/theinitiative)>.

<sup>230</sup> The objective of the Mediate BC Family Unbundled Legal Services Project (Mediate BC Project) is to "encourage more family lawyers to offer unbundled legal services to support families using mediation. It will find out more about how some lawyers are using unbundling successfully (and build on those experiences), surface the concerns and barriers that are inhibiting BC family lawyers from offering these services and develop strategies to alleviate those concerns." For more information, visit Mediate BC website: <[www.mediatebc.com/unbundle](http://www.mediatebc.com/unbundle)>.

<sup>231</sup> Mediate BC, "Family Unbundled Legal Services Project", online: <[www.mediatebc.com/unbundle#UnbundleEval](http://www.mediatebc.com/unbundle#UnbundleEval)>. See Mediate BC, "Family Unbundled Legal Services Project: Final Report", (7 July 2017), online: <[www.mediatebc.com/PDFs/Unbundling-Project-Final-Report.aspx](http://www.mediatebc.com/PDFs/Unbundling-Project-Final-Report.aspx)> for more details on the project. See also Mediate BC, "Family Unbundled Legal Services Project: Evaluation Final Report", (Alison Brewin Consulting: 30 June 2017), online: <[www.mediatebc.com/PDFs/MBC-Unbundled-Legal-Services-Project-Evaluation-Re.aspx](http://www.mediatebc.com/PDFs/MBC-Unbundled-Legal-Services-Project-Evaluation-Re.aspx)> [Brewin Report].

<sup>232</sup> *Ibid.*

<sup>233</sup> Mediate BC, "Family Unbundled Legal Services Project: Summary of Lawyer Survey Responses", (August 2016) at 1, online: <[https://www.scribd.com/document/324944160/Family-Unbundled-Legal-Services-Project-Summary-of-Lawyer-Survey-Responses#from\\_embed](https://www.scribd.com/document/324944160/Family-Unbundled-Legal-Services-Project-Summary-of-Lawyer-Survey-Responses#from_embed)> [Mediate Lawyer Responses]. For information on responses received from mediators, see also Mediate BC, "Family Unbundled Legal Services Project Summary of Mediator Survey Responses", (September 2016), online: <[https://www.scribd.com/document/324944161/Family-Unbundled-Legal-Services-Project-Summary-of-Mediator-Survey-Responses#from\\_embed](https://www.scribd.com/document/324944161/Family-Unbundled-Legal-Services-Project-Summary-of-Mediator-Survey-Responses#from_embed)>.

- Preparing documents and forms for the court;
- Advice for self-represented litigants in court (procedural and substantive);
- Coaching;
- Independent legal advice on agreements;
- One-time representation in court or at a discovery.<sup>234</sup>

Survey participants also reported using unbundled legal services for mediation, with the top three being legal advice, identifying dispute resolution options, and providing independent legal advice on agreements entered between the parties.<sup>235</sup>

The results of the Mediate BC Project survey seemed to reiterate the Task Force's findings that unbundling was not an unfamiliar practice among lawyers. However, only 26% of survey participants to the Mediate BC Project advertised unbundled legal services.<sup>236</sup> Responses from family law clients showed that 73% reported not knowing about unbundling specifically, despite recognizing a need for, and perhaps having used, this type of service.<sup>237</sup> Not only were clients unfamiliar with unbundled legal services, almost half who had experience using unbundled services said it was hard to find a lawyer willing to offer them.

The results from the Mediate BC Project and Dr. Macfarlane's research showed that not only was there uncertainty over what unbundled legal services are, regular access to this alternative service delivery model was still limited. Mediate BC concluded that the practice of unbundling needed to come out from behind closed doors and into the mainstream. This would encourage more lawyers to offer unbundled legal services, and make it easier for clients to find lawyers who offered them.

With assistance from the Law Society of BC, Mediate BC created the Family Law Unbundling Toolkit, available on the Courthouse Libraries BC website.<sup>238</sup> The Toolkit provides information, best practice tips, resources, training materials, and templates to help lawyers integrate unbundled legal services into every day practice.<sup>239</sup> Mediate BC also established the BC Family Unbundling Roster where lawyers can create a profile setting out the unbundled legal services they offer.<sup>240</sup> Phase Two of the

---

<sup>234</sup> Mediate Lawyer Responses, *ibid.*

<sup>235</sup> *Ibid* at 2.

<sup>236</sup> *Ibid.*

<sup>237</sup> Mediate BC, "September 2016", *supra* note 233 at 2.

<sup>238</sup> Courthouse Libraries BC, "Family Law Unbundling Toolkit", online: <[www.courthouselibrary.ca/practice/familylaw/unbundling/](http://www.courthouselibrary.ca/practice/familylaw/unbundling/)>.

<sup>239</sup> For more information on the Toolkit, and a list of the resource materials available, see *ibid.*

<sup>240</sup> Mediate BC, "BC Family Unbundling Roster", online: <[www.mediatebc.com/unbundle](http://www.mediatebc.com/unbundle)>.

---

Mediate BC Project aims to apply information from Phase One to address the concerns raised by survey participants, and continue to promote unbundling in this area.

### *Access to Justice BC*

While Mediate BC was conducting its study, and in response to the 2013 Cromwell Report,<sup>241</sup> justices and members of the legal community came together to form Access to Justice BC.<sup>242</sup> Led by Chief Justice Robert Bauman, a series of meetings held in 2015 generated a concrete plan of action for how to address the access-to-justice problem. Access to Justice BC's first commitment targeted improving access to the civil and family justice system for British Columbians.<sup>243</sup> In July 2016, Bauman C.J. announced an initiative to put the plan into action to support and promote unbundled legal services so "litigants could get legal help while exercising greater control over the cost by choosing particular points in the litigation where they need help rather than having to retain a lawyer for the entire duration of the litigation."<sup>244</sup> Bauman C.J. also worked with Dr. Macfarlane and justices from Ontario and Nova Scotia to speak directly to lawyers to address concerns that may be prohibiting them from offering this alternative financing option.<sup>245</sup>

### *Canadian Bar Association—BC Branch*

In June 2017, the CBA BC also established the Unbundled Legal Services Section to provide professional development, education, networking, peer support, information exchange, and discussion for the legal community to enhance the use of unbundled legal services in BC.<sup>246</sup>

---

<sup>241</sup> 2013 Cromwell Report, *supra* note 98.

<sup>242</sup> In July 2014, 14 representatives from different justice system agencies within BC attended a colloquium in Toronto on access to justice. Access to Justice BC was then formed as British Columbia's initiative to improve access to justice for both family and civil legal matters. Members of the forum include leaders from all major justice system organizations, representatives from public sectors, self-represented litigants, businesses, Indigenous people, people with disabilities, and immigrants. For more information on Access to Justice BC, visit its website: <<https://accesstojusticebc.ca/>>. For information on the July 2014 colloquium, see The Honourable Chief Justice Robert J Bauman & David Crossin, QC, "British Columbia Access to Justice Committee Q&A", (Benchers' Bulletin, No 4, 2015) 7 at 7, online: <[https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB\\_2015-04-Winter.pdf#page=7](https://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB_2015-04-Winter.pdf#page=7)>.

<sup>243</sup> Access to Justice BC, "Framework for Action", online: <<https://accesstojusticebc.ca/approach/framework-for-action/>>.

<sup>244</sup> Chief Justice Robert Bauman, Access to Justice BC, "Invitation to Lawyers to Try Something New (Or Not So New)", (15 November 2016), online: <<https://accesstojusticebc.ca/2016/11/invitation-to-lawyers-to-try-something-new-or-not-so-new/>>.

<sup>245</sup> National Self-Represented Litigants Project, "Justices Speaking Up for Unbundling: The Video", (8 November 2016), online: <[representingyourselfcanada.com/justices-speak-up-for-unbundling-the-video/](http://representingyourselfcanada.com/justices-speak-up-for-unbundling-the-video/)>.

<sup>246</sup> For more information, visit the CBA BC website: <<https://www.cbabc.org/Home>>.



### *Law firms*

A recent search of the BC Family Unbundling Roster shows there are 99 lawyers and paralegals registered as offering unbundled family law services.<sup>247</sup> Presently, there is no provincial list of lawyers or firms offering unbundled legal services in other practice areas. Information from Dr. Macfarlane's National Database shows 94 lawyers in British Columbia registered as offering this financing option.<sup>248</sup> Practice areas include wills and estates, employment, immigration, and general civil litigation matters.

Participation in both the BC Family Unbundling Roster and the National Database is voluntary, so the actual number of lawyers in British Columbia offering unbundled legal services may be higher. Litigants in search of unbundled legal services may still need to rely on internet searches, contact with previous counsel, or word of mouth.

### *Community legal organizations*

Consultation participants shared their efforts at offering unbundled legal services. For example, the Community Legal Assistance Society (CLAS)<sup>249</sup> offers legal assistance to low- and modest-income people in the areas of housing, income security, workers' rights, mental health, human rights, and access to government benefits. The unbundled legal services offered depends on the program area that a litigant falls under. Table 8 outlines CLAS's three main program areas, the unbundled legal services available in each, and statistics on the number of individuals who received those services in 2016–2017.<sup>250</sup>

---

<sup>247</sup> BC Family Unbundling Roster, "Home", online: <<https://sites.google.com/view/bfur>>. Search current as of August 23, 2017.

<sup>248</sup> See National Self-Represented Litigants Project, "National Database of Professionals Assisting SRLs", online: <<https://representingyourselfcanada.com/national-directory/>> [NSRL, "Database"]. Search current as of August 23, 2017. To generate the search results, the province and type of professional filters used were "lawyers" and "British Columbia."

<sup>249</sup> The Community Legal Assistance Society [CLAS] was established in 1971 as a not-for-profit legal aid society. For more information, visit its website: <[www.clasbc.net/](http://www.clasbc.net/)>.

<sup>250</sup> Community Legal Assistance Society, "Annual Report 2016/2017", (2017), online: <[https://d3n8a8pro7vhmx.cloudfront.net/clas-test/pages/582/attachments/original/1506451396/16-17\\_CLAS\\_Annual\\_ReportFinal.pdf?1506451396](https://d3n8a8pro7vhmx.cloudfront.net/clas-test/pages/582/attachments/original/1506451396/16-17_CLAS_Annual_ReportFinal.pdf?1506451396)>.

---

**Table 8—2016–2017 CLAS Statistics on Unbundled Legal Services**

Community Law Program	BC Human Rights Clinic	Mental Health Law Program
<ul style="list-style-type: none"> <li>• Prepare for court appearances, summary advice, public legal education to community groups, advocate training, and full representation for clients in superior court or in complex administrative tribunal proceedings</li> <li>• 693 people received information, advice or representation</li> <li>• 17 systemic public interest cases taken forward</li> </ul>	<ul style="list-style-type: none"> <li>• Legal education on <i>BC Human Rights Code</i>, legal information, complaint assessments, assistance filling out complaint forms, advice, advocacy and representation</li> <li>• 4,168 received information through telephone inquiry line</li> <li>• 1,311 received training or education</li> <li>• 380 received representation or advocacy services</li> </ul>	<ul style="list-style-type: none"> <li>• Legal representation for hearings under mental disorder provisions of <i>Criminal Code</i> and under <i>Mental Health Act</i>, legal information and counselling on the <i>Mental Health Act</i></li> <li>• 316 received representation for mental disorder provisions of the <i>Criminal Code</i></li> <li>• 656 files had representation for hearings under the <i>Mental Health Act</i></li> <li>• 417 detained people under the <i>Mental Health Act</i> received advice</li> </ul>

Another legal clinic is Rise Women’s Legal Centre (RISE) in Vancouver.<sup>251</sup> In May 2016, RISE began offering unbundled legal services “in family law, child protection law, and wills drafting.”<sup>252</sup> Service options range from summary advice at an initial consultation to coaching clients for court proceedings.

### Unbundled legal services across Canada

As early as 2000, the Canadian Bar Association (CBA) examined the issue of unbundled legal services in Canada. The CBA found, at the time, that unbundling was a relatively new way of providing legal services yet to gain popularity among the legal profession.<sup>253</sup> As self-represented litigants became the common face in the courts across Canada, a need arose to facilitate more access to legal advice and representation.

<sup>251</sup> Rise Women’s Legal Centre operates as a law student clinical program. Senior University of British Columbia Peter A. Allard School of Law students offer services to women in Vancouver in family law, child protection law, and wills drafting. Services include summary advice, unbundled legal services, court preparation, and representation. For more information, visit its website: <<https://womenslegalcentre.ca>>.

<sup>252</sup> RISE, “Our Services”, online: <<https://womenslegalcentre.ca/services/>>.

<sup>253</sup> Canadian Bar Association, “The Future of the Legal Profession: The Challenge of Change”, (Ottawa: Canadian Bar Association, 2000) at 74 [CBA, “Future”].

In 2006, and before changes to the Codes of Professional Conduct were made, the Canadian Judicial Council prepared a Statement of Principles that promoted a right of access and equal justice to everyone engaging with the justice system.<sup>254</sup> According to the Canadian Judicial Council, access to justice necessitates some access to representation.<sup>255</sup> The Canadian Judicial Council found that lawyers ought to develop and offer “other programs for short-term, partial and unbundled legal advice and assistance as may be deemed useful for the self-represented persons in the courts of which they are officers.”<sup>256</sup>

More and more studies emerged across Canada on how to use unbundled legal services in practice. In a 2012 Working Paper,<sup>257</sup> the CBA noted that unbundled legal services were an attractive financing option to improve access to justice. The CBA suggested further development of rules and guidelines to help lawyers incorporate unbundled legal services into practice.

### *Canadian Bar Association—Code of Professional Conduct*

The CBA Code of Professional Conduct provides long-standing guidance for lawyers on managing limited scope legal services:

#### **Chapter III – Advising Clients**

Commentary 3. The lawyer should clearly indicate the facts, circumstances and assumptions upon which the lawyer’s opinion is based, particularly where the circumstances do not justify an exhaustive investigation with resultant expense to the client. However, unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than merely make comments with many qualifications.<sup>258</sup>

---

<sup>254</sup> Canadian Judicial Council, “Statement of Principles on Self-Represented Litigants and Accused Persons”, (Ottawa: September 2006), online: <[https://www.cjc-ccm.gc.ca/cmslib/general/news\\_pub\\_other\\_PrinciplesStatement\\_2006\\_en.pdf](https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_other_PrinciplesStatement_2006_en.pdf)> [Canadian Judicial Council].

<sup>255</sup> *Ibid* at 1.

<sup>256</sup> *Ibid* at 9.

<sup>257</sup> Canadian Bar Association, “Unbundling Legal Services—Working Paper 2”, (Prepared by the CBA Access to Justice Committee during the Equal Justice Initiative, February 2013) at 1, online: <[www.cba.org/CBAMediaLibrary/cba\\_na/images/Equal%20Justice%20-%20Microsite/PDFs/WorkingPaper2Unbundling.pdf](http://www.cba.org/CBAMediaLibrary/cba_na/images/Equal%20Justice%20-%20Microsite/PDFs/WorkingPaper2Unbundling.pdf)> [CBA, “Working Paper 2”].

<sup>258</sup> Canadian Bar Association, “Code of Professional Conduct”, (2009) at 11, online: <[www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-\(1\)/Codes-of-Professional-Conduct](http://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct)>. The Federation of Law Societies of Canada developed a Model Code of Professional Conduct to act as a guide for the rules and policies for the law societies within Canada, which ultimately replaced the CBA Code of Professional Conduct in January 2010.

### *Federation of Law Societies of Canada*

The Federation of Law Societies of Canada was established in 1972 to facilitate exchange of information and initiatives among law societies across Canada. Since its inception, the Federation of Law Societies of Canada has worked to address public interest issues through establishment of the Canadian Legal Information Institute (CanLII) in 2001, the National Mobility Agreement to facilitate movement by lawyers among Canada's common law jurisdictions, and approval of two new law schools, Thompson Rivers University in British Columbia and Lakehead University in Ontario in 2011.<sup>259</sup>

Most notably, in 2009 the Federation of Law Societies of Canada adopted the Model Code of Professional Conduct (Model Code)<sup>260</sup> to harmonize the ethical standards that apply to the legal profession throughout Canada. In developing a uniform code to guide provincial law societies, the goal was to foster greater public confidence that clients could expect the same high standards of practice regardless of the jurisdiction they are in. With one national code, lawyers who move to other jurisdictions throughout their career could also rely on the Model Code as a compass to navigate the practice territory of their new legal community.

For guidance on unbundled legal services, the Model Code uses the following definition:

**"limited scope retainer"** means the provision of legal services for part, but not all, of a client's legal matter by agreement with the client.<sup>261</sup>

When providing unbundled legal services, lawyers must examine each case carefully to decide whether they can provide unbundled services at the standards required of the profession. The Model Code sets the expectation that lawyers ensure they are fully capable of providing unbundled legal services, and that clients understand the limitations of those services.<sup>262</sup>

The Federation of Law Societies of Canada also implemented "short-term summary legal services" for advice or representation to clients under the auspices of either a

---

<sup>259</sup> For a complete list of initiatives, see Federation of Law Societies of Canada, "Yesterday and Today", online: <[flsc.ca/about-us/yesterday-and-today/](http://flsc.ca/about-us/yesterday-and-today/)>.

<sup>260</sup> Model Code, *supra* note 218.

<sup>261</sup> *Ibid* at 10. This definition has been adopted by the Law Societies of British Columbia, Saskatchewan, New Brunswick, Newfoundland/Labrador, Nova Scotia, Northwest Territories, Nunavut, Prince Edward Island, and Yukon. For discussion on Alberta, Manitoba and Ontario, see below.

<sup>262</sup> *Ibid* at 17, commentary [7A].

pro-bono or not-for-profit legal services provider, but with the understanding that the lawyer will not provide continuing legal services in the matter.<sup>263</sup> Short-term summary legal services preclude the lawyer from having to conduct the standard conflict of interest check. If a conflict arises, and unless the client expressly consents to the contrary, the lawyer must cease the short-term summary legal services arrangement. The lawyer must also ensure the client understands the limited scope of services, and determine whether any additional services beyond the short-term summary arrangement are required or advisable. If additional services are recommended, the lawyer is required to encourage the client to seek further assistance.<sup>264</sup>

Except for Alberta, Manitoba, and Ontario, which have their own modifications to the definition of unbundled legal services (or limited scope retainers) described below, the provincial and territorial law societies across Canada have adopted the Model Code definition described above. Table 9 summarizes some of the different provisions from each jurisdiction.

---

<sup>263</sup> *Ibid* at 42, r 3.4–2A–D.

<sup>264</sup> For more information on short-term summary legal services, see *ibid* at 43, r 3.4–2D and commentary, as well as Model Code, *supra* note 218 at r 3.1–2 and commentary [7B].

---

**Table 9—Provincial Law Society Provisions on Unbundled Legal Services**

Jurisdiction	Differences with the Federation of Law Societies of Canada <i>Code</i>
Alberta	<ul style="list-style-type: none"> <li>• Detailed requirements on what lawyers must discuss with a client prior to entering into the limited scope agreement. For instance, lawyers must “advise the client about related legal issues that fall outside of the retainer”.<sup>265</sup></li> <li>• Modifications to the retainer to be confirmed in writing.<sup>266</sup></li> <li>• Requires lawyers to inform the court when the lawyer is acting under a limited scope retainer or for a particular purpose.<sup>267</sup></li> </ul>
New Brunswick	<ul style="list-style-type: none"> <li>• Requires lawyers to be careful not to mislead a tribunal or the parties about the scope of the retainer in discovery appearances.<sup>268</sup></li> </ul>
Northwest Territories	<ul style="list-style-type: none"> <li>• Lawyers must inform the tribunal in cases where the lawyer is acting under a limited scope retainer or for a particular purpose.<sup>269</sup></li> <li>• Lawyers must consider how to manage communications with opposing lawyers acting on a limited scope retainer to avoid unethical communications with their client.<sup>270</sup></li> </ul>
Nunavut	<ul style="list-style-type: none"> <li>• Lawyers must inform the tribunal in cases where the lawyer is acting under a limited scope retainer or for a particular purpose.<sup>271</sup></li> <li>• Requires lawyers to consider how communications with opposing lawyers acting on a limited scope retainer should be managed to avoid unethical communications with their client.<sup>272</sup></li> </ul>
Ontario	<ul style="list-style-type: none"> <li>• Adds the words “honestly” and “candidly” to describe the advice lawyers should give their clients on the scope of the retainer.<sup>273</sup></li> <li>• Requires lawyers to provide a copy of the written retainer to the client.<sup>274</sup></li> <li>• Additional requirements from the commentary include requiring lawyers to confirm with the client in writing when the retainer is complete, to consider doing the same for the tribunal, to carefully consider and assess whether limited scope services can be provided to a client with diminished decision making capacity.<sup>275</sup></li> </ul>

The next section provides a sample of what other Canadian jurisdictions are doing to support unbundled legal services.

<sup>265</sup> The Law Society of Alberta, *Code of Conduct*, 2017, r 2.02(1.1), commentary 1 [Alberta Code].

<sup>266</sup> *Ibid* at commentary 2.

<sup>267</sup> *Ibid* at commentary 4.

<sup>268</sup> The Law Society of New Brunswick, *Code of Professional Conduct*, 2017, r 3.2–1A, commentary 3.

<sup>269</sup> The Law Society of the Northwest Territories, *Code of Professional Conduct*, 2017, r 4(2), commentary 6.

<sup>270</sup> *Ibid* at commentary 7.

<sup>271</sup> The Law Society of the Nunavut, *Model Code of Professional Conduct*, r 3.2–1A, commentary 7.

<sup>272</sup> *Ibid* at commentary 6.

<sup>273</sup> The Law Society of Upper Canada, *Rules of Professional Conduct*, 2000, r 3.2–1A [Ontario Code].

<sup>274</sup> *Ibid* at r 3.2–1A.1.

<sup>275</sup> *Ibid* at commentary 5.1–5.4.

### *Alberta*

In defining limited-scope retainers, Alberta omits the language of “by agreement with the client,” as found in the Model Code and other provincial law society codes. Commentary to the Alberta Code of Conduct Rule 3.2–2 provides that a lawyer should discuss the scope of services with the client, and confirm the client’s understanding and acknowledgement of the risks and limitations of the retainer in writing.<sup>276</sup> Although the lawyer is also expected to advise a client of related issues falling outside the scope of the limited retainer, unlike the Model Code, there is no requirement to encourage a client to seek further assistance for those matters. Rather, a lawyer must only ensure the client understands the consequences of the limited scope retainer as not including responsibility for those outside legal issues.<sup>277</sup>

In March 2017, in partnership with the Canadian Research Institute for Law and the Family, a team of lawyers introduced the Alberta Limited Legal Services Project.<sup>278</sup> The goal of the project is to help lawyers offer limited-scope legal services, and to enhance the affordability of, and access to, legal services for people who otherwise cannot afford to hire a lawyer under a full-scope retainer.

The project will recruit Alberta lawyers who agree to offer legal services under a limited scope retainer, using either an hourly rate or flat fee model. Participant lawyers are provided training, and access to resources and tools to help them develop and continue to offer, limited scope legal services. Both lawyers and clients will be asked questions to report on:

- The level of satisfaction with limited legal services for the lawyer and client;
- The level of assistance limited legal services provides; and
- The impact of limited legal services on a client’s ability to resolve their legal issues.<sup>279</sup>

The project also maintains a list of participating lawyers, currently totaling 53.<sup>280</sup> Lawyers also provide information on areas of practice and services. The list of lawyers is available to other public legal agencies, including the database maintained by Dr. Macfarlane for the National Self-Represented Litigants Project.<sup>281</sup>

---

<sup>276</sup> Alberta Code, *supra* note 265.

<sup>277</sup> *Ibid.*

<sup>278</sup> The Alberta Limited Legal Services Project, online: <albertalegalservices.com/>. See also John-Paul Boyd, “Update on the Alberta Limited Legal Services Project”, *Slaw* (25 April 2017), online: <www.slaw.ca/2017/04/25/update-on-the-alberta-limited-legal-services-project/>.

<sup>279</sup> *Ibid.* Boyd notes in his article that survey information will be used to issue a report “evaluating the project and its implications for access to justice in Alberta.”

<sup>280</sup> The Alberta Limited Legal Services Project, “Participating Lawyers”, online: <albertalegalservices.com/participating\_lawyers.htm>. Search current as of August 23, 2017.

<sup>281</sup> National Self-Represented Litigants, “Database”, *supra* note 248.

### *Manitoba*

The Manitoba Code of Professional Conduct does not have a general definition of limited scope retainer, but adopts the same language from the Model Code.<sup>282</sup>

### *Newfoundland and Labrador*

The Chief Justice of the Supreme Court of Newfoundland and Labrador Honourable J. Derek Green publicly supported unbundling initiatives in the Sir Francis Forbes Annual Law Lecture at the Memorial University of Newfoundland: “the Bar must address how to deliver services more effectively and cheaply, employing creative ways (like unbundling legal services) to charge only for what is really needed by the client considering the nature of the case at hand.”<sup>283</sup>

The Public Legal Information Association of Newfoundland offers referrals to lawyers who provide 30-minute consultations for a flat rate of \$40. The organization also offers free self-help kits for family law matters. The organization’s funders include the Department of Justice and the Law Foundation of Newfoundland and Labrador.<sup>284</sup>

### *Nunavut*

Although more related to self-representation than unbundling, in 2015 the Law Society of Nunavut launched a video called *Understanding the Nunavut Court Process*. The video details the criminal court process for complainants and other witnesses.<sup>285</sup>

### *Ontario*

The Law Society of Upper Canada defines unbundling as:

the provision of limited legal services or limited legal representation. It is the concept of taking a legal matter apart into discrete tasks and having a lawyer or paralegal provide limited legal services or limited legal representation, that is, legal services for part, but

---

<sup>282</sup> The Law Society of Manitoba, *Code of Professional Conduct*, 2011 at 19, online: <[www.lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct/documents/english-version/code\\_of\\_conduct.pdf](http://www.lawsociety.mb.ca/lawyer-regulation/code-of-professional-conduct/documents/english-version/code_of_conduct.pdf)>.

<sup>283</sup> Honourable J Derek Green, “Re-Imagining Justice: Finding Local Solutions to the Access Crisis” (Sir Francis Forbes Annual Law Lecture delivered at the Memorial University of Newfoundland, 2016) online: <[www.court.nl.ca/supreme/appeal/pdf/Forbes\\_Lecture.pdf](http://www.court.nl.ca/supreme/appeal/pdf/Forbes_Lecture.pdf)> at 38.

<sup>284</sup> Public Legal Information Association of NL, “Annual Report 2016-2017”, (June 2017), online: <<http://publiclegalinfo.com/wp-content/uploads/2012/02/AR-2016-17.pdf>> at 3 notes the Lawyer Referral Service and Legal Information line assisted 2,805 people in 2016-2017.

<sup>285</sup> Law Society of Nunavut, “Updates & Announcements”, (30 November 2015), online: <[www.gov.nu.ca/sites/default/files/2015-11\\_psa\\_jus\\_nls\\_nunavut\\_court\\_process\\_video-eng.pdf](http://www.gov.nu.ca/sites/default/files/2015-11_psa_jus_nls_nunavut_court_process_video-eng.pdf)>.

---



not all, of a client's legal matter by agreement with the client. Otherwise, the client is self-represented.<sup>286</sup>

The Law Society of Upper Canada added language to its Rules of Professional Conduct that go beyond the Model Code. While the definition of limited scope retainer remains the same, the Law Society of Upper Canada expands the lawyer's duties to include assessment of whether the services offered fall within the financial means of the client.<sup>287</sup> This places the onus on the lawyer to ensure a client engages in a discussion, prior to entering a limited scope arrangement, about his or her ability to pay for the services. The duty compels lawyers to consider not only the possibility of scope creep, but also whether entering into a limited scope retainer is in the client's best financial interests.

In December 2016, former Ontario Chief Justice Annemarie Bonkalo released her report, "Family Legal Services Review."<sup>288</sup> The report encourages more education for lawyers about unbundled legal services. The report also recommends that lawyers, "continue to offer unbundled services and should take steps to ensure the public is made aware of their availability."<sup>289</sup>

### *Prince Edward Island*

The Community Legal Information Association of Prince Edward Island is a not-for-profit organization that delivers several unbundled legal services. Their services include "Uncontested Divorce Kits" priced at \$50, a "Power of Attorney Kit" priced at \$20, and a lawyer referral service where lawyers offer consultations up to 45 minutes

---

<sup>286</sup> Jim Varro, "'Unbundling' of Legal Services and Limited Legal Representation: Background Information and Proposed Amendments to Professional Conduct Rules Prepared for the Law Society of Upper Canada", (2011) at 2, online: <<http://www.lsuc.on.ca/unbundling/>> [Varro]. The proposed amendments were approved in September 2011 at the annual Convocation of the Law Society of Upper Canada.

<sup>287</sup> The Law Society of Upper Canada, *Rules of Professional Conduct*, 2016, r 3.2-1A and 3.2-1A.1. The Federation of Law Societies of Canada amendments were adopted by the Law Society of Upper Canada by Convocation on October 24, 2013, effective October 1, 2014. For a complete history of amendments, see the Law Society of Upper Canada, "Amendment History", online: <[www.lsuc.on.ca/with.aspx?id=672](http://www.lsuc.on.ca/with.aspx?id=672)>.

<sup>288</sup> Annemarie Bonkalo, "Family Legal Services Review", (31 December 2016), online: <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family\\_legal\\_services\\_review/](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/family_legal_services_review/)>.

<sup>289</sup> *Ibid* at 65. For recent commentary in BC in support of Chief Justice Bonkalo's recommendations, see Timothy E. McGee, QC (CEO), The Law Society of British Columbia, "Unbundling Legal Services Provides Benefits to Both Lawyers and Clients", *Bencher's Bulletin*, (Summer 2017), online: <[www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB\\_2017-02-Summer.pdf](http://www.lawsociety.bc.ca/Website/media/Shared/docs/bulletin/BB_2017-02-Summer.pdf)>. In his article, at 4, McGee, QC states, "Justice Justice Bonkalo's report was discussed in our conversations on strategic planning at the May Bencher retreat, and her clearly articulated position on unbundling supports the direction of our unbundling initiatives in BC."

for \$25.<sup>290</sup> Funders include the Department of Justice, the Law Society of PEI, and the Law Foundation of PEI.<sup>291</sup>

### *Québec*

In “Hourly Billing: A Time for Rethink”, the Barreau du Québec identifies unbundled legal services to keep the costs of legal services down. The practice is encouraged for cases where “the client has a certain understanding of the law and is in a position to recognize the legal services he or she is not able to perform.”<sup>292</sup> The Barreau du Québec also has a Limited Scope Representation committee. The committee published a guide for lawyers to offer unbundled services. The guide includes best practice tips and retainer templates.<sup>293</sup>

## **The development of unbundled legal services internationally**

### *United States*

The development of unbundled legal services in Canada has been attributed to the steady growth of the self-represented litigant in the courts.<sup>294</sup> A similar trend occurred much earlier in the United States, with the American Bar Association (ABA) revealing that, since 1989, US courts experienced a steady increase in self-represented litigants across the country.<sup>295</sup> The United States soon became one of the leading jurisdictions for the promotion and widespread use of unbundled legal services and limited scope representation.

---

<sup>290</sup> Community Legal Information Association of Prince Edward Island, “Home”, (12 April 2017), online: <[www.cliapei.ca/content/page/front\\_home](http://www.cliapei.ca/content/page/front_home)>.

<sup>291</sup> Community Legal Information Association of Prince Edward Island, “Annual Report 2016-2017”, (2017), online: <[www.cliapei.ca/sitefiles/File/publications/AGM/AGM17.pdf](http://www.cliapei.ca/sitefiles/File/publications/AGM/AGM17.pdf)>.

<sup>292</sup> Barreau du Québec, “Hourly Billing: Time for a Rethink”, (March 2016) at 28, online: <<https://www.barreau.qc.ca/pdf/publications/2016-summary-report-hourly-billing.pdf>>.

<sup>293</sup> Barreau du Québec, “A Lawyer’s Guide to Limited Scope Representation”, (2011), online: <[www.barreaudemontreal.qc.ca/loads/Guides/GuideMandatPorteeLimitee\\_an.pdf](http://www.barreaudemontreal.qc.ca/loads/Guides/GuideMandatPorteeLimitee_an.pdf)>.

<sup>294</sup> Varro, *supra* 286 at 3 (listed under “Background Report”). See also John M Greacan, “Self-Represented Litigants and Court Legal Services Responses to Their Needs: What We Know”, (Prepared for the Center for Families, Children & the Courts, California Administrative Office of the Courts, 2003), online: <[www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf](http://www.courts.ca.gov/partners/documents/SRLwhatweknow.pdf)>. Greacan reviewed internal court statistics gathered by the State of California on self-representation over four counties. This data showed areas such as small claims (91.1%), infractions (83.1%), and unlawful detainer (landlord/tenant) (81.1%) as having the highest percentage of proceedings (not percentage of cases) with at least one party self-represented (*Ibid* at 6–7).

<sup>295</sup> American Bar Association, Standing Committee on the Delivery of Legal Services, “An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants: A White Paper”, (August 2014) at 1, online: <[www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/ls\\_del\\_unbundling\\_white\\_paper\\_2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_white_paper_2014.authcheckdam.pdf)>.

As Mosten identified over 20 years ago, lawyers were already providing limited scope services in family law long before they became known as “unbundled legal services.”<sup>296</sup> Eventually, the practice was formalized in 2002 under Rule 1.2(c) of the ABA Model Rules of Professional Conduct.<sup>297</sup>

With new policy and guidelines in place from the ABA, states across the United States developed laws to outline the delivery of unbundled legal services.<sup>298</sup> In 2003, the ABA’s Litigation Section also created a guide to help lawyers become more comfortable offering unbundled legal services in practice.<sup>299</sup> The ABA defined unbundling as an à la carte option for legal services where, rather than a lawyer handling the entirety of a case from beginning to end, a client and lawyer can agree that he or she will only work on certain parts or tasks of a file.<sup>300</sup>

Advocates for unbundled legal services like Mosten and M. Sue Talia, California family law attorney and private family law judge,<sup>301</sup> encouraged the American legal community to make unbundled legal services a part of mainstream legal practice. The ABA also created the online Unbundling Resource Centre, a one-stop shop for lawyers and the public to review articles, books, cases, reports, and rules on unbundled legal

---

<sup>296</sup> Mosten, “Unbundling”, *supra* note 202 at 422.

<sup>297</sup> American Bar Association, *Model Rule of Professional Conduct*, 2016, online: <[www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_table\\_of\\_contents.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html)>. Rule 1.2(c) provides that a lawyer can provide unbundled or limited scope representation “if the limitation is reasonable under the circumstances and the client gives informed consent.” For a list of jurisdictions that have adopted the rule, visit the ABA Standing Committee on the Delivery of Legal Services’ Unbundling Resource Centre, online: <[http://www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html)>.

<sup>298</sup> For a state-by-state listing of unbundling laws, see National Center for State Courts website: <[www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx?cat=unbundling%20rules](http://www.ncsc.org/topics/access-and-fairness/self-representation/state-links.aspx?cat=unbundling%20rules)>.

<sup>299</sup> American Bar Association, “Handbook on Limited Scope Assistance: A Report of the Modest Means Task Force”, (Chicago: ABA, 2003), online: <[www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_handbook\\_on\\_limited\\_scope\\_legal\\_assistance.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf)> [ABA Handbook].

<sup>300</sup> American Bar Association, Standing Committee on the Delivery of Legal Services, “Unbundling Fact Sheet”, (2011), online: <[www.americanbar.org/content/dam/aba/administrative/delivery\\_legal\\_services/ls\\_del\\_unbundling\\_fact\\_sheet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/ls_del_unbundling_fact_sheet.authcheckdam.pdf)>

<sup>301</sup> M Sue Talia is a certified family law specialist and private family law judge in Danville, California. She has developed numerous resources on unbundled legal services, most notably her 3-hour webinar entitled “Expanding Your Practice Using Limited Scope Representation 2015”, (New York: Practising Law Institute, 2015), online:

<[www.pli.edu/Content/Seminar/Expanding\\_Your\\_Practice\\_Using\\_Limited\\_Scope/\\_/N-4kZ1z12610?ID=235982](http://www.pli.edu/Content/Seminar/Expanding_Your_Practice_Using_Limited_Scope/_/N-4kZ1z12610?ID=235982)>. See also Stephanie L Kimbro, “Limited Scope Legal Services: Unbundling and the Self-Help Client”, (Law Practice Management Section, ABA, 2012).

---

services, organized by state, on an interactive map.<sup>302</sup> Additional guidance is also provided in the Unbundling Legal Services toolkit, developed by the Institute for the Advancement of the American Legal System.<sup>303</sup>

### *United Kingdom*

In 2012, the Law Society of England and Wales identified that “initiatives for unbundling, hub-and-spoke working, providing brief bits of paid-for time, etc. need to be developed and publicised.”<sup>304</sup> In 2013, the Law Society of England and Wales published practice notes to educate solicitors on the use of unbundled legal services in family law practice. Services could range from “providing clients with self-help packs, providing discrete advice about a specific step or steps in a case or issue on one or more occasion, checking or drafting documents” and initial advice on law and procedure.<sup>305</sup> The practice notes were expanded in April 2016 to include general civil litigation matters as well.<sup>306</sup>

### Optimal uses

The consultation participant feedback and research highlight the following ways unbundled legal services may be used:

- **Organization and case planning:** A lawyer may provide clients with a range of early-stage services, such as writing a demand letter, or an assessment on an initial settlement offer. Clients can pay for a case-planning session where the lawyer explains the relevant law applicable to the facts, outlines options for resolution, and prepares a checklist of necessary steps and processes.

---

<sup>302</sup> For more information, see American Bar Association, “Unbundling Resource Center”, online: <[www.americanbar.org/groups/delivery\\_legal\\_services/resources.html](http://www.americanbar.org/groups/delivery_legal_services/resources.html)>.

<sup>303</sup> For more information, see Institute for the Advancement of the American Legal System, “Unbundling Legal Services”, online: <[iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services](http://iaals.du.edu/honoring-families/projects/ensuring-access-family-justice-system/unbundling-legal-services)>. For information on statistics regarding plaintiff and defendant representation in the United States, see Hannaford-Agor, “Civil Justice Initiative: The Landscape of Civil Litigation in State Courts”, (National Center for State Courts, 2015), online: <[ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/133](http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/133)>. The report states that the 2015 numbers are significantly higher than those published in a 1992 study.

<sup>304</sup> Lucy Scott-Moncrieff, “Speech—President and Secretaries Conference 2012” (Speech delivered at The Law Society of England and Wales, 2012), online: <<https://www.lawsociety.org.uk/news/speeches/presidents-and-secretaries-conference/>>.

<sup>305</sup> The Law Society of England and Wales, “Law Society guidance helps clients access legal advice in wake of government cuts to civil legal aid” (20 March 2015), online: <[www.lawsociety.org.uk/News/Press-releases/Guidance-access-legal-advice/](http://www.lawsociety.org.uk/News/Press-releases/Guidance-access-legal-advice/)>.

<sup>306</sup> The Law Society of England and Wales, “Unbundling civil legal services” (4 April 2016), online: <[www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/](http://www.lawsociety.org.uk/support-services/advice/practice-notes/unbundling-civil-legal-services/)>.

---

- **Self-representation coaching:** A client can pay a lawyer a fee for training or coaching on court procedures. Self-represented litigants often need assistance on how to effectively transmit the facts of their case within the confines of court rules. A lawyer can explain how to make proper statements, submit evidence, and examine witnesses.
- **Document drafting:** Lawyers may be retained on a limited basis to draft court documents, contracts, or settlement agreements.
- **Mediation and settlement negotiations:** A self-represented litigant unfamiliar with mediation procedures or settlement negotiations can hire a lawyer to help navigate these processes and reach an effective outcome.

### Advantages

#### *Financial predictability*

An unbundled legal services model enables both lawyers and their clients to better gauge the time required to complete tasks. Clients can select from a menu of services for tasks that more easily fit within their budget. Lawyers also benefit from a “pay-as-you-go” model because they can likely expect bills to be paid in full and on time.<sup>307</sup> While hourly rates are still used to bill for unbundled legal services, other options include flat or fixed fee arrangements.<sup>308</sup> These alternative fee arrangements could help clients develop a litigation budget to plan how much they can expect to pay at each stage of the process.<sup>309</sup>

---

<sup>307</sup> Mosten, “Today”, *supra* note 206 at 15. An attempt was made to track specific pricing information on unbundled legal services, however the cost largely depends on the amounts set by lawyers or firms. One resource identified in the research is from the Chicago Bar Association, Justice Entrepreneurs Project, “Pricing Toolkit for attorneys seeking to serve low- and moderate-income clients”, (21 March 2016), online: <[chicagobarfoundation.org/pdf/jep/pricing-toolkit.pdf](http://chicagobarfoundation.org/pdf/jep/pricing-toolkit.pdf)>. While it does not provide specific price information, it offers guidelines for lawyers on how to price out unbundled legal services. See also Alaska Bar Association, “Unbundled Legal Services—Attorney List”, (updated to January 2017), online: <[https://www.alaskabar.org/servlet/content/Unbundled\\_Legal\\_Services\\_atty\\_list.html](https://www.alaskabar.org/servlet/content/Unbundled_Legal_Services_atty_list.html)>. This resource lists names of attorneys offering unbundled legal services, and corresponding prices charged for those services.

<sup>308</sup> CBA, “Working Paper 2”, *supra* note 257 at 2.

<sup>309</sup> Stephanie L Kimbro, “Law a la Carte: The Case for Unbundling Legal Services” 29:5 GP Solo (September/October 2012), online: <[www.americanbar.org/publications/gp\\_solo/2012/september\\_october/law\\_a\\_la\\_carte\\_case\\_unbundling\\_legal\\_services.html](http://www.americanbar.org/publications/gp_solo/2012/september_october/law_a_la_carte_case_unbundling_legal_services.html)> [Kimbro, “Law”].

---

### *Clear client expectations*

Unbundled legal services can help set client expectations. With full-scope retainers, clients may be unsure of how many tasks are required from start to resolution of their case. With an unbundled model, the lawyer divides the tasks required at each stage of the case. Clients can select the services that best suit their needs, capabilities, and budget. For example, a client who completes some of the tasks themselves can hire a lawyer to fill remaining gaps in a file. For the lawyer, the scope of services is well defined.

### *Simplicity of tasks*

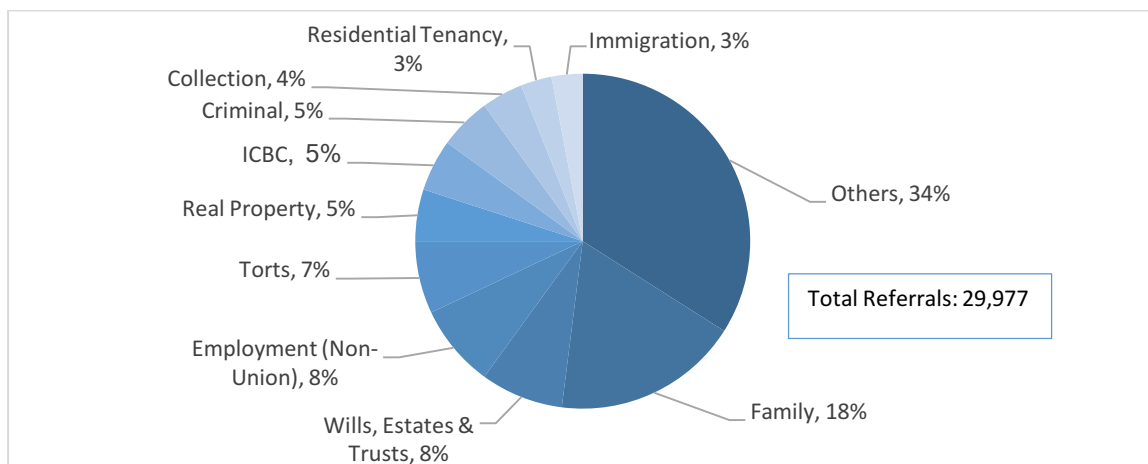
Consultation participants noted unbundled legal services are frequently used by advocacy groups. This is especially the case for groups that assist on sections of larger, more complex cases. Through unbundling, advocacy groups can offer provincial court appearances in one instance, but provide only drafting assistance for cases going to Supreme Court. By only taking on small, manageable parts of a case, lawyers quickly and efficiently deliver a variety of services.

Because a lawyer providing unbundled services does not need to manage a file for the entire life of the case, they can provide efficient services in a limited amount of time. Even time-restricted services, such as the 30-minute referrals under the CBA Lawyer Referral Service, can help clients untangle legal issues in a multitude of areas of law through helpful information and advice. Figure 3 illustrates the 2015–2016 distribution of referrals, by area of law.<sup>310</sup>

---

<sup>310</sup> Canadian Bar Association, “Annual Report 2015/2016”, online: <[www.cbabc.org/CBAMediaLibrary/cba\\_bc/pdf/Publications/AnnualReports/CBABC\\_Annual\\_Report\\_2015\\_2016.pdf](http://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/Publications/AnnualReports/CBABC_Annual_Report_2015_2016.pdf)>. The Lawyer Referral Services connects potential clients with members of the Lawyer Referral Services panel for a 30-minute, in-person consultation, at a rate of \$25 plus tax. After the consultation, the client and lawyer decide whether the lawyer will be retained for additional services at the lawyer’s regular rates.

---



**Figure 3—CBA Lawyer Referral Services by Area of Law (2015–2016)**

The Lawyer Referral Service is an opportunity for individuals to obtain preliminary legal advice for a wide range of legal issues. The number of referrals above suggest it's a popular tool for individuals to connect in-person with a lawyer for a fee that represents a fraction of what a client might pay for an initial consultation. The CBA also notes the service is useful to “find a lawyer who meets specific requirements such as speaking a certain language or accepts Legal Aid.”<sup>311</sup>

### *Flexible for the client and the lawyer*

Unbundled legal services create flexibility for both client and lawyer to meet a range of circumstances, such as:

- **(CLIENT) Limited finances:** A client may have limited finances to pay for representation on their case. With a fixed budget, and a lawyer who offers unbundled legal services, a client can look at the range of options to pick services that meet their needs and budget.
- **(CLIENT) Autonomy:** Consultation participants explained that, in many cases, clients are willing and able to work on parts of their case themselves. Clients may appreciate being able to work on their case since they are intimate with the facts. A lawyer can assist a client by dealing with some of the more difficult or complex tasks, while the client handles the rest.<sup>312</sup>

---

<sup>311</sup> Canadian Bar Association, “Lawyer Referral Service”, online: <<https://www.cbabc.org/For-the-Public/Lawyer-Referral-Service>>.

<sup>312</sup> The notion of empowerment with unbundled legal services is also discussed in CBA, “Working Paper 2”, *supra* note 257 at 2. The CBA Working Paper 2 cites Samreen Beg & Lorne Sossin, “Should

- **(CLIENT) Changing lawyers:** If a client is not satisfied with the services provided by a lawyer, the client can easily change lawyers once the tasks under the unbundled legal services agreement are complete.
- **(LAWYER) Work-life balance:** A lawyer winding down a practice for retirement, or who wishes to work part-time, can take on simple, discrete cases on an unbundled basis. This helps to alleviate the administrative challenges of managing full-scope retainers.
- **(LAWYER) Marketing:** As Dr. Macfarlane reports, many self-represented litigants said it was difficult to find lawyers willing to provide unbundled legal services.<sup>313</sup> Research on self-representation demonstrates both a need and market for unbundled legal services. This alternative form of financing litigation is a potential new source of revenue for lawyers and firms to service clients.<sup>314</sup>
- **(LAWYER) Collaboration:** Consultation participants providing advocacy services described how unbundled legal services foster collaboration with other lawyers on complex cases. The organization handles one part of the file and, in the event a case escalates, it is passed forward to a more specialized lawyer who continues to work on the file using the same type of unbundled legal services agreement.

### *Efficiency of judicial and extrajudicial processes*

Another advantage of providing unbundled legal services, and one that should not be understated, is the benefit that even limited representation has on the efficiency of judicial and extrajudicial<sup>315</sup> processes. The judiciary has long recognized that, without some level of legal advice or representation, self-represented litigants often do not

---

Legal Services Be Unbundled?", in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) 197 at 202. Unbundling "plays to the strengths of individual clients; the lawyers can offer help that complements the knowledge and skill sets of each person."

<sup>313</sup> Macfarlane Report, *supra* note 14 at 43 & 46.

<sup>314</sup> Stephanie L Kimbro, "Unbundled Legal Services—Risk Management Handouts of Lawyers Mutual", (Liability Insurance Company of North Carolina, June 2010) at 1, online:

<[files.lawyersmutualinc.com/risk-management-resources/risk-management-handouts/avoiding-malpractice-traps/Unbundling\\_Legal\\_Services.pdf](http://files.lawyersmutualinc.com/risk-management-resources/risk-management-handouts/avoiding-malpractice-traps/Unbundling_Legal_Services.pdf)>. See also the Canadian Bar Association—Alberta Branch, "The Limited Scope Retainer", at 6, online: <[www.cba-alberta.org/getattachment/Publications-Resources/Resources/Handbooks-Reports/Limited-Scope-Retainers/limited-scope-retainers\\_FINAL.pdf](http://www.cba-alberta.org/getattachment/Publications-Resources/Resources/Handbooks-Reports/Limited-Scope-Retainers/limited-scope-retainers_FINAL.pdf)>, wherein Robert Harvie, QC, suggests limited scope retainers present an opportunity for a new market of legal services over and above a lawyer or law firm's existing clientele.

<sup>315</sup> *Black's Law Dictionary*, 10<sup>th</sup> ed, *sub verbo*, "extrajudicial" means outside court; outside the functioning of the court system. Also termed *out-of-court*.

---



know how, or what is needed, to effectively bring forward their matter to court.<sup>316</sup> Not only can this lack of awareness slow down a court procedure, it can also pose challenges for judges to manage the duty to remain impartial whilst balancing the need to ensure an unrepresented party is afforded meaningful access to the courts.<sup>317</sup>

In *Moore v Apollo Health & Beauty Care*, the Ontario Court of Appeal held that a Small Claims Court judge failed to make sufficient inquiries of a self-represented litigant about whether she had abandoned her claim for unpaid wages, resulting in an unfair trial.<sup>318</sup> Lawyers comment that the decision illustrates the unique challenges judges face when dealing with self-represented litigants in their courtrooms.<sup>319</sup> Dr. Macfarlane stated that a judge should be able to refer a self-represented litigant to resources if assisting them would become a significant disruption to court proceedings.<sup>320</sup>

In April 2017, the National Self-Represented Litigants Project (NSLRP), Pro Bono Ontario, and Access Pro Bono intervened in the Supreme Court of Canada case, *Pintea v Johns*.<sup>321</sup> The self-represented appellant, Valenti Pintea, was injured in a car accident in 2005. Mr. Pintea filed a Statement of Claim in 2007 with the Alberta Court of Queen's Bench. Mr. Pintea's claim was subsequently struck in January 2015, and Mr. Pintea was held in contempt of court for his failure to appear at several scheduled court proceedings for his matter. Mr. Pintea was also ordered to pay costs in the matter, in an amount of approximately \$83,000.<sup>322</sup>

At the Alberta Court of Appeal, Mr. Pintea argued that the court and opposing counsel failed to send the case management meeting notices to his new address. At issue on

---

<sup>316</sup> Rt. Honourable Beverly McLachlin, C.J., *supra* note 158.

<sup>317</sup> *Ibid.*

<sup>318</sup> *Moore v Apollo Health & Beauty Care*, 2017 ONCA 383 at para 49.

<sup>319</sup> Alex Robinson, "Court Weighs in on Self-Represented Litigants", *Law Times News* (23 May 2017), online: <[www.lawtimesnews.com/author/alex-robinson/court-weighs-in-on-self-represented-litigants-13387/](http://www.lawtimesnews.com/author/alex-robinson/court-weighs-in-on-self-represented-litigants-13387/)>.

<sup>320</sup> *Ibid.*

<sup>321</sup> *Pintea v Johns*, 2017 SCC 23 [*Pintea*].

<sup>322</sup> *Pintea v Johns* (21 January 2015), Calgary 0701 12350, (ABQB) and *Pintea v Johns* (30 January 2015), Calgary 0701 12350, (ABQB), cited in *Pintea v Johns*, 2016 ABCA 99. Of note is the dissenting opinion of Martin J. who, in allowing the appeal, stated at paras 33 and 34, "In my opinion, the consequences of dismissing this appeal are excessively punitive. We now know that the appellant's failure to attend the case management meetings was not an act of contempt; he was simply not aware of them. The appellant is a self-represented litigant, who we understand had no fault in the motor vehicle accident and who could reasonably have expected a significant award of damages for the injuries he suffered. Now instead, this disabled, unemployed man is saddled with a cost award of almost \$83,000. In my respectful opinion, that is a significantly disproportionate consequence for failing to file a change of address with the court."

appeal was whether the court was properly informed of Mr. Pintea's change of address.<sup>323</sup> The Alberta Court of Appeal struck down Mr. Pintea's appeal because he failed to fulfill the procedural requirements to submit new evidence that the court received notification of the new address information.<sup>324</sup>

As intervenor in the Supreme Court of Canada *Pintea* case, the NSLRP advocated for a "reasonable assistance test" in cases where it is clear a self-represented litigant does not understand litigation proceedings.<sup>325</sup> The NSLRP suggested, "assistance to a self-represented litigant, as long as it does not prejudice the other party, in instances where the litigant would benefit from assistance on a matter that is critical to ensure their procedural or substantive rights, could have an effect on the outcome or was necessary to ensure the litigant was treated fairly."<sup>326</sup> The Supreme Court of Canada did not comment on or implement the "reasonable assistance test" in the decision, but did endorse the Canadian Judicial Council's Statement of Principles for unbundled legal services, cited earlier in this chapter.<sup>327</sup>

In appellate applications, the most important part of the application can be the factum,<sup>328</sup> as justices rely heavily on them at the start of a case. Consultation participants explained that if a self-represented litigant tries to write a factum on their own, and they often do, the resulting product can be inadequate.<sup>329</sup> One example of when the appellate court in British Columbia has noted the importance of adequate materials is in *Crepnjak v Crepnjak*.<sup>330</sup> Speaking about trial court judges, the court highlighted the challenge of "having to adjudicate important issues based on inadequate materials provided by self-represented litigants. That difficulty is often exacerbated by inadequate submissions on the legal issues in dispute."<sup>331</sup> Not only did the self-represented litigant in *Crepnjak* fail in his application to meet the criteria to introduce new evidence, the majority of the materials submitted were not what the

---

<sup>323</sup> *Ibid* at para 6.

<sup>324</sup> *Ibid* at paras 13-14.

<sup>325</sup> Robinson, *supra* note 319.

<sup>326</sup> *Ibid*.

<sup>327</sup> Canadian Judicial Council, *supra* note 254.

<sup>328</sup> A factum outlines the argument to be used by a party when appealing a decision to the Court of Appeal. Rules 20 to 24 of the *Court of Appeal Rules*, BC Reg 297/2001 outline the form and content required to be included in a factum.

<sup>329</sup> See also *Canadian Lawyer Magazine* article by David Dias, "Self-Representation rising in BC, chief justice warns", *Canadian Lawyer Magazine* (3 April 2014), online: <<http://www.canadianlawyermag.com/legalfeeds/author/na/self-representation-rising-in-bc-chief-justice-warns-5668/>>, wherein he notes lawyers find it troublesome to consider how a self-represented litigant could draft the complex legal arguments required to made at the appeal level.

<sup>330</sup> 2011 BCCA 177, 201 ACWS (3d) 486 [*Crepnjak*].

<sup>331</sup> *Ibid* at para 23.

court would classify as evidence at all.<sup>332</sup> While there may be procedural delays to consider, there may also be added pressure on court justices to look beyond the factum to discover the issues and collect the information needed.

By contrast, a factum written by a lawyer should meet the requirements of the court, and convey information and arguments not only in a clear manner, but also under the criteria required at the appeal level. The resulting procedures and hearings can be smoother, with fewer delays and reduced frustration for all parties involved.

### *Better settlement and case outcomes*

The 2013 Cromwell Report highlights “individuals who receive legal assistance are between 17% and 1,380% more likely to receive better results” than those who have none.<sup>333</sup> Dr. Macfarlane’s study suggests this is still the case, noting only 14% of the 1192 self-represented litigants at hearings win their case.<sup>334</sup> Arguably, if a litigant can secure even limited scope advice or representation, the odds of achieving a better outcome may fall more in their favour.

Unbundled legal services can also assist a litigant entering into settlement discussions before litigation begins. The choice to accept a settlement offer is often driven by one’s understanding of the relative monetary value of the legal issue at hand, weighed against the overall cost of litigation.<sup>335</sup> Take, for instance, an employee terminated from a job without cause, and who is offered a lump-sum settlement amount that does not reflect their legal entitlement.<sup>336</sup> To know whether the offer reflects what a judge

---

<sup>332</sup> *Ibid* at para 33.

<sup>333</sup> 2013 Cromwell Report, *supra* note 98 at 4. See also ABA Handbook, *supra* note 299 at 144 wherein the ABA supported the notion from the California judiciary that some legal assistance for litigants is better than none.

<sup>334</sup> National Self-Represented Litigants Project, “Finally, Canadian Data on Case Outcomes: SRLs vs. Represented Parties”, (18 April 2016), online: <[representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties/](http://representingyourselfcanada.com/finally-canadian-data-on-case-outcomes-srl-vs-represented-parties/)>. The results reflect the outcome of cases decided in Ontario’s Superior Court for the period January 1, 2012 to April 7, 2016. For statistics in 2015 on summary judgment applications, see also Dr. Julie Macfarlane, Katrina Trask & Erin Chesney, NSRLP, “The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?”, (November 2015) which states, at 13, that 88% of summary judgment applications made by represented parties in the province were successful when made against a self-represented litigant.

<sup>335</sup> Jonathan Molot, “Litigation Finance: A Market Solution to a Procedural Problem” (2010) 99:1 Geo L J 65-113. See also CBA, “Future”, *supra* note 253 at 71.

<sup>336</sup> Under section 63 of the *Employment Standards Act*, RSBC 1996 c 113, an employer can legally terminate an employee, but must pay the employee an amount for their years of service, unless an employer can show that they have just cause not to pay this amount. For more information on terminations, including just cause, see the Province of British Columbia, Employment Standards Branch, “Just Cause Factsheet” (October 2016), online: <[www2.gov.bc.ca/assets/gov/employment-](http://www2.gov.bc.ca/assets/gov/employment-)

would consider fair in the circumstances, the employee not only requires some knowledge and understanding of employment law, but also the probability of a successful outcome in court. The question is whether the offer on the table is comparable to what the employee could expect from a judicial decision.

Settlement offers generally intend to reflect what one can expect to receive in court. However, the cost of litigation as against the potential award also factors into the calculation of how much to offer.<sup>337</sup> If the cost to litigate outweighs the offer, and without some access to legal advice to assess the case value, the employee may accept an offer based not on what they may legally be entitled to, but rather what they see as being the more cost-effective option.<sup>338</sup> If the employee could hire a lawyer on a limited scope retainer to review and advise on the offer, the information gathered from the lawyer could either confirm the reasonableness of the amount, or highlight areas for the client to consider in negotiations. Alternatively, if the lawyer's professional opinion is to pursue litigation, then a client will better understand the value of the claim, and the probability of success. It may also create an opportunity for future unbundled services from that same lawyer to provide drafting or even coaching assistance to mitigate the overall cost of litigation. Consultation participants noted that advice early on could help encourage settlements early in the litigation process that would save money for all parties involved.

### Disadvantages and potential complications

#### *Lack of continuity*

When assisting a client on an unbundled basis, the issue of continuity can be a persistent concern for the client and the lawyer. Clients may be suspicious that a lack of continuity negatively affects their case, particularly where the legal services are not provided by the same lawyer. This is especially the case in complex matters where a few different lawyers are retained, or ongoing cases where an issue needs to be revisited over time (such as those commonly found in family law). Lawyers offering unbundled legal services are unlikely to thrive in certain areas of law where the tasks require more time. Although unbundled legal services are well-developed for family law practice, and continue to gain momentum with Mediate BC's efforts, consultation participants observed there may be areas where unbundling could do a disservice to the client.

---

business-and-economic-development/employment-standards-workplace-safety/employment-standards/factsheets-pdfs/pdfs/just\_cause.pdf>.

<sup>337</sup> Kimbro, "Law", *supra* note 309 at 76.

<sup>338</sup> *Ibid.*

The continuity challenge has been raised by practitioners as it relates to criminal law matters, or complex litigation issues, where the client's best interests may require full-scope representation.<sup>339</sup> Attempting to offer unbundled legal services in this area could lead to "inconsistencies with regard to strategy" on a case, or perhaps challenge a lawyer's ability to ensure he or she is sufficiently competent to step in on a complex file at a given period of time.<sup>340</sup>

Advocacy groups and organizations like the Legal Services Society of British Columbia (LSS BC) do make efforts to provide continuity to clients. Consultation participants explained that, for family files, attempts are made to ensure the same lawyer works with a client who returns for more legal services. For example, the LSS BC uses a Family Services Retainer Agreement with a title, "My Role as Your Lawyer" to highlight a service commitment made by the lawyer signing the agreement.<sup>341</sup> This is but one example of where an organization has attempted to address the continuity challenge.

Where clients return for additional services later on, effectively creating a new file, the issue of client expectations must be revisited. Consultation participants expressed concern that, in some cases, repeat clients may blur the line between a lawyer on a one-time, limited scope retainer and the lawyer being "their" lawyer forever—a distinction which can have profound ethical consequences. Although this may be less of a challenge for legal services that are governed by tariffs setting out how much time can be expected under an agreement, other advocacy groups or organizations not bound by these limits may have to grapple with this challenge. Clearly defining the scope and limits of representation for each occasion becomes imperative.

For lawyers, particularly those opposing a client represented on an unbundled basis, there are potential disadvantages if a client uses different lawyers at different stages of litigation, or if a lawyer provides only limited representation. Confusion can arise over who the lawyer on record is—and this can pose challenges for communication, serving documents, negotiating settlements, and more.

The *BC Code* instructs lawyers using limited scope retainers on how to communicate with opposing counsel, and under what circumstances another lawyer may communicate directly with a client:

---

<sup>339</sup> *Ibid.*

<sup>340</sup> Barbra Bailey, *supra* note 156 at 11.

<sup>341</sup> LSS BC, "LSS Family Services Retainer Agreement", (February 2016), online: <[www.lss.bc.ca/assets/lawyers/practiceResources/lssFamilyServicesRetainerAgreement.pdf](http://www.lss.bc.ca/assets/lawyers/practiceResources/lssFamilyServicesRetainerAgreement.pdf)>.

---

**7.2–6.1** Where a person is represented by a lawyer under a limited scope retainer on a matter, another lawyer may, without the consent of the lawyer providing the limited scope legal services, approach, communicate or deal with the person directly on the matter unless the lawyer has been given written notice of the nature of the legal services being provided under the limited scope retainer and the approach, communication or dealing falls within the scope of that retainer.

### **Commentary**

**[1]** Where notice as described in rule 7.2–6.1 has been provided to a lawyer for an opposing party, the opposing lawyer is required to communicate with the person's lawyer, but only to the extent of the limited representation as identified by the lawyer. The opposing lawyer may communicate with the person on matters outside of the limited scope retainer.<sup>342</sup>

Forrest Mosten's guide to using unbundled legal services in divorce cases explains:

A lawyer may be engaged for a single issue only, and the client will either represent himself and/or engage another representative to handle all other issues. In the same way, a lawyer might represent a client in a single hearing on temporary child custody, but the client will represent herself at subsequent hearings on child custody or at trial on all issues. Lawyer and client are in charge of determining the scope of representation and unbundling; in unbundling-friendly jurisdictions, the court and other parties (and lawyer for the other party, if there is one) are required to honor that lawyer-client decision to unbundle.<sup>343</sup>

In other words, if the lawyer clearly explains the scope of representation to the client, court, and opposing counsel, it falls upon the client, court, and opposing counsel to honour that representation agreement.

The *BC Code* also directs lawyers on how to manage disclosure about the limited nature of a limited scope retainer.<sup>344</sup> Things to consider are whether the rules of practice require disclosure, or if it is necessary in the circumstances. There are both advantages and disadvantages for disclosing a limited scope retainer. For example, the impression of full-scope representation can discourage opposing counsel from pressuring the client for a low settlement. However, and unless written notice of the limited scope retainer is provided, opposing counsel is permitted under the *BC Code*

---

<sup>342</sup> *BC Code*, *supra* note 29, r 7.2–6.1 and commentary [1].

<sup>343</sup> Forrest S Mosten, "Unbundled Services to Enhance Peacemaking for Divorcing Families" (2015) 53:3 Family Court Review 439 at 439. Although Mosten does not specify which jurisdictions he means, a report by the ABA Standing Committee on the Delivery of Legal Services, "An Analysis of Rules that Enable Lawyers to Serve Self-Represented Litigants", (Chicago: 2014) provides an overview of states which have policies on unbundling, either in their rules of professional conduct, or civil procedure.

<sup>344</sup> *BC Code*, *supra* note 29, r 3.2–1.1, commentary [3].

to communicate directly with the client on matters falling within the scope of a limited scope retainer.<sup>345</sup>

### *Scope creep*

Scope creep was a primary concern raised by consultation participants. A case may start out simple, but over time become increasingly complex, expensive, and time-consuming. This can occur gradually (e.g., a client asking for more help than was agreed to, but it expands the scope of the retainer), or suddenly (e.g., a previously undiscovered facet of the case is revealed). Clients may assume broadening the scope bears no impact on the lawyer's competency to perform additional tasks. The *BC Code* confirms a client can "assume that the lawyer has the ability and capacity to deal adequately with all legal matters to be undertaken on the client's behalf."<sup>346</sup> No exception is offered to this rule for limited-scope retainers, so the lawyer is tasked to balance the needs of the client with an ethical obligation to provide competent service.

Concerns over scope creep can escalate if a court determines that responsibilities under a limited-scope retainer are insufficiently defined, or that a lawyer ought to recognize when to go beyond the scope of the agreement to ensure a client is not unfairly prejudiced. A recent example where this issue arose came out of the Ontario Court of Appeal in *Outaouais Synergist Inc v Lang Michener LLP*.<sup>347</sup> The case involved a limited-scope retainer to assist on purchase negotiations for vacant land. The client was not made aware of a cost recovery mechanism attached to the contract. The issue was missed, resulting in significant financial consequences for the client. The court found the lawyer failed to not only inquire into the cost recovery issue to avoid a negative impact on the client, but also failed to ensure the client was clear on the division of responsibility under the limited scope retainer.<sup>348</sup> Given the complexity of the legal matters involved, which the court noted would not generally be delegated to a client, it was incumbent upon the lawyer, in the absence of a clear division of responsibilities, to ensure the client was aware of, and understood, the consequences of the cost recovery issue.<sup>349</sup>

---

<sup>345</sup> *Ibid* at 7.2–6.1. Of note is that, even when opposing counsel receives written notice of limited scope representation, he or she may still communicate with the client on matters falling outside the limited scope retainer, per commentary [1] to the rule.

<sup>346</sup> *Ibid* at r 3.1-2, commentary [1].

<sup>347</sup> 2013 ONCA 526, (2013) 116 OR (3d) 742 [*Outaouais*]. See also *Poulain v Iannetti*, 2015 NSSC 181, 362 NSR (2d) 225 (where a lawyer was held liable for professional negligence despite not being retained to perform a specific task, merely because he had offered advice on the matter).

<sup>348</sup> *Outaouais*, *supra* note 347 at para 42.

<sup>349</sup> *Ibid* at paras 46–47.

---

Scope creep can also pose a challenge if a lawyer providing limited representation is presumed by the court to be responsible for the case from start to finish. For pro bono counsel, and lawyers on limited scope retainers, time on the case is carefully managed. Consultation participants explained that, in some cases, courts may assume counsel on a limited scope or pro bono retainer know all the facts of case. The court may request the lawyer continue to provide services to the client—even if those services are beyond the scope of the limited retainer.

Consultation participants observed that the legal profession in British Columbia is not yet in a place where unbundled services are the norm. The general expectation for clients is that, once hired, the lawyer will represent them for the life of the case. This is particularly troublesome in family law cases that often grow in complexity. Consultation participants noted it is not unheard of for lawyers to continue to be served with documents unrelated to parts of the case for which they are retained.

### *Potential for limited application*

There is still some debate over whether unbundled legal services can be used for more complex litigation cases. Practitioners who offer unbundled legal services highlight that it may be less appropriate to use this financing model for criminal matters or complex litigation where full-scope representation may be more practical.<sup>350</sup>

## **Ethics and professional responsibility considerations**

The CBA also examined the practical and ethical questions regarding unbundled legal services, as they seemingly operate outside the scope of the traditional solicitor-client relationship.<sup>351</sup> When lawyers receive partial or inadequate information from clients, they may find themselves unable to meet professional standards, thus making themselves vulnerable to professional discipline. Requesting or investigating for more information may fall outside the scope of the unbundled legal services agreement, resulting in low levels of inquiry.

### *Professional negligence*

A recent Canadian Bar Association (Alberta Branch) review of unbundled legal services notes a perception among the legal community that providing these services risks lowering one's ethical standards, and potentially breaching professional responsibility rules.<sup>352</sup> Consultation participants echoed this concern, explaining that

---

<sup>350</sup> Kimbro, "Law", *supra* note 309.

<sup>351</sup> *Ibid* at 3.

<sup>352</sup> Marie L Gordon, QC, "Limited Scope Retainers—Coming to a Courtroom Near You", (Canadian Bar Association Alberta Branch, June 2014) at 26 [Gordon]. See also John-Paul Boyd, "DIY A2J 4: Unbundle Your Services, Reinvent Your Billing Model", *Slaw Magazine* (February 2016), online:



often lawyers may feel they expose themselves to the risk of complaints of professional negligence if they fail to work under a full-scope retainer. They may also feel at risk by not knowing all the facts of a case, and worry about the effect this has on the outcome—and any follow-ups by the dissatisfied client. Even when clients work with a lawyer under a full-scope retainer, consultation participants admit it is often difficult to know all the facts of a case, with the expectation that risks only increase under limited retainers. Some consultation participants noted that, while the *BC Code* offers guidance, it cannot fully shield lawyers from these potential consequences.

Efforts continue to be made to dispel what some consultation participants believe to be misconceptions about the risks involved in providing unbundled legal services. The CBA Alberta Branch's review notes:

As with the introduction of collaborative family law, fears and suspicions about a reduction in ethical standards were inevitable in the beginning, but unfounded in the end. . . . Probably the most important point to make is that [limited scope retainers] do not import a lower standard of competence or professional conduct than the full scope retainer.<sup>353</sup>

While concerns over competence are both legitimate and paramount for lawyers working under this model, research shows no evidence to support a higher risk of malpractice or negligence claims for lawyers offering this service.<sup>354</sup> As John-Paul Boyd notes in his article on the report, lawyers who worry unbundling will “herald a decline in lawyers’ standards of practice” are unfounded.<sup>355</sup> Anecdotally, consultation participants noted that fewer professional negligence complaints arise from clients using unbundled legal services than when using full-scope retainers. Consultation participants suggested some of the reasons to explain this experience are:

- **Client satisfaction:** Unbundled legal services offer choice and flexibility to clients. Since clients can choose the type of service they want, and can quickly

---

<[www.slaw.ca/2016/02/05/diy-a2j-4-unbundle-your-services-reinvent-your-billing-model](http://www.slaw.ca/2016/02/05/diy-a2j-4-unbundle-your-services-reinvent-your-billing-model)> [Boyd] and Brewin Report, *supra* note 231 at 5, which states that, in addition to concerns around scope creep and lack of background on the legal issues, lawyers expressed, “[f]ear of risk and concerns around liability—though no one surveyed or interviewed had any experiences or evidence that demonstrated that unbundled legal services are more vulnerable to complaints or claims.” Other concerns raised by survey participants include: 1) fear of Law Society complaints; 2) fear of losing business; 3) clients not wanting to pay for services; and 4) challenges with time management.

<sup>353</sup> Gordon, *supra* note 352 at 28.

<sup>354</sup> National Self-Represented Litigants Project, “Unbundling ‘Unbundling’: Separating the Myths from the Realities”, (11 April 2016), online: <[representingyourselfcanada.com/unbundling-unbundling-separating-the-myths-from-the-realities](http://representingyourselfcanada.com/unbundling-unbundling-separating-the-myths-from-the-realities)>.

<sup>355</sup> Boyd, *supra* note 352.

---

see results from the money paid for the service, they are more likely to be satisfied with the outcome—even if the case does not result in their favour.

- **Transparency:** A clear, written agreement for services (as required by the *BC Code*) gives clients a clear explanation of the services they are paying for. It also protects lawyers against complaints arising from scope creep.
- **Risk management:** Unbundled legal services also offer more choice for lawyers over the type of cases to take on, thereby avoiding attempts to unbundle cases that can easily grow in complexity. This can help lawyers avoid or mitigate risks of offering unbundled legal services in cases where it is less appropriate, or where there is greater chance for issues to go unchecked.

A recent appellate case from the United Kingdom illustrates how efforts to manage risk through clear communication about scope at the start of a retainer can prevent potential professional negligence claims from succeeding. In *Minkin v Landsberg*,<sup>356</sup> a former spouse in a divorce case who had previously received comprehensive legal advice hired the same lawyer to draft a consent order. Unhappy with the result, she claimed the lawyer was professionally negligent for the advice provided, and for advice the lawyer failed to provide. However, due to the limited scope of the retainer (even though not in writing), the wife's intelligence, and her specific knowledge of the legal issues, the lawyer was found not to owe any greater duty to provide legal advice than that which she gave while drafting the consent order.<sup>357</sup>

The majority in *Minkin* held that the scope of the duty of care begins with the retainer. If the scope is clear, then the lawyer is bound by a contractual duty to perform the work reasonably incidental to that scope.<sup>358</sup> To determine what is reasonably incidental, all the circumstances of the case must be examined—including the character and experience of the client. The court stated:

it is not possible to give definitive guidance, but one can give fairly bland illustrations. An experienced businessman will not wish to pay for being told that which he/she already knows. An impoverished client will not wish to pay for advice which he/she cannot afford. An inexperienced client will expect to be warned of risks which are (or should be) apparent to the solicitor but not to the client.<sup>359</sup>

Lady Justice King also made strong comments about the importance of unbundled legal services in improving access to justice, and the chilling effect that could result if

---

<sup>356</sup> *Minkin v Landsberg*, [2015] EWCA Civ 1152, [2016] 1 Fam CR 584 [*Minkin*].

<sup>357</sup> *Ibid* at para 43.

<sup>358</sup> *Ibid* at para 32.

<sup>359</sup> *Ibid* at para 38.

lawyers who provided unbundled legal services are not given some flexibility in the duty of care. Lady Justice King wrote:

There would be very serious consequences for both the courts and litigants in person generally, if solicitors were put in a position that they felt unable to accept instructions to act on a limited retainer basis for fear that what they anticipated to be a modest and relatively inexpensive drafting exercise of a document (albeit complex to a lay person) may lead to them having imposed upon them a far broader duty of care requiring them to consider, and take it upon themselves to advise on aspects of the case far beyond that to which they believe themselves to have been instructed.<sup>360</sup>

The success of the lawyer in this case, despite the retainer terms not having been put in writing, turned on the limited nature of the task, namely re-drafting a consent order already agreed upon prior to commencement of the retainer. The court relied on two important factors in reaching this conclusion.

The first factor was the plaintiff's actions in retaining the defendant. The plaintiff came to the defendant with a consent order she had already agreed to and presented in court, and for which she received legal advice. The plaintiff's instructions were limited to introducing certain court-required amendments to the order. When giving instructions, the plaintiff said nothing of alleged duress in agreeing to the original terms.<sup>361</sup>

The second factor was that the defendant wrote two letters to the plaintiff summarizing the instructions, her advice, and actions she would take. The plaintiff responded to these letters and confirmed the defendant "had correctly understood her instructions" and that she wanted to "bring this all to an end as swiftly as possible."<sup>362</sup>

The court concluded that while "[i]t would have been good practice for the defendant expressly to confirm in one of her two letters...the limited nature of her retainer," the defendant "was operating under a defined and limited retainer."<sup>363</sup>

---

<sup>360</sup> *Ibid* at para 76. On the issue of access to justice and unbundled legal services, Lord Justice Jackson notes at paragraph 3 of the decision, "Although the underlying matrimonial proceedings were in progress at a time when legal aid was available, the issues thrown up by this case have now assumed wider importance. That is because legal aid is no longer available for divorcing couples seeking to resolve their financial disputes [...] it is now commonplace for the parties to negotiate their own agreements and then to instruct solicitors for limited purposes, such as drawing up a consent order for the court's approval under section 25 of the Matrimonial Causes Act 1973."

<sup>361</sup> *Ibid* at paras 45 & 59.

<sup>362</sup> *Ibid* at para 16.

<sup>363</sup> *Ibid* at para 48.

The *Minkin* decision has since been cited positively in five United Kingdom decisions, and in Australia, for the proposition that a clear retainer agreement can help to more clearly define the scope of the duty of care.<sup>364</sup>

Similar to the *BC Code*, the professional conduct rules in the United Kingdom emphasize the importance of preserving the client's interests, addressing conflict issues, upholding confidentiality, and fulfilling the lawyer's duty to the court.<sup>365</sup> However, the rules are silent on how lawyers should manage offering limited scope retainers or short-term summary legal services. Rather, the Law Society of England and Wales offers practice notes for lawyers offering unbundled legal services.<sup>366</sup> The support for unbundled legal services from *Minkin* is noteworthy given the similarly principled approach by Australia and the United Kingdom to professional responsibility, and the role unbundled legal services play in improving access to justice.<sup>367</sup> It is perhaps likely that similar accommodation for unbundled legal services may be afforded in British Columbia.<sup>368</sup>

---

<sup>364</sup> *Richtoll Pty Ltd. v WW Lawyers (In Liquidation) Pty Ltd.*, [2016] NSWSC 438; *Commodities Research Unit International (Holdings) Ltd. v King & Wood Mallesons LLP*, [2016] EWHC 727 (QB); *Mansion Estates Ltd. v Hayre & Co (A firm)*, [2016] EWHC 96 (Ch) (United Kingdom); *Lyons v Fox Williams LLP*, [2016] EWHC 2427 (QB); *Seery v Leathes Prior (A Firm)*, [2017] EWHC 80 (QB). Of note, in May 2016, the High Court judgment in *Sequence Properties Ltd v Kunal Balwantbhal Patel* (unreported) suggested the use of unbundled legal services may still face challenges in the jurisdiction. The Law Society Gazette, "New judgment 'kills' unbundled legal services", (24 May 2016), online: <<https://www.lawgazette.co.uk/law/new-judgment-kills-unbundled-legal-services/5055453.article>> notes the *Patel* case involved a litigant in person (UK term for self-represented litigant) who filed an appeal of a costs order issued against him for failure to file on time. Writing for the High Court, Mrs Justice Asplin stated that "although the applicant was apparently acting without a solicitor on record, he had had the assistance of a solicitor through 'unbundled services'." The article suggests the *Patel* case may pose challenges to the 2016 *Minkin* ruling over solicitor liability in offering unbundled legal services. The article quotes Law Society chief executive Catherine Dixon's concerns over the *Patel* judgment and calling upon "government to consider the introduction of statutory protection for solicitors delivering unbundled services for acts or omissions which fall outside the scope of their retainer."

<sup>365</sup> The United Kingdom's equivalent of the *Legal Professions Act* is the *Solicitors Act 1974* (UK), c 47, and its equivalent to the *Code of Professional Conduct of BC* is the *Solicitors Regulation Authority Code of Conduct 2011*, online: <[www.sra.org.uk/solicitors/handbook/code/content.page](http://www.sra.org.uk/solicitors/handbook/code/content.page)> [*Solicitors Regulation Authority Code*].

<sup>366</sup> The Law Society of England and Wales, *supra* note 306.

<sup>367</sup> Examples of where the principles from *Minkin* have been cited in the UK include: *Turner v Bromets Jackson Heath LLP*, [2016] EW Misc B15 (CC); *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP (formerly SJ Berwin LLP)*, [2016] EWHC 727 (QB); *Seery v Leathes Prior (A Firm)*, [2017] EWHC 80 (QB); *Mansion Estates Ltd v Hayre and Co Eyeglasses*, 2016 EWHC 96 (CH); *Lyons v Fox Williams LLP*, 2016 EWHC 2427 (QB). For Australia, see *Richtoll Pty Ltd v WW Lawyers (in liq) Pty Ltd*, [2016] NSWSC 438.

<sup>368</sup> One case in BC which dealt with similar issues to the ones outlined in *Minkin* is *Duckett v McKinnon*, 2012 BCSC 2147, [2013] BCWLD 8078.

The practice note published by the Law Society of England and Wales<sup>369</sup> states that specific parts of the *Solicitors Regulation Authority Code of Conduct* are relevant to providing unbundled legal services. Among the provisions cited are IB 1.2 and IB 1.5, which relate to the lawyer's relationship with the client, and an explanation of the lawyers' responsibilities and limitations or conditions on those responsibilities.<sup>370</sup> The practice note also cites chapters 5 and 11 which cover the lawyer's professional duty to the court and the opposing party,<sup>371</sup> and accounting rules in chapter 7 for hourly and fixed fees.<sup>372</sup>

One apparent difference between the rules in the United Kingdom and the *BC Code* is that the *Solicitors Regulation Authority Code* has no explicit requirement to confirm the scope of the retainer in writing (Rule 3.2–1.1 of the *BC Code*).<sup>373</sup> The *Solicitors Regulation Authority Code*, in IB 1.5, does require “explaining any limitations or conditions on what you can do for the client, for example, because of the way the client's matter is funded,”<sup>374</sup> but there is no requirement to do so in writing.

The British Columbia courts have also turned their minds to the concern among lawyers over potential professional negligence issues with unbundled legal services. The recent British Columbia Supreme Court case, *Heppner v Heppner*,<sup>375</sup> notes the ability of limited scope retainers to improve access to justice for litigants outweighs the potential drawbacks of adopting this alternative service model. Master McDiarmid states that “concerns that might arise hypothetically from limited retainers are generally dealt with by the body of ethical rules governing the conduct of lawyers. Lawyers are required to conduct themselves in accordance with the rules of The Law Society of British Columbia, and with the *Code of Professional Conduct for British Columbia*.”<sup>376</sup> Master McDiarmid sees a responsibility of the courts to encourage lawyers to offer limited scope legal services to clients, so long as limitations on the lawyer's role are clear and understood by both parties.

---

<sup>369</sup> The Law Society of England and Wales, *supra* note 306.

<sup>370</sup> *Solicitors Regulation Authority Code*, *supra* note 365, IB 1.2, IB 1.5.

<sup>371</sup> *Ibid* at c 5, 11.

<sup>372</sup> *Ibid* at c 7.

<sup>373</sup> *BC Code*, *supra* note 29 at r 3.2–1.1.

<sup>374</sup> *Solicitors Regulation Authority Code*, *supra* note 365 at IB 1.5.

<sup>375</sup> 2016 BCSC 2111 (CanLII) [*Heppner*].

<sup>376</sup> *Ibid* at para 6.

The Law Society of BC notes the benefits of limited scope retainers for individuals and the courts, and confirms that no evidence exists to suggest an increased likelihood of professional negligence complaints will result from using this model.<sup>377</sup>

### *The lawyer-client relationship*

While unbundled legal services may give clients more freedom and control over when and how much they want to engage a lawyer for assistance, it also changes the dynamics of the lawyer-client relationship. If a client hires a lawyer to perform a single, discrete task, like the case in *Minkin*, then what type of relationship does the client and the lawyer have in this circumstance? Can it properly be called a lawyer-client relationship if the scope of the retainer is to draft a single document, with the potential that the lawyer may not see the same client again?

Recall from Dr. Macfarlane's study that most self-represented litigants (SRLs) who used unbundled legal services were only able to do so because they had previously retained that same lawyer under a full-scope retainer on another matter.<sup>378</sup> Gaining access to more affordable legal services essentially required an established relationship with a lawyer from an earlier full-scope retainer. This raises a "chicken before the egg" dilemma over what ought to come first. If the full-scope retainer is the key to establishing the kind of relationship that encourages lawyers to offer unbundled legal services down the road, but at the same time is not a financially viable option for most litigants, then how does one overcome this?

The assumption that a lawyer-client relationship can only truly exist under a full-scope retainer for the entire life of a case may be resolved by looking to the *BC Code*. Under the definitions section, a lawyer-client relationship is said to exist, either formally or informally, when a lawyer agrees to provide legal services to a client.<sup>379</sup> It is clear the *BC Code* supports the notion that a lawyer-client relationship exists regardless of how frequently, or fulsome, the exchange is. While unbundled legal services may break with what traditionally has shaped the lawyer-client relationship, there is opportunity to foster and preserve this relationship with clients who only seek unbundled legal services, as they may return for additional services as their case moves through the litigation process.

---

<sup>377</sup> Letter from David Crossin, QC, President of the Law Society of British Columbia, to the Honorable Robert Bauman, Access to Justice BC, and Monique Steensma, CEO of Mediate BC Society (15 December 2016), online: <[www.courthouselibrary.ca/docs/default-source/unbundling/1/law-society-of-bc-president's-letter-of-support-\(dec-15-2016\).pdf](http://www.courthouselibrary.ca/docs/default-source/unbundling/1/law-society-of-bc-president's-letter-of-support-(dec-15-2016).pdf)>.

<sup>378</sup> Macfarlane Report, *supra* note 14 at 93.

<sup>379</sup> *BC Code*, *supra* note 29 at r 1.1-1, "client".

Despite these efforts, many in the profession appear to remain uncomfortable reinforcing the need for a cultural shift to enhance the use of unbundled legal services in practice. Such a shift may require training and resource development, and experience providing unbundled legal services successfully. It may become easier for the legal community to accept that a true lawyer-client relationship can exist outside the walls of a full-scope retainer.

### **Systemic, structural, or legal changes to consider**

Consultation participants described a range of ways lawyers can improve the efficiency of delivering unbundled legal services, including:

- Providing clients with a roadmap to their case, and clearly defining legal issues to address;
- Creating standardized forms for clients to map out their needs and match the appropriate services, while also addressing literacy, technological, and language barriers;
- Creating a checklist of requirements for both the client and the lawyer to work on together, ensuring the scope of the agreement is clear and important aspects of the case are not missed;
- Using continuing legal education courses to train lawyers on how to provide unbundled legal services, and dispel common misconceptions about perceived ethical and professional-responsibility issues.

With the topic of unbundled legal services a live issue among legal professionals across Canada, efforts are currently underway to encourage more use of unbundled legal services in law offices today.

#### *Enhancing the BC Code to address scope concerns*

Although the *BC Code* addresses the scope issue with the requirement that limited scope retainers be documented clearly, and in writing, there may be opportunity to enhance clarity around the scope of the agreement at the outset, and before the lawyer begins work on a task. One can look to the *Ontario Rules of Professional Conduct*<sup>380</sup> for language to incorporate into the *BC Code* around the appropriateness of using unbundled legal services, and reduce potential confusion over scope from the beginning.

The *Ontario Code* sets out guidelines which may be useful to consider in British Columbia. Over and above a requirement to ensure the nature, extent and scope of

---

<sup>380</sup> *Ontario Code*, *supra* note 273.

services are clear, the *Ontario Code* states that a lawyer must also assess “whether the services can be provided within the financial means of the client.”<sup>381</sup> If the type of unbundled legal services required would charge an amount that falls outside a client’s budget, then one might presume the *Ontario Code* requires that the lawyer not provide the service. While the *Ontario Code* does not specify how a lawyer should make the financial assessment, it does encourage discussion before a limited scope retainer is entered into on what can realistically be accomplished with the client’s budget. Collaboration between the lawyer and the client at the start may help a client to plan further in advance for more complex tasks that he or she may need to undertake.

Another useful provision from the *Ontario Code* is the recommendation to confirm, in writing, when the retainer is complete, including written notification to a court or tribunal if appropriate.<sup>382</sup> The importance of communicating the limits for unbundled legal services is a sentiment echoed by practitioners both in Canada and the United States.<sup>383</sup> The benefit of documenting the conclusion of a retainer is arguably just as valuable as documenting its beginning. Not only does it make clear to the client what work has been done, it also provides an opportunity for the lawyer to list the tasks which remain the client’s responsibility to complete.

### *Develop practice resources*

The fact that unbundling is still gaining momentum in British Columbia suggests there may be opportunity for further development of resources to assist lawyers who are integrating this financing model into practice. Mediate BC has already developed materials for family law practitioners.<sup>384</sup> The Law Society of BC also offers helpful resources for lawyers to learn more about offering unbundled legal services.<sup>385</sup>

---

<sup>381</sup> *Ibid* at r 3.2–1A.

<sup>382</sup> *Ibid* at r 3.2–1A.1, commentary [5.1].

<sup>383</sup> Kimbro, “Law”, *supra* note 309, wherein Stephanie Kimbro discusses the need to further document any expanded terms of representation in circumstances where a lawyer, or client, may be tempted to provide services that go beyond the scope of the original limited scope retainer. This discussion enables the lawyer and client to enter “a new agreement so that the change in scope is clear and on record”. See also Ontario’s LAWPRO, “Limited Scope Representation Resources”, online: <[www.practicepro.ca/practice-aids/limited-scope-representation-resources/](http://www.practicepro.ca/practice-aids/limited-scope-representation-resources/)> [LAWPRO].

Developed to offer risk management, claims prevention and law practice management information to lawyers in the province. LAWPRO’s practice PRO provides guidance on best practices and how to mitigate potential professional negligence claims.

<sup>384</sup> For Best Practice Guidelines, educational webinars, unbundling FAQs, and sample retainer letters are provided for family law practitioners, see Courthouse Libraries BC, “Family Law Unbundling Toolkit”, *supra* note 238.

<sup>385</sup> Law Society of British Columbia, “Unbundling Legal Services”, online: <<https://www.lawsociety.bc.ca/our-initiatives/legal-aid-and-access-to-justice/unbundling-legal-services/>>. See also The Law Society of British Columbia, “CLE-TV Limited Scope Retainers: Practical Advice and Tips”, (12 June 2014), online: <<https://www.youtube.com/watch?v=a---Zr8FuRc>>.



LAWPRO also provides practice tips and resources, however their sample retainer is geared to family law practice.<sup>386</sup> There is an opportunity to develop additional resources and practice guides for implementing unbundled legal services in other practice areas, such as for wills and estates, transaction-based or solicitor-type practice areas (real estate, corporate and commercial), and immigration. Consultation participants noted there may be some benefit in using unbundled legal services for human rights and judicial review matters. Additional resource development for these areas could help facilitate this practice.

### *Opening the lines of communication between counsel*

The *BC Code* states that disclosure to opposing counsel by a lawyer offering unbundled legal services is discretionary.<sup>387</sup> Unless opposing counsel “has been given written notice of the nature of the legal services being provided under the limited scope retainer,” he or she is at liberty to communicate directly with the client. The benefit of imposing a duty to disclose a limited scope retainer was canvassed in a 2012 ABA report.<sup>388</sup> Hornsby describes that, under the ABA Model Rules of Professional Conduct, a lawyer must inform opposing counsel of the fact they are providing limited scope representation to a client, and the extent or limits of that agreement.<sup>389</sup> This practice may facilitate use of unbundling for more complex legal matters that traditionally are reserved for full-scope retainers.

### *Professional development and annual practice declaration reporting*

In addition to creating the Unbundling Resource Centre, the ABA also provides notification to the legal community on conferences held by bar associations across the United States about unbundled legal services. These conferences reach out to members of the legal profession, and other industry professionals, to discuss and develop ways to promote the use of this model, and improve access to justice.<sup>390</sup> Efforts are underway by organizations like the CBA to educate lawyers about unbundling.<sup>391</sup> Consultation participants noted that more lawyers may be receptive to introducing unbundled legal services if they can more easily connect with

---

<sup>386</sup> LAWPRO, *supra* note 383.

<sup>387</sup> *BC Code*, *supra* note 29 at r 7.2–6.1, commentary [1].

<sup>388</sup> Will Hornsby, “Unbundling and the Lawyer’s Duty of Care” (2012) 35 Fam Advoc 26.

<sup>389</sup> *Ibid* at 28.

<sup>390</sup> See American Bar Association, “Standing Committee on the Delivery of Legal Services”, online: <[www.americanbar.org/groups/delivery\\_legal\\_services.html](http://www.americanbar.org/groups/delivery_legal_services.html)>.

<sup>391</sup> CBA, *supra* note 246. See also Continuing Legal Education BC, “CLE-TV: A Bit of Counsel-Providing Legal Services to the Self-Represented” (April 2016), online: <[www.cle.bc.ca/onlinestore/productdetails.aspx?cid=1267](http://www.cle.bc.ca/onlinestore/productdetails.aspx?cid=1267)>. See also Canadian Bar Association, “Unbundling Demystified: Practical Tips from Lawyers Using It (Webinar Repeat)”, (18 August 2016), online: <[www.cbapd.org/details\\_en.aspx?id=BC\\_unb0816wr](http://www.cbapd.org/details_en.aspx?id=BC_unb0816wr)>.

practitioners already offering them. There is an opportunity to introduce conferences in Canada like those used in the United States, either provincially or nationally, to bring together practitioners and members of the legal profession who support and practice unbundling. One idea explored with a consultation participant was to offer lawyers the option of listing on their annual practice declaration any hours spent offering unbundled legal services, much like they do for pro-bono legal services.

### *Legal coaches*

The National Self-Represented Litigants Project launched a new initiative earlier this year to develop a training program for lawyers to become “effective legal coaches.”<sup>392</sup> Nikki Gershbnain, National Director of Pro Bono Students Canada, suggests many self-represented litigants could more effectively move cases forward with coaching from a lawyer at key moments.<sup>393</sup> Gershbnain has partnered with Dr. Julie Macfarlane to develop curriculum and professional development materials for lawyers on unbundled legal services.<sup>394</sup> The goal is to not only integrate this practice into law firms, but encourage and support lawyers to “promote the service so clients are aware of the fact this is an option for them.”<sup>395</sup> With training as a legal coach added to their toolkit, Gershbnain notes lawyers can offer “support, guidance and the tools needed to effectively get clients through litigation.”<sup>396</sup>

This project is a step in the direction towards fulfilling what Mosten predicted would be training both within law schools and in bar courses.<sup>397</sup> By 2032, Mosten suggests most law schools will have a course that discusses the benefits of unbundled legal services, and legal clinics that will train future lawyers on how to implement this model into practice.<sup>398</sup>

The Action Group on Access to Justice, an organization funded by the Law Foundation of Ontario, and supported by the Law Society of Upper Canada, hosted professional development sessions on unbundling last year.<sup>399</sup> Sabreena Delhon, manager of The Action Group on Access to Justice, notes a need for a culture change; younger lawyers

---

<sup>392</sup> See National Self-Represented Litigants Project, “Legal Coaching”, online: <[representingyourselfcanada.com/legal-coaching/](http://representingyourselfcanada.com/legal-coaching/)>. Note that community legal organizations also offer coaching services to clients. For more information, see earlier sections of this chapter.

<sup>393</sup> Mallory Hendry, “Unbundling for the Underserved Family Law Client”, *Canadian Lawyer* 41:3 (March 2017) 45 at 46 [Hendry].

<sup>394</sup> *Ibid* at 45.

<sup>395</sup> *Ibid*.

<sup>396</sup> *Ibid*.

<sup>397</sup> Mosten, “Today”, *supra* note 206 at 17.

<sup>398</sup> *Ibid*.

<sup>399</sup> Hendry, *supra* note 393 at 48.

must assume their role in access to justice.<sup>400</sup> Delhon suggests “embracing coaching or unbundling is another opportunity to demonstrate their value.”<sup>401</sup>

---

<sup>400</sup> *Ibid* at 49.

<sup>401</sup> *Ibid*.

### Highlights from Chapter 6—Unbundled Legal Services

Unbundled legal services provide a means for litigants to pay a lawyer to perform a discrete, limited-scope legal service. They also enable litigants and lawyers to better estimate the amount of time and cost to perform a task. Unbundled legal services can be used on a one-time or repeat basis. Examples of unbundled legal services include legal advice (initial consultation or throughout a case), research (by client, lawyer, or jointly), drafting (e.g. letters, court documents), negotiation (coaching and training to clients) and court appearances (including hearings or mediation sessions).

#### *Optimal Uses*

- **Organization and case planning** (e.g. writing letters, assessing initial settlement offers, explaining relevant law(s) applicable to the facts, outlining options for resolution, preparing a checklist of necessary steps and processes for client to consider);
- **Self-representation coaching** (e.g. client pays lawyer for training or coaching on court procedures, including how to make proper statements, submit evidence, and examine witnesses);
- **Document drafting** (e.g. court documents, contracts, or settlement agreements); and
- **Mediation and settlement negotiations** (e.g. coaching for, or appearance at, mediation or negotiation sessions).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"> <li>• Financial predictability</li> <li>• Clear expectations</li> <li>• Simplify complex cases</li> <li>• Flexibility for lawyer and client</li> <li>• Streamline judicial and out-of-court processes</li> <li>• Improved settlement and case outcomes</li> </ul>	<ul style="list-style-type: none"> <li>• Lack of continuity</li> <li>• Risk of scope creep</li> <li>• Potential for limited application</li> </ul>	<ul style="list-style-type: none"> <li>• Professional negligence</li> <li>• Lawyer-client relationship</li> </ul>

#### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted five ideas where changes could be considered to promote unbundled legal services in British Columbia: enhance the British Columbia *Code of Professional Conduct*; develop practice resources; encourage lawyers to disclose limited-scope representation services; professional development and annual practice declaration reporting; and legal coaches.



## CHAPTER 7. THIRD-PARTY LITIGATION FUNDING

### What is third-party litigation funding?

Third-party litigation funding<sup>402</sup> (3P Funding) derives from private and public sources.<sup>403</sup> Generally, a third-party with no personal interest in the litigation provides funding to pay the costs of litigation. The nature of the funding arrangements and what the funding covers varies. It depends on whether the funding is from a private funder or is provided pursuant to a statutory scheme.

This chapter outlines the development of private 3P Funding in British Columbia, and across Canada, by first examining how the laws of champerty and maintenance have impacted the use of private 3P Funding to promote access to justice. The chapter then reviews how Canadian jurisprudence has considered the use of private 3P Funding as an alternative financing option. Finally, private 3P Funding in the United States and on the international stage is reviewed in order to uncover some of the advantages and disadvantages of this option, followed by discussion of ideas to enhance the use of 3P Funding practices in British Columbia.

There are two overarching categories of 3P Funding: private and public.<sup>404</sup>

---

<sup>402</sup> Third-party litigation funding [3P Funding] includes financing by a private third-party funder who is not a party to the litigation, such as a lawyer, firm, or litigation funding company, and funding from public sources, such as class action proceedings funds. 3P Funding includes private funding from both outside funding companies and through contingency fee agreements between lawyer and client. The public 3P Funding mechanism of class action proceedings funds are mentioned as an example of public 3P Funding, discussed more thoroughly in Chapter 11—Publicly Funded Litigation Funds. Excluded from this discussion are other public 3P Funding sources like legal aid and workers' compensation. Other terms used to describe 3P Funding in both case law and academic articles include litigation funding, litigation financing, third-party financing, third-party funding, and alternative litigation financing. For further discussion on other types of 3P Funding mechanisms, see Martha Binks & Sarah Hurowitz, "A Canadian Perspective on the Current State of Third Party Litigation Funding [TPLF]," (Article presented at Association of Corporate Counsel Annual Meeting 2016, Washington, D.C., 17 October 2016) [Binks & Hurowitz]. See also Ranjan K Agarwal & Doug Fenton, "Beyond Access to Justice: Litigation Funding Agreements Outside the Class Actions Context" (2017) 59 Can Bus LJ 65 [Agarwal].

<sup>403</sup> For a comparison of private and public funding available in Canada, see Heather McDonald, "Third Party Litigation Funding: Plaintiff Identity and Other Vexing Issues" (Paper presented to the Canadian Bar Association, October 2011), online: <[www.cba.org/cba/cle/PDF/Heather\\_McDonald\\_paper.pdf](http://www.cba.org/cba/cle/PDF/Heather_McDonald_paper.pdf)> [McDonald].

<sup>404</sup> *Ibid* at 1.

### *Private*

Private 3P Funding involves a third-party funder providing financing directly to a plaintiff or lawyer for legal fees and disbursements.<sup>405</sup> The third-party funder has no legal right or interest in the matters at issue in the litigation, but participates as financier in exchange for a share or percentage of the settlement or judgment award. Examples of private 3P Funding include contingency fee agreements, litigation loans, and adverse cost insurance.<sup>406</sup>

### *Public*

Public 3P Funding is collected and distributed to litigants through statutory mechanisms. Designed to allocate federal and provincial funding to both individual and groups of litigants, common forms include provincial class proceedings funds, legal aid plans, and workers' compensation advocacy services.<sup>407</sup>

## **The law on private third-party litigation funding**

An examination of private 3P Funding in Canada requires review of how the laws of champerty and maintenance influenced its development. One of the leading cases that outlines both the history and application of these doctrines comes from the Ontario Court of Appeal in *McIntyre Estate v Ontario (Attorney General)*.<sup>408</sup> The *McIntyre* decision is important for two reasons: 1) its detailed account of the origins and development of champerty and maintenance at common law; and 2) how it changed the Ontario court's approach to the legitimacy of contingency fee agreements between lawyer and client as an effective financing option to improve access to justice.

### THE COMMON LAW OF CHAMPERTY AND MAINTENANCE

As far back as 1305, the English statute *Statutum de Conspiratoribus*<sup>409</sup> was enacted to address concerns that litigants seeking to have their cases brought before the courts were assigning claims over to royal officials or affluent individuals who would

---

<sup>405</sup> *Ibid.*

<sup>406</sup> Binks & Hurowitz, *supra* note 402 at 3. Note that this chapter only briefly discusses adverse cost insurance. For a more in-depth review, see Chapter 10—Litigation Expense Insurance.

<sup>407</sup> *Ibid* at 1–2. See also McDonald, *supra* note 403 at 1. This chapter only discusses private 3P Funding. Class proceeding funds are discussed in Chapter 11—Publicly-funded Litigation Funds. For more information on workers compensation tribunals, see McDonald, *supra* note 403 at pp 13–30.

<sup>408</sup> [2002] OJ No 3417 (QL), 61 OR (3d) 257 (Ont CA) [*McIntyre*].

<sup>409</sup> 33 Edw 1, Stat 2, referred to as the *Statute Concerning Conspirators*. For cases discussing the development of common law doctrines of champerty and maintenance in the United Kingdom, see *Findon v Parker*, (1843) 11 M & W 675 at 682; *Bradlaugh v Newdegate* (1883), 11 QBD 1 (cited in Agarwal at footnotes 33–35).

profit from the outcome.<sup>410</sup> The statute aimed to ensure no one, other than someone related to the litigant or directly connected to the legal matters at issue in the lawsuit, could finance a legal action simply for profit. The goal was to prevent frivolous and vexatious claims from unscrupulously finding their way into the courts.<sup>411</sup>

In 1897, Ontario codified prohibitions against champerty by enacting the *Champerty Act*.<sup>412</sup> To date, no other Canadian jurisdiction has enacted similar prohibitions. Comprised of only two sections, Ontario's *Champerty Act* reads, as follows:

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
2. All champertous agreements are forbidden, and invalid.<sup>413</sup>

Historically, champerty and maintenance were treated as both common-law crimes and torts, to thwart efforts by litigants and their financiers from abusing the litigation system for financial gain. Together, these two common law doctrines imposed an absolute bar against anyone trying to secure financial support from an outside party for even legitimate legal claims. Although the United Kingdom eventually abolished the two common law crimes of champerty and maintenance in 1967,<sup>414</sup> *McIntyre* notes the statute repealing them "left open the possibility that champerty and maintenance could still render contracts unenforceable as being contrary to public policy and because of that, the English courts continued to address issues relating to the enforceability of lawyers' contingency fee agreements until they were expressly permitted by statute in 1998."<sup>415</sup>

### THE LAW ON CONTINGENCY FEE AGREEMENTS

Chapter 1 of this study paper states that maintenance, in the context of financing litigation, refers to situations where an outside party becomes involved in another person's lawsuit, to encourage it to go forward, with no legal interest or proper

---

<sup>410</sup> *McIntyre*, *supra* note 408 at para 19.

<sup>411</sup> McDonald, *supra* note 403 at 2.

<sup>412</sup> RSO 1897, c 327.

<sup>413</sup> For additional history on the origin of champerty and maintenance law, see the Ontario Court of Appeal decision, *Buday v Locator of Missing Heirs Inc* (1993), 16 OR (3d) 257, 108 DLR (4th) 424 (Ont CA). See also Ontario Law Reform Commission Report on Class Actions, 1982, Vol III, at 717. See also Agarwal, *supra* note 402 at 5.

<sup>414</sup> *Criminal Law Act* 1967 (UK), 1967, c 58, ss 13(1), (2), 14. In 1954, s 8 (now s 9) of the *Criminal Code of Canada*, RSC 1985, c 46, s 9 effectively abolished common law offences, which included champerty and maintenance. Despite this change, and noted in *McIntyre* at para 25, is that a party could still argue champerty and maintenance as actionable in tort with proof of special damages. A list of cases to consider this are provided in the same paragraph.

<sup>415</sup> *McIntyre*, *supra* note 408 at para 24.



motive in law to do so.<sup>416</sup> Champerty has been called the more egregious form of maintenance, where the party seeking to interfere does so in exchange for a share in the settlement or judgment.<sup>417</sup> While no longer treated as common law crimes, the two doctrines still posed a challenge for lawyers who sought to assist clients by offering the option of a contingency fee agreement.

In the 1975 case of *Wallersteiner v Moir*, Lord Denning discussed the prohibition on lawyers' contingency fees, as follows:

English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,' that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. . . .

It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law of champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England.<sup>418</sup>

The court's reluctance to allow contingency fee agreements was from concerns that a lawyer's awareness of being paid only if the action succeeds may tempt a lawyer to abandon ethics and professional responsibility to ensure success.<sup>419</sup> Furthermore, contingency fee agreements were thought to challenge the long-standing trust relationship between lawyer and client by tying the lawyer's compensation to recovery of a settlement or judgment.<sup>420</sup>

The British Columbia Court of Appeal case of *Fredrickson v I.C.B.C.*<sup>421</sup> was one of the earliest cases to consider occasions where a litigant could legitimately assign or share in the outcome of an action with a third party. At issue in *Fredrickson* was whether a person insured by ICBC could legitimately assign their cause of action against ICBC to the person claiming against that individual, on the basis that ICBC failed to properly defend and reach a settlement on their behalf. Justice McLachlin (as she then was) noted that, traditionally, the doctrines of champerty and maintenance did not support assignment of a cause of action in tort.<sup>422</sup> To allow for an exception to this rule required examining "whether the assignment can fairly be seen as prompted by a

---

<sup>416</sup> *Black's Law Dictionary*, 10th ed, *sub verbo* "maintenance".

<sup>417</sup> *McIntyre*, *supra* note 408 at para 26.

<sup>418</sup> *Wallersteiner v Moir (No. 2)*, [1975] QB 373 at 393–94, [1975] 1 All ER 849 (CA) [*Wallersteiner*].

<sup>419</sup> *McIntyre*, *supra* note 408 at para 51.

<sup>420</sup> *Ibid* at para 52.

<sup>421</sup> (1986) 28 DLR (4th) 414, 3 BCLR (2d) 145, (BCCA), *aff'd* [1988] 1 SCR 1089, 49 DLR (4th) 160 [*Fredrickson* cited to CanLII].

<sup>422</sup> *Ibid* at para 21.

desire to advance the cause of justice rather than as intermeddling for some collateral reason.”<sup>423</sup> If the intent of assignment is to effect the former outcome, then the agreement will not be found champertous, and can proceed.

The emphasis on motive became an important consideration when looking at agreements of this type. With no evidence to support the proposition from *Wallersteiner* that contingency fee agreements weaken the lawyer-client relationship, the *McIntyre* case opened the doors for lawyers and clients to use contingency fee agreements as a form of private 3P Funding. The court recognized the utility of this alternative financing option to improve access to justice for litigants who otherwise were financially precluded from bringing forward legitimate claims.<sup>424</sup> Prior assumptions that contingency fee agreements were *per se* champertous could be resolved by “an appropriate regulatory scheme governing the conduct of lawyers and the amount of lawyers’ fees.”<sup>425</sup>

### THE USE OF CONTINGENCY FEE AGREEMENTS IN CANADA

#### British Columbia

In British Columbia, the statute that deals with contingency fee agreements is the *Legal Profession Act*. The *Legal Profession Act* authorizes the Law Society of BC to regulate contingency fee agreements. The Law Society of BC has exercised this power by adopting rules on contingency fee agreements in the Law Society of BC Rules and the *BC Code*. Table 10 highlights some key sections from each source.<sup>426</sup>

---

<sup>423</sup> *Ibid* at para 23.

<sup>424</sup> *McIntyre*, *supra* note 408 at paras 56–69.

<sup>425</sup> *Ibid* at para 70.

<sup>426</sup> The information contained in the table is adapted from both the *Legal Profession Act* and Andrew Morrison, “A Contingency Fee Is Not a “Lottery Ticket”: Special Considerations for Contingency Fee Agreements” (Paper presented to the CLE BC, Costs—2015 Update, October 2015) at 2.1.2, online: <<https://www.cle.bc.ca/PracticePoints/PRAC/15-contingency-fee-is-not-a-lottery-ticket-special-considerations-for%20contingency-fee-agreements.pdf>>.

**Table 10—Law Society of BC and *Legal Profession Act* Provisions for Contingency Fee Agreements**

Law Society of BC Rules	<i>Legal Profession Act</i>
<ul style="list-style-type: none"> <li>• Must be in writing—r 8-3(a) and Code of Professional Conduct r 3.6-2</li> <li>• Maximum contingency fees—r 8-2(1)</li> <li>• If lawyer accepts costs recoverable instead of percentage fee, then term must be noted in contingency fee agreement, and must contain mandatory statement in the form required by the Law Society of BC—r 8-2(2) and 8-4(3)</li> <li>• Must contain statement of client's right to review fee agreement—r 8-3(b)</li> <li>• For personal injury or wrongful death cases, must include statements in form required by Law Society of BC—r 8-4</li> <li>• Must not contain terms limiting client's ability to discontinue or settle claim without consent of lawyer, nor prohibit client from terminating the contingency fee agreement—r 8-3(c)</li> <li>• Must not prohibit a client from changing lawyers—r 8-3(c)</li> <li>• Must not contain language or terms attempting to relieve a lawyer of his or her professional responsibilities or negligence—r 8-3(c)</li> </ul>	<ul style="list-style-type: none"> <li>• Must not contain terms limiting client's ability to discontinue or settle claim without consent of lawyer, or prohibit client from terminating the contingency fee agreement—s 65(3)</li> <li>• Benchers can make rules governing limits on fee amounts, form and content, and conditions to be met by lawyers and law firms—s 66(2)</li> <li>• Maximum contingency fees—s 66(4)</li> <li>• Fees to charge if agreement is void—s 66(5)</li> <li>• Application by lawyer for a higher fee—s 66(6)</li> <li>• Restrictions—s 67(2)</li> <li>• Client's right of review to determine the fairness and reasonableness of a contingency fee agreement—s 68</li> </ul>

Failure to comply with the Law Society of BC Rules, *Legal Profession Act*, or *BC Code* can render an agreement unenforceable, and may result in a review by the client or the court. While the *BC Code* requires lawyers to advise all clients on how they will bill for services, special consideration is given to billing on contingency.<sup>427</sup> If a client disagrees with the terms of the contingency fee agreement, and if a resolution with

<sup>427</sup> *BC Code*, *supra* note 29 at r 3.6–3, commentary 1. See also *ibid* at 2.1.3. A recent case to highlight the importance for lawyers retained under a contingency fee agreement to ensure the client is well informed of how the fee will be calculated is the Ontario Superior Court of Justice decision in *Edwards v Camp Kennebec (Frontenac) (1979) Inc.*, 2016 ONSC 2501, [2016] OJ No 1921 (QL). The court held at para 28 that the contingency fee agreement was invalid for two reasons, namely 1) it did not contain a term informing the client that hourly rates varied among lawyers in the firm and that the client could speak with other lawyers to compare rates; and 2) failure to provide an example of how the fee would be calculated. Both requirements are set out in the Ontario *Solicitor's Act*, RSO 1990, c S.15.

the lawyer cannot be reached, the client can request a review of agreement.<sup>428</sup> Table 11 outlines options available for litigants to have a contingency fee agreement reviewed.

**Table 11—Options to Review Contingency Fee Agreements in British Columbia**

Law Society of BC Fee Mediation Program	BC Supreme Court Registrar
<ul style="list-style-type: none"> <li>• <b>Cost:</b> Free</li> <li>• <b>Amount:</b> Fee disputes of \$1,000 to \$25,000</li> <li>• <b>Where:</b> In person or via online meeting</li> <li>• <b>Forum:</b> Private</li> <li>• <b>Type:</b> Informal</li> <li>• <b>Duration:</b> Maximum three hours</li> <li>• <b>How:</b> Application; requires consent of both parties</li> <li>• <b>Advantages:</b> Shorter process; quicker resolution; may reach binding settlement agreement; in person or online</li> <li>• <b>Disadvantages:</b> Harder to enforce; party can withdraw at any time; not available if client or lawyer already deals with fees in court, or reaches agreement through other process; on a “without prejudice” basis, therefore agreement to participate only means willingness to do so, not admission of a wrong, and negotiations throughout process cannot be used in court proceedings</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Cost:</b> \$80 (paid by the applicant and potential costs (awarded against the losing party))</li> <li>• <b>Amount:</b> No limit on dollar value of dispute</li> <li>• <b>Where:</b> In person hearing only</li> <li>• <b>When:</b> Review of agreement must occur within 3 months after the agreement was made or terminated<sup>429</sup></li> <li>• <b>Forum:</b> Public</li> <li>• <b>Type:</b> Formal (testimony and decision)</li> <li>• <b>Duration:</b> No set limit for hearing</li> <li>• <b>How:</b> Application; does not require consent of both parties</li> <li>• <b>Advantages:</b> Court decision easier to enforce; contingency fee agreement can be reviewed even if bill already paid</li> <li>• <b>Disadvantages:</b> lengthier process; costly; must be in person; time limits apply even if in mediation</li> </ul>

In assessing the fairness and reasonableness of a contingency fee agreement, the court will consider several factors, including “whether the client understood the agreement, whether there was any pressure or undue influence placed on the client and whether

<sup>428</sup> Information contained in Table 11 adapted from the Law Society of BC brochure, “Law Society Fee Mediation Program”, online:

<<https://www.lawsociety.bc.ca/Website/media/Shared/docs/public/FeeMediation.pdf>>. While the table focuses on review of contingency fee agreements, other rules apply for general fee reviews. For more information, see Law Society of BC page on BC Supreme Court Registrar Fee Review:

<<https://www.lawsociety.bc.ca/complaints-lawyer-discipline-and-public-hearings/complaints/complaints-about-lawyers-fees/>>; BC Supreme Court Registrar Office’s website under *Legal Profession Act* Reviews:

<[www.courts.gov.bc.ca/supreme\\_court/about\\_the\\_supreme\\_court/registrar\\_office/booklet/Legal%20Professions%20Act.pdf](http://www.courts.gov.bc.ca/supreme_court/about_the_supreme_court/registrar_office/booklet/Legal%20Professions%20Act.pdf)>.

<sup>429</sup> Note other time limits apply for general fee reviews of a lawyer’s bill. For more information, see *Legal Profession Act*, Part 8—Lawyers’ Fees.

the lawyer took advantage of the circumstances.”<sup>430</sup> If the agreement was obtained fairly, the Registrar will review the fee structure. Even if the Registrar concludes an agreement is both fair and reasonable, a client may request a review of the bill rendered under that agreement.<sup>431</sup>

### Other provinces

Similar provisions to those found in the *Legal Profession Act* on contingency fee agreements exist in the *Legal Profession Act* of Manitoba and Yukon, and the *Solicitor's Act* of Ontario.<sup>432</sup> According to Binks and Hurowitz, no equivalent provisions exist in the *Legal Profession Acts* of the provinces of Alberta, Saskatchewan, Prince Edward Island, Nova Scotia, Nunavut or Northwest Territory.<sup>433</sup> Rather, contingency fees are generally regulated by rules of the provincial Law Societies, in accordance with the Model Code of Professional Conduct (Model Code).

### Limits on contingency fees in Canada

In addition to British Columbia, only New Brunswick has prescribed a maximum percentage that can be charged under a contingency fee arrangement. New Brunswick permits a fee up to 25% of the amount recovered, exclusive of costs, charges, disbursements and taxes directly incurred on behalf of the client in recovery of the amount. The cap is 30% if the case is appealed to a higher court.<sup>434</sup>

Other jurisdictions simply require that contingency fees cannot exceed damages.<sup>435</sup> Like British Columbia and New Brunswick, all other jurisdictions (except Quebec) have Codes of Conduct modeled after the Model Code, which require contingency fees

---

<sup>430</sup> Morrison, *supra* note 426 at 2.1.4.

<sup>431</sup> For information on review of a fee charged under a contingency fee agreement, see *Legal Profession Act* Part 8—Lawyers' Fees, s 70. In assessing fairness on a review of a fee, the Registrar will consider those factors listed under s 71 of the *Legal Profession Act*. See also *Mide-Wilson v Hungerford Tomy Lawrenson and Nichols*, 2013 BCCA 559, 56 BCLR (5th) 57 [*Mide-Wilson*] at paras 22–23 for the two-pronged test of fairness. The court in *Mide-Wilson*, at para 85, reiterated the standard expected in both contingency and non-contingency agreements of the “duty of fairness on solicitors in contracting with clients, requiring the solicitor to establish, for example, that the client understood the agreement, that the price was reasonable,” and “that the transaction was in all respects fair, and such as an independent solicitor who had performed his duty, would have advised his client to enter into.”

<sup>432</sup> Binks & Hurowitz, *supra* note 402 at 3. See also *Legal Profession Act*, CCSM c L107; *Legal Profession Act*, RSY 2002, c 134; *Solicitor's Act*, RSO 1990, c S.15, [*Solicitor's Act*] which contains regulations for contingency fee agreements, O Reg 195/04.

<sup>433</sup> Binks & Hurowitz, *ibid*.

<sup>434</sup> Law Society of New Brunswick, *Contingent Fee Rules*, r 1, online: <lawsociety-barreau.nb.ca/uploads/forms/Contingent\_Fee\_Rules\_-\_R%C3%A8gles\_sur\_les\_honoraires\_conditionnels.pdf>.

<sup>435</sup> For example, see Ontario: O Reg 195/04, s 7.

to be “fair and reasonable” in the circumstances. Factors used in this assessment include “the likelihood of success, the nature and complexity of the claim, the expense and risk of pursuing it, the amount of the expected recovery and who is to receive an award of costs.”<sup>436</sup>

### Internationally

The United Kingdom regulates two types of contingency fees. Conditional fee agreements, where a success fee is paid if a defined “success” is achieved, are regulated by the *Courts and Legal Services Act 1990*.<sup>437</sup> In 2005, the English Court of Appeal considered the legality and merits of 3P Funding.<sup>438</sup> With respect to third-party funders using contingency fee agreements with clients, the Court stated that:

“a professional funder, who finances part of a claimant’s costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided*” [emphasis original]. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.<sup>439</sup>

The second type of agreements are damage-based, and the fee is based on a percentage of the damages collected from the losing party.<sup>440</sup>

There have been changes to contingency fee and damage-based agreements over the years. In 2013, several amendments were made to the *Courts and Legal Services Act 1990* regarding costs orders under contingency fee agreements, and new requirements for these agreements in personal injury cases.<sup>441</sup> The amendments also set out conditions to be met for use of damage-based agreements in personal injury cases; employment matters; all other civil claims.<sup>442</sup>

---

<sup>436</sup> *Model Code*, *supra* note 218 at r 3.6-2, commentary 1.

<sup>437</sup> (UK) 1990 c 41, s 58.

<sup>438</sup> *Arkin v Borchard Lines Ltd*, [2005] EWCA Civ 655, [2005] 1 WLR 3055 (Eng CA, Civ Div).

<sup>439</sup> *Ibid* at para 41.

<sup>440</sup> *Supra* note 437 at s 58A.

<sup>441</sup> *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), 2012 c 10, s 44–46. For a summary of the changes, see David Holland, QC, Landmark Chambers, “The Changes to the Costs Regime Which Take Effect on 1<sup>st</sup> April 2013: A Note for Chancery Members”, (The Chancery Bar Association, 8 March 2013), online: <[www.chba.org.uk/for-members/library/practice-directions-court-notice-changes-to-the-costs-regime-a-note-for-chancery-barristers](http://www.chba.org.uk/for-members/library/practice-directions-court-notice-changes-to-the-costs-regime-a-note-for-chancery-barristers)>.

<sup>442</sup> *Ibid* at 4–8.

In the United States, contingency fees are regulated at the state level. The ABA Model Rules of Professional Conduct set procedural requirements, and prohibit contingency fees in criminal cases.<sup>443</sup> States usually cap contingency fees on a sliding scale depending on the amount of damages recovered.<sup>444</sup>

In Australia, lawyers are prohibited from using contingency fee agreements. These prohibitions stem from the common-law doctrines of champerty and maintenance. When both doctrines were abolished, the ban on contingency fee agreements was legislated.<sup>445</sup> In January 2017, the Attorney-General of Victoria asked the Victorian Law Reform Commission to consider whether removing the ban on contingency fees would enable more litigants to access 3P Funding.<sup>446</sup> In July 2017, the Victorian Law Reform Commission issued a Consultation Paper<sup>447</sup> notes that the ban on contingency fee agreements “is underpinned by public policy concern that contingency fees create perverse incentives for lawyers who have a direct financial interest in decisions affecting the litigation they are involved in.”<sup>448</sup> The consultation paper provides a detailed review of the issues to be considered if the rules were to be lifted, and seeks input on a number of questions. The final recommendations are expected in March 2018.

### *Private lenders*

Binks and Hurowitz note that, “in circumstances where contingency fee agreements are not available, consumer and commercial plaintiffs have turned to private lenders.”<sup>449</sup> Recall in the *Wiegand* case from Chapter 1 that the courts have long held that loans to litigants to initiate or continue litigation may be found non-champertous if the lender does not do anything to encourage a litigant to commence the lawsuit.<sup>450</sup> Where *McIntyre* confirmed the value of contingency fee agreements as a means for litigants to pursue legitimate claims in the courts, *Wiegand* established judicial

---

<sup>443</sup> American Bar Association, “Model Rules of Professional Conduct”, r 1.5, online: <[www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_5\\_fees.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees.html)>.

<sup>444</sup> For an example from New York see *Rule of Appellate Courts*, NY Sup Ct App Div 1st Dept r 603.7(e).

<sup>445</sup> *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 s 183.

<sup>446</sup> Honourable Martin Pakula, MP, Attorney-General of Victoria, Media Release, “Making Civil Justice Fairer for Victorians” (16 January 2017), online: <[www.premier.vic.gov.au/making-civil-justice-fairer-for-victorians/](http://www.premier.vic.gov.au/making-civil-justice-fairer-for-victorians/)>.

<sup>447</sup> Victorian Law Reform Commission, “Access to Justice—Litigation Funding and Group Proceedings: Consultation Paper” (July 2017), online: <[www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Litigation\\_Funding\\_and\\_Group\\_Proceedings\\_Consultation\\_Paper\\_for\\_web.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Litigation_Funding_and_Group_Proceedings_Consultation_Paper_for_web.pdf)>.

<sup>448</sup> *Ibid* at 16.

<sup>449</sup> Binks & Hurowitz, *supra* note 402 at 3.

<sup>450</sup> *Wiegand*, *supra* note 10.

support for litigants to enter into litigation funding agreements (also known as LFAs). Both *McIntyre* and *Wiegand* call for a need to strike a balance over protecting the administration of justice from frivolous or vexatious litigation, while addressing the need to facilitate access to justice.<sup>451</sup>

### PERSONAL INJURY CASES

Litigation funding agreements are predominantly used as an alternative for personal injury clients who otherwise cannot secure a contingency fee agreement with a lawyer, or a loan from a bank. The scope of coverage varies depending on the litigation funding company. BCLI reviewed four 3P Funding companies in Canada. The discussion that follows is an outline of some of the LFAs available today.<sup>452</sup>

#### How litigation funding agreements work

The LFA is entered into with an individual, lawyer, or law firm on the understanding that the litigation is financed by the 3P Funding company, with applicable interest, and payable out of a share of the proceeds if the case is successful. If the case fails, generally there is no requirement for the litigant or firm to repay the funds.

For example, if seeking a settlement loan<sup>453</sup> from BridgePoint Financial Services, a litigant, lawyer or firm must first provide basic information about the case. The details are then assessed and, if approved for a loan (Bridgepoint calls the loans a “settlement loan”), a litigation funding agreement is prepared. Once executed, funds are advanced by wire transfer. Table 12 outlines the terms of BridgePoint’s litigation loans.<sup>454</sup>

---

<sup>451</sup> McDonald, *supra* note 403 at 2–3. McDonald highlights an important quote from the *Wiegand* case: “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.” (*Wiegand*, *supra* note 10 at 104).

<sup>452</sup> See 1) BridgePoint Financial Services, online: <[bridgepointfinancial.ca](http://bridgepointfinancial.ca)> [BridgePoint]; 2) Harbour Litigation Funding online: <<https://www.harbourlitigationfunding.com/>>; 3) Bentham IMF, online: <<https://www.benthamimf.ca/home>>; and 4) Rhino Legal Finance Inc., online: <[rhinofinance.com/](http://rhinofinance.com/)>.

<sup>453</sup> With BridgePoint, a settlement loan provides funding to a litigant to cover necessary basic living expenses (rent, utilities, food, etc.); reasonable and necessary medical/rehabilitation treatment, attendant care or other treatment services where insurance coverage is not available; refinancing higher interest debt or to cover minimum monthly debt payments on bank or credit card debt that may be in default; reasonable disbursements for your legal claim if these are not covered under the retainer agreement with your lawyer.

<sup>454</sup> BridgePoint Financial Services, “Process and Terms”, online: <[bridgepointfinancial.ca/settlementloans/process-and-terms/](http://bridgepointfinancial.ca/settlementloans/process-and-terms/)>.



**Table 12—BridgePoint Financial Services-Settlement/Litigation Loan Terms**

Term	Content
<b>Loan Amount</b>	Standard Loan: \$7,500 Express Loan: \$1,000 to \$7,500 (loans are disbursed monthly)
<b>Interest Rate</b>	18-24% per year (1.5-2.0% per month)
<b>Compounding?</b>	Semi-annually
<b>LFA Term</b>	Minimum six months; no maximum term
<b>Payment</b>	No interim principal or interest payments until resolution of claim
<b>Credit History Review</b>	Not required
<b>Employment or Income Verification</b>	Not required
<b>Application Fee</b>	None
<b>Administration Fees</b>	Standard Settlement Loan: \$375 plus GST/HST (\$475 if advanced in stages) (payable only if loan offer accepted) Express Loan: \$250 plus GST/HST

In comparison, Rhino Legal Finance Inc. in Alberta offers litigation loans with terms that vary depending on where the accident occurred. For example, a litigant, lawyer or law firm seeking a loan for an accident in British Columbia can expect the standard terms to apply in the LFA, as follows:

- **Loan Size:** Minimum \$1000 (no maximum);
- **Interest Rate:** 2.3% per month. Reduces to 1.75% after year 2—until settlement under the Rate Reduction Program™
- **Payments:** No monthly payments until proceeds from successful litigation are received;
- **Application Fee:** None
- **Documentation fee:** Fee is the lesser of 10% of loan amount or \$400—payable only if litigation loan is advanced.<sup>455</sup>

On the contrary, and if the accident occurred in Ontario, the interest rate is set at 1.99 percent, and the documentation fee is \$175, with the same right of adjustment for complicated cases.<sup>456</sup>

<sup>455</sup> Rhino Legal Finance Inc., “Terms”, online: <[rhinofinance.com/terms-fees/standard-terms/](http://rhinofinance.com/terms-fees/standard-terms/)>. Province-specific terms can be accessed by selecting the province from the interactive map on the ‘Terms’ page. Also of note is that Rhino Legal Finance Inc. reserves the right to adjust its Documentation Fee for complicated cases requiring more time. It also offers a trademarked Rate Reduction Program for loans that carry over longer periods.

<sup>456</sup> Another 3P Funding company in Ontario is Easy Legal Finance Inc., which offers settlement loans to plaintiffs with pending injury claims. For more information, see its website: <[www.easylegal.ca/](http://www.easylegal.ca/)>.

### Case law on litigation funding agreements

#### INTEREST RATES

The courts have closely examined two key issues with LFAs, namely: 1) lenders charging interest; and 2) whether interest paid is recoverable as a disbursement expense.

Most notably, in 2011, the Ontario Superior Court in *Giuliani v Halton (Regional Municipality)*<sup>457</sup> expressed concern over the amount of interest charged by the private funding company to the personal injury plaintiff. The court found the 51.1 percent interest rate on the disbursement loan unconscionable and unreasonable in the circumstances.<sup>458</sup> Of significance to the court was that, were the litigant to secure a settlement at trial equivalent to the amount reached between the parties in this case, the litigant would have been left owing money to the lawyer, subsequently keeping no amount of the award for herself.<sup>459</sup> To collect interest that effectively nullifies any access to an award for a litigant who is otherwise financially limited from pursuing their claim in the first place not only runs contrary to the principles of access to justice, but also threatens to “bring the administration of justice into disrepute.”<sup>460</sup>

---

<sup>457</sup> 2011 ONSC 5119, [2011] OJ No 3916 (QL) [*Giuliani*].

<sup>458</sup> Binks & Hurowitz, *supra* note 402 at 6. *Ibid* at para 56.

<sup>459</sup> *Giuliani*, *supra* note 457 at para 58.

<sup>460</sup> *Ibid* at para 59. The court took a different approach a year earlier in the case of *LeBlanc v Doucet*, 2010 NBCA 13, 354 NBR (2d) 117, where the interest amount charged was deemed to be both a reasonable and necessary expense because it “reflected an assessment of the risk assumed” (at para 39) and for which two other financial institutions were not prepared to carry. The court found the loan, and the interest accrued on the loan, helped to prevent a potentially unjust outcome were the client to accept a settlement or abandon it prior to having used the funds to bolster his claim. Courts expect that interest rates applied to litigation funding agreements will be reasonable, fair and necessary in the circumstances. In seeking to recover interest on disbursement expenses, a funder must demonstrate the client would have otherwise suffered an injustice without it. In *Chandi (Guardian ad litem of) v Atwell*, 2014 BCCA 446, 378 DLR (4th) 419, leave to appeal to SCC refused, 36266 (May 14, 2015), the BC Court of Appeal declined to follow the *LeBlanc* principle and refused to include interest expenses as recoverable disbursements in assessing recovery of costs under the *Supreme Court Civil Rules*. See also *Wynia v Soviskov*, 2017 BCSC 195, [2017] BCWLD 1686, wherein the court adopted the reasoning from *MacKenzie v Rogalasky*, 2014 BCCA 446 (CanLII), to decline to allow the plaintiff to recover the cost paid for litigation cost insurance, stating at para 7 that “the cost of insurance coverage is not a proper or necessary disbursement incurred in the conduct of the proceeding. No doubt it provides a measure of financial comfort to the plaintiff, however, it does not arise from the exigencies of the proceeding and relate directly to the direction, management, or control of the litigation used to prove a claim against the defendants. Accordingly, the cost of the insurance coverage is disallowed.”

### IMPROPER MOTIVES

To determine whether an improper motive exists in the context of when a financial interest in the case is assigned to another party, the Manitoba Court of Appeal's decision in *Bjornsson v Smith*<sup>461</sup> is useful to consider. In this case, Smith was counsel for Carol Dee Bjornsson, having prepared her will, acted as executor, and lawyer for Ms. Bjornsson's estate following her death. The will stated that "Ms. Bjornsson's principal beneficiary under her will predeceased her, leaving her two sons, Michael Kenneth Bjornsson and Clinton Bjornsson (Michael and Clinton), and the Winnipeg Humane Society as the residual beneficiaries. Michael and Clinton were each to receive 41.66 per cent and the Winnipeg Humane Society 16.68 per cent of the estate."<sup>462</sup>

In response to demands from both beneficiaries for money out of the estate, Smith obtained consent from the two sons to sell Ms. Bjornsson's house to an investor for \$50,000 (\$40,000 below the appraised value).<sup>463</sup> Smith failed to inform the sons that the sale would be to Smith's wife. The sale was also performed without notice to the Winnipeg Human Society. Sale proceeds were distributed to the two sons, under the terms of the will, with the remaining share given to the Winnipeg Humane Society. The Winnipeg Human Society filed claims against the Law Society of Manitoba reimbursement fund for loss arising from the misappropriation of trust property.

In paying out monies to the beneficiaries, the Law Society of Manitoba secured a release to their right and interest in the claim regarding the misappropriation issue. At issue on appeal was whether the Law Society of Manitoba, in funding the action, was engaging in champerty or maintenance with no legislated jurisdiction to do so.<sup>464</sup> Relying on *McIntyre*, the court found the Law Society of Manitoba had a legitimate interest in the outcome of the action, namely recovery of the monies it paid out of the reimbursement fund. The court found that while the financial interest was based on recovery of monies paid out of the reimbursement fund, this fact on its own did not establish an improper motive under the laws of champerty or maintenance.<sup>465</sup>

---

<sup>461</sup> 2016 MBCA 91, 403 DLR (4th) 354 [*Bjornsson*] leave to appeal to SCC refused, 37298 (February 23, 2017).

<sup>462</sup> *Ibid* at para 3.

<sup>463</sup> *Ibid* at para 5.

<sup>464</sup> *Ibid* at para 13.

<sup>465</sup> *Ibid* at para 23. See also Prof John D McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 441–42 (cited in *Bjornsson* at para 22).

---

### CLASS PROCEEDINGS (CLASS ACTIONS)

Another avenue where private 3P Funding has arguably more support from the courts, and wider application in Canada, is for class proceedings. Although a recent phenomenon in Canada, funding for large-scale group litigation presents a financing option for litigants with relatively small-value claims on their own but, when filed within a larger class of persons, stand to secure a high payout if successful. In the context of funding class proceedings, 3P Funding agreements generally take the form of standard LFAs, where the company funding the action covers the cost of lawyer's fees and disbursements, but often with added coverage to indemnify a representative plaintiff from potential adverse costs awards.<sup>466</sup>

#### Legislation and procedure

The British Columbia *Class Proceedings Act*<sup>467</sup> defines a class proceeding or action as a plaintiff commencing an action in court on behalf of members of a class.<sup>468</sup> A plaintiff must apply to the British Columbia Supreme Court to be deemed as the representative plaintiff for the class, and obtain approval from the court to have the litigation certified as a class proceeding.<sup>469</sup>

Requirements for certification as a class proceeding are outlined in s 2(2) of the *Class Proceedings Act*. If members of the class retain a lawyer or law firm to assist, then the lawyer or firm becomes counsel for all class members.

Section 37(1) of the *Class Proceedings Act* prohibits both the Supreme Court and Court of Appeal from awarding costs arising from an application for certification of a class proceeding to any party to the proceeding, or on appeal arising from a class proceeding, at any stage of the application, proceeding or appeal. For this reason,

### CLASS ACTION

With more and more individuals purchasing the same consumer goods and services, a single mistake or wrongful act in the design, production, or distribution of a product can harm many people in a similar way. A class action is a group of people, also known as a class, pursuing a common claim against the same defendant. Rather than pursuing lawsuits individually, members of the class commence a single legal proceeding on an issue. Where a single lawsuit may have rendered a relatively small judgment in favour of an individual claimant, class actions commonly result in larger monetary awards that are shared amongst the class members.

Source: The Canadian Bar Association, "Class Actions in British Columbia" (April 2015).

---

<sup>466</sup> For more information on Class Proceedings, see Chapter 2—A Roadmap to Litigation.

<sup>467</sup> *Class Proceedings Act*, *supra* note 69.

<sup>468</sup> *Ibid* at s 2(1).

<sup>469</sup> *Ibid* at s 2(2). Of note is that, unlike Ontario and Québec, only a resident of British Columbia may commence a class proceeding, per s 2(1) of the *Class Proceedings Act*.

British Columbia is known as a “no-cost jurisdiction” for class proceedings.<sup>470</sup> This helps improve access to justice because, unlike when an individual files a lawsuit against a party, there is little risk in class proceedings of an unsuccessful representative plaintiff having to pay part of the defendant’s legal costs.

In contrast, Ontario operates as a two-way cost regime, where the potential for cost awards to be granted to a defendant against a representative plaintiff remains a very real possibility.<sup>471</sup> Although Ontario has its own Class Proceedings Fund to offer financial support for disbursements, and indemnity against potential adverse cost awards, a fixed 10 percent levy is applied against any settlement award received by the class, including a return on any funding for disbursements.<sup>472</sup>

### **The evolution of third-party litigation funding for class proceedings**

The courts have carefully considered what will constitute a reasonable litigation funding agreement for class proceedings. Relying on the principles from *McIntyre* that these agreements are not *per se* champertous, courts look to the circumstances of each case. The courts have also developed useful guidelines for how plaintiffs can use this financing option to seek a fair resolution of their claims.

### **EXCEPTIONS TO BC’S NO-COST REGIME**

Section 37(2) of the *CPA* allows the court to award adverse costs in the following circumstances:

- To address vexatious, frivolous or abusive behavior (s. 37(2)(a));
- If a party has taken an improper or unnecessary application or step to delay or increase costs or for any other improper purpose (s. 37(2)(b)); or
- If there are exceptional circumstances that would make it unjust to deprive the successful party of a costs award.

---

<sup>470</sup> Costs may only be awarded in exceptional circumstances to address vexatious litigation, per s 37(2) of the *Class Proceedings Act*.

<sup>471</sup> See s 131 of the Ontario *Courts of Justice Act*, RSO 1990, c C.43 and s 37 of the Alberta *Class Proceedings Act*, SA 2003, c C-16.5. A defendant was granted costs against the representative plaintiff in *Kerr v Danier Leather*, 2007 SCC 44, 286 DLR (4th) 601, for the trial, Court of Appeal and Supreme Court of Canada proceedings, for a total over \$1 million. See also *Fresco v CIBC*, 2010 ONSC 1036, 185 ACWS (3d) 300, [appealed in 2012] and *Williams v Canon Canada Inc.*, 2012 ONSC 1856, [2012] OJ No 1354 (QL), where plaintiffs who lost certification motions were ordered to pay \$525,000 and \$200,000, respectively.

<sup>472</sup> In 1992, an amendment to the *Law Society Act*, RSO 1990, c L.8 was made to include s 59.1, to govern the Class Proceedings Fund. Under s 31(1) of the Ontario *Class Proceedings Act*, 1992, SO 1992, c. 6 permits the court to exercise its discretion in an award of costs if it considers the case to be a test case, raising a novel point of law, or involves a matter of public interest. For more information on the Class Proceedings Fund, see its website: <[www.lawfoundation.on.ca/class-proceedings-fund/](http://www.lawfoundation.on.ca/class-proceedings-fund/)>. For further discussion of the Ontario Class Proceedings Fund, see Chapter 11—Publicly Funded Litigation Funds.

Canada's first approved litigation funding agreement for a class proceeding occurred in the Alberta case of *Don Hobsbawn v ATCO Gas and Pipelines Ltd.*<sup>473</sup> The parties were granted the ability, on an *ex parte* basis, to enter into a LFA with a private 3P Funding company, and secure indemnification from a potential adverse costs award. Although no reasons were provided for the decision in *Hobsbawn*, it subsequently opened the door for class members to enter a LFA, provided the terms were both reasonable and fair.

An attempt to secure court approval for a litigation funding agreement pre-certification was made in the Ontario Superior Court case of *Metzler Investment GMBH v Gildan Activewear Inc.*<sup>474</sup> The representative plaintiff sought to certify a class proceeding against the defendant under a cost indemnification agreement with an international 3P Funding company.<sup>475</sup> The terms stated the 3P Funding company would cover any potential adverse cost award in exchange for 7 percent of the settlement award, with no upper limit, less expenses for legal fees, disbursements, and administrative charges.<sup>476</sup>

Relying on *McIntyre*, the court considered whether an improper motive existed on the part of the funder, and the nature and amount of the fees to be paid.<sup>477</sup> Despite recognizing the benefit of 3P Funding to promote access to justice for class members, the court did not accept the terms of the agreement in *Metzler* because there was no upper limit assigned to the amount the company could recover from the settlement.

### KEY POINTS FROM *METZLER*

*Metzler* offers guidance on the terms that ought to appear in 3P Funding agreements to ensure they are fair and reasonable:

- The representative plaintiff must have full control to initiate, organize and manage the litigation, including instructions to counsel for the class (para. 58);
- Settlement discussions remain confidential between the parties to the litigation. The plaintiff cannot irrevocably authorize and require class counsel to immediately report to [the 3P Funding company] on the details of any settlement discussions (at para 59); and
- To avoid placing undue influence on the parties to reach a settlement, a 3P Funding company may only terminate its obligations under the LFA if the representative plaintiff fails to fulfil its obligations under the LFA, or appoints different lawyers to replace the lawyers as agreed upon under the LFA (at para 60).

---

<sup>473</sup> (May 14, 2009), Calgary 0101-04999 (ABQB) (unreported) [*Hobsbawn*]. See also *MacQueen v Sydney Steel Corp*, 2011 NSSC 484, 311 NSR (2d) 354 [*MacQueen*].

<sup>474</sup> 2009 CanLII 41540 (ONSC), [2009] OJ No 3315 (QL) [*Metzler* cited to CanLII].

<sup>475</sup> At the time, the company was known as Claims Funding International PLC. It has since changed its name to Claims Funding Europe. For more information, visit its website: <claimsfunding europe.eu/>.

<sup>476</sup> *Metzler*, *supra* note 474 at para 12.

<sup>477</sup> *Ibid* at para 44.

Rather, the 3P Funding company could recover 7 percent of the entire settlement monies. The court was concerned that an uncapped term in the agreement could result in over-compensation to the funder.<sup>478</sup> Furthermore, were the court to approve the agreement pre-certification, any class members joining post-certification would have no say as to whether compensation was reasonable or fair in the circumstances.<sup>479</sup> The *Metzler* decision set a precedent for what representative plaintiffs ought to consider if seeking approval of an LFA pre-certification.

### REASONS TO APPROVE A LITIGATION FUNDING AGREEMENT

In *Dugal v Manulife Financial Corporation et al*,<sup>480</sup> the representative plaintiff sought approval of the LFA pre-certification under similar repayment terms used in *Metzler*. What distinguishes the circumstances in *Dugal* from *Metzler*, subsequently leading to a finding that the LFA was non-champertous, is that the parties agreed to cap the recovery amount to avoid potential over-compensation.<sup>481</sup> The representative plaintiff also heeded the court's recommendation in *Metzler* to give notice to potential class members of the LFA, and obtain their input on its terms.<sup>482</sup>

The court in *Dugal* also made note of the inherent benefit of 3P Funding as an important financing option for class litigants, especially in jurisdictions where representative plaintiffs risk bearing the expense of adverse cost awards.

For Strathy J.:

One of the important goals of class proceedings is to provide access to justice to large groups of people who have claims that cannot be economically pursued individually. In Ontario, the costs rules applicable to ordinary actions apply to class proceedings — the loser pays. The costs of losing can be astronomical — well beyond the reach of all but the powerful and very wealthy — not exactly the group the legislature had in mind when the CPA was enacted.

The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars.<sup>483</sup>

---

<sup>478</sup> *Ibid* at para 70.

<sup>479</sup> McDonald, *supra* note 403 at 7.

<sup>480</sup> 2011 ONSC 1785, (2011) 105 OR (3d) 364 [*Dugal*].

<sup>481</sup> *Ibid* at para 6.

<sup>482</sup> *Ibid* at para 7.

<sup>483</sup> *Ibid* at paras 27–28.

Strathy J. not only upheld the LFA, but also offered conditional approval of the LFA if 1) security could be guaranteed by the funder to realize on its cost indemnification obligation; 2) the defendants could be granted a right against the security; and 3) there were “some reasonable controls on the provision of information to the funder.”<sup>484</sup>

Strathy J.’s reasons for approval of the agreement in *Dugal* are summarized below:

- Similar to contingency fee agreements, litigation funding agreements facilitate access to justice;
- The funder did not stir up or provoke the litigation. The plaintiffs showed a clear intent to move forward before the funding company became involved;
- The indemnification agreement ensures control of the litigation remains with the representative plaintiffs. The funder is entitled to receive information about the progress of the case for the purposes of managing the litigation funding;
- The commission agreed upon is reasonable;
- The commission cap is reasonable and fairly reflects the risk assumed by the funder;
- The representative plaintiffs accept the commission terms;
- Potential for a “windfall” recovery to the funder is a standard factor that all 3P Funding companies must consider when deciding what amount of compensation will be fair and reasonable;
- The plaintiffs have experienced litigation counsel who will be able to represent the interests of the plaintiffs, class and court without influence from the funder; and
- The court will supervise the parties to the litigation funding agreement.<sup>485</sup>

### LITIGATION FUNDING AGREEMENTS IN BRITISH COLUMBIA

In 2013, the first third-party litigation funding agreement was approved in British Columbia in *Stanway v Wyeth Canada Inc.*<sup>486</sup> Madam Justice Gropper found that even though the *Class Proceedings Act* does not explicitly mention 3P Funding agreements, this does not preclude their use for class proceedings, provided care is taken to ensure strict ethical and practice standards are met.<sup>487</sup>

---

<sup>484</sup> *Ibid* at paras 35–36.

<sup>485</sup> *Ibid* at para 33.

<sup>486</sup> 2013 BCSC 1585, 56 BCLR (5th) 192 [*Stanway*].

<sup>487</sup> *Ibid* at para 37.



Gropper J. set out the following terms that must be met for a representative plaintiff to enter into a litigation funding agreement:

- (a) Court approval: the LFA must be subject to court approval;
- (b) Notice: the LFA must be described in the notice of certification so that class members can choose whether or not to accept it by opting in/out of the class;
- (c) Contingency: the LFA must be payable only in the event of success;
- (d) Disbursements: the purpose of the LFA is to cover disbursements only. Given British Columbia's "no cost" rules, it is not intended to pay for an adverse cost award;
- (e) Independence: the private lender shall have no say in the conduct of the lawsuit. All decisions remain the preserve of the representative plaintiff;
- (f) Qualifications: the only private lenders to be considered are those which have already been approved by Canadian courts in other cases involving LFAs;
- (g) Confidentiality of Canadian Documents: the Plaintiff will not provide to the private lender any documents produced by the Canadian Defendants in this lawsuit which are subject to the implied undertaking rule. For greater clarity however, it is the Plaintiff's position that Canadian documents which are publicly available may be shared with the private lender. This would include documents which have already been filed as exhibits on motions in this proceeding....<sup>488</sup>

### LITIGATION FUNDING AGREEMENTS IN ONTARIO

In June 2015, the Ontario Superior Court in *Bayens v Kinross Gold Corp*<sup>489</sup> finalized a settlement originating from a litigation funding agreement with Harbour Litigation Financing Ltd. In *Bayens*, after failing to secure funding from the Ontario Class Actions Proceeding Fund, the plaintiffs approached Harbour, one of the few third-party financiers operating in Canada at the time. In May 2013, the parties entered an agreement that was approved by the Ontario Superior Court in July 2013. In April 2015, the case was finalized and the litigation funding agreement, which granted Harbour 7.5% to 10% of any net recovery, was completed.

The *Bayens* decision is important for setting out the principles courts should consider when deciding whether to approve a litigation funding agreement:

- Third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis;

---

<sup>488</sup> *Ibid* at para 4.

<sup>489</sup> 2015 ONSC 3944, [2015] OJ No 3240 (QL) [*Bayens*].

## Study Paper on Financing Litigation

---

- Plaintiffs must obtain court approval in order to enter into a third party funding agreement;
- A third party funding agreement must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The third party agreement is itself not a privileged document;
- The court has the jurisdiction to make an approval order binding on the class pre-certification of the class: *Fehr; Dugal; Metzler*;
- To be approved, the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members;
- To be approved, the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation;
- Before approving a third party funding agreement, the court must be satisfied that the representative plaintiff will not become indifferent in giving instructions to Class Counsel in the best interests of the class members. (To speak colloquially, the concern is that insulated from an adverse costs award and with a modest individual claim to compensation, the representative plaintiff will not have any "skin in the game" with a resultant diminished commitment to advance the class action on behalf of the class.);
- Before approving a third party agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members' access to justice;
- In seeking approval for a third party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund for funding. If, however, approval from the Fund is sought and refused, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding;
- Before approving a third party agreement, the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award. (This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund's percentage uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable.);
- To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information; and
- It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant's costs. (Whether this should be a necessary term in every case has not been determined in the case law.).<sup>490</sup>

---

<sup>490</sup> *Ibid* at para 41.

The *Bayens* has become the leading authority for courts across Canada on what factors ought to be considered when approving a litigation funding agreement.<sup>491</sup>

A complete understanding of how 3P Funding agreements are entered into is still under development. However, a 2013 article by two Canadian law school professors and a clerk from the Supreme Court of Canada offers some guidance.<sup>492</sup> According to the article, agreements for class proceedings “are principally indemnity agreements, with modest or no monies advanced by the funder.”<sup>493</sup> The funder enters into a contract with the representative plaintiff and, “unlike litigation financing in some personal injury cases, the funding of class actions is not structured as a loan but rather as an investment with a return calculated as a percentage of the settlement or judgment if one is obtained.”<sup>494</sup>

Although 3P Funding has been predominantly used for personal injury and class proceedings litigation, a recent case out of the Ontario Superior Court approved a 3P Funding loan for a commercial legal action. In *Schenk v Valeant Pharmaceuticals International Inc.*,<sup>495</sup> Justice McEwen commented that, so long as it is subject to specific terms that protect the administration of justice, litigation funding agreements may be used for commercial litigation.

### *The United States and Australia*

While the development and application of 3P Funding in Canada is in its infancy, it is estimated that 3P Funding (including for arbitration matters) is a multibillion dollar industry internationally.<sup>496</sup> Two leading jurisdictions with long-standing support for 3P Funding are the United States and Australia.

#### UNITED STATES

Despite having similar concerns over champerty and maintenance, the United States is a leading 3P Funding jurisdiction, not only for personal injury and tort claims, but also for large and complex commercial litigation. The development of this model in

---

<sup>491</sup> Based on CanLII search conducted June 2017, *Bayens* has been cited in the following decisions: *Mancinelli v Barrick Gold Corporation*, 2016 ONCA 571 (CanLII); *Hayes v The City of Saint John et al*, 2016 NBQB 125 (CanLII); *Stanway v Wyeth Canada Inc*, 2014 BCSC 931 (CanLII); *Schneider v Royal Crown Gold Reserve Inc*, 2016 SKQB 278 (CanLII); *Berg v Canadian Hockey League*, 2016 ONSC 4466 (CanLII); *Li v Li*, 2016 ONSC 7410 (CanLII)

<sup>492</sup> Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, “Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding” 16 Am J Comp L 93 (Winter 2013) [Kalajdzic, Cashman & Longmoore].

<sup>493</sup> *Ibid* at 118.

<sup>494</sup> *Ibid*.

<sup>495</sup> 2015 ONSC 3215, 255 ACWS (3d) 306 [*Schenk*].

<sup>496</sup> Victoria Shannon Sahani, “Judging Third-Party Funding” (2016) 63 UCLA L Rev 388 at 393–4.

the United States began like it did in Canada, only much earlier, with lawyers and firms offering contingency fee agreements to clients for the past several decades.<sup>497</sup> While the appetite for contingency fee agreements from would-be plaintiffs remained strong, lawyers and firms simultaneously struggled with how to manage both the risks and monetary challenges these agreements imposed.<sup>498</sup> A trend of securing financial support outside law firm walls emerged as an opportunity for lawyers and firms to “remain solvent, alleviate cash flow problems, and overall to remain competitive with firms that have more capital.”<sup>499</sup>

In 2009, the practice of using non-traditional sources of funding for litigation became known as alternative litigation finance. The ABA defines alternative litigation finance as “the funding of litigation activities by entities other than the parties themselves, their counsel, or other entities with a preexisting contractual relationship with one of the parties, such as an indemnitor or a liability insurer.”<sup>500</sup> Today, three types of agreements are commonly used: 1) nonrecourse loans to plaintiffs; 2) loans to lawyers or law firms; and 3) funding of complex or commercial litigation matters.<sup>501</sup>

The first two types, categorized under consumer legal funding, generally cover personal injury or tort claims.<sup>502</sup> Loans under the consumer legal funding category typically involve an agreement by the funder to provide the plaintiff with a lump sum amount of money on the understanding that the plaintiff, if successful, will repay the full amount plus an additional fee.<sup>503</sup> Loans to lawyers or firms are “secured by assets of the firm, such as furniture and fixtures, the firm’s accounts receivable, or the firm’s

---

<sup>497</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 128. See also Steven Garber, “Alternative Litigation Financing in the United States: Issues, Knowns, and Unknowns” (2010) RAND Corporation Occasional Paper at 1, online: <[https://www.rand.org/pubs/occasional\\_papers/OP306.html](https://www.rand.org/pubs/occasional_papers/OP306.html)>.

<sup>498</sup> Kalajdzic, Cashman & Longmoore, *ibid*.

<sup>499</sup> *Ibid*.

<sup>500</sup> American Bar Association, Commission on Ethics 20/20, “Informational Report to the House of Delegates”, (27 December 2011) at 1, online:

<[www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111212\\_ethics\\_20\\_20\\_alf\\_white\\_paper\\_final\\_hod\\_informational\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf)> [ABA, “Informational Report”].

<sup>501</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 128-29.

<sup>502</sup> ABA “Informational Report”, *supra* note 500 at 6. See also the American Legal Finance Association, a trade association established in 2004, “that represents the leading consumer legal funding companies across the country...to establish the highest ethical standards and fair business practices within the Legal Funding industry.” The website notes there is a Code of Conduct for members, which is based on an “Agreement negotiated by ALFA with the New York Attorney General dated February 17, 2005 for all New York State transactions.” For more information, visit its website: <[americanlegalfin.com](http://americanlegalfin.com)>.

<sup>503</sup> *Ibid*.

contingent interests in ongoing cases.”<sup>504</sup> Unlike loans to plaintiffs, lawyers and firms must repay the loan regardless of whether the case succeeds.

The third form of funding is investments made from either public or private funds for commercial litigation matters between businesses over contract, intellectual property, and antitrust disputes.<sup>505</sup>

A recent case to highlight 3P Funding in America is the highly-publicized decision of *Bollea v Gawker Media LLC* (aka “Hulk Hogan v Gawker”).<sup>506</sup> Shortly following the judgment in favor of the plaintiff, Peter Thiel (the wealthy co-founder of PayPal, among many other tech ventures) admitted to funding the lawsuit in retaliation for the defendant outing him and others in articles published on its website.<sup>507</sup> While no follow-up legal actions were pursued to examine Thiel’s financing agreements, the *Bollea* case nonetheless magnified the issue of 3P Funding in civil cases.<sup>508</sup>

### AUSTRALIA

Australia has seen rapid growth for 3P Funding in all three areas of civil, commercial and class action litigation.<sup>509</sup> Commercial funding is primarily used to advance class proceedings since representative plaintiffs are not required to obtain certification.<sup>510</sup> The reasons why 3P Funding is used for class proceedings are largely attributed to limited availability of legal aid funding, and the cost-shifting rule that places representative parties at risk of bearing adverse cost awards if the case does not succeed.<sup>511</sup>

---

<sup>504</sup> *Ibid* at 8.

<sup>505</sup> *Ibid*. Due to the private nature of these types of contracts, little is known about the repayment terms.

<sup>506</sup> *Terry Gene Bollea v Gawker Media LLC et al*, Case no 12-012447-CI-011 (Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida) [*Bollea*]. See also *Bollea v Gawker Media LLC*, 2016 WL 4073660 (Fla Cir Ct) 1 for final judgment in this matter.

<sup>507</sup> Andrew Ross Sorkin, “Peter Thiel, Tech Billionaire, Reveals Secret War with Gawker”, *New York Times* (25 May 2016), online: <[www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html](http://www.nytimes.com/2016/05/26/business/dealbook/peter-thiel-tech-billionaire-reveals-secret-war-with-gawker.html)>.

<sup>508</sup> Following the decision, Gawker Media filed for bankruptcy and was bought by Univision. Univision decided to shut down the site. See Steven Tweedie and Nathan McAlone, “Gawker is being sold to Univision for \$135 million”, *Business Insider* (16 Aug 2016), online:

<[www.businessinsider.com/univision-buys-gawker-for-135-million-2016-8](http://www.businessinsider.com/univision-buys-gawker-for-135-million-2016-8)>. See also Joshua Hut, “What Litigation Financing is Really About”, *The New Yorker* (1 Sept 2016), online: <[www.newyorker.com/business/currency/what-litigation-finance-is-really-about](http://www.newyorker.com/business/currency/what-litigation-finance-is-really-about)>.

<sup>509</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 96.

<sup>510</sup> *Ibid* at 97.

<sup>511</sup> *Ibid* at 98. For a list of the nine options available in Australia for paying for class action litigation, see *ibid* at 99–100.

In 2001, Australia became the first jurisdiction in the world to establish a commercial litigation funding company, known today as IMF Bentham. According to its website, IMF Bentham set the precedent for litigation funding companies as the first to: 1) be publicly listed; 2) be regulated as a financial institution; 3) invest in claims over the AUD 3 billion value barrier; and 4) fund disputes internationally.<sup>512</sup> The Australian arm of Bentham IMF provides funding to plaintiffs, law firms and corporations. In Canada, “Bentham IMF Capital Limited provides litigation finance and investment capital to plaintiffs and law firms for large disputes in Canada and for international arbitration.”<sup>513</sup>

According to its website, as at June 2017, the Australian Bentham IMF model offers funding for commercial litigation cases (generally with values over AUD 5 million), class actions, insolvency matters over AUD 1 million, and international commercial arbitration and treaty claims with values more than AUD 10 million. The Canadian offering has funding options in five main categories: 1) commercial litigation; 2) law firm financing; 3) insolvency matters; 4) appeals; and 5) arbitration. Unlike litigation funding options currently available through other Canadian private funding companies, Bentham IMF Capital Limited will not provide individual commercial funding for personal injury, discrimination or malpractice claims. When asked what factors are considered in determining a suitable claim for commercial litigation funding, Chief Investment Officer, Tania Sulan states:

The claim should have strong prospects of success and a defendant able to satisfy a judgment. The budget should be approximately one-tenth of the realistic claim size to ensure that, on success, the litigant receives the majority of any recovery. A funder will undertake due diligence to ensure the case is meritorious and also consider factors such as how the litigation is to be managed, exposure to court ordered costs, and the likely time to resolution.<sup>514</sup>

Although 3P Funding has garnered widespread application to facilitate access to justice for litigants who otherwise cannot afford to bring forward their claim, or bear the financial burden of potential adverse cost awards, it has faced legal challenges. Of note is that many of the concerns raised by the Australian judiciary mirror those found in Canadian courts.<sup>515</sup> A 2013 empirical study of 3P Funding in Australia notes

---

<sup>512</sup> See IMF Bentham’s website: <[www.imf.com.au/about#ourhistory](http://www.imf.com.au/about#ourhistory)>. In 2011, IMF Bentham brought its litigation funding model to the United States and, more recently, to Canada.

<sup>513</sup> Bentham IMF Capital Limited, online: <<https://www.benthamimf.ca/>>.

<sup>514</sup> “Six Things You Need to Know about Litigation Funding,” *Expert Magazine* (June 2017) [*Expert*, “Bentham IMF”]. Article sponsored by Bentham IMF.

<sup>515</sup> Much of the case law in Australia has examined whether 3P Funding triggers the doctrines of champerty, maintenance, and abuse of process. For a list of cases to consider these issues, see Kalajdzic, Cashman & Longmoore, *supra* note 492 at 106, footnote 42. See also *Campbells Cash and*

that states with higher use of 3P Funding also have greater court backlogs.<sup>516</sup> While this could easily be treated as a disadvantage, Abrams and Chen suggest that, “[w]hile congesting the courts may be a cost of third-party funding, the overall welfare effects could still be positive. If the value of the adjudication of cases is greater than the expense of adjudicating them, then third-party funding should be encouraged.”<sup>517</sup> They also suggest 3P Funding offers precedential value; cases funded by third-parties are cited more than twice as often as their unfunded counterparts.<sup>518</sup>

The Victoria Law Reform Commission is looking at regulation of 3P Funding. The terms of reference<sup>519</sup> include an examination of the need for further regulation of litigation funders. The final report and recommendations may offer some additional insights into this kind of funding and the issues that must be addressed.

### Optimal uses

The consultation participant feedback and research highlight the following ways 3P Funding may be used:

- **Powerful opposition:** Plaintiffs who face off against large and well-funded defendants, such as large corporations or governments, may lack important advantages from which the latter may benefit—for example, the ability to write-off legal expenses. 3P Funding can help equalize the financial playing field. It may also provide leverage for plaintiffs to discourage wealthier defendants who may draw out the litigation process to increase costs.
- **Riskier cases:** 3P Funding encourages lawyers and firms to expand their risk threshold when taking on cases. For contingency matters, lawyers strive to carefully balance the risk and reward to ensure they only take on cases where awards surpass the expenses. 3P Funding offers support to lawyers and law firms to take on riskier cases through expense coverage under the agreement.
- **Industry-specific advantages:** 3P Funding may also help in specific areas of commercial litigation. For example, in intellectual property cases where plaintiff resources as a new company may be limited. It may also allow companies to focus limited funds on future research and development of its

---

*Carry Pty Ltd v Fostif Pty Ltd.*, [2006] HCA 41, (2006) 229 CLR 386 and *Brookfield Multiplex Funds Ltd v International Litigation Funding Partners Pte Ltd*, (2009) 180 FCR 11.

<sup>516</sup> David S Abrams & Daniel L Chen, “A Market for Justice: A First Empirical Look at Third Party Litigation Funding” 15:4 (2013) 15 U Pa J Bus L 1075.

<sup>517</sup> *Ibid* at 1106-07.

<sup>518</sup> *Ibid* at 1107.

<sup>519</sup> Victoria Law Reform Commission, *supra* note 447.

intellectual property—rather than spending it on legal fees.<sup>520</sup> For corporate users of 3P Funding who are not impecunious, this financing model can be an attractive way to manage and spread the risks inherent in long and complex litigation.<sup>521</sup>

### Advantages

#### *Improved accessibility to cases not traditionally taken on contingency*

One of the most compelling advantages of 3P Funding is its ability to improve access to encourage lawyers and law firms to take on cases that would otherwise seem too risky to take on a contingency fee basis. Contingency fee agreements are conventionally used as an alternative to full-scope retainers in cases with a probability of high awards—such as for personal injury and medical malpractice claims. Clients whose cases are riskier (either due to lower awards or less compelling facts) may have difficulty finding a lawyer willing to take on their matter. Likewise, lawyers and law firms who are hesitant to bear the cost and risks associated with these types of cases may also lack the resources and infrastructure to take on a long and difficult case in the hope of a large payout months, or years, later.

Poonam Puri notes that relaxation of the common law doctrines of champerty and maintenance calls for “an appropriate balance...between the protection of vulnerable parties, allowing plaintiffs to use third-party litigation financing to assert their legal rights, and the potentially harmful effects of allowing third parties to accrue windfall profits from another party’s litigation.”<sup>522</sup> Puri notes a potential benefit of 3P Funding is that actions can be funded sufficiently through a third party, thus removing the need for law firms to partner with each other to carry litigation forward, thereby reducing the number of lawyers required on a case.<sup>523</sup>

---

<sup>520</sup> Naomi Loewith, “Financing the fight: Court opens door to third party litigation funding in private commercial cases”, *The Lawyers Weekly* (March 2016) at 13.

<sup>521</sup> Ira Nishisato & Hugh Meighen, “Third Party Funding in Arbitration”, *Borden Ladner Gervais* (June 2016), online: <[blg.com/en/News-And-Publications/Documents/Publication\\_4544\\_1033.pdf](http://blg.com/en/News-And-Publications/Documents/Publication_4544_1033.pdf)>.

<sup>522</sup> Poonam Puri, “Profitable Justice: Aligning Third-Party Financing of Litigation with the Normative Functions of the Canadian Judicial System” (2014) 55 Can Bus LJ 34.

<sup>523</sup> *Ibid.*



### *Enhance application in jurisdictions with two-way cost regimes*

Ontario and Alberta still operate under a two-way cost regime for class proceedings. In Ontario, and unless a representative plaintiff can secure indemnity from either the lawyer or law firm representing the class, or through the provincial Class Proceedings Fund, there may be very few, if any, alternative options to secure financial protection from liability for what could amount to a very high cost award in favour of the defendant. 3P Funding companies that offer cost protections as part of their services present a useful alternative to ensure representative plaintiffs are not deterred from initiating a claim.

### *Diversifying risk*

3P Funding improves access to the courts by sharing a key aspect of a lawyer's legal practice, namely: the risk analysis to decide whether to take on a case. By sharing the risk assessment with a funding company, lawyers get support in deciding which cases to take on to lower overall potential costs.<sup>524</sup>

A lawyer unsatisfied with an initial profitability assessment can rely on the expertise of the funding company to provide actuarial values and cost-benefit analyses on disbursements, costs, and fees. If the company can show the case will be profitable, the parties can agree to enter into a litigation funding agreement, and negotiate the terms. The parties also have flexibility to define the terms of the agreement—including what costs are covered, the percentage paid to the 3P Funding company, and the scope of legal services. This flexibility is particularly useful in jurisdictions with no cost protections, like Ontario and Alberta because it helps reduce the threat of high cost awards against the party seeking the funding.

### *Improves client ability to pay for necessary disbursements*

In cases that require specialized expert reports or extensive evidence collection, 3P Funding can fund expenses which may otherwise be financially out of reach for a client. Known as disbursement or expert financing, this service is often made available to lawyers or law firms as a loan for an individual file, or as a settlement loan. One financing company offers disbursement loans to law firms to finance both new and

---

<sup>524</sup> For further discussion on this point, see Michael J Trebilcock & Elizabeth Kagedan, "An Economic Assessment of Third-Party Litigation Funding of Ontario Class Actions" (2014) 55 Can Bus LJ 54 at 70 [cited in Agarwal, *supra* note 402 at 15]. See also *Lexpert* "Bentham IMF", *supra* note 514, wherein Sulan and Loewith note, "[s]ophisticated companies use external sources of capital to finance many parts of their business and see litigation funding as a financing and risk management tool to monetize litigation assets. As a funder pays the legal fees and disbursements, capital is freed up for other parts of the business. Further, because litigation funding is non-recourse and the funder typically covers any costs if the litigation is unsuccessful, the potential downside of pursuing litigation is removed."

existing disbursements on individual files. The lawyer is the borrower, on behalf of the plaintiff, with both interest and principal payments deferred until a settlement is reached.<sup>525</sup>

### *Coverage for out-of-pocket litigation expenses*

Litigation funding agreements may also be drafted to cover expenses that would otherwise come out of the client's pocket—such as medical bills, or living allowances. For example, in automobile-related personal injury cases in British Columbia, consultation participants noted that amounts for what are known as “no-fault benefits”<sup>526</sup> have seen little changes over many years. Clients who fail to meet ICBC's criteria for direct payment will be required to pay for their own rehabilitation. For clients facing long-term rehabilitation programs, the costs for these treatment services may eventually become unmanageable without some financial support. Clients may be forced to stop treatment until they can secure additional funding to cover those costs. This could lead to accusations of failing to mitigate damages, or the insurer drawing other negative inferences about the scope of the injury.

Companies like BridgePoint and Rhino Legal Finance Inc., among others, present a financing alternative to manage up-front costs with treatment financing. Treatment financing refers to a loan to cover the cost of services that include medical treatments, counselling, and rehabilitation, among others, typically provided directly to the plaintiff. While the lawyer or firm oversees administration of the loan funds, they are not required to act as a guarantor for the loan.<sup>527</sup>

### **Disadvantages and potential complications**

3P Funding is still in its infancy in Canada. The courts continue to assess the benefit of 3P Funding as an alternative financing option for individual and class litigation. Best practices continue to evolve as courts review and consider requirements to ensure these types of agreements are fair and reasonable.

One case offering suggestions in this regard is the *Stanway* decision. In her discussion about the proper use of litigation funding agreements, Madam Justice Gropper refers

---

<sup>525</sup> BridgePoint, *supra* note 452.

<sup>526</sup> For information on benefit entitlements with the Insurance Corporation of British Columbia (ICBC), visit its website: <[www.icbc.com/claims/injury/Treatment-and-Injury/Pages/default.aspx](http://www.icbc.com/claims/injury/Treatment-and-Injury/Pages/default.aspx)>.

<sup>527</sup> For more information on Treatment Loans, see BridgePoint and Rhino Legal Finance Inc., *supra* note 452.

to the limited number of previous cases in Ontario,<sup>528</sup> Alberta,<sup>529</sup> and Nova Scotia,<sup>530</sup> where agreements were approved by the court. Gropper J. cited an article from academics, Adrian C. Lang and Samaneh Hosseini, to outline the approach Ontario courts will take when reviewing LFAs:

- All such arrangements should be disclosed and approved by the court;
- The court must be convinced that there is no improper motive on the part of the funder and that the arrangement does not take advantage of vulnerable litigants by setting a recovery amount for the funder that is unreasonable or unfair. . . .
- Courts are clearly concerned that third-party litigation funding may pose a threat to the independence of representative plaintiffs and class counsel. As such, the courts will review the terms of each agreement, including terms requiring disclosure of information to the funder or participation of the funder in settlement discussions, to ensure that the agreement leaves control of the litigation and settlement in the hands of the plaintiffs. . . and;
- Courts have shown concern about potential improper disclosure of defendants' confidential information to third-party funders who are not parties to the proceedings.<sup>531</sup>

The points identified in *Stanway* are useful to prompt discussion on the disadvantages that arise from using litigation funding agreements. They also offer suggestions for where structural, systemic, or legal changes can be made to help promote wider application of 3P Funding in Canada.

### *Litigation privilege and disclosure issues*

Generally, parties to an action must disclose evidence which may be relevant to the case at hand. However, if a party can satisfy the court that a document was prepared for litigation, and thus should be protected under litigation privilege,<sup>532</sup> there may be

---

<sup>528</sup> *Fehr v Sun Life Assurance Co. of Canada*, 2012 ONSC 2715, [2012] OJ No 2029 (QL) [Fehr]; *Dugal*, *supra* note 480; *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v Sino-Forest Corp.*, 2012 ONSC 2937, 216 ACWS (3d) 834, cited in *Stanway*, *supra* note 486 at para 14.

<sup>529</sup> *Hobbsawn*, *supra* note 473. See also *Stanway*, *supra* note 486.

<sup>530</sup> *MacQueen*, *supra* note 473, cited in *Stanway*, *supra* note 486.

<sup>531</sup> Adrian C Lang & Samaneh Hosseini, "The Absent Party: An Examination of Third-Party Funding of Class Actions in Canada" (2013) 41:1 Advocate's Quarterly 1 at 18; cited in *Stanway*, *supra* note 486 at para 15.

<sup>532</sup> "Litigation privilege" is a rule of evidence that enables parties to argue for protection from disclosure any documents or communications that can be shown were produced for the purposes of litigation. In *Dos Santos v Sun Life Assurance Co of Canada*, 2005 BCCA 4 at para 43, 249 DLR (4th) 416, the court offered to factual determinations that must be reviewed to determine whether a party will succeed in an argument for litigation privilege against a document, namely: 1) Was litigation in reasonable prospect at the time the document was produced; and 2) If so, what was the dominant purpose for its production? *Supreme Court Civil Rules*, *supra* note 61, r 7-1(20).

exceptions to waive this obligation. In British Columbia, the court has discretion to review a document in consideration over whether an exemption will apply.<sup>533</sup>

Ontario courts take the position that management and administration of LFAs ought to have judicial oversight, and have gone so far as to allow defendants to appear at motions when representative plaintiffs seek approval of LFAs.<sup>534</sup> Gropper J. cites the reasons for allowing defendants to attend in Ontario courts are because:

- a) the defendant may have an interest in ensuring that adequate provision has been made to satisfy an adverse costs award under the Ontario *Rules of Civil Procedure*, R[R] O 1990, Reg 194;
- b) the defendant may have an interest in ensuring that the implied undertaking rule is complied with; and
- c) the defendant may have an interest in ensuring that a private financier is not controlling the litigation.<sup>535</sup>

Gropper J. points out that, in British Columbia, section 38 of the *Class Proceedings Act* permits a representative plaintiff to apply to the court for approval of an agreement respecting fees and disbursements without notice to the defendants.<sup>536</sup> Gropper J. also noted that the distinction from Ontario's requirement that applications for approval be made with notice to the defendants relates to Ontario's standing as a two-way cost jurisdiction.<sup>537</sup> As such, clarification of this in BC's legislation is desirable to remove any uncertainty.

The case law is divided on whether terms of a litigation funding agreement ought to be disclosed. Binks and Hurowitz note the courts in *Hobsbawn* and *MacQueen* imposed confidentiality orders on the litigation funding agreements in those cases.<sup>538</sup> While the court in *Stanway* agrees some aspects of the agreement will fall under the blanket of litigation privilege,<sup>539</sup> Gropper J. leaves the door ajar for situations where partial disclosure will be appropriate, and perhaps necessary, for defendants to weigh-in on terms as they relate to undertakings made by the parties, and to ensure the funding

---

<sup>533</sup> *Supreme Court Civil Rules*, *ibid*.

<sup>534</sup> *Stanway*, *supra* note 486 at paras 21–22. See also *Fehr*, *supra* note 528 at paras 89–90.

<sup>535</sup> *Stanway*, *ibid* at para 22. The implied undertaking rule refers to Rule 30.1(3) of the Ontario *Rules of Civil Procedure*, which states that “All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.”

<sup>536</sup> *Class Proceedings Act*, *supra* note 69 at s 38(3)(a).

<sup>537</sup> *Stanway*, *supra* note 486 at para 23.

<sup>538</sup> Binks & Hurowitz, *supra* note 402 at 8.

<sup>539</sup> *Stanway*, *supra* note 486 at paras 43–46. Protected terms include confidential communications between the representative plaintiff, their lawyer or firm, and the 3P Funding company.

company is not controlling the course of the litigation.<sup>540</sup> For Gropper J., litigation privilege will apply to the terms of the agreement “in respect of specific aspects: litigation strategy, litigation budget and other “highly sensitive” aspects.”<sup>541</sup> What is clear from *Stanway* is that any degree of disclosure will depend on the circumstances of the case. Without specific direction from the *Class Proceedings Act* for a notice requirement to defendants prior to approval, and unless the court orders otherwise, litigation funding agreement terms may remain a mystery for quite some time. Binks and Hurowitz note this could extend to situations where the plaintiff or group of plaintiffs have yet to receive class certification.<sup>542</sup>

### *Lack of regulation*

In British Columbia, the Law Society of BC has set out regulations and policies for when lawyers advance funds to clients to cover the cost of disbursements. However, there is little guidance in the way of regulations for 3P Funding from private companies for civil and class proceedings litigation. In 2014, the Law Society of BC Benchers released an Ethics Opinion on the practice of lawyers advancing funds to clients for case-related disbursements, and a review of the sections of the *BC Code* that regulate it.<sup>543</sup> The Law Society of BC notes that lawyers paying the cost of client disbursements has become the norm, especially for clients who cannot finance the expenses on their own. Generally, the agreement between the lawyer and the client is that any up-front costs incurred by the lawyer will be reimbursed by the client upon settlement of the claim.<sup>544</sup>

The *BC Code* instructs lawyers on how to properly and ethically advance funds to clients to cover disbursement expenses, including non-traditional disbursements, like medical costs and living expenses, where interest is also collected.

For traditional disbursement expenses, a lawyer must:

- disclose the charge in writing in a timely fashion (Rule 3.6-1);
- ensure the charge is fair and reasonable (Rule 3.6-1); and

---

<sup>540</sup> *Ibid.* For further discussion on disclosure and litigation funding agreements, see also Puri, *supra* note 522 at 51-53.

<sup>541</sup> *Stanway*, *supra* note 486 at para 46.

<sup>542</sup> Binks and Hurowitz, *supra* note 402 at 8.

<sup>543</sup> Law Society of British Columbia, “Benchers’ Bulletin, ‘Advancing funds to a client to cover the cost of disbursements, medical expenses or living expenses’” (Benchers’ Bulletin, No 3, Fall 2014) at 12, online: <[https://www.lawsociety.bc.ca/docs/bulletin/BB\\_2014-03-Fall.pdf](https://www.lawsociety.bc.ca/docs/bulletin/BB_2014-03-Fall.pdf)> [Benchers’ Bulletin].

<sup>544</sup> *Ibid.* Of note is that two British Columbia Supreme Court decisions have expressly approved the practice of lawyers advancing funds for client disbursements, namely: *Franzman v Munro*, 2013 BCSC 1758, [2013] BCJ No. 2096 and *Chandi v Atwell*, 2013 BCSC 830, 48 BCLR (5th) 173.

---

- ensure the client consents to the charge (Rule 3.6–1).

For non-traditional disbursements (e.g., medical costs and living expenses), a lawyer must:

- disclose the charge in writing in a timely fashion (Rule 3.6–1);
- ensure the charge is fair and reasonable (Rule 3.6–1);
- ensure the client consents to the charge after receiving independent legal advice (Rule 3.4–28); and
- comply with Rule 3.4–26.1, which prevents a lawyer from advancing funds to a client if there is a substantial risk that the lawyer’s loyalty to or representation of the client would be materially and adversely affected by the lawyer’s relationship with the client, interest in the client, or the subject matter of the legal services provided.

While the *BC Code* provides useful guidance, there is an absence of guidance for private litigation funding agreements.

In an article published in 2011, the same year the *Giuliani* decision was released, the Law Society of BC confirmed that “lawsuit loans made by third parties that are independent and unrelated to the lawyer are not specifically mentioned” in the Law Society of BC rules or guidelines.<sup>545</sup> This is also the case in Ontario, despite recommendations from its own provincial Law Society to consider developing regulations for this practice.<sup>546</sup> Both the courts and private 3P Funding companies must continue to ensure these agreements are fair and reasonable in the circumstances. Dr. Kalajdzic notes successful application of this model will largely depend on an opportunity for early review of the agreement by the court, as in the case with class proceedings.<sup>547</sup> Debate continues among members of the legal community remains over whether allowing early disclosure of litigation funding agreement terms could compromise a plaintiff’s potential advantage in the case.<sup>548</sup>

### *Potential undue influence and power imbalances*

As noted earlier in the chapter, one of the greatest challenges posed to 3P Funding is how to reconcile concerns within the legal community about champerty and maintenance. Since a private funding company unrelated to the case plays an important role in bringing the case forward, there is a real concern about whether the

---

<sup>545</sup> Ava Chisling, “The Loan Arrangers”, *Canadian Lawyer Magazine* (14 November 2011). The article also noted confirmation by the Law Society of Upper Canada of no regulation of loan companies.

<sup>546</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 122.

<sup>547</sup> *Ibid* at 123.

<sup>548</sup> *Ibid*.

funder can truly remain at arm's length from the outcome. As noted by Dr. Kalajdzic, "it would be naïve to accept that the funder makes a decision to indemnify a representative plaintiff against potentially millions of dollars of adverse costs—in some cases will also inject millions of dollars into the litigation itself—and then take a completely passive back seat role in the way that the litigation unfolds."<sup>549</sup>

At a glance, the potential for conflict is apparent. A private 3P funding company could engage in champerty if acting with an improper motive to help or encourage litigation to profit from the outcome. Alternatively, they may be liable for maintenance if they exert undue influence on a plaintiff, lawyer or law firm. A query that arose for consultation participants was over who truly has ownership of the interests in the outcome of the case.

While the courts continue to review litigation funding agreements, concerns that it may encroach the laws of champerty and maintenance remain. For example, where funding companies are found to be effectively investing in litigation to earn a profit,<sup>550</sup> the determination of whether there is an "improper motive" on the part of the funder is increasingly blurred. The notion that litigation could be transformed from a dispute over a person's rights into an investment opportunity is a concern echoed among members of the United States legal profession as well.<sup>551</sup>

It has been suggested that the negative impacts and inefficiencies with 3P funding may result in a "degradation of equity in the legal system."<sup>552</sup> Richey suggests 3P Funding creates an imbalance in power between plaintiffs and defendants, where plaintiffs

---

<sup>549</sup> Jeff Gray, "The risky business of investing in lawsuits", *The Globe and Mail*, (26 June 2012), online: <[www.theglobeandmail.com/report-on-business/industry-news/the-law-page/the-risky-business-of-investing-in-lawsuits/article4372582/](http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/the-risky-business-of-investing-in-lawsuits/article4372582/)>. See also Joanna M Shepherd, "Ideal Versus Reality in Third-Party Litigation Financing" (2012) 8:3 *JL Econ & Policy* 593 at 594. At 594-610, Shepherd suggests that while 3P Funding has its advantages, third-party financiers do not necessarily have access to justice as their primary objective. Instead, third-party financiers seek to maximize returns, leading funding commercial litigation matters more often than cases that could improve access to justice. Shepherd argues 3P Funding power imbalances may in fact hinder access. She further asserts that defendants may accept outcomes that are less favourable than if the plaintiffs were not financed by a third-party.

<sup>550</sup> See Chapter 9—Crowdfunding.

<sup>551</sup> See Sara Randazzo, "Litigation Financing Attracts New Set of Investors", *The Wall Street Journal* (15 May 2016), online: <<https://www.wsj.com/articles/litigation-financing-attracts-new-set-of-investors-1463348262>>. See also U.S. Chamber Institute for Legal Reform, "Before the Flood: An Outline of Oversight Options for Third Party Litigation Funding in England & Wales", (April 2016), online: <[http://www.instituteforlegalreform.com/uploads/sites/1/BeforeFlood\\_vFINAL\\_Web.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/BeforeFlood_vFINAL_Web.pdf)>.

<sup>552</sup> Joshua G Richey, "Tilted Scales of Justice? The Consequences of Third-Party Financing of American Litigation" (2016) 63:2 *Emory LJ* 489 at 524. Mr. Richey is a lawyer practising in Atlanta, Georgia.

---

funded by third-parties have the advantage.<sup>553</sup> Richey concludes that, “third-party litigation financing must be overhauled,” and argues for changes on the: (1) institution of caps on possible recovery for funders; (2) enactment of registration and licensing requirements; and (3) extension of the Maine, Nebraska, and Ohio frameworks.<sup>554</sup> Richey notes that:

“[t]he three states that have enacted legislation have required clauses that include (1) language that allows a plaintiff who signs a third-party litigation financing contract to cancel that contract within five days of receiving the financing if the plaintiff returns the funds, (2) language that instructs the plaintiff to consult an attorney, (3) itemized one-time fees charged by the funder, (4) the annual percentage rate of return that the funder will receive on the investment, and (5) the total dollar amount to be repaid by the plaintiff to the funder after the conclusion of the litigation.”<sup>555</sup>

In Norton Rose Fulbright’s September 2016 publication,<sup>556</sup> Christopher Bogart of Burford Capital commented that, “additional regulation is not merited, and that more regulation targeting simply “third-party funders” would be unfair. Self-regulation has accomplished many, if not all, of the objective that some have called for, including minimum capital requirements and an ethical code of conduct.”<sup>557</sup>

As noted earlier in this chapter, the Victoria Law Reform Commission is expected to make recommendations on regulation of litigation funders.

### *Potential to advance unmeritorious cases*

Another area where ethical lines are blurred is family law. In the United States and United Kingdom, 3P Funding is now used in divorce proceedings.<sup>558</sup> Since divorce lawyers in the United States and United Kingdom are not allowed to represent a

---

<sup>553</sup> *Ibid.*

<sup>554</sup> *Ibid* at 524–25.

<sup>555</sup> *Ibid* at 514. See *Maine Consumer Credit Code*, Me Rev Stat Ann tit 9-A §§12-101 to 107 (2007); *Nonrecourse Civil Litigation Act*, Neb Rev Stat Ann §§25-3301 to 3309 (West Supp 2010); and Ohio Rev Code Ann §1349.55 (West Supp 2013). See also Victorian Law Reform Commission, *supra* note 447 for details on Australia’s efforts to address this issue.

<sup>556</sup> Sherina Petit, James Rogers & Cara Dowling, “Third-party Funding in Arbitration—the Funders’ Perspective: A Q&A with Woodsford Litigation Funding, Harbour Litigation Funding and Burford Capital,” *Norton Rose Fulbright* 7 (September 2016) 2, online; <[www.nortonrosefulbright.com/files/international-arbitration-report-issue-7-142408.pdf](http://www.nortonrosefulbright.com/files/international-arbitration-report-issue-7-142408.pdf)>.

<sup>557</sup> *Ibid* at 6. See also *Lexpert*, “Bentham IMF”, *supra* note 514, where Sulan and Loewith note that, in cases where a dispute arises between the third-party funder and the client over a settlement offer, or any other control issue, Bentham IMF’s funding agreement includes “a short fuse arbitration mechanism to resolve any dispute.”

<sup>558</sup> The Economist, “Financing Divorce: Till debt do us part”, *The Economist* (Print Edition) (March 2016), online: <[www.economist.com/news/business-and-finance/21694473-firms-who-lend-people-seeking-end-marriage-are-attracting-interest-inside](http://www.economist.com/news/business-and-finance/21694473-firms-who-lend-people-seeking-end-marriage-are-attracting-interest-inside)>.



divorce client on contingency, a niche market developed for 3P Funding loans.<sup>559</sup> Private funding companies are free to fund legal disputes over marital assets for a share of the awards.

A recent decision by the British Columbia Financial Institutions Commission (FICOM) found a funding company operating in Canada was selling legal indemnities, and thereby acting as an unregulated insurance dealer.<sup>560</sup> FICOM ordered the company to cease and desist its operations. Whether loans like those described above would be considered similarly remains unknown. Furthermore, this funding model may encourage frivolous litigation if used with an unscrupulous funder.

One consultation participant noted that, in the personal-injury bar, a third-party funder could partially fund many cases at once, including frivolous cases, in the hope that one turns out to have a large award or settlement.<sup>561</sup> This could have profoundly adverse impact on court caseloads, and the judicial system generally. A code of conduct barring such behaviour could be helpful in such circumstances.

### *A form of insurance*

The insurance market is tightly regulated to ensure consumer protection. Insurance dealers must be licensed and abide by strict regulations which provide oversight and ensure compliance with the law.

FICOM used the *BICO* case as an opportunity to distinguish between third-party litigation funders and companies selling legal indemnities. FICOM examined the use of Bridgepoint's legal indemnities in *Markovic v Richards*,<sup>562</sup> *Alary v Brown*,<sup>563</sup> *Stamp v Sun Life Assurance Co of Canada*,<sup>564</sup> and *Shah v Loblaw Companies Ltd*<sup>565</sup> to review the appropriateness of these services. FICOM found that BridgePoint had never

---

<sup>559</sup> In the United States, the ABA Model Rules note the prohibition, see American Bar Association, "Model Rules of Professional Conduct" *supra* note 443. In the United Kingdom, the prohibition can be found at *Courts and Legal Services Act 1990*, *supra* note 437, s 58A(1)–(2).

<sup>560</sup> *In the Matter of the Financial Institutions Act*, RSBC 1996, c 141 and *Bridgepoint Indemnity Company (Canada) Inc.* (June 30, 2016) [*BICO*], online: <[www.fic.gov.bc.ca/pdf/enforcement/trust/fia20160630.pdf](http://www.fic.gov.bc.ca/pdf/enforcement/trust/fia20160630.pdf)>. Further discussion of the *BICO* decision is found under the heading "TPLF as a form of insurance" below.

<sup>561</sup> See also Puri, *supra* note 522 at 37-38. Puri identifies key drawbacks associated with 3P Funding: (1) collaboration between affiliated firms can be eliminated; (2) counsel may be less inclined to manage disbursement costs; and (3) counsel may be less likely to screen for unmeritorious litigation when there are no-recourse loans.

<sup>562</sup> *Markovic v Richards*, 2015 ONSC 6983, [2015] OJ No 5901 (QL) [*Markovic*].

<sup>563</sup> *Alary v Brown*, 2015 ONSC 3021, 254 ACWS (3d) 303.

<sup>564</sup> *Stamp v Sun Life Assurance Co of Canada*, 2015 ONSC 2858, [2015] OJ No 2324 (QL).

<sup>565</sup> *Shah v Loblaw Companies Ltd*, 2015 ONSC 5987, [2015] OJ No 5169 (QL).

---

registered with the corporate registry in British Columbia (it is registered in Ontario), nor had it applied or been authorized to conduct an insurance business in British Columbia.<sup>566</sup>

FICOM looked to the *Insurance Act*,<sup>567</sup> the *Financial Institutions Act*,<sup>568</sup> and its *Classes of Insurance Regulation*.<sup>569</sup> The Superintendent of FICOM found that BridgePoint's products and services constituted the practice of offering "legal expenses insurance," as defined in the regulation.<sup>570</sup> FICOM held that BridgePoint "was conducting insurance business in British Columbia without authorization in breach of section 75 of the Act."<sup>571</sup> From this finding, and pursuant to provisions under the *Financial Institutions Act*,<sup>572</sup> the Superintendent ordered BridgePoint to cease conducting insurance business and arrange for the assumption of all current contracts by an authorized insurance company at BridgePoint's expense.

BridgePoint did not deny that two of its services were insurance products under the Act,<sup>573</sup> and FICOM found that the Certificate of Indemnity it offered to clients as part of its legal cost protection services were, in substance, contracts of insurance as defined in the *Insurance Act*. FICOM did not agree with BridgePoint's position that the legal-cost protection services were not considered insurance because they maintain solicitor-client privilege. FICOM also disagreed that a simple disclaimer on the company website that the product "is not designated to be a regulated insurance product" is sufficient to distinguish the two.<sup>574</sup>

FICOM offered reasons for the importance of strictly regulating the insurance industry in the province. It explained that unregulated insurance businesses pose a risk to the public. Consumers would be vulnerable if ever BridgePoint could not fulfill its financial obligations, without recourse to the Property and Casualty Insurance Compensation Corporation. Additionally, consumers would not benefit from the security afforded by the conduct oversight under insurance regulatory agencies—

---

<sup>566</sup> *BICO*, *supra* note 560 at para 5.

<sup>567</sup> *Insurance Act*, [RSBC 2012], c 1.

<sup>568</sup> *Financial Institutions Act*, [RSBC 1996] c 141.

<sup>569</sup> *Classes of Insurance Regulation*, BC Reg 204/2011 [*Classes of Insurance Regulation*].

<sup>570</sup> *Ibid* at s 1(1) "legal expenses insurance" means insurance against costs incurred for legal services specified in the policy, including any retainer and fees incurred for the services, and other costs incurred in respect of the provision of the services.

<sup>571</sup> *BICO*, *supra* note 560 at para 36. The Act referred to is the *Financial Institutions Act*, *supra* note 568.

<sup>572</sup> *Financial Institutions Act*, *supra* note 568, ss 244(2)(a), (e)(ii), and (f), and 238.

<sup>573</sup> *BICO*, *supra* note 560 at para 22.

<sup>574</sup> *Ibid* at para 24.

including licensing oversight and ongoing capital requirements.<sup>575</sup> FICOM also noted there are litigation expense insurance products available in British Columbia which *are* licensed and regulated (the Superintendent wrote that at least one unnamed company offers nearly identical, but licensed, services to those offered by BridgePoint).<sup>576</sup>

BridgePoint responded by requesting a hearing before the Financial Services Tribunal, while at the same time undertaking to comply with the order.<sup>577</sup> The plan included a short-term solution under which a licensed company would take over their current contracts, and a long-term solution of partnering with a licensed insurance company that would underwrite any future legal expenses insurance contracts. The undertaking also provided that, if the long-term solution was accepted by the Superintendent, BridgePoint would withdraw its request for a hearing.<sup>578</sup>

In July 2016, the Superintendent of the Financial Services Commission of Ontario issued an interim cease and desist order to BridgePoint for reasons similar to those in the BC order.<sup>579</sup> BridgePoint later announced an agreement with FICOM and Financial Services Commission of Ontario to resume operations. While BridgePoint “maintained that its legal cost protection products [were] not insurance,”<sup>580</sup> the company signed letters of intent with a Canadian insurer and an insurance brokerage to sell regulated insurance policies. FICOM stated that the new products would “remain in all material respects the same cost protection currently enjoyed by BICO’s clients.”<sup>581</sup> On March 8, 2017, BridgePoint officially launched its new legal expense

---

<sup>575</sup> *Ibid* at paras 41–43.

<sup>576</sup> *Ibid* at para 32. For a comparative analysis of third-party litigation funding and legal expense insurance, see Michael Faure & Jef De Mot, *Comparing Third-Party Financing of Litigation and Legal Expenses Insurance*, Journal of Law, Economics and Policy, Vol. 8, No. 3, 2012. For further discussion on legal expense insurance, see Chapter 10—Legal Expense Insurance below.

<sup>577</sup> Superintendent of Financial Institutions, “In the matter of the *Financial Institutions Act* RSBC 1996, c 141 and Bridgepoint Indemnity Company (Canada) Inc.—Undertakings of BridgePoint Indemnity Company (Canada) Inc., PBL Insurance Brokers Canada Ltd. and Mark R Frederick [FIAs. 208]” (22 September 2016), online: <[www.fic.gov.bc.ca/pdf/enforcement/trust/fia20160922.pdf](http://www.fic.gov.bc.ca/pdf/enforcement/trust/fia20160922.pdf)>.

<sup>578</sup> *Ibid* at para 20.

<sup>579</sup> Financial Services Commission of Ontario, “Interim Cease and Desist Order to Bridgepoint Indemnity Company (Canada) Inc”, (7 July 2016), online: <<https://www.fscs.gov.on.ca/en/about/enforcement/cdo/pages/co-bridgepoint.aspx>>.

<sup>580</sup> BICO Risk Management Inc, “BICO September 23 Regulatory Update”, online: <[www.bico.ca/blog/BICO-is-back-in-business/](http://www.bico.ca/blog/BICO-is-back-in-business/)>.

<sup>581</sup> *Ibid*.

insurance products, in partnership with Canadian licensed insurer Omega and insurance broker EasyInsure.<sup>582</sup>

### **Ethics and professional responsibility considerations**

#### *Complications from lawyer self-financing*

A concern with 3P Funding is the risk of conflicts of interest arising when lawyers advance funds to their clients. The *BC Code* does not permit lawyers to lend money (and charge interest) to clients where it may result in the lawyer having an interest in the outcome that would affect their personal judgment.<sup>583</sup> As the Law Society of BC notes, a lawyer or law firm who loans a client a large sum of money may be more likely to guide that client towards an outcome that would result in them receiving their loan payments.<sup>584</sup>

The Law Society of BC affirms that the practice of lawyers advancing funds for disbursement costs is not contrary to the rules, and has in fact been approved by some court decisions.<sup>585</sup> However, consultation participants note that further direction is still needed to clarify the scope and obligations required to ensure lawyers entering litigation funding agreements with private funding companies to cover those costs will not find themselves in breach of the *BC Code* provisions. Until such time, ethical issues may still arise because concepts like “medical expenses” and “living expenses” used by the Law Society of BC are broad—and risk being interpreted in ways that may bring a lawyer in breach the *BC Code*.

For example, a consultation participant queried that, if a client accepts money from a lawyer for treatment, and the opposing counsel argues the treatment is excessively costly, could this result in the lawyer becoming a *de facto* witness in their client’s case—and thereby placed in a position of conflict? Likewise, another consultation participant noted that if funds advanced by the lawyer are used to pay for the living expenses of a child in a family dispute, it may lead to conflicts with the court’s duty to ensure the best interests of the child.<sup>586</sup>

---

<sup>582</sup> BICO Risk Management Inc, “BICO Risk Management Successfully Launches New Legal Expense Insurance Product”, (8 March 2017), online: <[www.bico.ca/blog/BICO-Risk-Management-Successfully-Launches-New-Legal-Expense-Insurance-Product/](http://www.bico.ca/blog/BICO-Risk-Management-Successfully-Launches-New-Legal-Expense-Insurance-Product/)>.

<sup>583</sup> *BC Code*, *supra* note 29 at r 3.4–26.1.

<sup>584</sup> Bencher’s Bulletin, *supra* note 543.

<sup>585</sup> *Franzman and Chandi*, *supra* note 544.

<sup>586</sup> *Family Law Act*, [SBC 2011] c 25, at Part 4—Care of and Time with Children, Division 1—Best Interests of the Child.

---

The annotations to the *BC Code* directly comment on situations where lawyers provide medical financing to their clients:

It is not contrary to the rules for lawyers to pay the cost of client disbursements or to advance funds to the client to pay for medical treatment or living expenses. However, the *BC Code* has provisions that restrict and regulate the circumstances under which lawyers can advance funds to clients (see especially rules 3.6–1, 3.4–28 and 3.4–26.1).<sup>587</sup>

The rules require the transaction to be reasonable and fair, and not adversely affect the lawyer's relationship with the client and the client's interests. The *BC Code* governs the behaviour lawyers must keep when acting as witnesses.<sup>588</sup> The annotations state that "[w]here there is a strong chance that a lawyer will be obliged to give evidence if the matter proceeds to trial, it would be improper to continue as counsel unless other counsel is ready to assume conduct of the matter without interruption if the lawyer's evidence is required."<sup>589</sup>

Another potential risk of conflict involves situations where the lawyer has an established relationship with a 3P Funding company, with perhaps many cases within the firm receiving some form of 3P Funding. In this case, the lawyer is both representative to the client, but also acts as a client of the funding company. A conflict could arise if the lawyer is asked to provide legal services to the funding company, or if the lawyer or firm is offered an incentive to promote 3P Funding to new or existing clients. Under the *BC Code*, a lawyer has a duty to avoid conflicts of interest, which can arise "when there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person."<sup>590</sup> This issue was contemplated by the ABA as well, in the context of lawyers receiving referral fees from funding companies as a means of drawing in future clients.<sup>591</sup>

### *Threats to the independence of plaintiffs and counsel*

Recall from Gropper J. in *Stanway* that one of the concerns with litigation funding agreements is that, in the absence of regulation or judicial oversight, there may be situations where the role of the representative plaintiff or class counsel is overshadowed by the interests of the 3P Funding company. Research suggests it is not unforeseeable in some situations where a company with comparatively higher risk

---

<sup>587</sup> *BC Code*, *supra* note 29 at annotations to r 3.4–26.1. See also Law Society of British Columbia, "Bencher's Bulletin Item 1", (Benchers' Bulletin, No 3, Fall 2014) online: <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/code/bb/2014-03.pdf>>.

<sup>588</sup> *BC Code*, *supra* note 29.

<sup>589</sup> *Ibid* at annotations to r 5.2–1.

<sup>590</sup> *BC Code*, *supra* note 29 at r 3.4–1, commentary [1].

<sup>591</sup> ABA, "Informational Report", *supra* note 500 at 16.

tolerance than the representative plaintiff, or their counsel, attempts to persuade the parties to take more risks in the litigation.<sup>592</sup> Gropper J. suggests this can be resolved as the courts review the terms of litigation funding agreements, including those that cover disclosure of information to the funder, or participation by the funder in settlement discussions. Presently, judicial review of litigation funding agreements is still ongoing in Canada and British Columbia.

### *Limited applicability to other areas of the law*

3P Funding is somewhat limited to areas of law that support contingency fee agreements, or class proceedings. 3P Funding may have limited application to areas of law where awards are insufficient to be profitable, such as for human rights or other public interest litigation.

Consultation participants agreed 3P Funding may be of limited use in areas where persons are most vulnerable or most likely to be self-represented—such as in small claims courts, family disputes, or areas dealt with in administrative tribunals (e.g. residential tenancy, human rights, and employment standards). Since the awards in these areas can be smaller than those seen in civil and class proceedings litigation, a lawyer or law firm may not be able to rely on 3P Funding to take on such cases, or other public interest cases with non-pecuniary awards. When considering 3P Funding, access to justice for public interest cases is almost exclusively limited to class proceedings litigation.

## **Systemic, structural, or legal changes to consider**

### *Regulations for third-party litigation funding agreements*

Consultation participants observed that a licensing program or an official code of conduct to regulate the use of litigation funding agreements is worth considering. This may facilitate use of 3P Funding for a wider variety of cases, and respond to concerns around protecting the control of both lawyer and client in the litigation. It may also help mitigate concerns about funding companies being used to advance frivolous and vexatious litigation.<sup>593</sup>

---

<sup>592</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 121–22.

<sup>593</sup> See Puri, *supra* note 522 at 46. Puri suggests three regulatory schemes: (1) regulation through lawyer-client relationship (expand lawyer's fiduciary duty to the client); (2) require TPLF agreements to be subject to judicial review; and (3) regulation through statute (either principle-based or mandatory contractual terms).

### UNITED KINGDOM

In considering the development of a regulatory framework for 3P Funding, research reveals that much has been accomplished in this regard in England and Wales. Use of this financing option to enhance access to justice in the United Kingdom has received strong support in public policy and from the judiciary. Three overarching mechanisms are used to regulate and oversee the application of 3P Funding, namely: 1) the Association of Litigation Funders; 2) a Code of Conduct for Litigation Funders; and 3) judicial oversight.<sup>594</sup> The first two mechanisms are discussed here, with the third outlined under the heading below.

Created by the Civil Justice Council, a government agency of the Ministry of Justice in England and Wales, the Association of Litigation Funders was established in 2011 as an independent body to regulate 3P Funding.<sup>595</sup> While membership is voluntary, funding companies that are members are subject to the terms and standards of practice set out in the *Code of Conduct for Litigation Funders*.<sup>596</sup> To become a member of the association, the company must provide evidence demonstrating access to funds sufficient to maintain capital to fulfill its obligations under the *Code of Conduct for Litigation Funders*. The company must also submit a copy of the litigation funding agreement to association counsel for review. The purpose of this disclosure requirement is to have a lawyer assess whether the agreement complies with the *Code of Conduct for Litigation Funders*, and whether the company should become a member.

The association also has a process for complaints against a member for failure to adhere to the *Code of Conduct for Litigation Funders* or requirements of the association, and a guideline to be used by counsel to encourage clients to consider 3P Funding as a financing option.<sup>597</sup> Efforts have been made to regulate minimum

---

<sup>594</sup> For an in-depth review of the above mechanisms, including review of the judicial oversight applied against 3PFunding, see Rachel Mulheron, "England's Unique Approach to the Self-Regulation of Third Party Funding: A Critical Analysis of Recent Developments" (2014) 73:3 Cambridge LJ 570 [Mulheron]. For an example of a similar model used in the United States, see also American Legal Finance Association, *supra* note 502. For discussion on the topic of regulation in Australia, see Michael Duffy, "Two's Company, Three's a Crowd? Regulating Third-Party Litigation Funding, Claimant Protection in the Tripartite Contract, and the Lens of Theory" (2016) UNSWLawJl 5, online: <[www.austlii.edu.au/au/journals/UNSWLawJl/2016/5.html](http://www.austlii.edu.au/au/journals/UNSWLawJl/2016/5.html)>.

<sup>595</sup> For more information about the Association of Litigation Funders, see its website: <[associationoflitigationfunders.com](http://associationoflitigationfunders.com)>.

<sup>596</sup> Association of Litigation Funders, *Code of Conduct for Litigation Funders*, (November 2014), online: <[associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf](http://associationoflitigationfunders.com/wp-content/uploads/2014/02/Code-of-conduct-Nov2016-Final-PDF.pdf)> [*Code of Conduct for Litigation Funders*].

<sup>597</sup> For more information on the complaints procedure, see Complaints Procedure, online: <[associationoflitigationfunders.com/wp-content/uploads/2014/02/ALF-Complaints-Procedure-](http://associationoflitigationfunders.com/wp-content/uploads/2014/02/ALF-Complaints-Procedure-)

amounts necessary for the funding company to meet its financial obligations, ensure the agreement discloses the involvement of the funding company in settlement discussions, and instances when a funding company may terminate the litigation funding agreement.<sup>598</sup> The company must also ensure that a party entering into a litigation funding agreement obtains independent legal advice prior to signing the agreement, proof of which must be gathered by the funding company, in writing.<sup>599</sup>

Binks and Hurowitz note development of a similar code in Canada could help regulate issues like those covered in the *Code of Conduct for Litigation Funders*, and which have been considered by the cases outlined above for “conditions under which funding can be withdrawn, guidance for dispute resolution, and parameters outlining the control of the course of litigation.”<sup>600</sup>

### SINGAPORE

On June 30 2016, Singapore introduced legislation that would permit 3P Funding for international arbitration that is seated in Singapore.<sup>601</sup> The purpose of the legislation is, “to further promote Singapore’s growth as one of the world’s leading arbitration seats.”<sup>602</sup> The Bill would abolish common law doctrines of champerty and maintenance to allow for 3P Funding in the arbitration context.<sup>603</sup>

### ONTARIO TRIAL LAWYERS’ ASSOCIATION (OTLA) POLICY

Although the *Code of Conduct for Litigation Funders* has not received judicial consideration in Canadian jurisprudence as of the date of publication,<sup>604</sup> of note is that practitioners in Ontario have attempted to develop a regulatory mechanism for 3P Funding. In October 2015, the OTLA developed a policy to outline standards for interactions with litigation loan companies that mirror some of the objectives of the

---

Final-PDF.pdf> [Complaints Procedure]. See also Information for Solicitors, online: <associationoflitigationfunders.com/wp-content/uploads/2014/03/ALF-info-for-solicitors.pdf>.

<sup>598</sup> *Code of Conduct for Litigation Funders*, supra note 596 at ss 9.4, 11.1 & 11.2.

<sup>599</sup> *Ibid* at s 9.1.

<sup>600</sup> Binks & Hurowitz, supra note 402 at 10.

<sup>601</sup> KC Lye & Katie Chung, “Third-party Funding for International Arbitration in Singapore”, *Norton Rose Fulbright* 7 (September 2016) 7, online: <www.nortonrosefulbright.com/files/international-arbitration-report-issue-7-142408.pdf>.

<sup>602</sup> *Ibid*.

<sup>603</sup> *Ibid* at 8.

<sup>604</sup> Of note is that the *Code of Conduct for Litigation Funders* was mentioned in *Musicians’ Pension Fund of Canada (Trustee of) v Kinross Gold Corp*, 2013 ONSC 4974, 117 OR (3d) 150, in a motion for court approval of class action funding, as the company providing indemnity against adverse costs was British and acted under the *Code of Conduct for Litigation Funders*. However, there was no discussion of the *Code* itself.



*CCLF*.<sup>605</sup> Any funding company that intends to appear at OTLA conferences, or advertise in OTLA publications, must comply with the OTLA Policy. Table 13 outlines excerpts from the OTLA Policy.

**Table 13—Excerpts from OTLA Policy for litigation loan companies**

Responsibility of Companies	Requirements of Companies
<ul style="list-style-type: none"> <li>• Providers of products and services to personal injury claimants owe a responsibility to clients and their lawyers, to ensure their products/services are suitable;</li> <li>• the terms of any loan or insurance are straightforward and transparent;</li> <li>• there are no conflicts of interest and no interference or control of litigation;</li> <li>• client confidentiality and privilege are protected; and</li> <li>• the client's fundamental right to 'access to justice' is enhanced.<sup>606</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Agree to operate in compliance with all Canadian laws;</li> <li>• Agree to provide information to clients and lawyers to ensure complete transparency of cost and risk including details concerning all fees and administrative charges, minimum loan periods, and rates of interest (including sample charts);</li> <li>• Agree to act in the best interest of the client, by taking steps such as recommending periodic advances rather than lump sum payments to minimize interest payments,</li> <li>• Agree to be responsible for taking the appropriate steps, which would be in addition to merely speaking to the claimant's lawyer, to obtain sufficient information about the claimant as to ensure that the requested loan is appropriate, in the circumstances, for that claimant;</li> <li>• Agree to be responsible for compliance with applicable financial industry protocols;</li> <li>• Avoid any conflict of interest or potential conflict of interest;</li> <li>• Refrain from requiring legal counsel representing a client to provide any written analysis or opinion as a requirement of entering into a business relationship with a client, and to limit any other inquiry to a brief overview of the parameters of the case together with an assurance that the claim is (on the balance of probabilities) likely to succeed;</li> <li>• Refrain from requiring the client or legal counsel to provide privileged information as a requirement of entering into a business relationship with a client;</li> <li>• Agree to protect client confidentiality and client privilege;</li> <li>• Agree to require all claimants to discuss, with their lawyers, their intention to borrow before proceeding with the loan process.<sup>607</sup></li> </ul>

<sup>605</sup> Ontario Trial Lawyers' Association, "OTLA Policy regarding Litigation Loan Companies", (27 October 2015) [OTLA Policy]. Note: This policy was made available to the BCLI through the consultation sessions, and is generally only made available to members of the OTLA.

<sup>606</sup> *Ibid* at s 2.

<sup>607</sup> *Ibid* at s 3.

The OTLA Policy is administered by the OTLA Practice Direction Committee that oversees compliance and procedures for complaints from OTLA members, clients, or other companies regarding a funding company's failure to comply with OTLA Policy.

Although the OTLA Policy is still new, it suggests an appetite within the legal community for regulation of 3P Funding companies. The OTLA Policy provision calling for a company's commitment to enhance a client's right of access is perhaps a way to ensure that companies consider other non-financial benefits for supporting a case. Consultation participants noted that while the OTLA Policy is a positive attempt towards developing clear guidance, the policy could be strengthened further.

One option to consider in attempts to regulate 3P Funding in British Columbia is to create provisions within the *BC Code* outlining the duties and obligations of lawyers entering litigation funding agreements. This may include more direction on how to avoid potential conflicts of interest, not only in the context of managing the lawyer's relationship with the client and 3P Funding company, but also to address other areas that may fall prey to potential conflicts or other ethical challenges.

One example to be captured could be situations when a lawyer is assisting with negotiations over the terms of the litigation funding agreement with both the client and funding company. The ABA notes that, in this situation, a lawyer may find themselves at odds with their own interests, and what is best for the client.<sup>608</sup> The lawyer would be required to advise the client of both the benefits and potential adverse impacts of the litigation funding agreement, including alternative options. While the ABA suggests obtaining a client's written confirmation of informed consent prior to executing the agreement, an additional requirement that the client obtain independent legal advice may be worthwhile, as advocated for under the model *Code of Conduct for Litigation Funders* from England and Wales.

### *Greater judicial oversight*

Much of what is known about the use of 3P Funding in Canada, especially in the context of its application to class proceedings, comes from the case law. However, and until either regulations or official policies are developed, further judicial oversight may be needed to ensure litigation funding agreement terms are reasonable and fair.

In terms of judicial oversight, and its impact on the application of 3P Funding, the judiciary of England and Wales offers some guidance in assessing whether the doctrine of champerty will be triggered by a litigation funding agreement, as follows:

---

<sup>608</sup> ABA, "Informational Report", *supra* note 500 at 17.

1. A TPLF company must ensure a client receives independent legal advice prior to executing a LFA;
2. There can be no actual or implied conflicts of interest arising from the LFA; and
3. No improper control on the part of the TPLF company to either the lawyer/firm or client.<sup>609</sup>

All three of the above factors are codified in the *Code of Conduct for Litigation Funders*.<sup>610</sup> With recent development of three additional factors, which have yet to be adopted into the *Code of Conduct for Litigation Funders*, it is clear the courts are taking an active role to offer guidance to both counsel and funding companies to ensure practices fall within the professional obligations of lawyers within the country, and preserve the administration of justice for the client.<sup>611</sup> Recall earlier in this chapter that the court in *Bayens* takes a similar position for approval of LFAs in class proceedings.

It is unclear how far the courts can extend this oversight outside the parameters of what has more recently been permitted in the case law. Dr. Kalajdzic notes that while judicial oversight may be what is needed to provide interim control over the use of 3P Funding, how far it can extend beyond approval of LFAs to oversee the conduct of the funding company remains uncertain.<sup>612</sup> The ultimate benefits of judicial oversight are challenged in the Agarwal article, where the authors assert that LFAs made between freely negotiating private parties should not be subject to judicial approval, as “[w]hatever the ultimate regulatory response to litigation funding, ad hoc judicial review of the reasonableness of a litigation funding agreement concluded in private commercial litigation does little to address the perceived ills of litigation funding, and erect barriers to realizing the benefits of such arrangements.”<sup>613</sup> Whether separate and distinct principles are needed to review LFAs for non-class proceedings matters requires further review by the courts.

---

<sup>609</sup> Mulheron, *supra* note 594 at 582.

<sup>610</sup> *Code of Conduct for Litigation Funders*, *supra* note 596 at ss 9.1, 9.2 & 9.3.

<sup>611</sup> OTLA Policy, *supra* note 605. The three additional factors derived from recent case law are: 1) not improperly stirring up litigation; 2) a fair proportion of the settlement award; and 3) willingness to meet liabilities under the LFA. Based on the most recent version of the *Code of Conduct for Litigation Funders* (November 2016), it appears the third factor may have been implemented through rule 9.4.1.2: “A funder will; ensure that the Funder, its Funder Subsidiaries and Associated Entities maintain the capacity; to cover aggregate funding liabilities under all of their LFAs for a minimum period of 36 months.” (*Code of Conduct for Litigation Funders*, *supra* note 596)

<sup>612</sup> Kalajdzic, Cashman & Longmoore, *supra* note 492 at 125.

<sup>613</sup> Agarwal, *supra* note 402 at 103.

---

### VICTORIAN LAW REFORM COMMISSION—AUSTRALIA

In January 2017, the Victorian Law Reform Commission was tasked by the Attorney General to review 3P Funding to ensure litigants can use this option without encountering unfair risk or excessive cost imposed by the funding company.<sup>614</sup> The impetus behind the study is a concern that, at present, litigants are unable to recover meaningful financial outcomes from the success of the case because the funds are being used to cover legal fees incurred through the litigation process. The Terms of Reference on its website note some considerations are whether the scope of judicial oversight can be increased, limitations on success fees charged by 3P Funding companies, removal of the prohibition against lawyers and firms using contingency fee agreements, as well as potential certification criteria.<sup>615</sup>

The final report is due for release in March 2018. The report is expected to review how further judicial oversight may create safeguards for people who use 3P Funding to finance litigation. The report is also expected to comment on what impact additional judicial oversight could have on the workload of the courts.

### *Expansion to arbitration matters*

In October 2016, the Law Reform Commission of Hong Kong released its report for recommendations to expand the use of 3P Funding to arbitration proceedings under the Arbitration Ordinance.<sup>616</sup> The argument put forward in its report is that 3P Funding presents a way to facilitate access to justice for litigants who are otherwise financially prohibited from pursuing legitimate claims in the courts. The report also suggests that, in amending the Arbitration Ordinance, consideration should also be given to development of standards and guidelines for its appropriate use.

In January 2017, the Law Reform Commission of Hong Kong announced that the Department of Justice introduced a Bill to modify its arbitration and mediation legislation to permit the use of 3P Funding in arbitration proceedings.<sup>617</sup>

---

<sup>614</sup> Victorian Law Reform Commission, “Litigation funding: Terms of Reference”, (19 January 2017), online: <[www.lawreform.vic.gov.au/projects/litigation-funding/litigation-funding-terms-reference](http://www.lawreform.vic.gov.au/projects/litigation-funding/litigation-funding-terms-reference)>.

<sup>615</sup> *Ibid.* See also the Victorian Law Reform Commission, “Consultation Paper”, *supra* note 447.

<sup>616</sup> For details of the release, and links to the full report, visit the Law Reform Commission of Hong Kong website: <[www.hkreform.gov.hk/en/publications/rtpf.htm](http://www.hkreform.gov.hk/en/publications/rtpf.htm)>.

<sup>617</sup> For details on the news release, visit the LRCHK website: <[www.hkreform.gov.hk/en/news/newsXML.htm?newsDate=20170112&selectedSubSection=5&jumpToDetails=y#newsDetails](http://www.hkreform.gov.hk/en/news/newsXML.htm?newsDate=20170112&selectedSubSection=5&jumpToDetails=y#newsDetails)>. See also *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016*, (Hong Kong) 2016 C1331.

---



## Highlights from Chapter 7—Third-party Litigation Funding

Third-party litigation funding (3P Funding) offers an opportunity for clients, lawyers and law firms to obtain funding from private and public third-party sources to pay for litigation.

Private 3P 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. The third-party funder has no legal right or interest in the matters at issue in the litigation, but participates as financier in exchange for a share or percentage of the settlement or judgement award. Examples include contingency fee agreements, litigation loans, and adverse cost insurance.

Public 3P Funding is collected and distributed to litigants through statutory mechanisms. 3P Funding mechanisms 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.

### *Optimal uses*

- **Powerful opposition** (equalize the financial playing field between plaintiffs and large, well-funded defendants);
- **Riskier cases** (encourage lawyers and firms to expand their risk threshold);
- **Industry-specific** (e.g. commercial litigation or intellectual property cases).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"> <li>• Improved accessibility to cases not traditionally taken on contingency</li> <li>• Enhance application in jurisdictions with two-way cost regimes</li> <li>• Diversifying risk</li> <li>• Improves client ability to pay for necessary disbursements</li> <li>• Coverage for out-of-pocket litigation expenses</li> </ul>	<ul style="list-style-type: none"> <li>• Litigation privilege and disclosure</li> <li>• Lack of regulation</li> <li>• Potential undue influence and power imbalances</li> <li>• Potential to advance unmeritorious cases</li> <li>• A form of insurance</li> </ul>	<ul style="list-style-type: none"> <li>• Complications from lawyer self-financing</li> <li>• Threats to the independence of plaintiffs and counsel</li> <li>• Limited applicability</li> </ul>

### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted three ideas where changes could be considered to promote 3P Funding in British Columbia: regulations for litigation funding agreements; greater judicial oversight; and expand to include arbitration matters.



## CHAPTER 8. ALTERNATIVE FEE ARRANGEMENTS

### What are alternative fee arrangements (AFAs)?

Alternative fee arrangements are not a new concept, nor are they particularly contentious. The AFA represents different fee options that go beyond the traditional billable hour model. AFAs act as an alternative mechanism for lawyers and firms to price out their services. This chapter examines the trend from traditional hourly-based billing to the use of different AFA models in practice today, which range from contingency fee agreements through to hybrid fee models that combine two or more billing options. This chapter also highlights alternative fee options that work well on their own, and as part of a legal-practice model that combines them with traditional hourly rate billing.

### The traditional fee arrangement—billable hour

In 2002, the American Bar Association (ABA) released a report reviewing the billable hour in the United States, and the use of AFAs as a new way for clients to pay for litigation.<sup>618</sup> According to the 2002 ABA report, timekeeping and hourly billing for legal services became the norm for law practitioners in the 1950s and 60s.<sup>619</sup> Prior to this, lawyers assigned a fee or value to their work, at the conclusion of a case, based on a number of factors:

[T]he extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation in which the services were rendered; the amount of money or the value of the property to be affected; the professional skill and experience called for; the character and standing in his profession of the counsel; the results secured, and to some extent at least the ability of the client to pay.<sup>620</sup>

---

<sup>618</sup> American Bar Association, “ABA Commission on Billable Hours Report—2001-2002”, (August 2002), online:

<[ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4\\_ABABillableHours2002.pdf](http://ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf)> [ABA Report].

<sup>619</sup> *Ibid* at 3.

<sup>620</sup> *Yule v Saskatoon (City) (No 4)*, 16 WWR (ns) 305, [1955] SJ No 65 (QL) (SKQB) at para 21. See also *Murphy v Corry*, (1906) 7 OWR 363. On appeal to the *Yule* case, at para 12, Chief Justice Martin asserted that, “the judgement delivered by the learned trial judge indicates a most careful consideration of the authorities and a decision as to what was a just and fair remuneration after a meticulous examination of the evidence.” *Yule v Saskatoon (City) (No 4)* (1955), 1 DLR (2d) 540, 17 WWR 296 (SKCA).



Only one of these factors was based on a calculation of time spent. The report notes consideration was also given to the value assigned to the case by the client.<sup>621</sup>

Arguably, the report suggests the movement towards hourly based billing was spurred “to address antitrust concerns with bar association fee schedules, to provide lawyers with a better handle on their own productivity and, more urgently, to address clients’ demands for more information about the legal fees charged.”<sup>622</sup>

### *The formula*

Under the billable hour model, lawyers typically track six-minute increments of time spent on a file, multiplying total time by an hourly rate for a final total fee. Through a simple calculation of billable time spent against an hourly rate, a lawyer or firm can more easily predict how much revenue is expected in each year. This amount is also used to estimate budget expenditures, and to determine whether higher hourly rates or increased billable hours (also known as targets) are required to maintain profits.<sup>623</sup> The formula essentially functions as a measure of success, or performance, for lawyers and firms.

### *The billable hour in practice*

While the billable hour is the predominant fee arrangement in Canada,<sup>624</sup> there are limits on how much lawyers and firms can rely on raising billable hours to increase revenue. The 2002 ABA report suggests preoccupation with using the billable hour in this way is akin to “drinking water from a fire hose,” with many lawyers starting to drown.<sup>625</sup>

Deciding whether to increase a billable hour target is largely market-driven. The market impact on legal services can be traced back to the 2008 economic crisis, where the financial plunge simultaneously resulted in a cap on hourly rates.<sup>626</sup>

---

<sup>621</sup> ABA Report, *supra* note 618.

<sup>622</sup> *Ibid* at ix.

<sup>623</sup> *Ibid* at 3.

<sup>624</sup> Canadian Bar Association, “The Billable Hour—Here to Stay?” (12 March 2014), [CBA, “Billable Hour”], online: <<https://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2014/The-Billable-Hour%E2%80%94Here-to-Stay>>. The article refers to a survey conducted by Richard Stock of Catalyst Consulting to note that 85 percent of legal work in Canada is billed using the billable hour model. See also Julius Melnitzer, “Pricing Legal Services: the alternative fee arrangement tipping point”, *Lexpert Magazine* (March 2015), online: <[www.lexpert.ca/article/pricing-legal-services-1/](http://www.lexpert.ca/article/pricing-legal-services-1/)>.

<sup>625</sup> ABA Report, *supra* note 618 at vii.

<sup>626</sup> Robert E Hirshon, “The Billable Hour is Dead. Long Live...?” *GPSOLO* 30 (Chicago, IL: American Bar Association, January/February 2013) online: <[www.americanbar.org/publications/gp\\_solo/2013/january\\_february/billable\\_hour\\_dead\\_long\\_live.html](http://www.americanbar.org/publications/gp_solo/2013/january_february/billable_hour_dead_long_live.html)>.

Correspondingly, the option to simply increase hourly rates when billable hours reached their peak soon became financially unmanageable for clients as well.<sup>627</sup>

The economic crisis effectively placed clients at the centre of the equation. The result was a need to offer more predictability in how fees are calculated so clients can better plan for, and manage, the cost of litigation.<sup>628</sup> When it becomes economically impractical to continue to raise hourly rates, lawyers and firms may need to shift away from relying merely on time spent to calculate their fees.<sup>629</sup>

### A break from tradition

One of the leading cases to consider the limitations of the billable hour model is the Ontario Court of Appeal decision in *Bank of Nova Scotia v Diemer*.<sup>630</sup> The *Bank of Nova Scotia* case involved an appeal of the court's refusal to approve legal fees of \$255,955 for a cattle farm receivership that spanned approximately two months.<sup>631</sup> The respondent was a cattle farmer, over whose farm both the Bank of Nova Scotia and another financial corporation held security.<sup>632</sup> The Bank of Nova Scotia applied to the court for the appointment of a receiver, and the court appointed PricewaterhouseCoopers Inc. The court's order also permitted the receiver, and counsel to the receiver, to be paid reasonable fees and disbursements at standard rates and charges.<sup>633</sup>

Pepall J.A. outlined the legal fees and disbursements, as follows:

[11] The Receiver also asked the court to approve its fees and disbursements and those of its counsel including both of their estimates of fees to complete.

[12] The Receiver's fees amounted to \$138,297 plus \$9,702.52 in disbursements. The fees reflected 408.7 hours spent by the Receiver's representatives at an average hourly rate of \$338.38. The highest hourly rate charged by the Receiver was \$525 per hour. Fees estimated to complete were \$20,000.

[13] The Receiver's counsel, BLG, performed a similar amount of work but charged significantly higher rates. BLG's fees from August 6 to October 14, 2013 amounted to \$255,955, plus \$4,434.92 in disbursements and \$33,821.69 in taxes for a total account of

---

<sup>627</sup> Canadian Bar Association, "The Mighty Billable Hour: Is it preferred in a Downward Economy?", (16 July 2009), online: <[www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2009/The-Mighty-Billable-Hour-Is-it-Preferred-in-a-Down](http://www.cba.org/Publications-Resources/CBA-Practice-Link/solo/2009/The-Mighty-Billable-Hour-Is-it-Preferred-in-a-Down)>.

<sup>628</sup> *Ibid.*

<sup>629</sup> *Ibid.*

<sup>630</sup> 2014 ONCA 851, 20 CBR (6th) 292 [*Bank of Nova Scotia*].

<sup>631</sup> *Ibid* at para 2.

<sup>632</sup> *Ibid* at para 4.

<sup>633</sup> *Ibid* at para 6.

## Study Paper on Financing Litigation

---

\$294,211.61. The fees reflected 397.60 hours spent with an average hourly rate of \$643.75. Mr. Jaipargas's hours amounted to 195.30 hours at an hourly rate of \$750.00. The rates of the other 10 people on the account ranged from \$950 per hour for a senior lawyer to \$195 for a student and \$330 for a law clerk.

[14] Fees estimated to complete were \$20,000.<sup>634</sup>

The judge held that \$255,955 in fees was excessive and that “the amount of counsel’s efforts and the work involved was disproportionate to the size of the receivership.”<sup>635</sup> The court reduced the amount by approximately \$100,000.<sup>636</sup>

The court noted the traditional hourly billing model used to price out the legal fees in this case ran contrary to what clients want when they hire a lawyer, namely service. Pepall J.A. stated:

[a] person requiring legal advice does not set out to buy time. Rather, the object of the exercise is to buy services. Moreover, there is something inherently troubling about a billing system that pits a lawyer’s financial interest against that of its client and that has built-in incentives for inefficiency. The billable hour model has both undesirable features.<sup>637</sup>

While the court acknowledged the popularity of the hourly billing model to objectively measure productivity for the client, lawyer and firm, its ability to reflect service value is arguably less concrete.<sup>638</sup> The court recognized that, in court-appointed insolvency cases, the court should assess the fairness and reasonableness of the fees charged. Relying on factors from the New Brunswick Court of Appeal case, *Federal Business Development Bank v Belyea*,<sup>639</sup> the court began its assessment by looking at the following:

- the nature, extent and value of the assets;
- the complications and difficulties encountered;
- the degree of assistance provided by the debtor;
- the time spent;
- the receiver’s knowledge, experience and skill;
- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver’s efforts; and

---

<sup>634</sup> *Ibid* at paras 11–14.

<sup>635</sup> *Ibid* at para 24.

<sup>636</sup> *Ibid* at para 27. The motion judge’s decision can be found at *Bank of Nova Scotia v Diemer*, 2014 ONSC 365, [2014] OJ No 308 (QL).

<sup>637</sup> *Bank of Nova Scotia, ibid* at para 36.

<sup>638</sup> *Ibid* at paras 37 & 40.

<sup>639</sup> (1983), 44 NBR (2d) 248 (CA), 18 ACWS (2d) 19 [*Belyea*].

---

- the cost of comparable services when performed in a prudent and economical manner.<sup>640</sup>

Pepall J.A. also stated that “value provided should pre-dominate over the mathematical calculation reflected in the hours times hourly rate equation. Ideally, the two should be synonymous, but that should not be the starting assumption.”<sup>641</sup> In upholding the motion judge’s decision to reduce the fees, Pepall J.A. added that the court must consider value based “on what was accomplished, not on how much time it took”, factoring in potential complications and difficulties encountered in the process.<sup>642</sup>

Although the *Bank of Nova Scotia* case is unique as a court-supervised insolvency, Pepall J.A. noted the same principles can be used to assess fees in other legal practice areas.<sup>643</sup>

### The alternative fee arrangement

Even before *Bank of Nova Scotia* shed light on the overarching limitations of the billable hour model, the legal profession had already considered using AFAs to offer more financial predictability over the cost of litigation to clients. While no universal definition exists for AFAs, they represent an alternative method for clients to pay for legal services.<sup>644</sup> However, some debate exists within the legal community over exactly what AFAs are an alternative to. Some suggest AFAs are, simply put, an alternative option to traditional hourly billing, but can use hourly billing models, such as discounted hourly rates.<sup>645</sup> Opposing views suggest that, for a model to truly be an AFA, it must offer a financing option that is “not based on how many six-minute increments it took to complete a task.”<sup>646</sup>

---

<sup>640</sup> *Ibid* at para 9, cited in *Bank of Nova Scotia*, *supra* note 630 at para 33.

<sup>641</sup> *Bank of Nova Scotia*, *supra* note 630 at para 45.

<sup>642</sup> *Ibid* at para 45.

<sup>643</sup> *Ibid* at para 41. The principles set out in the *Bank of Nova Scotia* case have been applied in two recent BC Supreme Court Decisions involving a court-appointed receiver: *Canadian Imperial Bank of Commerce v Rempel Copper Sky Development Ltd*, 2015 BCSC 2183 and *Paradigm Mortgage Investment Corp v M&G Property Investment Ltd.*, 2016 BCSC 1772.

<sup>644</sup> Ilina Rejeva, “Alternative Fee Arrangements: A Comprehensive Guide for Law Firms”, *LegalTrek* (16 September 2015), online: <<https://legaltrek.com/blog/2015/09/alternative-fee-arrangements-a-comprehensive-law-firm-guide/>>.

<sup>645</sup> Law Technology Today, “What is, and is not, an Alternative Fee Arrangement”, (10 December 2014), online: <[www.lawtechnologytoday.org/2014/12/what-is-and-is-not-an-alternative-fee-arrangement/](http://www.lawtechnologytoday.org/2014/12/what-is-and-is-not-an-alternative-fee-arrangement/)>.

<sup>646</sup> *Ibid*.

The verdict is still out on whether modified hourly billing is truly an AFA. Research shows that several AFA models are used in the legal services market. Table 14 outlines the Canadian Bar Association (CBA) definitions for common forms of AFAs.<sup>647</sup>

**Table 14—CBA Definitions for AFAs in Canada**

Type	Definition
Blended Rates	Based on the average rate of two or more lawyers, and paralegals, working on a file. The lower rates of paralegals and junior associates are combined with the higher rates of senior counsel to arrive at an average hourly rate, which is then used by all individuals working on the file.
Capped Fees	The client pays up to a defined maximum amount. This can allow for hourly rate billing to be used, so long as the capped maximum amount is not exceeded.
Contingency	Depend on the successful outcome of a case. Generally set as a percentage amount of fees recovered by the lawyer or firm.
Fixed or Flat	A set price for a discrete task, either on its own or as part of a larger, more complex file. Does not depend on hours spent on the task, however can include mechanisms to adjust the price if more time is required above initial expectations.
Retainers	Client pays a lump sum amount, as a down payment, to cover legal fees and disbursements. Funds are replenished by the client as depleted to cover fees and disbursements on a file.
Success Fee (also known as Performance-based holdback)	Fee is based on the outcome of the case. The CBA uses a scenario where the parties agree that if a lawyer wins a case in court (or closes a deal by the required deadline), the firm receives 130% of the fees. If the lawyer loses the case (does not meet the closing deadline), then only 70% of the fees are recovered.
Task-based	Uses categories of fees based on the type of work performed. Pre-defined phases and tasks, with associated costs, are used to apply a coding system to track cost, draw comparisons for different activities, and review accounts.
Unbundled Legal Services	Also known as discrete task or limited scope retainers, the lawyer and client agree on which tasks will be performed by the lawyer (e.g. research, drafting, etc.) and which tasks will be done by the client.

---

<sup>647</sup> CBA, “Reaching”, *supra* note 12. Information also gathered from CBA, “Billable Hour”, *supra* note 624.

---

### Alternative fee arrangements in practice

While Table 14 above shows a sample of common types of AFAs in Canada, how they are used in practice largely depends on what an individual lawyer or firm offers, and whether the AFA is advertised on their website. It is difficult to know conclusively how and what AFAs are used, and how often. Below are some examples of efforts made by individual provinces to promote AFAs as an alternative form of financing litigation.

#### *British Columbia*

##### MEDIATE BC

In 2015, Mediate BC introduced the Sliding Scale Family Mediation Project as a user-pay mediation service for families undergoing separation or divorce.<sup>648</sup> Families have access to a private family mediator at a fee based on the family's financial circumstances. Services include division of assets and debts, spousal support matters, parenting time, child support and guardianship issues. The project goal is to increase access to justice by offering more affordable legal services. This goal aligns with Mediate BC's work on unbundled legal services, discussed in Chapter 6 of this study paper.

Mediate BC's Sliding Scale Family Mediation Project uses a family's total household income to calculate a joint hourly rate for mediation services.<sup>649</sup> The Family Mediation Coordinator reviews tax information from the previous tax year, and income from the following sources:

- Employment, including salaries, wages, commissions and bonuses;
- Social assistance, Canada Pension, Old Age Pension, other pensions and disability benefits;

#### DIVORCE

Monique is getting divorced. She has a low income and few savings, but family assets to be divided are significant. She met with many lawyers but all required lump sum retainers. Not knowing what to do, she turned to a friend who directed her to a new legal clinic offering legal services using AFAs. Monique met with two lawyers at the clinic. One lawyer specialized in uncontested divorces, and offered a flat fee to handle the case from start to finish, payable from the divided family assets. The second lawyer proposed a sliding-scale arrangement, tailored to Monique's income and assets. Monique will need to decide, based on the second lawyer's estimate of the time required, which fee model best meets her needs.

---

<sup>648</sup> For more information on the project, see its website: <[www.mediatebc.com/About-Us/News/Sliding-Scale-Helps-Families-Access-Mediation-Serv.aspx](http://www.mediatebc.com/About-Us/News/Sliding-Scale-Helps-Families-Access-Mediation-Serv.aspx)>.

<sup>649</sup> Mediate BC, "Fee Rates Info Sheet—How does the sliding scale work?", (November 2016), online: <[www.mediatebc.com/PDFs/SSP/SSP-fee-rates-info-sheet-Nov-2016.aspx](http://www.mediatebc.com/PDFs/SSP/SSP-fee-rates-info-sheet-Nov-2016.aspx)>. "Joint hourly rate" is the "total mediation fee" and is normally split evenly between the parties. The parties generally decide how to divide the fee and, unless they agree otherwise, each party pays their own portion of the fees directly to the mediator.

## Study Paper on Financing Litigation

---

- Workplace safety insurance benefits;
- Rental income;
- Spousal support received;
- Investment income or income from annuities and income funds; and
- Income from a business.<sup>650</sup>

The Family Mediation Coordinator also has discretion, on a case-by-case basis, to conduct individual income assessments if using the joint income is inappropriate.<sup>651</sup> Table 15 lists income amounts and corresponding joint hourly rates.<sup>652</sup>

**Table 15—Mediate BC Sliding Scale Family Mediation Project**

Total Annual Household Income	Joint Hourly Rate
\$0–45,000	\$40
\$45,001–55,000	\$55
\$55,001–65,000	\$75
\$65,001–75,000	\$95
\$75,001–85,000	\$120
\$85,001–100,000	\$150
\$100,001–120,000	\$190
\$120,001+	Mediator's posted rate

Of note is that the joint hourly rate charged is based on a comparison of the sliding scale rate, and the mediator's own published market rate, with the lower of the two applied. The rates are subject to applicable GST, and the total mediation fee includes pre-mediation meeting time spent with each party.<sup>653</sup> This applies regardless of whether a joint hourly rate or individual rate is used.

The Mediate BC Roster lists 75 family law mediators are currently registered to offer mediation services under the Sliding Scale Family Mediation Project.<sup>654</sup> Services include resolving disputes regarding reorganization of the family after separation or divorce, parenting, financial support and property matters connected to separation or divorce, family business, family property or finances, family inheritance and

---

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

<sup>652</sup> *Ibid.*

<sup>653</sup> *Ibid.*

<sup>654</sup> Mediate BC, "Find a Mediator", online: <[www.mediatebc.com/Find-a-Mediator.aspx](http://www.mediatebc.com/Find-a-Mediator.aspx)>. Search current as of June 26, 2017.

estates, responsibility for care of elderly parents, adoption, pre-nuptial issues, and intra-family conflicts.<sup>655</sup>

Rates for registered mediators range from \$75 to \$625 per hour, with some offering a graduated fee scale depending on the number of mediation hours required.<sup>656</sup>

### PUBLIC ADVOCACY ORGANIZATIONS

One example of how public advocacy organizations use AFAs is Rise Women's Legal Centre. The Rise Women's Legal Centre offers clients up to three hours of legal services without charge. After the initial three hours are used, a sliding scale from \$25–100 per hour is applied for clients with income levels above the threshold used for the number of people in the family, and the size of the community where the family resides.<sup>657</sup>

### PRIVATE FIRMS

For a sense of how AFAs are used in private practice, two law firms that presently advertise AFAs as part of their billing model are reviewed.<sup>658</sup> Open Door Law Corporation is based out of Vancouver.<sup>659</sup> With services available in real estate, wills and estates, family and corporate law, Open Door advertises flat fee options for drafting services (e.g., powers of attorney, wills, and representation agreements) and more transactional-based services (e.g., incorporation of a company, small business and residential purchase and sales).<sup>660</sup> The fees associated with these services are listed on its website, as follows:

### CONTINGENCY FEES IN BC

Part 8 of the *Law Society Rules*, Rule 8-2, states that, unless a lawyer receives court approval for a higher amount, the maximum amount a lawyer can receive under a contingency fee agreement for representation in a personal injury action, up to and including all matters pertaining to the trial, is 33 1/3% of the amount recovered for MVA personal injury or wrongful death claims arising out of the use or operation of a motor vehicle, and 40% for any other claim for personal injury or wrongful death.

A lawyer can elect to forego the remuneration, and instead receive an amount equal to costs awarded to a client (Rule 8-2(2)).

A lawyer and client agree to payment above the amounts in Rule 8-2 for representation in an appeal from a trial judgment (Rule 8-2(3)). See also s 67 of the *Legal Profession Act*.

---

<sup>655</sup> *Ibid.*

<sup>656</sup> See Mediate BC, "Family Roster", online: <[www.mediatebc.com/Find-a-Mediator/Find-a-Mediator.aspx?RosterTypeId=2](http://www.mediatebc.com/Find-a-Mediator/Find-a-Mediator.aspx?RosterTypeId=2)>. Under the graduated fee scale, hourly rates are reduced as the number of hours required for mediation services increases. Note information current to date: June 27, 2017.

<sup>657</sup> See Rise Women's Legal Centre, "Frequently Asked Questions", online: <<https://womenslegalcentre.ca/faq/>>.

<sup>658</sup> These law firms were selected based on a Google search.

<sup>659</sup> Open Door Law, "Home", online: <[opendoorlaw.com/](http://opendoorlaw.com/)>.

<sup>660</sup> *Ibid.* For specific information on pricing of the services listed, visit its website.



- Initial consultation (up to 30 minutes)—\$175.00;
- Estate Planning services—Power of Attorney (\$199.00), Will (\$299.00), Will for Spouses (2 Wills—\$499.00), Representation Agreement (\$250.00), Probate (Estate <\$100K, \$1,499.00);
- Family Law—Marriage/Separation Agreement (\$1,299), Uncontested divorce—no children (\$999), Co-habitation Agreement (\$999);
- Corporate and Commercial matters—BC Incorporation (\$599), Small business sale (\$1,299), Small business purchase (\$1,599), Residential sale (\$699), Residential Refinance (\$749), Residential Purchase (\$849), Residential Transfer/Transmission (\$499).<sup>661</sup>

Heritage Law also offers retainer, pre-agreed flat fees, and capped fees for family, estate planning, mediation and corporate law matters.<sup>662</sup> Their website notes the following AFAs for Estate Planning services:

- **Basic Estate Planning Package:** Single: \$1,500.00, Couple: \$1,800.00—Power of Attorney, Representation Agreement, Nomination of Committee, Living Will, simple Will, Important Personal Info Summary;
- **Disabled Beneficiary Estate Planning Package:** Single: \$2,250.00, Couple: \$2,500.00—Power of Attorney, Representation Agreement, Nomination of Committee, Living Will, Will with testamentary trust(s), Important Personal Info Summary;
- **Blended Family Estate Planning Package:** \$4,500.00—Marriage or Co-Habitation Agreement, Power of Attorney, Representation Agreement, Nomination of Committee, Living Will, Will (possibly with spousal trusts), Important Personal Info Summary; and
- **Alter Ego/Joint Partner Trust Estate Planning Package:** \$7,500.00—Trust and all related documents Property Transfer Taxes and registration fees applicable if registered in Land Title Office.<sup>663</sup>

FlatLaw.ca is a website where lawyers can advertise flat fee legal services.<sup>664</sup> Services range from a power of attorney (priced at \$100) to legal representation in child custody and support matters (priced at \$6,500).<sup>665</sup>

---

<sup>661</sup> Open Door Law Barristers and Solicitors, “Value Pricing”, (26 June 2017), online: <[opendoorlaw.com/value-pricing](http://opendoorlaw.com/value-pricing)>.

<sup>662</sup> Heritage Law is based out of West Vancouver. Heritage Law, “Home”, online: <<https://www.bcheritagelaw.com/>>.

<sup>663</sup> Heritage Law, “Value Pricing”, (26 June 2017), online: <<https://www.bcheritagelaw.com/about-us/value-priced-law/>>.

<sup>664</sup> FlatLaw, (26 June 2017), online: <<https://www.flatlaw.ca>>.

<sup>665</sup> *Ibid.* As of 2014, the company does not charge for advertisements, as way to attract more web traffic. For more information, see David Israelson, “Website makes a case for flat legal fees”, *The Globe and Mail*, (17 July 2014), online: <[www.theglobeandmail.com/report-on-business/small-business/talent/sb-how-to/website-makes-a-case-for-flat-legal-fees/article19658049/](http://www.theglobeandmail.com/report-on-business/small-business/talent/sb-how-to/website-makes-a-case-for-flat-legal-fees/article19658049/)>.

### LEGAL SERVICES SOCIETY OF BRITISH COLUMBIA

The Legal Services Society of British Columbia (LSS BC) uses a model similar to a sliding scale to assess eligibility for services. A household income chart is used to consider both household size (number of family members) and monthly net income (after deductions).<sup>666</sup> Table 16 illustrates how the LSS BC calculates net monthly income for family law advice services.<sup>667</sup>

**Table 16—LSS BC Guidelines for Calculating Monthly Net Income**

Included	Excluded	Allowable deductions
<ul style="list-style-type: none"><li>• Employment income</li><li>• Self-employed business income</li><li>• Social assistance benefits</li><li>• CPP and OAS benefits,</li><li>• Disability pensions or benefits</li><li>• Child or spousal support</li><li>• Student loans</li><li>• Money from boarders (including children who pay rent) or rental property</li><li>• Spousal income</li><li>• Income of a common-law partner (lived with two years or more) or with whom an individual shares a child</li></ul>	<ul style="list-style-type: none"><li>• Child Tax Benefit</li><li>• BC Family Bonus</li><li>• GST payments</li><li>• Tuition or book fees under federal or provincial student loans</li><li>• Children's income</li></ul>	<ul style="list-style-type: none"><li>• Mandatory deductions from pay (income tax, EI, and CPP)</li><li>• Daycare expenses</li><li>• Medical Service Plan (MSP) payments</li><li>• Child or spousal maintenance payments</li><li>• Court fines</li><li>• Travel costs for child access visits</li><li>• Medical or dental expenses or medication necessary for the client or their dependents.</li></ul>

The income thresholds used to assess eligibility, once monthly income is calculated, depend on family size. For example, a household size of between one and four family members is capped at the net monthly income amount of \$3,400. A household of seven or more family members must not exceed a monthly net income of \$5,280.<sup>668</sup>

<sup>666</sup> Legal Services Society BC, “Do I qualify financially for legal advice?”, Family Advice Services, online: <[www.lss.bc.ca/legal\\_aid/dolQualifyAdvice.php](http://www.lss.bc.ca/legal_aid/dolQualifyAdvice.php)>. Note that “income” is net income from all sources, including child support payments received, but does not include income from a common-law partner of two years or less. Also, clients seeking legal advice for criminal and immigration matters are not required to undergo a financial eligibility test for this service.

<sup>667</sup> *Ibid.* The LSS BC website states these are some of the things that **may** be included, excluded, or treated as allowable deductions, so should not be read as exhaustive.

<sup>668</sup> *Ibid.*

### Legal Representation

To qualify for legal representation, clients must undergo a financial eligibility test that examines household income and assets.<sup>669</sup> Factors used to assess household income are the same as those for family law advice services. The asset-based portion of the test looks at the following:

- Family home;
- Real property (other than the family home);
- Vehicles;
- Business assets;
- Personal property; and
- RRSPs.<sup>670</sup>

The income threshold amounts to qualify for representation services are lower than those applied for family legal advice for households with up to three family members. Household size is broken out of the initial one to four family member grouping used for family legal advice services, such that a household size of one person is capped at a monthly income of \$1,550, or \$18,600 per year.<sup>671</sup> At the other end of the spectrum, a family of seven or more will not qualify for representation if the net monthly income exceeds \$5,250, or \$63,000 per year.<sup>672</sup>

### Mediation Referral Program

In November 2014, the LSS BC launched its Mediation Referral program, funded by the Ministry of Justice as one of the five Justice Innovation and Transformation Initiatives.<sup>673</sup> Family law clients who need services beyond the six hours covered under the program can hire Mediate BC mediators under the sliding scale fee model.<sup>674</sup>

---

<sup>669</sup> Legal Services Society BC, “Do I qualify for legal representation?”, online: <[www.lss.bc.ca/legal\\_aid/doIQualifyRepresentation.php](http://www.lss.bc.ca/legal_aid/doIQualifyRepresentation.php)>.

<sup>670</sup> *Ibid.* Each category has its own limits that the LSS BC uses to assess eligibility.

<sup>671</sup> *Ibid.*

<sup>672</sup> *Ibid.*

<sup>673</sup> Legal Services Society BC, “Legal Aid Facts – Mediation Referral”, (September 2015), online: <[www.lss.bc.ca/assets/media/factSheets/2015\\_10MediationReferralFactSheet.pdf](http://www.lss.bc.ca/assets/media/factSheets/2015_10MediationReferralFactSheet.pdf)>. See also Legal Services Society BC, “Justice Innovation and Transformation Initiatives—FAQ for Mediation Referral”, (November 17, 2014), online: <[www.lss.bc.ca/assets/media/2014\\_11\\_17FAQforMediationReferral.pdf](http://www.lss.bc.ca/assets/media/2014_11_17FAQforMediationReferral.pdf)>.

<sup>674</sup> *Ibid.*

### *Alberta*

AFAs are offered in Alberta firms for civil and commercial litigation matters. One example is Field Law LLP.<sup>675</sup> According to its website, Field Law LLP offers fixed fee, contingency fee arrangements, blended hourly rates, and performance-based holdbacks to individual and business clients for corporate and commercial matters, litigation and dispute resolution, labour and employment, insurance, intellectual property, energy, occupational health and safety, privacy, professional regulatory and medical malpractice issues.<sup>676</sup> Flat fees are commonly used for unbundled legal services, like drafting pleadings, document discovery matters, oral discovery, interlocutory matters, and trial proceedings.<sup>677</sup> A combination of flat fees and performance-based holdbacks are also available for certain types of litigation. Business clients also have the option of fixed fees for incorporations, administrative tasks for corporations, and real estate conveyances.

In November 2016, Quick Click Law was launched as an online legal services platform.<sup>678</sup> Lawyers contract with Quick Click Law to offer flat-fee based services for family, small business, estate planning, estates, adult guardianship and trusteeship, landlord/tenant disputes, real estate, small claims, debt recovery and foreclosure legal matters. A fee of \$79+ GST is charged for an initial 30-minute consultation. Flat fees are used for services going forward. No details are provided on what the flat fees are. However, Quick Click Law does offer a guarantee to clients that, once a client and lawyer agree on a fee, the client will not be charged anything higher than that amount.<sup>679</sup>

### *Ontario*

#### PRIVATE FIRMS

According to a recent Lexpert article, the firm Borden Ladner Gervais LLP uses AFAs in its medical malpractice litigation sector.<sup>680</sup> Melnitzer notes the firm has worked with one of its long-standing clients, Healthcare Insurance Reciprocal of Canada, under an AFA for “a volume of work guarantee measured by number of matters in different classes of matter rather than by hours.”<sup>681</sup> The AFA model enables Borden Ladner Gervais LLP to outsource work to the Healthcare Insurance Reciprocal of

---

<sup>675</sup> Field Law LLP, “Home”, online: <<https://www.fieldlaw.com/Home>>. Field Law LLP has offices in Edmonton, Calgary, and Yellowknife, Northwest Territories.

<sup>676</sup> *Ibid.*

<sup>677</sup> *Ibid.*

<sup>678</sup> Quick Click Law, “About Us”, online: <<https://www.quickclicklaw.ca/about>>.

<sup>679</sup> *Ibid.*

<sup>680</sup> Melnitzer, *supra* note 624.

<sup>681</sup> *Ibid.*

Canada's legal department, and use project management strategies for more complex matters. The AFA also combines a base fee with a success or performance-based holdback. Weighted indicators are used to reach a 30 percent premium if performance standards are met, or a 15 percent reduction if standards are not achieved.<sup>682</sup> Melnitzer notes that this deal is a six-year agreement, "projected to reduce legal fees by some 23 per cent."<sup>683</sup>

Another example is Spiegel Nichols Fox LLP which, in 2014, became "one of the first law firms in Canada to offer clients value-based, flat fees on all litigation and corporate matters."<sup>684</sup> Its website lists five different AFAs, namely: 1) Value-based flat fees; 2) Value-based hourly billing; 3) Contingency; 4) Monthly and annual retainers; and 5) Customized Arrangements.<sup>685</sup> Practice areas include litigation and alternative dispute resolution (mediation, negotiation, arbitration), construction law, debt collection and enforcement, business law, real estate, and tax matters.<sup>686</sup>

### IN-HOUSE COUNSEL SERVICES

According to Christine Silversides, director of legal services with the office of the counsel at York University, the trend for organizations and institutions like York University has been to promote AFAs with their own legal service providers.<sup>687</sup> The expectation is that the legal service providers, often large private law firms, will tailor AFAs to the subject matter of the required service, and use project management strategies to meet client needs.<sup>688</sup> Melnitzer reports that York U has opted to do AFA trials by taking "several examples of one type of high-volume file and run them on different AFA models to see whether there is one model that provides better pricing for that type of file."<sup>689</sup>

When in-house counsel seeks external legal services, AFAs are slowly becoming the leading model for client service delivery. The 2014 Annual Corporate Counsel Survey shows a marked decrease to 47.3 per cent for firms using the billable hour as the

---

<sup>682</sup> *Ibid.*

<sup>683</sup> *Ibid.*

<sup>684</sup> Allison Spiegel, "The journey from the billable hour to value-based flat fees", *Canadian Lawyer Magazine* (25 May 2015), online: <ontlaw.com/wp-content/uploads/AS-Flat-Fees-Article-Canadian-Lawyer.pdf>.

<sup>685</sup> Spiegel Nichols Fox LLP, "Pricing", online: <ontlaw.com/pricing/>.

<sup>686</sup> *Ibid.*

<sup>687</sup> Jennifer Brown, "Seeking Alternative Arrangements: Annual Corporate Counsel Survey", *Canadian Lawyer Magazine* (17 November 2014) online: <www.canadianlawyermag.com/5353/Seeking-alternative-arrangements.html>.

<sup>688</sup> *Ibid.*

<sup>689</sup> Melnitzer, *supra* note 624.

primary fee model, down 7.9 per cent from 2013.<sup>690</sup> A look at the 2015 survey results shows this trend is continuing, although less dramatically, with 46.8 per cent of firms citing the billable hour as their primary fee arrangement.<sup>691</sup> Although the movement is still somewhat slow, if the downward trend continues, the AFA could become the leading financing option in this sector.

### LEGAL AID ONTARIO

Legal Aid Ontario uses a certificate-based system for clients who are financially and legally eligible for services.<sup>692</sup> The certificate is issued to a qualified client as a voucher for services, and the client uses the certificate as payment to a lawyer for a set number of hours. Areas currently covered are criminal matters (a crime that could involve jail time), family matters (separation, custody, and support issues), refugee and immigration matters (possible deportation), and domestic violence matters (including emotional, financial, physical, and sexual abuse issues).<sup>693</sup> People who identify as Indigenous, Métis, or Inuit may also qualify for services. Individuals who suffer from mental health or addictions issues are also eligible for coverage.<sup>694</sup> Legal Aid Ontario services are provided free to certain groups (not part of this study), but also to those who can contribute to the cost of litigation, but do not otherwise have the full resources to carry the litigation to conclusion. The criteria used for billing litigants is set out below.

Legal Aid Ontario uses a financial test to review gross income from all sources, and applies this amount to different income ranges based on the number of family members in each household.<sup>695</sup> There are two eligibility streams, one that enables people who qualify to obtain a legal aid certificate for services, and another that allows individuals who earn more than the income range to enter a contribution agreement. A contribution agreement requires clients to repay Legal Aid Ontario for some or all the legal fees. Repayment under a contribution agreement is also assessed based on a client's income level.

---

<sup>690</sup> *Ibid.*

<sup>691</sup> Jennifer Brown, "Testing the AFA Waters: 2015 Canadian Lawyer Corporate Counsel Survey", *Canadian Lawyer Magazine* (16 November 2015), online: [www.canadianlawyermag.com/5827/Testing-the-AFA-waters.html](http://www.canadianlawyermag.com/5827/Testing-the-AFA-waters.html).

<sup>692</sup> Legal Aid Ontario, "Am I eligible for a legal aid certificate?", online: [www.legalaid.on.ca/en/getting/eligibility.asp](http://www.legalaid.on.ca/en/getting/eligibility.asp).

<sup>693</sup> *Ibid.*

<sup>694</sup> *Ibid.*

<sup>695</sup> *Ibid.* Note, for domestic violence issues, Legal Aid Ontario may use a different set of financial eligibility guidelines. For more information on these guidelines, see Legal Aid Ontario, "You are experiencing (or have experienced) domestic violence", online: [www.legalaid.on.ca/en/getting/type\\_domesticviolence.asp](http://www.legalaid.on.ca/en/getting/type_domesticviolence.asp).

Legal Aid Ontario uses a two-step income range to determine client eligibility for either a legal aid certificate, or contribution agreement.<sup>696</sup> Clients with income below Step 1 may qualify to receive a legal aid certificate for services. Clients with gross income amounts above Step 1, but below Step 2, can enter a monthly repayment plan under a contribution agreement. For duty counsel and summary legal advice services, Legal Aid Ontario uses a separate income range from \$22,270 for single-member households, and up to \$50,803 for families of five or more.<sup>697</sup>

Legal Aid Ontario uses a sliding scale fee model to assess monthly repayment amounts, looking at gross annual income. An annual six percent financial eligibility increase for both duty counsel and certificate legal aid services is also applied, with the second of three increases implemented in April 2015.<sup>698</sup> This increase applies to the amount of income used to determine whether a client will need to sign a contribution agreement, as set out in Table 17.<sup>699</sup>

**Table 17—Legal Aid Ontario Sliding Scale to Calculate Monthly Repayment Amounts for Contribution Agreement Clients**

Number of family members	Gross annual income ranges	Monthly Repayment Amount
1	\$13,635 to \$15,781	\$50 /month
2	\$25,588 to \$28,406	\$50 /month
3	\$26,889 to \$33,102	\$75 /month
4	\$30,384 to \$38,026	\$75 /month
5+	\$33,726 to \$42,874	\$115 /month
Single boarders (paying and non-paying)	\$8,964 to \$10,352	\$50 /month

### *Quebec*

In 2011, the Barreau du Québec published a report that recommends diversifying billing methods to improve access to justice.<sup>700</sup> A review of private firms revealed that, in 2008, over 65 percent of lawyers used the hourly billing model.<sup>701</sup> The report suggests what is absent from the hourly billing model is an assessment of value for

---

<sup>696</sup> *Ibid.*

<sup>697</sup> *Ibid.*

<sup>698</sup> *Ibid.*

<sup>699</sup> Chart adapted from information on the Legal Aid Ontario website (June 26, 2017): Legal Aid Ontario, “Getting Legal Help”, online: <[www.legalaid.on.ca/en/getting/eligibility.asp#contributionagreements](http://www.legalaid.on.ca/en/getting/eligibility.asp#contributionagreements)>.

<sup>700</sup> Barreau du Québec, Report of the Committee on Current Issues in Private Practice and the Future of the Profession, “Lawyers in Private Practice in 2021”, (Montreal: June 2011) [Québec Report], online: <<https://www.barreau.qc.ca/pdf/publications/avocat-2021-en.pdf>>.

<sup>701</sup> *Ibid* at 69.

the work done, and future lawyers should adopt a billing mechanism that reflects the worth of a lawyer's services.<sup>702</sup> The report named four AFA billing models from the ABA 2002 report: 1) task-based; 2) result-based; 3) fixed terms; and 4) hybrid billing.<sup>703</sup> The recommendations came at a time when technology was changing the way people access and engage with legal information, where time spent on a case was less useful in measuring service value.<sup>704</sup>

In March 2016, the Barreau du Québec published a summary report outlining the results of its consultation in 2014 with lawyers across the province about the methods used to set the cost of legal services, and what those amounts are.<sup>705</sup> Using the term "alternative billing methods," the report listed the following forms of AFAs for legal services:<sup>706</sup>

- **Package price**—Value of the fixed price correlated with the legal service whose parameters involved in carrying out that service are known;
- **Not-to-exceed ceiling price**—Hourly rate until the not-to-exceed ceiling price (maximum price) set with the client has been reached;
- **Project management**—A proven management formula that consists of setting a price for all the activities involved in handling a case;
- **Success-dependent billing**—Price set on the basis of the results obtained (billing often tied to an agreement on out-of-pocket expenses);
- **Retainer**—Agreement to pay fees according to a fixed period of time – monthly;
- **Single hourly rate**—One single rate regardless of who is working on the client's case;
- **Added-value billing**—Depends on what the client perceives as the actual value of the service provided; and
- **Hybrid**—Price that takes a number of forms, depending on the types of services provided.<sup>707</sup>

The report notes alternative billing methods are gaining momentum as clients become increasingly aware that strict application of an hourly based model can pose financial challenges to a litigation budget.<sup>708</sup> However, the report notes growth seems to be slowing, with 70 percent of law firms and corporate lawyers still using the hourly billing model.<sup>709</sup>

---

<sup>702</sup> *Ibid* at 72.

<sup>703</sup> For more information on each of these models, see *ibid* at 72. See also ABA, "Commission", *supra* note 618 at 16–18.

<sup>704</sup> Québec Report, *supra* note 700.

<sup>705</sup> Barreau, "Hourly Billing", *supra* note 292.

<sup>706</sup> *Ibid* at 6.

<sup>707</sup> *Ibid*.

<sup>708</sup> *Ibid*.

<sup>709</sup> *Ibid*.



### *Nova Scotia*

In 2014, Torys LLP launched a Legal Services Centre in Halifax to offer fixed-fee billing, based on client needs, for due diligence matters, contract review, banking and security documentation, and corporate reorganizations.<sup>710</sup>

### *United States*

The growth of law firms using AFAs in the United States is attributed, to some extent, to the 2008 economic crisis that challenged the practice of raising hourly rates.<sup>711</sup> Mark A. Robertson, member of the ABA House of Delegates, wrote in late 2011 that, following the collapse, 81 percent of large firms reported an increase in the use of AFAs as compared to 2010.<sup>712</sup> Robertson notes that AFAs are about charging “an appropriate fee based on what value the client receives *and* how that client perceives value,” and that value depends on whether money spent on legal services is treated as an investment, or as an expense, by the client.<sup>713</sup>

Among the categories of AFAs listed in Table 14 earlier in this chapter, Robertson adds the following types, including hybrid models:

- **Task or Unit-based Billing:** tasks or components of a file are used to measure the appropriate fee – also used in complex litigation or transactional legal matters where clients are working with a budget for legal services;

---

<sup>710</sup> Melnitzer, *supra* note 624. See also Torys Legal Services Centre website: Torys LLP, “Halifax”, online: <[www.torys.com/offices/halifax](http://www.torys.com/offices/halifax)>.

<sup>711</sup> Examples of ABA articles and publications on the topic are: Mark A Robertson & Jim Calloway, “Marketing and Alternative Fee Arrangements in a Fragile Economy”, (ABA Law Practice Management, undated), online: <[www.americanbar.org/content/dam/aba/events/law\\_practice\\_management/marketing\\_and\\_alternative\\_fee\\_arrangements\\_in\\_a\\_fragile\\_economy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/law_practice_management/marketing_and_alternative_fee_arrangements_in_a_fragile_economy.authcheckdam.pdf)>. See also ABA, “Alternative Fee Arrangements: A primer”, *ABA News* (2013), online: <[www.americanbar.org/news/abanews/aba-news-archives/2013/08/alternative\\_fee\\_arra.html](http://www.americanbar.org/news/abanews/aba-news-archives/2013/08/alternative_fee_arra.html)>; Mark A Robertson, *Alternative Fees for Business Lawyers and Their Clients*, (ABA Book Publishing, 2014). See also Robert S Peckar, “Creative and Alternative Billing Arrangements in Construction Law: Reality or Illusion?” (Presented at the 2009 Fall Meeting, “The Two-Way Street of Construction Counseling: Learning From the Ins and Outs”, ABA Forum on the Construction Industry, October 2009), online: <[www.americanbar.org/content/dam/aba/directories/construction\\_industry\\_knowledge\\_base/plenary1a\\_philadelphia2009.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/directories/construction_industry_knowledge_base/plenary1a_philadelphia2009.authcheckdam.pdf)>.

<sup>712</sup> Mark A Robertson, “Marketing Alternative Fee Arrangements”, *ABA Law Practice Magazine*, (September/October 2011), online: <[www.americanbar.org/publications/law\\_practice\\_magazine/2011/september\\_october/alternative\\_fee\\_arrangements.html](http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/alternative_fee_arrangements.html)>.

<sup>713</sup> *Ibid.* Emphasis taken from quote in Robertson article.

## Study Paper on Financing Litigation

---

- **Percentage Fee:** unlike contingency fees, the fee charged is based on a schedule of fees relating to the amount involved in the matter. The amount can be predetermined (e.g., percentage of a loan amount negotiated or value of real estate purchased) or based on the amount of a bond issue. Percentages can be applied consistently or in a graduated fashion;
- **Retrospective Fee Based on Value:** the amount of the fee is not finalized until the legal matter is concluded. The fee is based on factors set out in the AFA agreement, and could include a minimum or maximum fee allowable under the agreement;
- **Statutory or Other Scheduled Fee Systems:** set out in statutory enactments, schedule for prepaid legal service plans, or by clients who purchase legal services on a volume basis. Can be imposed or negotiated. Examples include social security cases, prepaid legal, insurance subrogation and uncontested foreclosures;
- **Fee Collars:** hourly rates with maximum and minimum fees assigned;
- **Fixed Fee Plus Hourly Rate:** a portion of the legal matter is charged on a fixed or flat fee, with the other portion charged on an hourly rate model. An example where this is applied is for estate planning matters, where documentation may be charged at a fixed fee, and client meetings on an hourly rate basis;
- **Fixed Fee Plus Success Fee:** used in situations where the firm has a strong sense of the services required, and the client and lawyer are willing to share the risks. One example cited is securities offerings where a fixed fee is charged for documentation, and success fee is charged if the offering closes; and
- **Hourly rate plus contingency fee:** may apply for litigation matters where a reduced hourly rate is offered for services leading up to resolution, and then a lower contingency fee percentage is applied upon success of the case.<sup>714</sup>

For a sense of how prevalent AFAs are in the United States, management consulting firm Altman Weil has been conducting law firm surveys for the past eight years, with a category that examines AFAs specifically.<sup>715</sup> The results of its 2016 survey note the following:

---

<sup>714</sup> *Ibid.*

<sup>715</sup> Per its website, Altman Weil offers, “management consulting services exclusively to legal organizations. Our clients include law firms, corporate law departments, government legal offices and legal vendors of all sizes and types throughout North America, Latin America, the UK and Europe” Altman Weil, Inc., “About”, online: <[www.altmanweil.com/index.cfm/fa/a.home/about.cfm](http://www.altmanweil.com/index.cfm/fa/a.home/about.cfm)>. The “Law Firms in Transition Survey” is conducted in March and April of each year, with the 2016 survey having “polled Managing Partners and Chairs at 800 US law firms with 50 or more lawyers. Completed surveys were received from 356 law firms, including 49% of the 350 largest US law firms and 48% of the Am Law 200. The complete survey report includes sections on industry trends, market demand and competition, pricing and alternative fee arrangements, efficiency of legal service delivery, lawyer staffing strategies, law firm growth and economic performance.” The complete 2016 Survey can be accessed on its website: Altman Weil, Inc., “Law Firms in Transition

- 88 percent of firms initiate conversations with clients about budgets and cost management generally;
- 97 percent are billing at least some work on a non-hourly model;
- 72 percent of firms still take what is called a reactive approach to AFAs, such that the clients are the ones specifically requesting AFAs as an alternative financing option;
- 84 percent of firms that do take a proactive approach, as the ones introducing AFAs to their clients, report that non-hourly based projects are at least as profitable as those billed on an hourly basis, with 40 percent noting that the AFA projects are more profitable than hourly based ones.<sup>716</sup>

### *United Kingdom*

AFAs have a long history in the United Kingdom, perhaps best illustrated by the legislation that introduced AFAs in the country. The most common form of AFA, the conditional fee agreement, was first introduced in the 1990 *Courts and Legal Services Act*.<sup>717</sup> At a time when contingency fee agreements were prohibited,<sup>718</sup> the *Courts and Legal Services Act* opened the door for a lawyer and client to enter a conditional fee agreement, where payment of fees and expenses incurred by the lawyer or law firm are recoverable in specific circumstances.<sup>719</sup> It operates under a “no win, no fee” philosophy, but includes a success fee to increase the compensation originally agreed upon if the case achieves a successful outcome.<sup>720</sup>

Conditional fee agreements were later expanded to cover all civil matters (except family proceedings) in 1998.<sup>721</sup> According to former Member of Parliament, Geoff Hoon, the expansion was intended to promote access to justice “to the many people who fall between those who are very rich or those who are so poor that they qualify for legal aid. In future, the question of whether one gets one’s case to court will no longer depend on whether one can afford it, but on whether one’s case is a strong one.”<sup>722</sup> In April 2000, the *Access to Justice Act 1999*<sup>723</sup> added provisions to section 58A to the *Courts and Legal Services Act*, granting authority to the courts to award

---

2016: An Altman Weil Flash Survey”, [Altman, “LFiT”], online: <[www.altmanweil.com/dir\\_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447_document.pdf)>.

<sup>716</sup> Altman, “LFiT”, *supra* note 715 at v.

<sup>717</sup> *Supra* note 437.

<sup>718</sup> *Solicitors Act 1974*, s 59; *Solicitors’ Code of Conduct 2007*, r 2.04.

<sup>719</sup> *Supra* note 437 s 59(2)(a).

<sup>720</sup> *Ibid* at s 59(2)(b). In the United Kingdom and Wales, for personal injury cases, and in addition to being paid the normal fees, the lawyer can also collect a success fee, at a rate of 25% for initial proceedings, and up to 100% for all other proceedings.

<sup>721</sup> Finlo Rohrer, “How did no-win no-fee change things?”, *BBC News Magazine* (7 May 2008), online: <[news.bbc.co.uk/2/hi/uk\\_news/magazine/7387796.stm](http://news.bbc.co.uk/2/hi/uk_news/magazine/7387796.stm)>.

<sup>722</sup> *Ibid*.

<sup>723</sup> (UK), c 22.

costs against the losing party under a conditional fee agreement, including any fees payable under the agreement that provides for a success fee.<sup>724</sup>

Despite opening the door for more lawyers and firms to enter conditional fee agreements, this change resulted in a significant cost burden to losing parties. The change lasted only a few years before Justice Secretary Ken Clarke announced in 2012 that the government would shift recovery away from the losing party to a share or portion of the damages award.<sup>725</sup> The shift was prompted by a review done by Lord Justice Jackson in 2010 of the overall cost of litigation.<sup>726</sup> Known as the “Jackson Reforms,” in April 2013, reforms were put in place to improve access to justice and reduce the cost of litigation generally.<sup>727</sup> The result of the Jackson Reforms on AFAs was such that success fees under conditional fee agreements would be paid by the plaintiff, not the defendant, except in a limited number of cases.

The Jackson Reforms also led to the use of “damages-based agreements” (DBAs), which represent a type of contingency fee agreement that originally was only available in employment matters brought before a tribunal. The change enabled a client to enter a DBA to pay a lawyer an amount for fees and expenses incurred in litigation based on the award granted in the case.<sup>728</sup>

There is also widespread application of the fixed fee model throughout the United Kingdom.<sup>729</sup> According to Melnitzer, a *Legal Week* survey of 1,400 in-house counsel shows clients “are increasingly rejecting the chargeable hours model and instead demanding fixed pricing for work.”<sup>730</sup> The number of firms using fixed fees rose by 22 percent, with capped hourly rates ranking as the second most popular AFA. Norton

---

<sup>724</sup> *Ibid* at s 27. For more information, see Legal Services, England and Wales, Statutory Instruments 2000 No. 900, *The Access to Justice Act 1999 (Transitional Provisions) Order 2000*, (1 April 2000) online: <[www.legislation.gov.uk/ukSI/2000/900/pdfs/ukSI\\_20000900\\_en.pdf](http://www.legislation.gov.uk/ukSI/2000/900/pdfs/ukSI_20000900_en.pdf)>.

<sup>725</sup> “‘No-win, no-fee’ changes announced by Ken Clarke”, *BBC News* (29 March 2011), online: <[www.bbc.com/news/uk-12890256](http://www.bbc.com/news/uk-12890256)>.

<sup>726</sup> *Ibid*.

<sup>727</sup> The legislative reforms were made through the *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK), c 10, ss 44 and 46, *Conditional Fee Agreements Order 2013* No 689, and new changes under the *Civil Procedure Rules*, 1998 No 3132 L 17 [Jackson Reforms]. For updates on the new Conditional Fee Agreement model, see the Law Society website: The Law Society, “New model conditional fee agreement” (26 June 2014), online: <[www.lawsociety.org.uk/support-services/advice/articles/new-model-conditional-fee-agreement/](http://www.lawsociety.org.uk/support-services/advice/articles/new-model-conditional-fee-agreement/)>.

<sup>728</sup> *Coroners and Justice Act 2009* (UK), c 25, s 154.

<sup>729</sup> Melnitzer, *supra* note 624.

<sup>730</sup> *Ibid*.

Rose also reported in 2016 that the most popular AFAs in the United Kingdom are fixed fees, capped fees, contingent and performance-based fees.<sup>731</sup>

### Optimal uses

The consultation participant feedback and research highlight the following ways AFAs may be used:

- **Advocacy organizations:** For some consultation participants, providing advocacy services for low-income and vulnerable clients under flat and sliding-scale fee arrangements are a useful practice-management tool.
- **Small firms with low overhead:** For smaller firms with limited administrative support and financial departments, fixed fees can be an effective way to build a practice. A new lawyer or a small firm can easily offer quick and efficient basic legal services for flat fees, driving a profit from a high turnover rate at the outset.
- **Hybrid representation:** Consultation participants noted that some lawyers increasingly rely on a practice model that mixes flat or sliding-scale fees with traditional up-front retainer payments. These lawyers use a hybrid model for the bulk of legal services, but also maintain a retainer from which they can bill hourly for communication with the client. This can help mitigate issues around scope creep on a file.
- **Mediation and alternative dispute resolution services:** Mediation services in British Columbia, like Mediate BC, experiment with sliding-scale AFAs to expand the availability of alternative dispute resolution options for litigants.
- **Criminal defence litigation:** Consultation participants discussed that, for criminal defence matters, flat fees can be a useful AFA for clients to finance litigation because a lawyer can collect payment up-front. It may also work well for criminal defence because of the relative predictability of criminal court processes, where a lawyer can offer a set list of prices for various legal services—such as fixed fees for preliminary hearings, or trial appearances.

---

<sup>731</sup> Norton Rose Fulbright, “2016 Litigation Trends Annual Survey”, (September 2016), online: <[www.nortonrosefulbright.com/files/20160915-2016-litigation-trends-annual-survey-142485.pdf](http://www.nortonrosefulbright.com/files/20160915-2016-litigation-trends-annual-survey-142485.pdf)>. The survey notes 60% of survey respondents are using AFAs, up 56% from the 2015 numbers.

---

## Advantages

### *Mitigate unpredictable costs*

Consultation participants who regularly use fixed or sliding-scale AFAs explained that appropriate steps can be taken to develop an effective profitability model. For example, a lawyer or firm can use actuarial models to calculate the average cost of cases, and use a fixed or a sliding-scale fee that reflects those costs.

A concern raised among consultation participants is that cases can become more complex over time, such that lawyer time spent exceeds the amount originally anticipated. If the additional time required is significant, it could result in lower-than-expected profits for the lawyer or firm. However, provided AFAs used in other files are generally profitable, those cases can balance the loss incurred by the occasional outlier cases to avoid harming overall profitability. Consultation participants also recommended lawyers contemplate this eventuality in the AFA through discussions with the client. A provision in the AFA could protect against potential scope creep, allowing the lawyer to increase costs, adjust the sliding scale, or bill hourly in certain circumstances.

Consultation participants used the example of contingency fee agreements, where fees can be adjusted based on the development of the case. A lower contingency rate can be agreed upon at the outset of the file, allowing for increases at set and agreed upon stages (for example, at certification, pre-trial Alternative Dispute Resolution and settlement negotiations, and at trial).

The use of AFAs as both an alternative financing option for clients, and an economic model for lawyers and firms to manage profitability, was described by consultation participants as offering a “basket” of rates for different legal services. Unlike hourly billing models, where amount of time to complete a task may be less predictable, AFAs offer an opportunity for lawyers and clients to agree on how much time will be allotted to a given task, and under what cost.

### *Meeting client expectations*

Meeting and satisfying client expectations remains an important dimension of a lawyer’s practice. A clear understanding of the services agreed upon, and setting reasonable expectations on the outcome of a case, are the cornerstones to achieving client satisfaction.

Consultation participants discussed that, in practice, clients may be less likely to apply for a fee review when hiring a lawyer on a fixed or sliding scale fee arrangement

because the cost of services are clearly set out. Consultation participants suggested more certainty on cost at the outset may enhance client satisfaction. They also noted that satisfied clients gain a trust relationship with their lawyer, and may be more likely to return for future services, and with fewer complaints to the Law Society. The feeling of certainty and security can also be shared by the lawyer: if an AFA is clear, and the client is satisfied, the lawyer may feel a negligence complaint or fee review is likely avoided. AFAs also offer the client an opportunity to plan how they will pay for services, and whether the cost fits within their means.

### *Pipeline to unbundled legal services*

Many different types of AFAs work particularly well for unbundled legal services. Provided a client can find a lawyer willing to work on an unbundled basis, a client can choose from a variety of AFA options for a single or set of unbundled legal services. For example, a lawyer can be paid a fixed fee to draft an outline of their client's case. The lawyer and client can then agree to use a capped fee if more work is needed on a specific task. Consultation participants observed that AFA structures can be benefit self-represented litigants because tasks are outlined for clients to select the ones they want the lawyer to perform, and which ones may be completed on their own. In this way, AFAs enable clients to pay a lawyer for a "litigation roadmap," to organize and complete necessary tasks on a file.

Other areas where AFAs may open the door to unbundled legal services include discrete research tasks, drafting pleadings, or financial statements in family law matters, uncomplicated adoptions, wills and estate planning, real estate matters, residential or commercial leases, business incorporations, and providing opinion or file review services.<sup>732</sup>

### *Building long-term client relationships*

Research on AFAs shows they also work well to generate repeat business from the same client. For instance, one article notes using a blended rate model can help the lawyer and client work together to examine how best to manage a wide range of tasks on a file.<sup>733</sup> By encouraging a client to adopt a more proactive role on how an initial task will be billed, this may act as an incentive for clients to return if they feel they can participate more in the financing decisions made at the outset. Brown notes that,

---

<sup>732</sup> John-Paul Boyd, "DIY A2J 5: Provide Some of Your Services on a Flat-Rate Basis", *Slaw* (12 February 2016), online: <[www.slaw.ca/2016/02/12/a2j-diy-5-provide-services-on-a-flat-rate-basis/](http://www.slaw.ca/2016/02/12/a2j-diy-5-provide-services-on-a-flat-rate-basis/)> [Boyd].

<sup>733</sup> Jennifer Brown, "Billable hour morphing into alternative arrangements", *Canadian Lawyer Magazine* (30 March 2015), online: <[www.canadianlawyermag.com/author/jennifer-brown/billable-hour-morphing-into-alternative-arrangements-2837/](http://www.canadianlawyermag.com/author/jennifer-brown/billable-hour-morphing-into-alternative-arrangements-2837/)>.

---

inherent in AFA models, is a client's opportunity to more subjectively consider whether the fee arrangement will work for their circumstances.<sup>734</sup>

### **Disadvantages and potential complications**

#### *Limited application to large or complex cases*

AFAs suffer from similar disadvantages as unbundled legal services. Availability and appropriateness of AFAs can largely depend on the area of law, and the scope of services being provided. Fixed, flat, or sliding scale fees may not be suitable for long and complex cases, as the end goal of a case is not always known. Without a robust agreement that protects against scope creep, the lawyer may have concerns about the increasing workload and potential loss of profits.

Similarly, sliding scale fees that adjust based on the phase of the litigation may work well for cases that follow reasonably predictable patterns and checkpoints, but are less useful for more complex litigation.

#### *Negative client expectations*

Consultation participants noted clients often question whether they are being treated fairly or equally compared to other clients. This can arise regardless of what fee arrangement is used. With an AFA, consultation participants noted lawyers may find themselves in awkward situations where they must evaluate each client's ability to pay, and determine the best way to be paid, all the while attempting to satisfy client expectations.

Lawyers cannot avoid having to make financial decisions about the cases they accept. The challenge, as noted by consultation participants and in the research, is that lawyers moving away from a traditional billable hour model need to be able to accurately predict the amount of work required for a task or set of tasks under an AFA. As one article notes, "the hurdle for any law firm moving away from the billable hour—which is how it tracks its internal costs—is figuring out, based on experience, what price to offer a client for a particular type of service, whether it is litigation or advising on a corporate acquisition."<sup>735</sup>

Consultation participants noted it may not always be clear to a client or lawyer that tasks that appear simple to the client may often require a significant amount of work

---

<sup>734</sup> *Ibid.*

<sup>735</sup> Jeff Gray, "Lawyers finding new ways to get paid", *The Globe and Mail* (31 May 2011), online: <<https://beta.theglobeandmail.com/report-on-business/industry-news/the-law-page/lawyers-finding-new-ways-to-get-paid/article583217/?ref=http://www.theglobeandmail.com&>>.



to complete them—and the challenge will be how to accurately capture this amount of work under an AFA. To achieve positive client expectations, both lawyer and client need to ensure the AFA is clear about the services provided, the range of possible outcomes, and the fee structure to achieve those outcomes.

### *Flat fee reviews by courts*

As one consultation participant noted, the most commonly reviewed bills are those that charge monthly over long periods of time. When a client pays and tops-up a retainer for weeks or months on end, without seeing measurable results, they can easily feel dissatisfied and be prone to filing a complaint or requesting a fee review. Lawyers may turn to AFAs and different practice models in attempt to avoid these situations. However, with AFAs, there may be a perception of heightened risk of fee reviews.

Consultation participants discussed that, under section 79(2) of the *Legal Profession Act*, courts continue to rely on time spent as a factor to assess the reasonableness of fees charged.<sup>736</sup> Lawyers may have concerns about using an AFA model, rather than an hourly one, because it may not clearly convey the amount of work done on a task in the same way an hourly-rate billing model can. To overcome this fear, consultation participants re-emphasized the need to structure AFAs to promote client satisfaction. When clients know at the outset the type of services to expect, and the set or range of fees for those services, they may be less likely to pursue a complaint or a fee review.

### *Administrative costs to develop a new model*

A concern raised by consultation participants with respect to sliding scale fee models is the complexity of creating an effective sliding scale system. Consultation participants stated that using income-based or asset-based tests to determine eligibility for services is difficult to apply. Additionally, a simple income test does not consider the full scope of a person's assets and other life circumstances, such as the ability to obtain funding from friends or family. These assessments not only require economic expertise to quantify and evaluate income streams and assets, but also a robust administrative framework to perform this individual assessment for each client.

Advocacy organizations interviewed as part of this project note it is not always practical to perform these assessments, given the amount of time required. With limited funds to begin with, devoting a part of those funds to ongoing analysis of client incomes is inefficient. One approach to resolving this may be to define an income cut-

---

<sup>736</sup> *Legal Profession Act*, *supra* note 88.

off by examining a person's recent tax return. Consultation participants admit this may not be an ideal solution, but is perhaps the simplest and most cost-effective one.

As one consultation participant put it, sliding scale fee arrangements may result in lawyers doing work at lower rates than would be charged if done on an hourly basis. To avoid this, a lawyer or firm will need to do work up-front to assess the amount of time required, the potential for scope creep or other complications to arise, and the maximum amount of additional time to address the changes in the AFA.<sup>737</sup> This is not necessarily a one-stop solution to the access to justice issue, but increasing awareness of AFAs can help create a dialogue about moving away from the entrenched use of traditional retainers.

### *Burden on the client*

The 2014 CBA Billable Hour article cites one potential disadvantage of an AFA is that it requires the client to do a great deal of work up-front to assess what work will be covered by the AFA, and what the cost will be.<sup>738</sup> If a client has limited, or no, experience working with a lawyer under an AFA, it may be difficult, if not impossible, to assess what a reasonable fee is for a task. Lawyers often rely on their own experience in setting AFA fees. If a client has no prior AFA experience, it is less certain how easily they can agree on what will be reasonable in the circumstances. The CBA suggests it may be easier, and perhaps preferable, for clients to rely on the "objective metric like hours times hourly rate" model.<sup>739</sup> The article cites a discussion with a managing partner of Bennett Jones LLP in Calgary, who states that clients may initially seek an AFA, but generally revert to a traditional hourly-based model because they cannot decide on an appropriate or fair fee for their case.<sup>740</sup>

### *Other considerations*

In addition to the points discussed above, the CBA article also suggests other challenges in using AFAs may arise, such as:

- **Blended rates—Cons:** hides personal contribution; can result in use of less experienced or less efficient lawyers
- **Task-based billing—Cons:** lawyers must be able to estimate costs accurately
- **Capped fees—Cons:** can hurt firm if something unforeseen happens or if it misjudges costs.<sup>741</sup>

---

<sup>737</sup> Boyd, *supra* note 732.

<sup>738</sup> CBA, "Billable Hour", *supra* note 624.

<sup>739</sup> *Ibid.*

<sup>740</sup> *Ibid.*

<sup>741</sup> *Ibid.*

## Notes on contingency agreements

### *Limited application*

Contingency fee agreements are a popular AFA model across Canada. In personal-injury law, medical malpractice claims, and class proceedings, to name a few, contingency fee agreements represent an effective way for clients to retain a lawyer regardless of income or assets. However, the financing structure of the contingency fee agreement limits it to few areas of law where awards are high enough to justify the lawyer providing time and coverage for disbursements, without up-front payment, for the duration of a case.

One consultation participant noted that, at an average downtown Vancouver firm, the award for a class proceeding must be at least \$3,000,000 to adequately compensate the law firm for time and expenses on a contingency fee file (support staff, disbursements, etc.). Similar price breakpoints exist for individual cases, depending on the size of the firm.

Allan Hutchinson of York University's Osgoode Hall Law School recently published a report on his examination of contingency fee agreements in personal injury litigation.<sup>742</sup> Hutchinson states that, "little research or study has been done on exactly how they [contingency fee agreements] operate in practice, whether they advance the objectives that they were intended to achieve, and whether litigants are best served by the current arrangements."<sup>743</sup> The report sets out both critiques on the use of contingency fee agreements, and preliminary proposals for reform of the contingency fee agreement model.<sup>744</sup>

### *Fee reviews*

Another complication with contingency fee agreements arose out of Ontario in March 2016, in the medical malpractice case of *Batalla v St. Michael's Hospital*.<sup>745</sup> The Ontario

---

<sup>742</sup> Allan C Hutchinson, "A Study of the Costs of Legal Services in Personal Injury Litigation in Ontario: Final Report" (2016), online:

<[digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1180&context=reports](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1180&context=reports)>

[Hutchinson]. For media commentary on the report, see Drew Hasselback, "Law Professor Questions Whether Contingency Fees Benefit Clients", *Financial Post* (18 January 2017), online:

<[business.financialpost.com/legal-post/law-professor-questions-whether-contingency-fees-benefit-clients](http://business.financialpost.com/legal-post/law-professor-questions-whether-contingency-fees-benefit-clients)>.

<sup>743</sup> Hutchinson, *ibid* at 3.

<sup>744</sup> *Ibid*.

<sup>745</sup> *Batalla v St. Michael's Hospital*, 2016 ONSC 1513, [2016] OJ No 1343 (QL) [*Batalla*].

Superior Court of Justice reduced a contingency fee agreement from 30% to 25%<sup>746</sup> to facilitate settlement negotiations and address noncompliance with the Ontario *Solicitor's Act*.<sup>747</sup> This amounted to a reduction of approximately \$500,000. The lawyer sought 30 percent of the costs awarded in the case, in addition to a 30 percent fee for damages and interest awarded.<sup>748</sup> The lawyer deposed that the case had been ongoing for six years, and he had devoted a significant amount of time and resources to the case. The lawyer argued the reduction would have a significant negative effect on the profitability of the case.

On assessing the reasonableness and fairness of the contingency fee agreement, the court adopted the factors outlined by the Ontario Court of Appeal in *Raphael Partners v Lam*.<sup>749</sup> In *Raphael*, the court described that the fairness assessment is dependent on “the circumstances surrounding the making of the agreement and whether the client fully understands and appreciates the nature of the agreement that he or she executed.”<sup>750</sup>

On the fairness issue, the court in *Batalla* found the lawyer's claim for a percentage of the costs over and above the contingency fee could not be supported because the lawyer failed to proffer sufficient documentary evidence to confirm the client's understanding of this arrangement at the time the agreement was entered. While the court stated the fee agreement was fair, it took exception to the clause requiring the plaintiff to pay interest on the funds borrowed by counsel to cover disbursements.<sup>751</sup>

In assessing the reasonableness of the contingency fee agreement, the court again relied on the *Raphael* factors, namely: the legal complexity of the matter; the results achieved; the risk assumed by the solicitor; and the time expended by the lawyer.<sup>752</sup> The court found that, were counsel to be awarded the initial amounts listed in the contingency fee agreement:

---

<sup>746</sup> In the motion materials, the lawyer stated that, per the contingency fee agreement, he was entitled to 30% of “all monies received less disbursements”, but that he was prepared to accept 25% of the damages (with interest) and disbursement costs in the alternative; *ibid* at para 8. The court chose the latter option.

<sup>747</sup> *Solicitor's Act*, *supra* note 432, s 20(1) states that a lawyer on contingency may not collect a portion of costs payable to their client unless the client expressly agrees. The lawyer in this case denied that he charged his client a percentage of the costs paid by the defendants, but the court found that this did not accord with the evidence in his initial affidavit supporting his fee arrangement (*Batalla*, *supra* note 745 para 32).

<sup>748</sup> *Ibid*.

<sup>749</sup> (2002), 218 DLR (4th) 701, 61 OR (3d) 417 (ONCA) [*Raphael*].

<sup>750</sup> *Ibid* at para 37.

<sup>751</sup> *Supra* note 745 at para 56.

<sup>752</sup> *Ibid* at para 57.

the amount payable to Aaron after payment of the legal fees and disbursements will not be adequate. . . . A settlement based on an all-inclusive amount of \$6,625,000 which pays fees of \$1,537,223 to the solicitor would not be in Aaron's best interests. While I appreciate the affidavit of the litigation guardian indicates that she does not oppose payment of these fees, that is but one factor in my consideration of the overall reasonableness of the proposed settlement and fee.<sup>753</sup>

Shortly before *Batalla*, Justice Belobaba in *Leslie v Agnico-Eagle Mines*<sup>754</sup> expressed concerns about contingency fee agreements in the context of class proceedings, stating:

Unfortunately, class counsel rarely provides much information about why the settlement falls within a zone of reasonableness. That is, information explaining why the case settled for \$17 million and not say \$37 million or \$57 million? Instead of providing much-needed information about why the settlement is within a zone of reasonableness, class counsel presents an unhelpful catalogue of self-serving (almost generic) reasons why the settlement should be approved: the many litigation risks; the hard-fought negotiation; the arm's-length settlement; and class counsel's impressive credentials and litigation experience.

In the vast majority of class action settlements, the court hears "a one-sided presentation about how wonderful the settlement is and how aggressively class counsel championed the absent class's cause."<sup>755</sup>

Justice Belobaba questioned whether, in moving away from using "boilerplate" contingency fee agreements, independent counsel should be hired by the court (and paid by both parties) to evaluate the proposed settlement and fees.<sup>756</sup>

### *Additional clarifications from the common law*

In *Holness Law Group Professional Law Corp v Mann*,<sup>757</sup> the BC Supreme Court ruled that contingency fees cannot be stacked when two (or more) law firms work on the same file for the same client. In *Holness*, a client retained a lawyer on contingency for the initial part of her insurance claim. Four years later, the client terminated the agreement and hired a second lawyer on contingency for a further three years. The court found that the two lawyers could not stack their respective 30% contingency fees on the client's settlement, but instead must split a single 30% portion. This case stands as a warning that the cap on contingency awards cannot be circumvented.

---

<sup>753</sup> *Ibid* at para 64.

<sup>754</sup> 2016 ONSC 532 (CanLII) [*Leslie*].

<sup>755</sup> *Ibid* at paras 9–10.

<sup>756</sup> *Ibid* at para 18.

<sup>757</sup> 2015 BCSC 2380, [2015] BCJ No 2797 [*Holness*].

---

Second, in a fee-review case at the BC Supreme Court,<sup>758</sup> one lawyer faced a fee review when his former client refused to pay fees related to an appeal because of confusion arising from the use of multiple contingency agreements. The first contingency fee agreement specified the lawyer would provide only initial drafting of appeal documents and filing fees. When the client could not afford the full cost of an expert report at the trial level, a second contingency fee agreement was signed with the same terms, but excluding appeal work. Following trial, the client continued to retain the lawyer to pursue the appeal and was successful—but refused to pay the lawyer’s fees, believing that he would only need to pay for the documents and filing as agreed-upon in the first contingency agreement.

Justice Nielsen held “this was a classic case of contingency agreements giving the impecunious plaintiff the key to the courthouse.”<sup>759</sup> The review was ultimately decided in the lawyer’s favor,<sup>760</sup> but stands as a warning against using unclear contingency agreements and failure to ensure a client’s expectations are clearly defined.

### **Systemic, structural, or legal changes to consider**

#### *Sliding scale fees for civil litigation mediation*

During the consultation sessions, it was suggested that, much like Mediate BC’s use of a sliding scale fee model for its family law mediation program, a similar approach could be adopted for mediation of civil litigation matters. A review of the Mediator Roster on Mediate BC’s site notes there are currently 187 mediators registered to provide services in civil/non-family disputes, including commercial disputes, construction, employment, environment, housing, human rights, land use, negligence, personal injury, small business and wills and estates.<sup>761</sup>

A sliding scale model could be used to derive an appropriate income assessment threshold to develop an appropriate rate for services. Mediators could still use their own published market rates to set their sliding scale fees. Rates would still be subject to additional costs for GST charges. Of note on the Mediate BC website is that it often selects a mediator from the civil directory when a mediator is required pursuant to

---

<sup>758</sup> Jean Sorensen, “The fine line on contingencies”, *Canadian Lawyer Magazine* (March 2016) at 12.

<sup>759</sup> *Lee (Guardian ad litem of) v Richmond Hospital Society*, 2005 BCCA 107 at para 3, 251 DLR (4th) 174.

<sup>760</sup> *Ibid.* Justice Nielsen concluding that it was unreasonable for the client to expect the appeal to be done at little or no cost to him, despite two contingency agreements explicitly excluding appeals.

<sup>761</sup> Mediate BC, “Family Roster”, *supra* note 656. Note this number includes the number of mediators registered to provide services connected with the Vancouver Justice Access Centre and the Victoria Justice Access Centre.

the Notice to Mediate Regulations (Supreme Court), or Small Claims Rule 7.3–Mediation for Claims Between \$10,000 and \$25,000.<sup>762</sup>

### *Litigation budgets*

One option that continued to appear in the research on AFAs was the opportunity for lawyers and firms to develop a budgetary approach to managing litigation files to introduce AFAs.<sup>763</sup> This method involves the lawyer and client working together to plan each stage of the litigation, and what AFA model is appropriate to budget for each group or individual task. Whether an hourly or AFA model is used, the idea is for the lawyer and client to negotiate how much should be spent on each task (or set of tasks) as against a client's overall budget for the case.<sup>764</sup> The goal is to give the client "a sense of the big picture, when most of their expenses will occur and what they will achieve from that phase in the process."<sup>765</sup>

### *Client value adjustments*

Another way to promote AFAs is to consider offering an option to the client to perform a "value adjustment" to the fee. Melnitzer describes this practice as enabling the client to review a bill and adjust the amount to reflect what they consider to be the appropriate value for the services.<sup>766</sup> Recall from the introduction to this chapter that, prior to hourly billing becoming the norm, clients attributed their own valuation to the services they received. This practice was echoed in the *Bank of Nova Scotia* case where the court held that clients see legal fees as payment for a service, measured in value rather than time.

There is an opportunity to consider how the value of a service ought to be assessed, and what role the client's input plays in that assessment. While lawyers and firms often use objective criteria to assess value for service, applying a client-based value adjustment model to an AFA factors in a client's own observations and assessment on what the service provides to them. To avoid a completely subjective valuation, a lawyer or firm can apply the *Bank of Nova Scotia* principles, looking at 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. This model was also discussed in the

---

<sup>762</sup> *Ibid.*

<sup>763</sup> CBA, "Billable Hour", *supra* note 624.

<sup>764</sup> *Ibid.*

<sup>765</sup> Samantha Green & Scott Venton, "8 Tips for Building a Successful Alternative Fee Arrangement", (Ontario Bar Association: 7 March 2016), online: <[https://www.oba.org/JUST/Archives\\_List/2016/March-2016/8-Tips-for-Building-a-Successful-Alternative-Fee-A](https://www.oba.org/JUST/Archives_List/2016/March-2016/8-Tips-for-Building-a-Successful-Alternative-Fee-A)>.

<sup>766</sup> Melnitzer, *supra* note 624.

Barreau du Québec as part of its recommendation for lawyers of the future.<sup>767</sup> The Chicago Bar Foundation has also developed a guide on how to incorporate this type of value assessment into billing practices, to offer more opportunities for clients to consider AFAs as an alternative financing option.<sup>768</sup>

---

<sup>767</sup> Barreau, “Hourly Billing”, *supra* note 292.

<sup>768</sup> The Chicago Bar Association and Justice Entrepreneurs Project, “Pricing Toolkit – for attorneys seeking to serve low- and moderate-income clients”, (21 March 2016), online: <<https://chicagobarfoundation.org/pdf/jep/pricing-toolkit.pdf>>. For more information, see the news release at: <[chicagobarfoundation.org/news\\_item/pricing-access-justice/](https://chicagobarfoundation.org/news_item/pricing-access-justice/)>. The toolkit also includes a Fee Arrangement Matrix which outlines the areas of law best suited to each AFA model.

---





## Highlights from Chapter 8—Alternative Fee Arrangements

There is no universal definition for an alternative fee arrangement (AFA). They are generally described as an alternative method for clients to pay for legal services, which may or may not include a modified hourly billing model. Common forms of AFAs include:

- **Blended rates**—average rate of two or more lawyers (and paralegals)
- **Capped fees**—payments up to a defined maximum amount
- **Contingency fee agreements**—generally a percentage of fees from settlement or award
- **Fixed or flat fees**—set price for discrete task that does not depend on hours spent
- **Retainers**—single or multiple, lump-sum payments to cover fees and disbursements
- **Success fees**—fee based on outcome of the case
- **Task-based agreements**—fee categories based on type of work performed

### *Optimal uses*

- **Advocacy organizations** (e.g. advocacy services for low-income and vulnerable clients offered as flat and sliding-scale fee arrangements);
- **Small firms with low overhead** (e.g. fixed fees can be an effective way to build a practice for new lawyers or small firms);
- **Hybrid representation** (e.g. practice models that mix flat or sliding-scale fees with traditional up-front retainer payments. This can help mitigate issues around scope creep on a file);
- **Mediation and alternative dispute resolution services;**
- **Criminal defence litigation** (e.g. a lawyer can offer a set list of prices for various legal services—such as preliminary hearings or trial appearances).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"> <li>• Mitigate unpredictable costs</li> <li>• Meet client expectations</li> <li>• Pipeline to unbundled legal services</li> <li>• Long-term client relationships</li> </ul>	<ul style="list-style-type: none"> <li>• Limited application to large or complex cases</li> <li>• Administrative costs to develop a new model</li> <li>• Burden on the client</li> <li>• Limitation of contingency fee agreements</li> </ul>	<ul style="list-style-type: none"> <li>• Negative client expectations</li> <li>• Flat fee reviews by courts</li> </ul>

### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted three ideas where changes could be considered to promote AFAs in British Columbia: sliding scale fees for civil litigation mediation; litigation budgets; and client value adjustments.



## CHAPTER 9. CROWDFUNDING

### What is crowdfunding?

Crowdfunding is used by individuals to raise money for a wide range of needs—whether it be for a medical procedure, a start-up business, or for charitable causes. A growing trend across Canada and the United States is crowdfunding to finance litigation. Litigants are turning to online communities to help finance their litigation. The notion of “strength in numbers” takes on a new meaning, as litigants amass substantial sums of money through single contributions from people across the country, and sometimes the globe.

The British Columbia Securities Commission defines crowdfunding as:

a process through which an individual or a business can raise small amounts of money from a large number of people, typically through the internet. The objective is to raise sufficient funds in order to carry out a specific project.<sup>769</sup>

Crowdfunding in its most basic form involves collecting funds from a group of people for a specific purpose. While this practice has long been used to fund political campaigns, charities, and even religious institutions, it wasn’t until 2006 when the term “crowdfunding” was used to refer to this type of fundraising.<sup>770</sup> With the advent of the internet, crowdfunding soon expanded to raising funds for business, scientific, agricultural, arts, and entertainment projects, to name a few.<sup>771</sup> Internet-based crowdfunding created an opportunity for an individual project to gain global financial support. As the variety of funding opportunities grew, so too did the methods for how to crowdfund those initiatives.<sup>772</sup> With this evolution came a variety of efforts to raise funds specifically to fund litigation.

---

<sup>769</sup> British Columbia Securities Commission, “Start-up Crowdfunding Guide”, online: <[www.bcscc.bc.ca/uploadedFiles/For\\_Companies/Private\\_Placements/Crowdfunding/Crowdfunding%20Guide%20-%20for%20Business%20-%20-%20July%202016.pdf?t=1489692031642](http://www.bcscc.bc.ca/uploadedFiles/For_Companies/Private_Placements/Crowdfunding/Crowdfunding%20Guide%20-%20for%20Business%20-%20-%20July%202016.pdf?t=1489692031642)> [BC Securities Commission, “Crowdfunding”]. The BC Securities Commission identifies three types of crowdfunding: 1) donation; 2) pre-selling of products; and 3) securities crowdfunding. This chapter discusses both donation and securities-based crowdfunding.

<sup>770</sup> C Steven Bradford, “Crowdfunding and the Federal Securities Laws” (2012) *Colum Bus L Rev* 1 at 14-27, and at 11.

<sup>771</sup> *Ibid* at 11-13.

<sup>772</sup> BC Securities Commission, “Crowdfunding”, *supra* note 769 at 14-15. See Bradford, *supra* note 770, who lists five categories of crowdfunding: 1) donation; 2) reward; 3) pre-purchase; 4) lending; and 5) equity.

### Donation crowdfunding

Bradford defines donation crowdfunding as contributions made by individuals for nothing in return.<sup>773</sup> Donation crowdfunding enables people to offer financial support for a cause or project without the expectation of a financial or other reward in return. Bradford notes this type of crowdfunding can be used to fund both not-for-profit and for-profit initiatives.<sup>774</sup>

The informal collection of non-charitable donations to pay for legal services is not a new idea. However, only recently have online platforms been used to facilitate this process. Websites, or funding portals,<sup>775</sup> allow users to create a webpage to solicit donations from the public. Consultation participants noted that, with sympathetic facts and the right social-media strategy, users can gain a great deal of exposure and collect large sums of money to fund their cases—often with little or no regulatory oversight.

#### DONATION

In Canada, the term “donation” is often used in the context of a financial gift to a charity, where the donor receives a tax receipt for the value of the gift. For the purposes of discussion in this study paper, “donation” is used more broadly to refer to the act of giving voluntarily. To avoid causing confusion for the reader, this paper refers to “non-charitable donations” to reflect the fact that most crowdfunding initiatives are not led by registered charities.

### Securities crowdfunding

The second form of crowdfunding follows an investor model where funding is provided for litigation with the expectation of a financial return. Also known as equity crowdfunding, this practice was recently approved by provincial securities regulators.<sup>776</sup> Investing in litigation has been slow to catch on in Canada. In the United

---

<sup>773</sup> Bradford, *supra* note 770 at 15.

<sup>774</sup> *Ibid.*

<sup>775</sup> For more information on funding portals for crowdfunding, see the British Columbia Securities Commission, “Start-Up Crowdfunding Guide: For Funding Portals”, (May 2015; last revised July 2016), online:

<[www.bccsc.bc.ca/uploadedFiles/For\\_Companies/Private\\_Placements/Crowdfunding/Crowdfunding%20Guide%20-Funding%20Portals%20-%20July%202016.pdf?t=1489767040530](http://www.bccsc.bc.ca/uploadedFiles/For_Companies/Private_Placements/Crowdfunding/Crowdfunding%20Guide%20-Funding%20Portals%20-%20July%202016.pdf?t=1489767040530)> [BC Securities Commission, “For Funding Portals”].

<sup>776</sup> Canada has two equity crowdfunding frameworks. In British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, and Nova Scotia, the *Start-up Crowdfunding Exemption* from May 2015 applies Canadian Securities Administrators, “45-316 Start-up Crowdfunding Registration and Prospectus Exemptions [Multilateral CSA Notice]” (15 May 2015), online:

<[https://www.bccsc.bc.ca/Securities\\_Law/Policies/Policy4/PDF/45-316\\_Multilateral\\_CSA\\_Note\\_May\\_14\\_2015/](https://www.bccsc.bc.ca/Securities_Law/Policies/Policy4/PDF/45-316_Multilateral_CSA_Note_May_14_2015/)>. A second exemption, the *Integrated Crowdfunding Exemption*, was adopted in January 2016 in Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, and Saskatchewan, online: <[www.osc.gov.on.ca/en/SecuritiesLaw\\_45-108.htm](http://www.osc.gov.on.ca/en/SecuritiesLaw_45-108.htm)>. On February 22, 2017, the Saskatchewan Securities Commission filed Amendment Regulations, bringing the Act into

States, businesses investing in the outcomes of corporate litigation comprise an estimated \$1 billion USD market.<sup>777</sup>

### *What is security- or equity-based crowdfunding?*

The National Crowdfunding Association of Canada defines securities or equity-based crowdfunding as follows:

Equity crowdfunding is the offering of unregistered securities through a registered funding portal/platform to raise small amounts of money from a large pool of non-accredited and/or accredited investors. These securities may be common shares, non-convertible preferred shares, convertible preferred shares, non-convertible debt securities, convertible debt securities, limited partnership units, trust units, or flow-through shares. Other terms used to describe equity crowdfunding are investment crowdfunding, securities-based crowdfunding, raising equity online or distributing securities over the internet.<sup>778</sup>

In British Columbia, equity or securities crowdfunding is the process whereby “a business raises funds through the Internet by issuing securities (such as bonds or shares) to many people. This type of crowdfunding is overseen by the regulator of the province or territory where the business and potential purchasers are located.”<sup>779</sup> Unless granted an exemption by the provincial securities regulator, anyone engaged in the practice of trading securities or equity with another individual or entity must be registered in the province or territory where they carry on business.<sup>780</sup> To make the process simpler and more cost-effective for start-up businesses, the British Columbia Securities Commission introduced the *Start-up Crowdfunding Exemption*.

---

force, per s 45 of MI 45-108. See online:

<[fcaa.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=9020,9019,8914,2258,2257,244,1,Documents&MediaID=7f3699a5-ab5f-426b-9385-69f7871bd5b3&Filename=45-108-mi-notice-of-approval-crowdfunding-january-25-2016.pdf](http://fcaa.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=9020,9019,8914,2258,2257,244,1,Documents&MediaID=7f3699a5-ab5f-426b-9385-69f7871bd5b3&Filename=45-108-mi-notice-of-approval-crowdfunding-january-25-2016.pdf)> and  
<[www.fcaa.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=10351,10343,10218,2258,2257,244,1,Documents&MediaID=923dc111-567a-45df-a91f-d61f5dde5d91&Filename=comm-reg-2017-mi-45-108-february+22-2017.pdf](http://www.fcaa.gov.sk.ca/adx/aspx/adxGetMedia.aspx?DocID=10351,10343,10218,2258,2257,244,1,Documents&MediaID=923dc111-567a-45df-a91f-d61f5dde5d91&Filename=comm-reg-2017-mi-45-108-february+22-2017.pdf)>.

<sup>777</sup> Jason Krause, “Crowdfunding can be a great way to finance your case—or destroy it”, *American Bar Association Journal* (September 2015), online:

<[www.abajournal.com/magazine/article/crowdfunding\\_can\\_be\\_a\\_great\\_way\\_to\\_finance\\_your\\_case\\_or\\_destroy\\_it/](http://www.abajournal.com/magazine/article/crowdfunding_can_be_a_great_way_to_finance_your_case_or_destroy_it/)> [Krause].

<sup>778</sup> National Crowdfunding Association of Canada, “What is equity crowdfunding?”, online:

<[ncfacanada.org/equity-crowdfunding-general-questions/](http://ncfacanada.org/equity-crowdfunding-general-questions/)>.

<sup>779</sup> BC Securities Commission, “Start-up Crowdfunding Guide for Businesses”, (May 2015; last revised July 2016) at 3, online:

<[www.bsc.bc.ca/uploadedFiles/For\\_Companies/Private\\_Placements/Crowdfunding/Crowdfunding%20Guide%20-%20for%20Business%20-%20July%202016.pdf?t=1502049722546](http://www.bsc.bc.ca/uploadedFiles/For_Companies/Private_Placements/Crowdfunding/Crowdfunding%20Guide%20-%20for%20Business%20-%20July%202016.pdf?t=1502049722546)> [BC Securities Commission, “Guide for Businesses”].

<sup>780</sup> BC Securities Commission, “Crowdfunding”, *supra* note 769.

The new exemptions permit the following:

- A start-up or early stage issuer to raise relatively small amounts of capital by distributing securities to investors without filing a prospectus (the start-up prospectus exemption); and
- A funding portal to facilitate trades of those securities without having to register as a dealer (the start-up registration exemption), although a funding portal can be operated by a registered dealer.<sup>781</sup>

For start-ups, the BC Securities Commission sets out the following steps for securities or equity-based crowdfunding:

- **Business (Issuer)** A small business or a start-up has an idea but needs to raise funds to make it happen. They create a pitch to investors that includes basic information about the business and the offering, how they will use the money, and the risks of the project. Then they set a minimum amount they need to raise to accomplish their goal. The pitch will be found on a crowdfunding website.
- **Investor** An investor spots an interesting business on a crowdfunding website. After reading all the business information (which they should make sure to understand) and researching the business and the people involved, the investor can invest up to \$1,500. They must understand and acknowledge the risk warnings presented.
- **Crowdfunding Website (Portal)** The crowdfunding website holds the money the business raises in trust for investors until the minimum amount is raised. If the business does not raise the money it needs, each investor gets their money back.<sup>782</sup>

To qualify to operate a crowdfunding portal, the BC Securities Commission lists several specific conditions that must be met, which include:

- Maintaining a head office in Canada;
- Ensuring most of its directors are Canadian residents;
- A commitment not to advise investors on the suitability of any given investment, nor the merits;
- Providing information about the securities, including the risk of investment;

---

<sup>781</sup> BC Securities Commission, “Guide for Businesses”, *supra* note 779. According to the BC Securities Commission, the maximum amount an investor can invest is \$1,500. The guide also states that the maximum amount a start-up can raise is, “\$250,000 per start-up crowdfunding distribution. The offering document must indicate a minimum amount that has to be raised before the offering can close. The issuer has a maximum of 90 days to raise the minimum amount, starting on the day the issuer’s offering document is first made available to investors through a funding portal’s website. The money will be held in trust by the funding portal until the minimum amount of the offering is reached. The issuer may then complete the offering by issuing the securities. If the minimum amount is not reached, or the start-up crowdfunding campaign is withdrawn, the funding portal must return the money to the investors.”

<sup>782</sup> *Ibid* at 4.

- Not receiving a commission or fee from an investor;
- Hold an investors' contributions separate from the funding portal's property, in trust for the investor and, in the case of cash, at a Canadian financial institution.<sup>783</sup>

In the context of financing litigation, and similar to third-party litigation funding (described in Chapter 7 of this study paper), investors under the securities-based crowdfunding model agree to fund litigation in exchange for a portion of the awards or settlements. The major difference with third-party litigation funding is that it typically involves a commercial organization providing financial support to a lawyer or firm to mitigate risk, or a lawyer self-financing a case to assist their client. Securities-based crowdfunding involves an investment in litigation for a financial return.

### Crowdfunding to Finance Litigation

While there are many crowdfunding portals on the internet today, below is a sample of the ones commonly used to finance litigation in Canada, the United States, and overseas.<sup>784</sup>

#### *Canada*

The National Crowdfunding Association of Canada is a not-for-profit agency that offers education, research, leadership, support, and opportunities for social and investment crowdfunders in Canada.<sup>785</sup> Members include investors, entrepreneurs, lawyers, accountants, and crowdfunding platforms. It also maintains a Canadian Online Funding Directory that lists the name, description, location and type of several crowdfunding portals. Recent statistics on the National Crowdfunding Association of Canada website shows that, of the 96 online funding portals listed, the provinces with the most online crowdfunding portals are Ontario, British Columbia, Québec, and Alberta.<sup>786</sup>

---

<sup>783</sup> BC Securities Commission, "For Funding Portals", *supra* note 775

<sup>784</sup> See Eleanor Kirby & Shane Worner, "Crowd-funding: An Infant Industry Growing Fast" (2013) OICU-IOSCO Working Paper, online: <<https://www.iosco.org/research/pdf/swp/Crowd-funding-An-Infant-Industry-Growing-Fast.pdf>>. See also Tanja Aschenbeck-Florange, David Blair, Javier Beltran, Thomas Nagel, Umberto Piattelli & Laura Quintavalla, "Regulation of Crowdfunding in Germany, the UK, Spain and Italy and the Impact of the European Single Market" (2013) *European Crowdfunding Network in Association with Osborne Clarke*, online: <[www.osborneclarke.com/media/filer\\_public/51/b3/51b3007b-73aa-4b9a-a19d-380fc1d6ff35/regulation\\_of\\_crowdfunding\\_ecn\\_oc.pdf](http://www.osborneclarke.com/media/filer_public/51/b3/51b3007b-73aa-4b9a-a19d-380fc1d6ff35/regulation_of_crowdfunding_ecn_oc.pdf)>.

<sup>785</sup> For more information on the National Crowdfunding Association of Canada, visit its website: <[ncfacanada.org/about-us/](http://ncfacanada.org/about-us/)>.

<sup>786</sup> National Crowdfunding Association of Canada, "2017 Canadian Online Funding Directory", online: <[ncfacanada.org/canadian-crowdfunding-directory/](http://ncfacanada.org/canadian-crowdfunding-directory/)>. Statistics current as of July 18, 2017.



### JUSTICEFUNDR

In February 2015, JusticeFundr became the first crowdfunding platform in Canada designed specifically to generate financial support for litigation.<sup>787</sup> Although the JusticeFundr website is no longer active (last Twitter activity occurred in May 2017), it is described here as an example of one Canadian crowdfunding platform.

The goal of JusticeFundr was to enable individuals and organizations to finance public interest litigation through an online, donation-based crowdfunding model.<sup>788</sup> To start a campaign through JusticeFundr, the litigation had to be in the public interest, based on the following criteria:

1. Transcends the interests of those most directly affected by the legal proceeding;
2. Seeks to effect public policy towards the objectives of an individual, organization, demographic constituency; and
3. Enforces or attempts to reconcile constitutional, statutory, or common law rights in regard to such matters or persons.<sup>789</sup>

The JusticeFundr website noted public interest cases also included areas with an environmental, health, finance or other social impact. Litigants already engaged in a court proceeding, or with an administrative tribunal, had to provide an originating or other filed court or tribunal document.<sup>790</sup> For cases not yet filed, individuals or organizations were required to indicate this on their campaign page, and may have been assigned a limit on how much could be raised until documents were filed.<sup>791</sup>

Once approved to start a campaign, an individual or organization had to register an account as a Campaign Creator. The Terms of Service set out the description of services, and campaign rules, which included:

---

<sup>787</sup> Avnish Nanda, "Crowdfunding: Leveling the Playing Field", *LawNow Magazine* (3 May 2016), online: <[www.lawnow.org/crowdfunding-leveling-playing-field/](http://www.lawnow.org/crowdfunding-leveling-playing-field/)>. JusticeFundr was a not-for-profit corporation incorporated in Edmonton, Alberta.

<sup>788</sup> JusticeFundr, "About Us". This information was collected in Spring 2017.

<sup>789</sup> JusticeFundr, "Campaign Criteria", [JusticeFundr, "Campaign"]. Public interest litigation is defined in its Terms of Services as "any matter that: (1) has been submitted for dispute resolution by a Canadian court of law, Canadian administrative tribunal, or other Canadian adjudicative body; and (2) involves advocating for the poor, the marginalized, under-represented or vulnerable individuals, or seeks effecting change in social or government policy, including, for example, matters relating to the protection of the environment, women's rights, equality, freedom of conscience and religion, consumer rights etc." JusticeFundr also considers recognition by a court of an individual or organization acting as an intervenor to meet its Campaign Criteria.

<sup>790</sup> *Ibid.*

<sup>791</sup> *Ibid.*

- Use the JusticeFundr website to email photographs, images, audio and video recordings, writings, documents, etc.;
- Participation in the legal proceeding as a party (plaintiff, defendant, applicant, or intervenor);
- Use of the funds raised to pay the costs of litigation, and disclose where excess funds will be applied;
- Maintain accounting records in accordance with Canadian accounting principles to demonstrate proper use of funds;
- Disclose at what stage of litigation the legal proceeding is at; and
- A commitment not to offer any financial or non-financial rewards, or any other type of interest, in exchange for receiving donations.<sup>792</sup>

A campaign would be launched for a 90-day term, with the option to obtain approval to post a subsequent campaign for the same legal proceeding. Funds received through JusticeFundr were as a donation only. Supporters had no influence over the legal proceedings. While funds raised had to be used to cover the cost of litigation, JusticeFundr did allow Campaign Creators to keep excess funds, provided they disclosed how the funds would be used for donors to make informed decisions.<sup>793</sup> In exchange for using its services, JusticeFundr retained four percent of each donation received, on top of which a further 2.9 percent plus \$0.30 per donation retained by the payment processing system.<sup>794</sup>

### GoFUND ME

In 2010, crowdfunding website GoFund Me was launched. GoFund Me advertises itself as the world's largest and fastest-growing social funding platform for people in Canada, United States, United Kingdom, Australia, and some European countries.<sup>795</sup> GoFundMe uses a donation-based crowdfunding model, and offers users two campaign options: personal and certified charity campaigns.<sup>796</sup> Funds raised under

---

<sup>792</sup> JusticeFundr, "Terms of Service".

<sup>793</sup> JusticeFundr, "Campaign", *supra* note 789.

<sup>794</sup> JusticeFundr, "How it works". As of March 18, 2017, JusticeFundr uses both PayPal and Stripe to process donations payments.

<sup>795</sup> GoFund Me, "About Us", online: <<https://www.gofundme.com/about-us>>.

<sup>796</sup> GoFund Me offers Certified Charity Campaigns for individuals who wish to raise money for a Certified Charity or not-for-profit organization. The charity must be an approved charity pursuant to the *Internal Revenue Code*, USC tit 26 § 501(c)(3). Section 501(c)(3) of the *Internal Revenue Code* provides tax exemptions for "Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or

personal campaigns go directly to the user. Donations made to certified charity campaigns are paid directly to the charity or not-for-profit organization. Donors receive a tax-deductible receipt, where permitted.<sup>797</sup>

GoFundMe states PayPal will not deduct a fee from donations made for certified charity campaigns.<sup>798</sup> Unlike JusticeFundr, GoFund Me does not place a time limit on campaigns, nor do they require a campaign to reach a funding goal.

While there is no specific category for litigation financing on their site, GoFund Me has been used to raise money for the costs of legal proceedings. A recent example is Ottawa-based lawyer, Michael Spratt, who started a GoFund Me campaign to raise funds for his client's constitutional challenge.<sup>799</sup> Spratt's client served a four-month sentence and one-year probation for pleading guilty in 2008 for selling cocaine to a police officer. The reason for starting a GoFund Me campaign to finance the litigation was because "people who are affected by [a potentially unconstitutional law] are by definition the very people who are least able to challenge it."<sup>800</sup> Spratt's GoFundMe page states that funds raised will be used to pay for the costs of litigation, or for other public interest cases should the goal not be reached, or the case fail.

### *United States*

#### **Donation-based**

In 2012, CrowdLaw was launched to support crowdfunding for "small-scale criminal defense cases or not-for-profit organizations trying to launch legal or political

---

distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

<sup>797</sup> For more information on the Certified Charity Campaign option, see GoFund Me, "How do Certified Charity campaigns work?", online: <<https://support.gofundme.com/hc/en-us/articles/203604054-How-do-Certified-Charity-campaigns-work>>.

<sup>798</sup> *Ibid.* Other campaigns are subject to a platform and payment processing fee of 7.9% + \$0.30 per platform, deducted from donations received.

<sup>799</sup> Sean Fine, "Man crowdfunding his fight against the 10-year wait for a legal pardon", *The Globe and Mail* (19 May 2015), online: <<https://beta.theglobeandmail.com/news/national/man-crowdfunding-his-fight-against-the-10-year-wait-for-a-legal-pardon/article24478915/?ref=http://www.theglobeandmail.com&>>.

<sup>800</sup> *Ibid.* For more information on Spratt's GoFundMe campaign, visit its site: GoFundMe, "Legal Challenge to CPC Pardon Law", online: <<https://www.gofundme.com/pardon>>. For another example of a crowdfunding campaign for legal defence, see also Bethany Lindsay, "Crowdfunding campaign raises thousands to support legal defense of Kinder Morgan protesters", *The Vancouver Sun* (03 November 2014), online: <[www.vancouversun.com/technology/Crowdfunding+campaign+raises+thousands+support+legal+defence+Kinder+Morgan+protesters/10348868/story.html](http://www.vancouversun.com/technology/Crowdfunding+campaign+raises+thousands+support+legal+defence+Kinder+Morgan+protesters/10348868/story.html)>.

---

campaigns.”<sup>801</sup> According to Henry Perlstein, founder of CrowdLaw, the purpose of the site was to “help people who are shut out of the legal process reach their goals” through crowdfunding technology.<sup>802</sup>

### Securities-based

Another crowdfunding platform that offers shares in the potential outcome of a case is LexShares. Launched in 2014, and based out of New York and Boston, LexShares uses a securities-based crowdfunding portal for plaintiffs and lawyers engaged in commercial litigation.<sup>803</sup> LexShares offers accredited investors the opportunity “to purchase shares of equity ownership in specific lawsuits. If the plaintiff prevails, investors are paid a portion of the proceeds from the settlement or court judgement.”<sup>804</sup>

---

<sup>801</sup> Krause, *supra* note 777. At time of publication of this study paper, it does not appear there is an active website for CrowdLaw available to the public. For more information on CrowdLaw, see also Laura Hogan, “Career Corner: UF Law alumni kickstart digital advocacy company”, *FlaLaw Online* (13 October 2014), online: <<https://www.law.ufl.edu/flalaw/2014/10/uf-law-alumni-kickstart-digital-advocacy-company/>>.

<sup>802</sup> Krause, *supra* note 777.

<sup>803</sup> LexShares, online: <<https://www.lexshares.com/>>. The types of commercial litigation cases in its portfolio include whistleblower matters, construction, real estate, banking and insurance disputes, professional negligence, breach of contract, anti-trust, fraud, intellectual property and arbitration. For more information on the other areas covered, visit its website: LexShares, “Frequently Asked Questions”, online: <<https://www.lexshares.com/pages/faqs>>.

<sup>804</sup> *Ibid.* The U.S. Securities and Exchange Commission provides the following information about accredited investors: “Under the Securities Act of 1933, a company that offers or sells its securities must register the securities with the SEC or find an exemption from the registration requirements.” The term accredited investor, as defined in Rule 501 of Regulation D, “shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following categories, at the time of the sale of the securities to that person: (1) Any bank as defined in section 3(a)(2) of the Act, or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Act whether acting in its individual or fiduciary capacity; any broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934; any insurance company as defined in section 2(a)(13) of the Act; any investment company registered under the Investment Company Act of 1940 or a business development company as defined in section 2(a)(48) of that Act; any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958; any plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000; any employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 if the investment decision is made by a plan fiduciary, as defined in section 3(21) of such act, which is either a bank, savings and loan association, insurance company, or registered investment adviser, or if the employee benefit plan has total assets in excess of \$5,000,000 or, if a self-directed plan, with investment decisions made solely by persons that are accredited investors; (2) Any private business development company as defined in section 202(a)(22) of the Investment Advisers Act of 1940; (3) Any organization described in section 501(c)(3) of the Internal

For plaintiffs, capital raised from a case can be used for litigation expenses (lawyer fees, expert witnesses, and court fees), working capital (salaries, rent, supplies), and personal expenses.<sup>805</sup>

For lawyers, LexShares also offers funding to lawyers for legal fees, other litigation expenses, and “settlement acceleration” to cover fees from an up-front settlement payment.<sup>806</sup> Lawyers can receive funding for different types of fee arrangements, including contingency, hourly, and hybrid fee models.

All cases undergo a review to ensure they meet the LexShares’ portfolio criteria. LexShares examines the merits of each case, interviews the plaintiff and their counsel (to verify their level of experience), the defendant’s capacity to pay damages awarded from the litigation, the estimated costs, and the amount of time expected to reach a resolution.<sup>807</sup> The cost of the case is used to determine the offering size, usually set at 10 per cent of the claim’s estimated value.

Although LexShares states it retains no control over litigation strategy or settlement decisions, it does provide details of the case to potential investors. Once a case is included in the LexShares portfolio, investors can review the following:

- Full plaintiff & defendant names
- The parties involved in the claim
- Description of parties—A summary of plaintiff, defendant, judge and jurisdiction

### CROWD SUPPORT

Calvin wants to pursue a claim against his former employer for a wrongful dismissal. After meeting with a lawyer for a consultation, he is convinced he has a strong case with sympathetic facts. However, the employment lawyer Calvin consulted with bills hourly using a traditional retainer model and he cannot afford to pay a large up-front retainer. He decides to create a page on a popular crowdfunding site, and publicizes his case on social media. Family, friends, and strangers rush to help by donating small amounts of money to his cause. Calvin’s story becomes a minor sensation, and even draws attention of wealthy investors. They contact Calvin and offer to invest in return for a share of the award. If Calvin agrees, he would have enough money to fund his case, but he is wary of the potential pitfalls his crowdfunding experiment can provoke.

---

Revenue Code, corporation, Massachusetts or similar business trust, or partnership, not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$5,000,000; (4) Any director, executive officer, or general partner of the issuer of the securities being offered or sold, or any director, executive officer, or general partner of a general partner of that issuer; (5) Any natural person whose individual net worth, or joint net worth with that person’s spouse, exceeds \$1,000,000. For more information see U.S. Securities and Exchange Commission, website: <[www.sec.gov/answers/accred.htm](http://www.sec.gov/answers/accred.htm)>.

<sup>805</sup> LexShares, “Plaintiffs”, online: <<https://www.lexshares.com/pages/plaintiffs>> [LexShares, “Plaintiffs”].

<sup>806</sup> LexShares, “Attorneys”, online: <<https://www.lexshares.com/pages/attorneys>>.

<sup>807</sup> LexShares, “Plaintiffs” *supra* note 805.

- Key facts—including case type, stage and damages sought
- Detailed case background—Summary of the litigation from inception to current stage
- Cash flow model—Details of potential return profile of the investment
- Legal team—Details regarding the plaintiff's representation and type of engagement.<sup>808</sup>

Investors are only paid if the case is successful, per the investment agreement. Any material changes made to a case must be reported by the plaintiff or lawyer to LexShares. When an investor makes a payment, they receive shares in a limited liability company as a limited member.<sup>809</sup> The limited liability company then contracts directly with the plaintiff or attorney whose case is being funded.<sup>810</sup> LexShares takes a share of the profits of the investment paid (to an investment manager) only in cases that are profitable and successfully funded. There are minimum and maximum investment limits assigned, depending on the case. Generally, the minimum investment required is US\$2,500, with the maximum being the lesser of the offering size, or five percent of “an investor’s liquid net worth.”<sup>811</sup>

### *United Kingdom*

Launched in 2015, CrowdJustice became the first crowdfunding platform in the United Kingdom designed to raise money for litigation.<sup>812</sup> Through a donation-based

---

<sup>808</sup> LexShares, “Investors”, online: <<https://www.lexshares.com/pages/investors>>.

<sup>809</sup> Internal Revenue Service, “Limited Liability Company (LLC)”, online: <<https://www.irs.gov/businesses/small-businesses-self-employed/limited-liability-company-llc>>. In the United States, a limited liability company is defined by the Internal Revenue Service as “a business structure allowed by state statute...Owners of an LLC are called members. Most states do not restrict ownership, and so members may include individuals, corporations, other LLCs and foreign entities. There is no maximum number of members. Most states also permit “single-member” LLCs, those having only one owner. A few types of businesses generally cannot be LLCs, such as banks and insurance companies.”

<sup>810</sup> *Ibid.* Like the BC Securities Commission regulation of securities crowdfunding, and the associated exemptions, the United States applies a similar regulatory model on investment crowdfunding. The LexShares site explains that, for investors, “The interests offered for sale through LexShares rely upon an exemption under Rule 506(c) enabled by Title II of the JOBS Act which went effective on September 23, 2013. This exemption permits an issuer to engage in general solicitation or general advertising of an offering and selling of securities pursuant to Rule 506, if (1) all purchasers of the securities are accredited investors and (2) the issuer takes reasonable steps to verify that such purchasers are accredited investors.” For more information on the *Jumpstart Our Business Startups Act*, Pub L No 112-106, 126 Stat 306 (2012) [*JOBS Act*], see United States Securities and Exchange Commission website: <<https://www.sec.gov/spotlight/jobs-act.shtml>>.

<sup>811</sup> LexShares, “Plaintiffs”, *supra* note 805.

<sup>812</sup> Joshua Rozenberg, “Is crowdfunded litigation the future of justice?” *The Guardian* (25 May 2015), online: <<https://www.theguardian.com/commentisfree/2015/may/25/crowdfunded-litigation-future-justice-crowdjustice>>. On January 31, 2017, CrowdJustice launched its operations in the United States. For more information, visit its website: <<https://www.crowdjustice.com/blog/launching-in-the-us/>>.

funding model, CrowdJustice helps litigants pay the costs of litigation to defend or pursue public-interest cases. Applicants must meet specific criteria before their case will be posted on the site, “including already having a lawyer on board (the site doesn’t offer legal representation or advice itself, just an opportunity to find potential donors) and proof that their case affects the wider community, not just their own personal interests.”<sup>813</sup> Once approved, an individual or organization can create a webpage and set a goal deadline and funding amount. Donors can pledge any time; however, funds are only collected if the total goal is reached.<sup>814</sup>

CrowdJustice does not charge a start-up fee to create a webpage. If the case is successfully funded, CrowdJustice collects approximately eight per cent of the total to cover platform and processing fees. The remaining funds are transferred directly to a lawyer’s client account, and are held in trust to finance the case.

While CrowdJustice does not monitor how funds are used, it does require users to provide information on their page about how the funds will be used for the litigation. If an individual does not use all funds raised, the surplus is returned to CrowdJustice.<sup>815</sup> For donors who contribute over £1000, the donor can request the contribution amount be returned on a pro rata basis.<sup>816</sup>

### Optimal uses

The consultation participant feedback and research highlight the following ways crowdfunding may be used:

- **Advocacy organizations:** Consultation participants working in advocacy organizations noted that crowdfunding could be a promising way to raise money for important cases, or to support their activities generally. Since the success of crowdfunding typically correlates with a case’s popularity, a well-organized advocacy organization can leverage its network of members and stakeholders to use crowdfunding to raise capital for legal services.

---

<sup>813</sup> Mary O’Hara, “Lawyer’s crowdsourcing site aims to help people have their day in court”, *The Guardian* (October 2015), online: <<https://www.theguardian.com/society/2015/oct/21/lawyer-crowdsourcing-site-court-legal-support>>.

<sup>814</sup> CrowdJustice, “Frequently Asked Questions”, online: <<https://help.crowdjustice.com/hc/en-us>>.

<sup>815</sup> *Ibid.* Note that not-for-profit or charity organizations can retain surplus funds for general charitable purposes.

<sup>816</sup> *Ibid.* Any funds remaining after a refund is made will be donated to another case on CrowdJustice, or to a charity that supports public interest litigation, at the election of the person who created the case page.

---

- **Sympathetic cases:** For individuals and advocacy organizations alike, sympathetic cases that capture the public's attention are worthwhile causes for crowdfunding. The inherent nature of crowdfunding dictates that cases with the sympathetic facts, or cases with high value to the public interest, are more likely to be funded.
- **Cases with low awards:** For cases with low or no pecuniary awards, crowdfunding represents an alternative option to pay for litigation where the cause drives the crowdfunding campaign. This is especially the case for donation-based crowdfunding, where individuals provide financial support to a litigant as a donation, rather than an investment, to a cause.

### Advantages

#### *Funding important cases*

Crowdfunding can be used by litigants to fund important cases that pique the public's interest. Consultation participants working in advocacy organizations explained it could be a promising way to supplement limited funding sources. Since the organizations often possess the infrastructure to solicit donations, to some extent, they could expand this to include crowdfunding. Alternatively, advocacy agencies could use crowdfunding to reach out to individuals who may not be interested in helping specific cases, but would support litigation on a broader issue.

#### *Control of the case*

For litigants using crowdfunding to collect money for their own litigation, this alternative funding model offers a high level of autonomy. The litigant is always in control. They can choose their lawyer and direct the course of the case without any interference from the funders, provided they do not make representations to the donors stating otherwise.

This model has also been adopted abroad with CrowdJustice. As noted earlier, the service requires clients to retain a lawyer prior to posting as part of the approval process. That way, the company can operate without the risk of offering legal representation or advice. Concerns about losing control of the case are alleviated since the client chooses their own lawyer and gives them direction—rather than CrowdJustice acting as a potential intermeddler.



### Disadvantages and potential complications

Consultation participants noted the growth of litigation crowdfunding's popularity has been hampered due to a range of potential ethical issues, misconceptions, and legislative roadblocks. While crowdfunding is popular in some industries,<sup>817</sup> the nature of the legal industry challenges its wide-range use. There are not only important questions about champerty and maintenance, but securities law in general.

#### *Potential conflicts of interest and other ethical concerns*

There are concerns that crowdfunding can lead to self-incrimination, and conflicts of interest. Successfully crowdfunding a case relies heavily on portraying the litigant as sympathetically as possible. It is possible that too many details about the case may be shared. As one American review notes:

The biggest problem is how to disclose the facts in a potential matter that will attract sympathetic investors without giving away compromising information to opposing counsel. Unfortunately, parties that need crowdfunding are often likely to be desperate and incautious.<sup>818</sup>

If a litigant shares information about their case to contributors, it is possible for opposing counsel to donate a minimal amount to the client to gain access to that information. It's unclear if this would be an ethical breach or a violation of solicitor-client privilege, as it poses many questions:

- Is a person sharing litigation strategies to donors a willful waiver of that privilege?
- Is the opposing counsel breaching their ethical responsibility of professional conduct by taking advantage of that waiver?
- Is the opposing counsel breaching their ethical responsibilities by *not* taking advantage of that waiver? Are they failing to act in the best interests of their client by not pursuing a clear advantage over the opposing party?

---

<sup>817</sup> In media industries, crowdfunding is being increasingly used to fund television programs, movies, music albums, and video games, by companies of all sizes. Crowdfunding in these areas has effectively become a litmus test for the proposed project's popularity and potential success: if the project is successfully crowdfunded, it is (typically) a positive indication that the final product will be profitable. Understandably, this same logic would not apply to the crowdfunding of litigation.

<sup>818</sup> Krause, *supra* note 777. Krause cites a quote from Nate Cade, co-chair of the ABA Section of Litigation's Ethics and Professionalism Committee: "Your crowdfunding profile is like a legal selfie. The danger of the Internet is that people who don't know better put too much information online...If I was opposing counsel in a crowdfunded case, the first thing I would do is subpoena the crowdfunding company for all of the communications between them and the litigant."

---

Crowdfunding companies can take steps to mitigate the concerns raised above. For example, LexShares requires litigants using their crowdfunded investment services to only share publicly available information from court filings with the public and potential investors.<sup>819</sup>

Consultation participants noted there is concern that crowdfunding could result in a third party (or multiple—from dozens to thousands—of third parties) having a direct interest in the case. As one consultation participant noted, if crowdfunding is examined as a financial transaction, there are fewer ethical issues—but legal services operate within a framework of strict ethical boundaries. If someone with an interest in the litigation tells a party what they can or cannot do, what lawyers they can hire, or what terms they can settle on, then ethical issues are triggered. This can arise if a litigant creates a crowdfunding pitch that grants donors the ability to dictate the direction of the case.

### *Potential for excessive fees*

In December 2015, the Philadelphia Bar Association issued an ethics opinion on lawyers using crowdfunding to raise funds for their client's cases.<sup>820</sup> One of the risks discussed in the opinion was the potential for a lawyer to receive an excessive fee through a crowdfund if the time required for the litigation ends up being significantly less than the amount of funds raised. The opinion uses the example of a case crowdfunded to raise money to cover legal fees, with a funding goal of \$20,000. If the entire amount is paid out once raised, but the lawyer ends up only working ten hours to resolve the case, it could result in excessively high legal fees.<sup>821</sup> If the lawyer is on an hourly billing model, he or she could effectively receive a \$2,000 hourly rate for services. With Rule 3.6–1 of the *BC Code* setting out that all legal fees must be reasonable and fair, a lawyer could be in breach of the *BC Code* in this case.

### *The need for legal advice and representation*

Another potential drawback of crowdfunding for litigation is that some sites may not be available to self-represented litigants. For example, CrowdJustice requires its users to have retained a lawyer before granting approval to post the case on their site. CrowdJustice does not provide legal advice services to users, nor is there any assistance offered to help those wishing to use their site to find a lawyer.

---

<sup>819</sup> *Ibid.*

<sup>820</sup> The Philadelphia Bar Association, Professional Guidance Committee, “Opinion 2015–6”, December 2015), online: <[www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2015-6.pdf](http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2015-6.pdf)>.

<sup>821</sup> *Ibid* at 3–4.

The challenge is that most individual plaintiffs who use crowdfunding sites to fund litigation do so because they can't afford to hire a lawyer. The purpose of the campaign is to raise funds so the individual or organization can pay for legal representation. As seen earlier in Chapter 6 on Unbundled Legal Services, having a pre-existing relationship with a lawyer is sometimes necessary to access unbundled legal services later on. Similarly, litigants seeking to use crowdfunding to pay for litigation, and without a pre-existing relationship with a lawyer, may be forced to abandon their claim.

Krause notes there is also a risk of oversharing by clients who start a crowdfunding campaign without a lawyer's input. For individuals or organizations that don't vet the information with legal counsel to ensure it remains high level, the risk is they could potentially share too much information that could be later used as evidence against them. A litigant could post a summary of their case on the crowdfunding page, intended to serve as background, but which may inadvertently contain details of their case that should not be disclosed publicly. Furthermore, and as stated by the co-chair of the American Bar Association Section of Litigation's Ethics and Professionalism Committee, opposing counsel in a crowdfunded case could "subpoena the crowdfunding company for all of the communications between them and the litigant."<sup>822</sup>

### Notes on crowdfunding regulation

#### *Uncertainty caused by legislative gaps*

Another obstacle lies in the legislative gaps that remain in provincial crowdfunding regulations. The *Start-Up Crowdfunding Exemption* used in British Columbia only applies to new companies registered in British Columbia that issue eligible securities.<sup>823</sup> Until new securities regulations are adopted, there is no guidance available for litigants who use crowdfunding to effectively sell "shares" in their litigation to investors. Consultation participants were quick to point out this likely qualifies as the distribution of unregulated securities, and that regulatory guidance from the BC Securities Commission would be welcomed on the matter.

In the United States, the Securities and Exchange Commission has adopted similar limitations. "Investors," as amended, must now meet regulatory standards of the

---

<sup>822</sup> Krause, *supra* note 777.

<sup>823</sup> BC Securities Commission, "Crowdfunding", *supra* note 769.

Exchange Commission,<sup>824</sup> including the minimum level of income and assets the investor must pay to invest in crowdfunding projects—including litigation.<sup>825</sup>

Similar gaps exist for fundraising by non-charitable donations. To date, only Saskatchewan has adopted discrete legislation that directly applies to crowdfunding by individuals. The *Informal Public Appeals Act* applies to anyone who makes a “public appeal,” which is defined as:

... an informal public appeal message directed at the public generally, or at a section of the public, requesting donations to or indicating that the proceeds of any sale, competition, lottery, raffle, entertainment, service or event will be applied towards a fund that is intended to be used for a specified object, whether charitable or non-charitable, but does not include a message communicated as part of a fundraising effort carried out on a permanent or continuing basis.<sup>826</sup>

Passed in 2014, the *Informal Public Appeals Act* strictly applies to informal or sporadic fundraising efforts, which encompass one-time crowdfunding efforts. The Act deems the funds collected to be held in trust,<sup>827</sup> and imposes strict duties and responsibilities on the person administering the fundraising effort. For example, the Act outlines what must be done with surplus funds (s.10) and refund requests (s.12).

Similar legislation is lacking in British Columbia, and elsewhere in Canada. Without it, crowdfunding efforts operate in a legislative gap that imposes uncertainty on litigants, the lawyers they hire, and donors that fund the case.

---

<sup>824</sup> *Commodity and Securities Exchanges*, 17 CFR §230.501 (2011).

<sup>825</sup> U.S. Securities and Exchange Commission, “Investor Bulletin: Crowdfunding for Investors” (16 February 2016), online: <[https://www.sec.gov/oiea/investor-alerts-bulletins/ib\\_crowdfunding-.html](https://www.sec.gov/oiea/investor-alerts-bulletins/ib_crowdfunding-.html)>. A review of the U.S. Securities and Exchange Commission website notes the following about the income level requirements, and investment limits, for investors seeking to invest in crowdfunding projects, “The limitation on how much you can invest depends on your net worth and annual income. If *either* your annual income *or* your net worth is less than \$100,000, then during any 12-month period, you can invest up to the greater of either \$2,000 or 5% of the lesser of your annual income or net worth. If *both* your annual income *and* your net worth are equal to or more than \$100,000, then during any 12-month period, you can invest up to 10% of annual income or net worth, whichever is lesser, but not to exceed \$100,000.”

<sup>826</sup> *An Act respecting Informal Public Appeals*, SS 2014, c I-9.0. This Act was based on the *Uniform Informal Public Appeals Act*, adopted at the Uniform Law Conference of Canada in August 2011. For more information on the UIPAA see the Uniform Law Conference of Canada website: <[www.ulcc.ca/en/civil-section/108-civil-section-current-topics/1328-uniform-informal-public-appeals-act-2012](http://www.ulcc.ca/en/civil-section/108-civil-section-current-topics/1328-uniform-informal-public-appeals-act-2012)>.

<sup>827</sup> *Ibid* at s 4.

### *Unpredictability and risk*

Not only is the law unclear, but relying on public outreach to fund litigation can be unpredictable. The amount of money raised does not have any bearing on whether a case will succeed. Funding sites also make no promises to investors on the prospects of a successful outcome. As a result, there is little certainty over whether an investment in a legal action will result in a return on the investment. While more funds expand a litigant's ability to pay for legal services, and having legal representation is far better than being self-represented, the outcome will ultimately depend on the circumstances of the case.

### *Costs*

In the event a litigant loses their case, they may be ordered to pay costs. As consultation participants noted, even a well-funded litigant must pay costs at the end of a long trial if they are unsuccessful. The litigant would need to plan ahead to save some of the funds raised to cover a costs order, or pay them out of pocket. Costs could not be collected against the donors themselves, leaving a litigant in a difficult financial situation. They may turn to crowdfunding again to pay the costs, but as consultation participants pointed out, it could be more difficult to raise money a second time.

## **Structural, systemic, or legal changes to consider**

### *Enhanced regulations and guidelines*

Given the infancy of the crowdfunding industry in British Columbia, and Canada in general, there is little guidance available on its use for funding litigation. Rules under the codes of conduct, either informal or legislative, have yet to be developed. Although lawyers seeking to use crowdfunding to support a client's case can consult with their Law Society, there are no specific provisions or practice guidelines available. Spratt states he consulted with the Law Society of Upper Canada, and "was told crowdfunding was not a problem, if he makes clear that he follows the instructions of his client, not the donors. The money would go toward his legal fees."<sup>828</sup> He also received confirmation that while the Law Society of Upper Canada would not offer legal advice or opinion on this practice, lawyers are expected to abide by the rules of professional conduct, especially around fees and costs. The risk of excessive fees could place a lawyer at odds with the requirement to uphold the rules around fair and reasonable fee amounts. Additional guidance from provincial and territory legislatures, or the Law Societies, would assist lawyers to ensure using this alternative funding model does not breach their ethical obligations.

---

<sup>828</sup> Fine, *supra* note 799.

### *Development of a practitioner database*

Sites often require users to have already retained a lawyer or law firm to help with the litigation before launching a campaign. Unless someone has a pre-existing relationship with a lawyer, they may find themselves struggling to find one willing to take on a crowdfunded case. There may be some benefit in developing a database of lawyers who have or are willing to take on crowdfunded cases. A similar platform has been created by the National Self-Represented Litigants Project for lawyers offering unbundled legal services, and Mediate BC maintains a roster of mediators offering AFAs.



## Highlights from Chapter 9—Crowdfunding

Crowdfunding is used by individuals and businesses to raise small amounts of money from a large number of people to carry out a specific project. A popular forum used to crowdfund litigation is the internet, through online funding portals. Funding can be provided to litigants as a donation, or as an investment in a share of equity ownership in the litigation.

Donation crowdfunding enables people to offer financial support for a cause or project without the expectation of a financial or other reward in return.

Equity-based crowdfunding enables investors to finance litigation in exchange for a portion of a settlement or court judgment.

### *Optimal uses*

- **Advocacy organizations** (e.g. used to raise money for important cases, or to support advocacy services generally);
- **Sympathetic cases** (e.g. cases with the sympathetic facts, or cases with high value to the public interest, are more likely to be funded);
- **Cases with low awards** (especially the case for donation-based crowdfunding, where individuals provide financial support to a litigant as a donation, rather than an investment, to a cause).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"><li>• Funding important cases</li><li>• Control of the case</li></ul>	<ul style="list-style-type: none"><li>• Potential for excessive fees</li><li>• Need for legal advice and representation</li><li>• Uncertainty caused by legislative gaps</li><li>• Unpredictability and risk</li><li>• Costs awards</li></ul>	<ul style="list-style-type: none"><li>• Potential conflicts of interest and other ethical concerns</li><li>• Potential for excessive fees</li></ul>

### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted two ideas where changes could be considered to promote crowdfunding in British Columbia: enhanced regulations and guidelines; and practitioner database of lawyers who take on crowdfunded cases.





## CHAPTER 10. LEGAL EXPENSE INSURANCE

### What is legal expense insurance?

Legal expense insurance (LEI) is a type of insurance product that offers the policy holder coverage for legal services.<sup>829</sup> Depending on the LEI policy, individuals pay an annual insurance premium to the LEI provider in exchange for legal information, advice, and representation.<sup>830</sup>

Typically, LEI falls under two categories, *before-the-event* and *after-the-event*, defined as follows:

- **Before-the-Event (BTE) Legal Expenses Indemnities:** insurance against potential litigation and other legal issues that could arise following a hypothetical future event – including disbursements and fees.
- **After-the-Event (ATE) Legal Expenses Indemnities:** insurance purchased after litigation has commenced (such as for an injury or a dismissal) to offer protection against part or all of the risk of paying an adverse costs award, as well as an individual's own expenses.<sup>831</sup>

### The roots of legal expense insurance

Although LEI was endorsed in Canada by the Law Society of Upper Canada in 1993, its origins trace farther back to early 20<sup>th</sup> century in Europe.<sup>832</sup> The first insurance company to offer LEI, *Defense Automobile et Sportive*, was established in 1917, in Le Mans, France.<sup>833</sup> Coverage was offered to race car drivers who suffered injuries while participating in the world-famous Le Mans 24-hour race, and who faced lengthy and complicated legal disputes between drivers and track owners or other drivers.<sup>834</sup>

The interest in LEI moved outside the European racing community and, in 1928, *Deutscher Automobil Schutz* (DAS) was established in Germany to offer LEI coverage

---

<sup>829</sup> Canadian Bar Association, Envisioning Equal Justice Summit, “Working Paper 1 – Legal Expense Insurance” (Ottawa: Canadian Bar Association, 25-27 April 2013) at 1, [CBA, “Working Paper 1”]. Another term used for LEI is prepaid legal expense plans.

<sup>830</sup> *Ibid.*

<sup>831</sup> DAS Canada, “What is ATE Insurance?”, online: <[www.das.ca/For-Lawyers/What-is-ATE-1.aspx](http://www.das.ca/For-Lawyers/What-is-ATE-1.aspx)>.

<sup>832</sup> Michael Trebilcock, “Report of the Legal Aid Review 2008” (Ontario: Ministry of Justice, 2008) at 96.

<sup>833</sup> DAS UK, “History”, online: <<https://www.das.co.uk/about-das/history>>.

<sup>834</sup> *Ibid.*

to a broader clientele.<sup>835</sup> Operating separate and apart from the French organization, DAS offered policy holders LEI coverage to pursue claims for compensation, wrongful dismissal, and criminal prosecution matters.<sup>836</sup> DAS is now present in 17 other European markets, including Canada and South Korea.

### Legal expense insurance—Canada

#### STERLON

According to its website, STERLON was granted the first special license to assess LEI claims in Canada in 1993.<sup>837</sup> Today, STERLON offers BTE insurance policies to corporations (including colleges and municipalities), as well as to educational and healthcare professionals. It also has specialized products for Canadian pilots, air crew, and religious institutions.<sup>838</sup> Depending on the policy, STERLON offers BTE LEI coverage for legal fees and expenses for advice and representation with one of STERLON's panel lawyers.<sup>839</sup> A STERLON LEI policy covers a variety of legal issues, including "employment disputes, litigation, disciplinary actions, Human Rights complaints and criminal charges."<sup>840</sup>

---

<sup>835</sup> DAS International, "About DAS—What is DAS?", online: <<https://www.das.com/en/Ueber-DAS.aspx?redirlang=en>>. A review of the DAS International site notes it offers LEI products to "families, employees, the self-employed, companies, and affinity groups" in addition to offering coverage to motorists.

<sup>836</sup> DAS International, "Why Legal Expenses?", online: <<https://www.das.com/en/Rechtsschutzversicherung.aspx>>.

<sup>837</sup> STERLON, "Company Profile—About Us", online: <<https://sterlon.com/company-profile/>>.

<sup>838</sup> *Ibid.* STERLON's professional LEI coverage (PLEI) for dentists "is an insurance cover whereby coverage is guaranteed provided the claim falls within the governing terms and conditions of the policy. In addition, CDPA [Canadian Dental Protective Association] lawyers are assigned by the Association. Dentists with PLEI coverage can choose their lawyer from a panel of lawyers specializing in dental issues." For educational professionals, STERLON states that "Most school boards do extend some legal protection to its administrators but usually when your interests are the same as the interests of the board. If your dispute is either with the board, or is a matter that runs contrary to board policy, you will likely find yourself without any legal representation. For less than a dollar a day, Professional Legal Expense Insurance can provide you with personal protection." STERLON's PLEI coverage for physicians and surgeons is "specifically designed to provide indemnity coverage to professionals. This distinguishes it from the cover that is provided by the CMPA [Canadian Medical Protective Association], which is discretionary." STERLON also offers commercial LEI (CLEI), which it describes as "a brand new product that was introduced in Canada in 2005. It is already widely sold in Europe and is specifically designed for small to medium sized businesses that do not typically have legal services on staff."

<sup>839</sup> STERLON, "Frequently Asked Questions", online: <<https://sterlon.com/frequently-asked-questions/>>. According to its site, a list of panel lawyers/firms is only made available to policy holders.

<sup>840</sup> *Ibid.*

Once a claim is accepted, a policy holder is matched with a STERLON panel lawyer or firm. STERLON pays all costs associated with legal services directly to the lawyer or firm. The extent of coverage depends on the policy agreement in each sector, however STERLON notes that “most policies provide a maximum indemnity of \$275 per hour, plus all reasonable disbursements. Legal fees that exceed this hourly rate remain the responsibility of the policyholder.”<sup>841</sup>

### DAS CANADA

DAS began offering LEI products to Canadians in July 2010.<sup>842</sup> DAS Canada is based out of Toronto, Ontario, with regional offices in Montreal and British Columbia. DAS Canada offers BTE LEI coverage to individuals and businesses<sup>843</sup> for the following legal situations:

- Disputes with a contractor
- Highway Traffic Act infractions
- Employment disputes
- Business contract disputes
- Tax investigations
- Landlord-tenant disputes
- Bodily injury disputes.<sup>844</sup>

A policy holder of DAS Canada BTE LEI receives coverage for legal costs, including lawyer fees, court filing fees, expert report and witness expenses, disbursements and adverse costs.<sup>845</sup> DAS Canada also offers clients access to a legal advice help line that connects the policy holder to a lawyer for advice and information on the legal issue, and an assessment of whether a client has a claimable issue.<sup>846</sup> If an

### LEI FOR BUSINESSES

Katie is fulfilling her dream of starting her own business. When wrapping up the paperwork, she is told about ‘legal expense insurance.’ In addition to the other insurance she carries for her business, legal expense insurance would cover a fixed amount of legal expenses in the event of a lawsuit, in return for small, yearly premiums. As Katie will be hiring and dismissing employees, dealing regularly with clients and suppliers who may have grievances, and acting as a corporate tenant in a commercial lease—she is confident this coverage is a good investment.

---

<sup>841</sup> *Ibid.*

<sup>842</sup> CBA, “Reaching”, *supra* note 12 at 102.

<sup>843</sup> DAS*business* policy offers LEI coverage includes “employment disputes, legal defence, statutory license protection, contract disputes and debt recovery, property protection, bodily injury, tax protection.” DAS Canada, “DAS*business*—Legal Protection & Advice”, (brochure: undated). DAS client brochures are provided to potential clients by DAS licensed insurance brokers.

<sup>844</sup> DAS Canada, “Why Legal Expense Insurance”, [DAS Canada, “FAQ”], online: <[www.das.ca/About-Us/Why-Legal-Expense-Insurance.aspx](http://www.das.ca/About-Us/Why-Legal-Expense-Insurance.aspx)>. DAS Canada LEI also covers limited circumstances where criminal charges arise out of the course of a policy holder performing his or her duties of employment.

<sup>845</sup> DAS Canada, “Legal Expense Insurance—FAQs”, online: <[www.das.ca/About-Us/Legal-Expense-Insurance-FAQ-s.aspx](http://www.das.ca/About-Us/Legal-Expense-Insurance-FAQ-s.aspx)>.

<sup>846</sup> *Ibid.* The lawyer applies a “reasonable prospect of success” analysis to a policy holder’s legal issue. The DAS Canada website states that “[f]or civil claims, the lawyer appointed to your file must agree

issue is covered, the file is sent to the DAS Canada claims department, and a claim is opened. For legal matters not covered by a DAS Canada LEI policy,<sup>847</sup> clients can still contact a lawyer from the advice line for general advice and guidance on their legal issue.

DAS Canada offers ATE insurance to lawyers and law firms for use with clients involved in personal injury compensation claims.<sup>848</sup> ATE LEI protects the client from an adverse costs award, and covers disbursement expenses incurred throughout the litigation. Claims covered under a DAS ATE policy include motor vehicle accident injuries, and slip and fall accidents. Depending on the outcome of the client's case, the DAS Canada ATE insurance policy offers coverage, as follows:

What happens if I lose my claim?

If you lose your personal injury claim, your DAS ATE insurance policy will pay up to a maximum of \$100,000 for the combined amounts of:

- Any of your opponent's legal costs and expenses you are required to pay
- Your own disbursements incurred in pursuing the claim
- The cost of your insurance premium

What happens if my claim is successful?

If you win, your lawyer will deduct your premium from your damages award.\*

\*Costs subject to assessment by the court.<sup>849</sup>

Clients who purchase DAS Canada ATE insurance receive retroactive coverage to the date the client entered the retainer agreement with the lawyer to pursue a claim. Policy premiums are deferred to the conclusion of a client's case, payable only if the case is successful.<sup>850</sup>

---

that it is more likely than not that you will be successful in your case. Reasonable prospects may change throughout a case; for example, there may be no reasonable prospects at the outset of your claim, but further evidence may come to light that will change the probability of success. In this case, we will resume coverage of your claim."

<sup>847</sup> DAS Canada does not currently have LEI policies for wills, estates, family or child custody disputes, copyright, or information technology matters. For further information on DAS Canada's limitations of cover, visit its website: <[www.das.ca](http://www.das.ca)>.

<sup>848</sup> DAS, "After the Event Insurance—Legal expense insurance for personal injury claims", online: <[das.ca/DASCanada/media/PDFs/ATE\\_1PG\\_EN\\_D\\_Final\\_180116.pdf](http://das.ca/DASCanada/media/PDFs/ATE_1PG_EN_D_Final_180116.pdf)>.

<sup>849</sup> *Ibid.* Lawyers and law firms can arrange for additional coverage over \$100,000.

<sup>850</sup> DAS Canada, "Personal Injury/DAS After the Event Insurance", online: <[www.das.ca/For-Lawyers/Personal-Injury-DASjusticesolutions.aspx](http://www.das.ca/For-Lawyers/Personal-Injury-DASjusticesolutions.aspx)>.

---

### BARREAU DU QUÉBEC

The Barreau du Québec, which is Québec's equivalent to the Law Society of British Columbia (LSBC), has endorsed and promoted LEI as an alternative litigation financing model. The Barreau describes LEI as a means to promote access to justice, and an "inexpensive way to enforce your rights and enjoy access to a range of quality legal services" for affordable monthly premiums.<sup>851</sup> In 2013, approximately 10% of Québec residents had LEI coverage.<sup>852</sup>

The Barreau du Québec states LEI can be purchased by individuals, small businesses, professional firms, and self-employed workers by contacting a broker or insurance company in the province. LEI is a form of pre-paid insurance, and covers a wide variety of legal issues in areas such as family, labour and employment, human rights, estates, property, and immigration, among others.<sup>853</sup> Examples of the types of disputes covered include:

- **Individuals**—consumer rights, bodily harm or material damages claims, compensation issues, employment and human rights, property and landlord/tenant matters; and
- **Small business/Professional Firms/Self-employed workers**—transaction or lease matters, labour disputes (except union), consumer protection, occupational health and safety, corporate matters.<sup>854</sup>

The two LEI products available are legal fees insurance and legal assistance insurance.

#### Legal fees insurance

Legal fees insurance covers the costs associated with hiring a lawyer for legal advice and representation, where the policy holder chooses the lawyer they wish to retain. Depending on the insurer, legal fees insurance policy holders may receive coverage for the following:

- Information and unlimited legal assistance (by telephone) in most areas of the law.
- In the event of legal action, financial assistance covering the fees charged by the lawyer you choose to handle your case, including dispute prevention and resolution processes. These fees may also include expenses (photocopying, travel), expertise (expert opinions) and court costs (filing procedures) and may relate to various areas of the law (consumer, bodily injury, material damages, property and housing, income, employment).

---

<sup>851</sup> Barreau du Québec, "Legal Expense Insurance", (2016), [Barreau, "LEI"] online : <[www.barreau.qc.ca/en/public/acces-justice/assurance-juridique/](http://www.barreau.qc.ca/en/public/acces-justice/assurance-juridique/)>.

<sup>852</sup> CBA, "Reaching", *supra* note 12 at 101.

<sup>853</sup> Barreau du Québec, "FAQ", online: <[www.legalinsurancebarreau.com/faq/](http://www.legalinsurancebarreau.com/faq/)>.

<sup>854</sup> Barreau, "LEI", *supra* note 851.

- Financial assistance in non-dispute cases, e.g. for mandates involving estates or to protect an individual, including instituting protective supervision for an individual of legal age who has become incapacitated, probating a will, approving a protection mandate (mandate given in anticipation of incapacity) and liquidating an uncontested estate.
- For small businesses, professional firms and self-employed individuals. Small businesses, professional firms and self-employed individuals are advised to take out legal fees insurance in order to protect themselves in the event of problems such as:
  - Conflicts with clients, suppliers or non-unionized employees.
  - Non-compliance relating to transactions or leases.
  - Issues surrounding laws governing consumer protection, occupational health and safety, competition or companies.
  - Employment insurance.<sup>855</sup>

Individuals can expect to pay between \$30 and \$100 per year to cover legal fees and other costs “up to \$5,000/dispute and up to \$15,000/year.”<sup>856</sup> For estate or personal protection matters, the coverage pays up to \$1,000.<sup>857</sup>

### Legal assistance

People who purchase the legal assistance product will not receive any compensation coverage, but do have unlimited access to legal assistance over the phone through a call centre.<sup>858</sup> Legal assistance coverage is generally offered as part of a package of insurance products, with no premium charged to the policy holder.<sup>859</sup>

### JUSTICERISK SOLUTIONS

JusticeRisk Solutions offers ATE legal expense insurance to lawyers for both plaintiff and defendant clients. An ATE LEI policy with JusticeRisk Solutions provides indemnity for opponent (adverse) costs, and disbursements incurred by the insured throughout the litigation.<sup>860</sup> Policy holders may also purchase extended coverage for an “Insured’s Lawyer Own Legal Costs” (where the Lawyer is not acting under a Contingent Fee Agreement or similar). The standard cover is for Costs incurred after the inception date of the Policy up to conclusion of the legal action, however (subject

---

<sup>855</sup> Barreau du Québec, “Legal fees insurance”, (Montreal: February 2016) at 1, online: <<https://www.barreau.qc.ca/pdf/publications/flyer-legal-insurance.pdf>> [Barreau, “Legal fees insurance”].

<sup>856</sup> *Ibid.* Small businesses, professional firms, and self-employed workers can expect to pay approximately \$300 per year for similar coverage.

<sup>857</sup> *Ibid* at 2.

<sup>858</sup> *Ibid.*

<sup>859</sup> *Ibid.*

<sup>860</sup> JusticeRisk Solutions, “After the Event (‘ATE’) Insurance”, online: <[www.justicerisk.com/after-the-event-insurance/](http://www.justicerisk.com/after-the-event-insurance/)>.

to negotiation) the Policy may also cover Costs already incurred prior to the Policy being taken out.”<sup>861</sup>

JusticeRisk Solutions LEI policies cover three legal areas: 1) civil litigation; 2) medical malpractice; and 3) personal injury.

### **Civil litigation LEI**

Civil Litigation LEI is available for legal matters involving contract and partnership disputes, professional negligence claims, banking and financial disputes, insolvency and debt recovery, and contentious probate matters.<sup>862</sup> A JusticeRisk Solutions LEI policy holder can expect coverage for the following:

- Cover for opponent’s costs and disbursements
- Cover for own disbursements
- Deferred, staged, and self-insured premiums
- Any valid client retainer
- Premium waved if unsuccessful.<sup>863</sup>

The amount of coverage ranges from \$100,000 to \$500,000.<sup>864</sup> Premiums for LEI coverage are not included in these amounts, but are an extra charge depending on the level of coverage chosen by the policy holder.

If a client has entered into a contingency fee agreement with a lawyer or firm, the ATE coverage will begin retroactively to the date the agreement was signed by the client. For all other fee arrangements, the ATE coverage will commence “the day JusticeRisk Solutions is advised to bind the coverage.”<sup>865</sup>

To obtain ATE LEI coverage with JusticeRisk Solutions, a client’s case must have a greater than 60% chance of success, based on the following assessment criteria:

- Completed ATE insurance application form
- Statement of claim
- Documentation to substantiate your claim
- Defendants response (if available)
- Information in respect of the defendant’s ability to satisfy a judgement

---

<sup>861</sup> *Ibid.*

<sup>862</sup> JusticeRisk Solutions, “Civil Litigation”, online: <[www.justicerisk.com/civil-litigation/](http://www.justicerisk.com/civil-litigation/)>.

<sup>863</sup> *Ibid.* According to its website, LEI premium rates are determined based on case type and state of litigation.

<sup>864</sup> *Ibid.* JusticeRisk Solutions advises that higher levels of coverage are also available.

<sup>865</sup> *Ibid.*



- Other relevant information (i.e. expert reports)<sup>866</sup>

JusticeRisk Solutions' LEI premiums are self-insured, meaning "no premium is payable in the event the case is lost or discontinued. There is no deduction from the level of insurance cover in place to pay the insurance premium." Also, a client who rejects an initial offer to settle pre-trial will be covered against any potential adverse costs award if the offer at trial is greater. The client retains any award granted, with the insurer paying the adverse costs order.<sup>867</sup>

### **Medical malpractice LEI**

JusticeRisk Solutions' Medical Malpractice litigation policy covers:

- Own disbursements, including investigatory reports
- Opponent's costs and disbursements
- Cover provided retrospectively to date of Contingency Fee Agreement
- Full protection to cover a failure to beat a settlement offer and interlocutory costs orders protection
- Premium waved if case is unsuccessful
- Tailored indemnity level to match actual case requirements
- Deferred premiums, paid only at successful conclusion.<sup>868</sup>

LEI coverage amounts start at \$100,000 per policy, with a main cover limit of \$250,000.<sup>869</sup> To be approved for ATE LEI under this category, clients must meet the following criteria:

- A completed JRS Application form
- Substantiating evidence: liability and causation reports that show the case has merits to move forward
- The lawyer must have entered into a Contingency Fee Agreement
- Client statement available
- Screening report fee applicable.<sup>870</sup>

Policy holders pay premiums at the conclusion of a case, and only if the case is successful.

---

<sup>866</sup> *Ibid.*

<sup>867</sup> *Ibid.*

<sup>868</sup> JusticeRisk Solutions, "Medical Malpractice", online: <[www.justicerisk.com/medical-malpractice/](http://www.justicerisk.com/medical-malpractice/)>.

<sup>869</sup> *Ibid.* Similar to the Civil Litigation LEI policy, higher coverage amounts are also available.

<sup>870</sup> *Ibid.*

### Personal injury LEI

JusticeRisk Solutions offers ATE LEI coverage to personal injury clients for the following:

- Own Disbursements
- Opponents Costs
- Cover retrospective to the date of retainer
- Online case submission
- No privileged information required
- Premium only due if case is successful.<sup>871</sup>

The standard coverage limit is \$100,000, with premium rates for both automobile and non-automobile cases starting at \$1,350 (plus applicable taxes).

### ARAG CANADA (ARAG SERVICES CORPORATION)

ARAG Canada (ARAG Services Corporation) is a subsidiary of ARAG Group, and was incorporated in 2015 as an insurance intermediary.<sup>872</sup> ARAG Canada offers LEI products for businesses, families, motorists, and landlords.<sup>873</sup> ARAG Canada also provides a “range of legal expenses products for intermediaries, underwriting agents and insurers.”<sup>874</sup>

ARAG Canada LEI policy holders receive coverage for the following:

- Families—Private individuals and their families benefit from telephone access to a lawyer to advise on any personal legal matter. Also covered: Costs of resolving many types of legal disputes, such as, e.g. employment, contract, personal injury or identity theft.

---

<sup>871</sup> JusticeRisk Solutions, “Personal Injury,” online: <[www.justicerisk.com/personal-injury-insurance/](http://www.justicerisk.com/personal-injury-insurance/)>.

<sup>872</sup> ARAG Canada, online: <<https://www.arag.com/company/locations/canada/>>. According to its website, ARAG Group was founded in 1935 by publisher and attorney, Heinrich Faßbender. The website also states “The ARAG Group is the largest family-owned enterprise in the German insurance industry and strengthened its position among the world’s three leading legal insurance providers. In more than 80 years, ARAG has evolved into an international successful, versatile and independent quality insurer. ARAG operates successfully in 17 countries, including the United States, and holds a leading position in many international legal insurance markets. In addition, ARAG with its strong subsidiaries in the German composite and health insurance segments relies since over 50 years on a segment mix that is firmly rooted in its history and expertise. With over 3,900 employees, the Group reports total revenue and premium income of roughly 1.6 billion EUR.” For more information, see ARAG Group, online: <<https://www.arag.com/company/>>.

<sup>873</sup> *Ibid.* According to the ARAG Canada website, LEI coverage is available to consumers and businesses in Ontario, British Columbia, Alberta, Saskatchewan, New Brunswick, and Nova Scotia.

<sup>874</sup> *Ibid.*

- Drivers—Protection against the costs of resolving many types of motoring-related legal disputes such as loss of licence, personal injury or contract disputes. This product also gives individuals telephone access to a lawyer to advise on any personal legal matter.
- Landlords—Landlords who are renting out residential property obtain access to a lawyer to advise on any personal legal matter and insures them against the costs of resolving many types of legal disputes relating to the lettings such as, e.g. rent units, repossession or property damage.
- Businesses—Insures the business against the costs of resolving many types of legal disputes, such as, e.g. employment, property, tax, compliance and regulation. This coverage also includes telephone access to a lawyer to advise on any legal matter affecting the business.<sup>875</sup>

ARAG Canada customers also have access to a variety of legal documents through the ARAG Legal Document Centre.<sup>876</sup>

### CANADIAN BAR ASSOCIATION

The CBA Access to Justice Committee set a target to ensure that 75% of middle-income Canadians have LEI coverage by 2030.<sup>877</sup> According to the CBA, LEI is a useful financing option for people to access legal services. The Committee also suggested that the “low uptake of LEI in Canada outside Québec appears largely because many people are unaware of its value.”<sup>878</sup> The CBA Council has taken steps to reach its target of improving awareness and understanding of the benefits of LEI to Canadians by adopting the following resolution:

- to collaborate with legal insurance providers to communicate to CBA members, government leaders and the public the potential for legal expense insurance to improve access to justice to the middle class in Canada; and
- to ask insurance providers to adopt measures to safeguard and inform consumers, and adapt policies to address the legal needs of the Canadian market, requiring family law services to be included at reasonable cost.<sup>879</sup>

---

<sup>875</sup> *Ibid.*

<sup>876</sup> ARAG Services Corporation Legal Document Centre, online:

<<https://documentcenter.arag.com/canada/ca/>>. Access to documents in the Legal Document Centre requires a customer log-in.

<sup>877</sup> CBA, “Reaching”, *supra* note 12 at 105.

<sup>878</sup> *Ibid* at 104. The CBA also has a page on its website outlining LEI coverage from DAS Canada, online: <[www.cba.org/Membership/CBA-Advantage/Das-Canada](http://www.cba.org/Membership/CBA-Advantage/Das-Canada)>.

<sup>879</sup> *Ibid* at 104–105.

### ELSEWHERE IN CANADA

Knowledge and use of LEI outside Québec is not commonplace. Legislation in British Columbia exists to regulate it,<sup>880</sup> but uptake remains slow. The Law Society of Upper Canada supports LEI, noting that it provides valuable consumer protection through a regulated process.<sup>881</sup> However, unlike the Barreau du Québec, it has yet to take steps to promote or advertise LEI. To date, the Law Society of BC does not appear to have commented publicly on the role LEI might play in addressing the A2J issue for consumers, small business and landlords, and others.

In a 2011 article for the *Globe and Mail*, Marion Boyd, former Ontario attorney general and lay benchler to the Law Society of Upper Canada, said about LEI:

If you look at what happens in most European countries, people would no more go without legal insurance than go without car insurance. . . It's not that much more expensive than the extended warranty on an appliance. I really think in the long term people will catch on to the importance of it.<sup>882</sup>

### Legal expense insurance—United States

LegalShield became the first pre-paid legal services plan company in the United States in August 1972.<sup>883</sup> LEI coverage is available to individuals, families, and small businesses across 50 States and four Canadian provinces with premiums starting at \$23 per month (for individual plans), up to \$175 per month (for small businesses with up to 100 employees).<sup>884</sup>

---

<sup>880</sup> *Classes of Insurance Regulation*, *supra* note 569, s 1 defines “legal expense insurance” and in s 2 establishes its applicability under the *Financial Institutions Act*, [RSBC 1996] c 141. See also SGI Canada—BC, which includes legal expense insurance in its home insurance policies, online:

<<https://www.sgicanada.ca/legal>>.

<sup>881</sup> Law Society of Upper Canada, “Legal Expense Insurance”, online:

<[www.lsuc.on.ca/with.aspx?id=1945](http://www.lsuc.on.ca/with.aspx?id=1945)>.

<sup>882</sup> Jeff Gray & Tara Perkins, “Go ahead, sue me—I have insurance”, *Globe and Mail* (July 2011), online: <<https://beta.theglobeandmail.com/report-on-business/industry-news/the-law-page/go-ahead-sue-me---i-have-insurance/article586639/?ref=http://www.theglobeandmail.com&>>.

<sup>883</sup> LegalShield, “Why LegalShield?”, online: <<https://www.legalshield.com/ca/why-legalshield/about>>. See also Douglas Martin, “Harland Stonecipher, Insurance Pioneer, Dies at 76”, *New York Times* (20 November 2014), online:

<[https://www.nytimes.com/2014/11/21/business/harland-stonecipher-pre-paid-legal-services-founder-dies-at-76.html?\\_r=0](https://www.nytimes.com/2014/11/21/business/harland-stonecipher-pre-paid-legal-services-founder-dies-at-76.html?_r=0)>.

<sup>884</sup> LegalShield, “Why Legal Shield?”, *ibid*. The four Canadian provinces where LegalShield is available are Alberta, British Columbia, Manitoba, and Ontario (as of June 2017).

The LegalShield Membership Contract for individuals in British Columbia stipulates that payment of monthly premiums grant access to the following services:<sup>885</sup>

- **Legal Consultation and Legal Assistance** – phone consultation for unlimited personal and business issues (examples include wills preparation, uncontested family matters, and motor vehicle accidents and traffic violations);
- **Legal Research** – up to one hour (for situations that cannot be sufficiently covered in phone consultation);<sup>886</sup>
- **Emergency Assistance** – consultation with a lawyer for certain legal emergencies (e.g. Detainment, serious injury, or warrant issues);<sup>887</sup>
- **Wills and Powers of Attorney** – preparation of a Will, Power of Attorney for Personal Care and Property, including execution of the documents and yearly review/updates;<sup>888</sup>
- **Other legal work** – any legal work provided by the lawyer in addition to the services listed under the plan is charged to the individual plan member at a 25% discount from the lawyer's standard hourly rate (or 33.3% discount from the lawyer's standard hourly rate for work done out of their office).<sup>889</sup>

The LegalShield website states that members in British Columbia can expect to pay between \$113 to \$300 per hour as a discounted rate for LegalShield lawyers under their contract.<sup>890</sup> Depending on where a member resides, they may also qualify to receive a limited number of pre-trial and trial representation hours from a LegalShield lawyer.

### Legal expense insurance on the international stage

The CBA's Access to Justice Committee notes that while LEI is not particularly well known in Canada, approximately 40% of all Europeans have LEI coverage—including 59% of families in the UK, where it is often bundled with home insurance policies.<sup>891</sup>

---

<sup>885</sup> LegalShield, "Membership Contract", CAN-700 BC, online: <<https://sites.legalshield.com/pdf/contractProvisions/V2ST25LIBC.pdf>> [LegalShield, "Membership Contract"]. This contract is valid for individuals who are single, with no spouse, dependants, or children.

<sup>886</sup> *Ibid* at 1, section A. At discretion of lawyer/firm providing consultation and legal assistance.

<sup>887</sup> A review of the plan details notes the following: "Fines, court costs, penalties, expert witness fees, bonds, bail bonds, and any out-of-pocket expenses are your responsibility and are not part of your membership fees and/or benefits. Emergency services are subject to conditions imposed by the detaining/questioning authority."

<sup>888</sup> LegalShield, "Membership Contract," *supra* note 885 at 3, section M.

<sup>889</sup> *Ibid* at 3, Title II: All Other Legal Work.

<sup>890</sup> LegalShield states "Cost ranges are calculated by multiplying the normal hourly fee of general (lowest) and specialized (highest) attorneys in the selected state by the average number of hours billed for that service." The website also notes that rates can vary depending on the work required, geographical needs, and other factors.

<sup>891</sup> CBA, "Reaching", *supra* note 12 at 101. See also CBA, "Working Paper 1", *supra* note 829 at 4, wherein the CBA notes "In the UK where LEI is usually purchased as part of a broader insurance product, premiums are between 13 and 24 pounds a year."

Extensive LEI coverage also exists in Sweden, where it has been mandatory since 1997 following decreases in the availability of legal aid.<sup>892</sup> One consultation participant noted that the range of legal expenses covered in Canada is relatively limited compared to other countries such as the UK.

### Optimal uses

The consultation participant feedback and research highlight the following ways LEI may be used:

- **Personal coverage:** LEI has its origins in automobile insurance, and has expanded to cover a variety of legal issues that can arise in a person's lifetime. LEI can protect against common legal issues, such as employment disputes, small claims disputes, non-fault accidents, personal injury, and more—a policy can be flexible.
- **Commercial businesses:** Businesses of all sizes can face legal troubles. From the management of employees, to the multitude of contract agreements, LEI can offer a safety net should a legal dispute arise. LEI, purchased as part of an insurance bundle, can provide peace of mind for small business owners who are new to the legal complexities of managing a business. LEI offers an opportunity to secure legal services in the event of a lawsuit by a former employee, an injured customer, a distributor, or an uncooperative landlord.
- **Groups and unions:** Consultation participants noted that LEI is often offered to members of unions as part of their benefits package. For example, the Canadian Autoworkers Union offers LEI coverage to its members through the Unifor Legal Services Plan.<sup>893</sup> Union employees and eligible family members receive access to legal services, either fully covered by the plan, or at a discounted rate.<sup>894</sup>

---

<sup>892</sup> CBA, "Reaching", *supra* note 12. See also CBA, "Working Paper 1", *supra* note 829 at 2, which notes that "an estimated 90% of households have LEI policies where LEI is included at no additional cost with most household insurance." See also the International Association of Legal Protection Insurers (RIAD), founded in 1969, "to promote, as an independent organisation, the interests of specialists in legal protection of 8 European countries. Since then, the Association has grown considerably and represents today more than 50 undertakings from 18 European countries, Canada, South Africa and Japan." For more information, visit its website: <riad-online.eu/home/>.

<sup>893</sup> Canadian Autoworkers Union, "Legal Services Plan", online: <www.caw.ca/en/10679.htm>. See also Unifor Legal Services Plan website for information on coverage and eligibility: <www.uniforlsp.com/home.htm>. A review of the Unifor website notes it also offers LEI services for real estate transactions and referral services to mortgage brokers.

<sup>894</sup> Unifor Legal Services, Plan, *ibid*. The Unifor Legal Services Plan offers three types of benefits packages: 1) Prepaid (plan pays all legal fees, except disbursements and taxes); 2) Mixed (plan pays

### Advantages

#### *Addressing service gaps for middle-income clients*

As consultation participants pointed out, a recurring issue with alternative forms of financing for legal services is service gaps. Many programs that offer legal services are subject to individuals meeting specific income requirements—either requiring low incomes to qualify for assistance, or high incomes to pay for the services in general. Alternatively, access to other financing options, such as third-party litigation funding or alternative fee arrangements, are determined not by income, but by potential results.

Service gaps impact segments of the population that extend beyond low-income, self-represented litigants. Middle-income clients often do not qualify for legal aid or other advocacy services, but are also not wealthy enough to retain (or continue to retain) a lawyer. If the case has a low probability of succeeding, clients may have little, or no success, securing a lawyer willing to be paid under a contingency fee model as well.

At the access-to-justice summit, hosted by the Canadian Bar Association (CBA) Access to Justice Committee, the CEO of DAS Canada, Barbara Haynes, explained that LEI services excel in providing affordable access to legal advice and representation services to the middle class.<sup>895</sup> LEI coverage can be used to supplement available funds for full representation or, as consultation participants observed, be used alongside contingency fee agreements to share the financial burden, and replace the need for lawyers to bear the full financial risk for the entirety of a case.

This promising aspect of LEI is the cornerstone of the Barreau du Québec's efforts to encourage middle-income residents to secure LEI coverage. Efforts by the regulatory body to publicize the benefits of LEI highlight the multitude of ways LEI can be used on a day-to-day basis (for property disputes with neighbours, home purchases/sales disputes, leaky condos or ineffective strata corporations, employment disputes, estate disputes, etc.).<sup>896</sup> According to the CBA, the promotion of typical "middle-class" advantages to LEI has increased coverage rates to approximately 10% over the last few years,<sup>897</sup> a small but promising start to the Access to Justice Committee's targeted goal of 75% LEI coverage by 2030.<sup>898</sup>

---

first part of legal fees, with remainder paid by plan member); and 3) Referral (plan member is provided access to lawyers and notaries who offer services at plan fee schedule rates).

<sup>895</sup> CBA, "Reaching", *supra* note 12 at 102.

<sup>896</sup> Barreau, "Legal fees insurance", *supra* note 856.

<sup>897</sup> CBA, "Reaching", *supra* note 12 at 101.

<sup>898</sup> *Ibid* at 105.

### *Affordability*

Even when compared to low-cost alternatives, such as unbundled legal services or alternative fee arrangements, LEI premiums are generally affordable for most middle-income Canadians. The CBA reports that, in 2012, the average cost of LEI premiums was \$150 to \$200 per year, or \$50 per year as part of a bundle with home or automobile insurance.<sup>899</sup> In Québec, premiums start as low as \$4 a month for basic coverage.<sup>900</sup>

Consultation participants noted low premiums are made possible because insurers can use strict policy terms to manage risks and dictate terms of the insurance agreement. While this control may lead to ethical complications (discussed in the next section), it is a characteristic of the insurance industry, and best addressed by a careful reading of the insurance agreement, and an understanding of its terms and limitations.

### **Disadvantages**

#### *Potential loss of control*

An unresolved concern of the CBA Access to Justice Committee is that LEI may result in clients losing control of their case.<sup>901</sup> This concern was echoed by consultation participants, who were wary about the prospect of clients using LEI that may impose strict limitations in terms of actual services received under the policy.

For example, the CBA notes a client may be unable to choose their own lawyer under a LEI plan.<sup>902</sup> The LEI agreement could dictate that a specific lawyer or law firm be retained. One example is shown in the LegalShield Member Contract, where plan members are directed to lawyers and firms that provide services to LegalShield plan holders specifically. The insurer may also have a small roster of lawyers on staff or on contract through which all claims must be handled. If this is the case, a client loses the right to choose their lawyer when pursuing a legal issue.

Where a lawyer or firm is assigned by the insurer, or where a client must choose from a small pool of lawyers selected by the insurer, consultation participants suggested there may be a misalignment of interests regarding award amounts. If the LEI policy terms dictate it, an insurer may want a say in the final settlement amounts, regardless

---

<sup>899</sup> *Ibid* at 102.

<sup>900</sup> Barreau, “Legal fees insurance”, *supra* note 856.

<sup>901</sup> CBA, “Reaching”, *supra* note 12 at 102.

<sup>902</sup> *Ibid*.



of the client's intent or wishes. If a lawyer is found to act primarily in the insurer's interests (i.e., collecting a profit for the insurer) rather than a client's interests (i.e., damages or restitution to make the client whole), then it may give rise to ethical concerns as well.

The insurer may also influence dispute resolution. For example, DAS Canada requires policy holders to agree that disputes may be "negotiated" before going to court.<sup>903</sup> While avoiding complex and expensive litigation is certainly a goal to consider, if there is any pressure from the insurer to avoid litigation, control of the case might be compromised. Alternatively, an insurer may withdraw coverage if a plan holder is unwilling to abide by a requirement to negotiate. There are also legitimate concerns about the independence of counsel over privilege and access to information if an insurer plays a role in the solicitor-client relationship.

Consultation participants agreed that, like all forms of insurance, the counterweight to LEI protection is the need for a precise insurance agreement. Insurance dealers operate on carefully defined margins of risk and profitability—and consultation participants noted the best way for insurers to manage that risk is to bind clients to strict contracts. Insurance policies often have very strict terms, and the steps to redeem on a policy can be very complex and fraught with challenges. It falls upon the client to carefully read and understand the terms and limitations of an LEI agreement before accepting it.

### *Lack of full coverage—costs and range of services*

As LEI products become more sophisticated and elaborate, so too do their limitations. In a recent Ontario Superior Court decision, Justice Milanetti ruled in a first-of-its-kind case that LEI insurance premiums paid by a client cannot be claimed as disbursements payable in a costs order to the unsuccessful party:

While it is clearly the plaintiff's prerogative to obtain ATE ["after-the-event"] insurance, I do not accept that such premium should be reimbursed by the defendants as a compensable disbursement. Such disbursements have not, as far as I am aware, ever been entertained in Canada and have certainly not been the subject of legislative reform as was the case in the UK. I can think of no policy reason that such should be compensated as a taxable disbursement. Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims. I do not think it fair and reasonable that an insurer be expected to cover the disbursement for this payment of premiums.<sup>904</sup>

---

<sup>903</sup> DAS Canada, "FAQ", *supra* note 844, Legal Expense Insurance FAQs.

<sup>904</sup> *Markovic*, *supra* note 562 at para 7.

This decision remains leading authority in Ontario on whether ATE insurance premiums qualify as a compensable disbursement.<sup>905</sup> In 2017, the British Columbia Supreme Court reached a similar conclusion to that of the *Markovic* decision in *Wynia v Soviskov*.<sup>906</sup> One consultation participant suggested the impact on costs could ultimately influence courts to be less inclined to award costs where the successful party is insured.

Following the Jackson Reforms (discussed in Chapter 8—Alternative Fee Arrangements), the United Kingdom updated its provisions on ATE LEI under the *Courts and Legal Services Act 1990* for similar access-to-justice concerns around high costs awards.<sup>907</sup> Under the new regime, policy holders of ATE LEI are no longer able to recover LEI premiums from the losing party. Although individuals can still take out ATE LEI to cover the potential expense of paying the opposing side's costs award, the amendments only allow for recovery of premium expenses in very limited circumstances.<sup>908</sup>

A second limitation is whether the range of services offered by the LEI provider are sufficient. This is inherently dependent on the terms of the LEI agreement, and the prerogative of the insurer to determine scope of coverage. However, clients who are considering LEI must ensure the policy they purchase meets their needs. Consultation participants warned that LEI contracts can be fraught with complex language and exemptions. For example, the agreement may only provide up to a certain amount for legal fees, or for services in limited areas of law.<sup>909</sup> Care must be taken to ensure a client secures coverage that addresses their needs.

### *Potential conflicts of interest*

Consultation participants involved in family-law advocacy and practice queried whether LEI could give rise to conflicts of interest for policy holders. They questioned what would happen if the policy included family law matters—which spouse would be entitled to the legal services? Or, as was suggested by one consultation participant, if there are no legal services, but general advice is available, how would the LEI provider ensure that appropriate confidentiality is maintained.?

---

<sup>905</sup> *Markovic* aff'd in *Valentine v Rodriguez-Elizalde*, 2016 ONSC 6395 at para 71, 272 ACWS (3d) 54; *Foster v Durkin*, 2016 ONSC 684 at para 15, 263 ACWS (3d) 595.

<sup>906</sup> 2017 BCSC 195 at para 5, [2017] BCWLD 1686 [*Wynia*].

<sup>907</sup> Jackson Reforms, *supra* note 727. The reforms were made pursuant to sections 44 and 46 of the *Legal Aid, Sentencing and Punishment of Offenders Act*, 2012 c 10.

<sup>908</sup> *Ibid*, s 46.

<sup>909</sup> DAS Canada's policies, for example, do not cover criminal defense costs. See DAS Canada, "FAQ", *supra* note 844.

As with other potentially problematic aspects of LEI, this risk must be mitigated by a comprehensive agreement. DAS Canada discloses that it will not cover *just any* legal dispute, and urges clients to carefully review the policy before starting a claim.<sup>910</sup>

### Structural, systemic, or legal changes to consider

#### *Increase public awareness*

In its 2013 Working Paper, the CBA noted that many people in Ontario who participated in the 2010 Civil Legal Needs Project were unaware of the use or benefit of LEI.<sup>911</sup> The CBA Working Paper states that “more than two-thirds of people (67 per cent) said they would not be interested. The main reason cited for their lack of interest was that they did not believe they would need it (56 per cent).”<sup>912</sup> Other reasons include perceptions about the overall cost of LEI, and how to pay for it.<sup>913</sup> A similar lack of public awareness over LEI exists in the United Kingdom, despite approximately 59 per cent of the population in 2007 holding some type of LEI under their home or other insurance policy plans.<sup>914</sup> Although LEI is seen in the United Kingdom as facilitating access to justice, “improvements in terms of design and promotion will be required to achieve that potential.”<sup>915</sup>

The CBA Working Paper suggests adopting a similar approach to what the Barreau du Québec has done to educate and promote awareness of LEI to enhance its application elsewhere in Canada.<sup>916</sup> The Barreau’s website offers information and resources that explain the type of LEI available to residents, and an educational video to help individuals better understand the purpose and benefits of LEI (currently offered in French only). The Barreau also offers a telephone line where people can call for more information.

#### *Financial ombudsperson*

The United Kingdom has a Financial Ombudsman Service to respond to public concerns about LEI providers.<sup>917</sup> Established in 2000, the purpose of the Financial

---

<sup>910</sup> *Ibid.*

<sup>911</sup> CBA, “Working Paper 1”, *supra* note 829 at 5. See also The Ontario Civil Legal Needs Project Steering Committee, “Listening to Ontarians: Report of the Ontario Civil Legal Needs Project”, (Toronto: May 2010), online: <[www.lsuc.on.ca/media/may3110\\_oclnreport\\_final.pdf](http://www.lsuc.on.ca/media/may3110_oclnreport_final.pdf)>.

<sup>912</sup> CBA, “Working Paper 1”, *ibid* at 39.

<sup>913</sup> *Ibid.*

<sup>914</sup> CBA, “Working Paper 1”, *ibid* at 5.

<sup>915</sup> *Ibid.* The Working Paper also provides sources to other reports conducted in the UK about the need to increase promotion of LEI in the jurisdiction.

<sup>916</sup> *Ibid.*

<sup>917</sup> Financial Ombudsman Service, “Online technical resource—legal expenses insurance”, online: <[www.financial-ombudsman.org.uk/publications/technical\\_notes/legal-expenses.html#>](http://www.financial-ombudsman.org.uk/publications/technical_notes/legal-expenses.html#>) [Financial

Ombudsman Service is to provide independent, impartial review of complaints between consumers and businesses. Some of the types of financial disputes reviewed include banking, mortgages, pensions, credit cards and store cards, auto, travel, and household insurance, and LEI issues.<sup>918</sup> A review of the Financial Ombudsman Service website notes that, as of March 2016, the Ombudsman received 715 new cases about LEI, up two per cent from the previous year.<sup>919</sup>

Specifically relating to issues about LEI coverage, the Financial Ombudsman Service notes it often renders decisions in three main complaint categories:

- whether the proposed action has reasonable prospects of success;
- the choice of solicitors; *and*
- allegations of maladministration in relation to the policy and/or the claim.<sup>920</sup>

When assessing LEI complaints, the Financial Ombudsman will only “assess the insurer’s handling of the claim in the light of the policy terms,” with determinations on the quality of legal advice offered remaining outside the scope of its mandate.<sup>921</sup> The test used is whether the LEI provider acted reasonably and fairly in fulfilling its contractual obligations, including decisions made to either withhold or withdraw services. Of consideration to the Financial Ombudsman is whether the LEI provider acted on professional advice, or if a decision was made arbitrarily.

For disputes that arise between a policy holder and the LEI provider over whether a claim is likely to succeed (for the purposes of qualifying for LEI coverage), the Financial Ombudsman requires the LEI provider to obtain a legal opinion from a qualified barrister for expertise on both the legal principles and their application in

---

Ombudsman Service, “Online”]. A review of its website notes the Financial Ombudsman Service operations as “an informal alternative to the civil courts—and take a different approach to resolving disputes. We have no power to compel the attendance of witnesses, take evidence on oath or test evidence by cross-examination. We rarely consider oral hearings necessary or helpful.”

<sup>918</sup> In 2001, the Financial Ombudsman Service was granted statutory power under the *Financial Services and Markets Act 2000*, c 8. For information on other complaints reviewed by the Financial Ombudsman Service, see its website: <[www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm](http://www.financial-ombudsman.org.uk/publications/consumer-leaflet.htm)>.

<sup>919</sup> Financial Ombudsman Service, “Annual Review 2015/2016”, online: <[www.financial-ombudsman.org.uk/publications/annual-review-2016/types-of-problems.html#A1](http://www.financial-ombudsman.org.uk/publications/annual-review-2016/types-of-problems.html#A1)>.

<sup>920</sup> Financial Ombudsman Service, “Online”, *supra* note 917. Emphasis provided in original quote from website.

<sup>921</sup> *Ibid.* Note that complaints regarding the quality of legal advice obtained from lawyers are generally referred to the Legal Ombudsman for England and Wales, online: <[www.legalombudsman.org.uk/](http://www.legalombudsman.org.uk/)>. For more information on the operation of the Legal Ombudsman, see also its Scheme Rules, online:

<[www.legalombudsman.org.uk/downloads/documents/publications/Scheme-Rules.pdf](http://www.legalombudsman.org.uk/downloads/documents/publications/Scheme-Rules.pdf)>.

---

court.<sup>922</sup> If the Financial Ombudsman determines that a business has breached the terms or conditions of an LEI agreement, such that a consumer is treated unfairly, the Financial Ombudsman will advise the business what must be done to remedy the breach. While this may involve both parties negotiating an outcome, cases where the Financial Ombudsman decides a business should compensate the consumer for the breach, a business can be ordered to pay up to £150,000.<sup>923</sup>

### *Expanded regulations*

The *Classes of Insurance Regulation* in British Columbia lists LEI as a class of insurance under the *Financial Institutions Act*.<sup>924</sup> Consultation participants queried whether concerns over potential conflicts of interest in choice of lawyers may be addressed with more comprehensive legislative schemes.

An example of where this has been done is in the United Kingdom, with *The Insurance Companies (Legal Expense Insurance) Regulations 1990*.<sup>925</sup> Under Part 5 of the regulation, LEI companies are required to avoid conflicts of interest by ensuring one of the following measures are in place:

#### **Arrangements for avoiding conflicts of interests**

5.—(1) An insurance company carrying on legal expenses insurance business shall adopt at least one of the following arrangements.

(2) The company shall ensure that no member of staff who is concerned with the management of claims under legal expenses insurance contracts, or with legal advice in respect of such claims, carries on at the same time any similar activity—

(a) in relation to another class of general insurance business carried on by the company, or

(b) in any other insurance company, having financial, commercial or administrative links with the first company, which carries on one or more other classes of general insurance business.

(3) The company shall entrust the management of claims under legal expenses insurance contracts to an undertaking having separate legal personality, which shall be mentioned in the separate policy or section referred to in regulation 4.

---

<sup>922</sup> Barristers are distinguished from solicitors for their experience in court advocacy and civil litigation. Note that the Financial Ombudsman Services considers a “reasonable prospect of success” to be cases for which there is a 51% or more chance of winning. “If the legal experts advise that there is an even (50-50) chance of success, we will not usually regard this as sufficient”.

<sup>923</sup> Financial Ombudsman Services, “Consumer factsheet on...how we deal with your complaint”, at 1, online: <[www.financial-ombudsman.org.uk/publications/factsheets/how-we-deal-with-your-complaint.pdf](http://www.financial-ombudsman.org.uk/publications/factsheets/how-we-deal-with-your-complaint.pdf)>.

<sup>924</sup> *Classes of Insurance Regulation*, *supra* note 569, ss 1 and 2(j). See also *Financial Institutions Act*, *supra* note 568.

<sup>925</sup> [SI 1159].

If that undertaking has financial, commercial or administrative links with another insurance company which carries on one or more other classes of general insurance business, members of the staff of the undertaking who are concerned with the processing of claims, or with providing legal advice connected with such processing, shall not pursue the same or a similar activity in that other insurance company at the same time.

(4) The company shall, in the policy, afford the insured the right to entrust the defence of his interests, from the moment that he has the right to claim from the insurer under the policy, to a lawyer of his choice or, to the extent that the law of the relevant forum so permits, to any other appropriately qualified person.<sup>926</sup>

LEI companies must also include a provision in the LEI contract permitting policy holders to choose their own lawyer once a claim has been initiated, and in situations where a conflict of interest arises.<sup>927</sup> The Financial Ombudsman Service notes that not all situations will give rise to a real conflict of interest, and may represent more of a disagreement between the policy holder and advice offered from the LEI panel solicitor. The Financial Ombudsman Service notes conflicts of interest where two parties in a claim hold the same LEI policy plan can be avoided by having a different insurer underwrite the legal expense portion of the plan.<sup>928</sup>

---

<sup>926</sup> *Ibid* at Part 5.

<sup>927</sup> *Ibid* at Part 6. Of note is that the Financial Ombudsman Services has published case studies on their approach to this provision, made available on their website: <[www.financial-ombudsman.org.uk/publications/ombudsman-news/26/legal-expenses-26.htm](http://www.financial-ombudsman.org.uk/publications/ombudsman-news/26/legal-expenses-26.htm)>.

<sup>928</sup> Financial Ombudsman Service, "Online", *supra* note 917.



### Highlights from Chapter 10—Legal Expense Insurance

Legal expense insurance offers coverage for legal services. Depending on the policy, individuals pay an annual insurance premium to the 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*, defined as follows:

- **Before-the-Event**—insurance against potential litigation and other legal issues that can arise following a hypothetical future event (includes disbursements and fees).
- **After-the-Event**—insurance 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.

#### *Optimal uses*

- **Personal coverage** (e.g. protection against common legal issues, such as employment disputes, small claims disputes, no-fault accidents, and personal injury matters);
- **Commercial businesses** (e.g. purchased as part of an insurance bundle, legal expense insurance can provide protection for small business owners who are new to the legal complexities of managing a business, such as in the event of a lawsuit by a former employee, an injured customer, a distributor, or an uncooperative landlord);
- **Groups and unions** (often offered to members of unions as part of their benefits package to provide union employees and eligible family members access to legal services, either fully covered by the plan, or at a discounted rate).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"><li>• Addressing service gaps for middle-income clients</li><li>• Affordability</li></ul>	<ul style="list-style-type: none"><li>• Potential loss of control</li><li>• Lack of full coverage—costs and range of services</li></ul>	<ul style="list-style-type: none"><li>• Potential conflicts of interest and other ethical concerns</li></ul>

#### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted three ideas where changes could be considered to promote legal expense insurance in British Columbia: increase public awareness; establish a financial ombudsperson; and expand regulations.





## CHAPTER 11. PUBLICLY FUNDED LITIGATION FUNDS

The final option explored in this study paper is the use of publicly funded litigation funds and foundations. These can serve as an efficient option to finance cases with important public interest dimensions. This chapter examines two of Canada's publicly funded litigation funds in Ontario and Québec, as well as the recently reinstated Court Challenges Program of Canada.

### What are publicly funded litigation funds?

Funds are self-sustained and able to provide an ongoing and continuous way to serve the public. Publicly funded class proceedings funds are also a useful starting point to examine this topic. Across Canada, two such funds are currently in place—the Ontario Class Proceedings Fund, and the Québec *Fonds d'aide aux actions collectifs*.

### Ontario Class Proceedings Fund

The Ontario Class Proceedings Fund is a statutory entity created from an amendment to the *Law Society Act*<sup>929</sup> and the *Class Proceedings* regulation<sup>930</sup> in 1992. The fund is administered by the Law Foundation of Ontario, which provided initial funding for the Ontario Class Proceedings Fund. The Law Foundation of Ontario appoints members to the fund's committee, and administers the fund.<sup>931</sup> In the first 20 years, the Ontario Class Proceedings Fund received over 130 applications, with 82 approved for funding.<sup>932</sup>

The Ontario Class Proceedings Fund has two primary objectives:

1. Provide financial support to approved class action plaintiffs for legal disbursements; and,
2. Indemnify plaintiffs for costs that may be awarded against them in funded proceedings.<sup>933</sup>

---

<sup>929</sup> *Law Society Act*, RSO 1990, c L 8.

<sup>930</sup> *Class Proceedings*, O Reg 771/92, [Ontario *Class Proceedings Reg*]. See also *Class Proceedings Act*, 1992, SO 1992, c 6.

<sup>931</sup> The Law Foundation of Ontario, "Class Proceedings Fund", online:

<[www.lawfoundation.on.ca/class-proceedings-fund/](http://www.lawfoundation.on.ca/class-proceedings-fund/)> [Law Foundation of Ontario, "Class"].

<sup>932</sup> Class Proceedings Fund, "Class Proceedings Fund—20 Years in Review", (December 2012), at 13, online: <[www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf](http://www.lawfoundation.on.ca/wp-content/uploads/CPF-Brochure-2013.pdf)>. As at December 31, 2012, of the 82 approved applications for funding, 30 resulted in settlements or awards to class members.

<sup>933</sup> Law Foundation of Ontario, "Class", *supra* note 931.

The Ontario Class Proceedings Fund is funded by levying 10% “of the amount of the award or settlement funds, if any, to which one or more persons in the class is entitled.”<sup>934</sup> If the funded case is unsuccessful, this levy is not collected, and the Ontario Class Proceedings Fund pays any adverse costs.

To ensure the Ontario Class Proceedings Fund remains sustainable, it has rigorous standards for funding that echo the criteria used by other means-tested subsidized legal services. To determine whether to fund a case, the Ontario Class Proceedings Fund’s committee reviews applications against a range of criteria, such as:

- Strength of the case;
- Scope of public interests involved;
- Plaintiff’s fund-raising efforts;
- Likelihood of certification as a class proceeding;
- Availability of funds at the time of application;
- Presence of other relevant case-specific factors.<sup>935</sup>

For approved cases, the Ontario Class Proceedings Fund makes it possible for class proceedings members to pursue litigation without being discouraged by the threat of overwhelming costs. Since Ontario is not a “no costs” jurisdiction like British Columbia,<sup>936</sup> protection against costs is a major benefit to a large, complex class proceeding. This is especially the case since individual awards to each class participant can be small, but a cost award against them could be substantial.

Applicants seeking support from the Ontario Class Proceedings Fund may submit separate applications for different stages of a class proceeding, beginning with steps up to the end of the hearing of a certification motion, through to an appeal from a judgment. Those seeking to file an initial application are required to submit a legal opinion on the likelihood of certification, and the merits of the case.<sup>937</sup>

The Ontario Class Proceedings Fund model is not without challenges. The Law Commission of Ontario reviewed the Ontario Class Proceedings Fund in 2013 and

---

<sup>934</sup> Ontario *Class Proceedings Reg*, *supra* note 930 at s 8(4)(c).

<sup>935</sup> Law Foundation of Ontario, “Class”, *supra* note 931. See also *ibid* at s 5. These factors derive from the decision of the Ontario Class Proceedings Committee in *Edwards v Law Society of Upper Canada* (1994), 36 CPC (3d) 116, online: <[www.lawfoundation.on.ca/wp-content/uploads/edwards\\_v\\_lsuc.pdf](http://www.lawfoundation.on.ca/wp-content/uploads/edwards_v_lsuc.pdf)>.

<sup>936</sup> See Chapter 2—A Roadmap to Litigation for discussion on BC as a “no-cost” jurisdiction.

<sup>937</sup> Law Foundation of Ontario, “Class”, *supra* note 931. See also Ontario *Class Proceedings Reg*, *supra* note 930 at s 3 for additional application criteria.

---

published a report of issues to consider moving forward to improve overall efficiency and sustainability.<sup>938</sup>

The Law Commission of Ontario highlighted the Ontario Class Proceedings Fund's ongoing sustainability as the primary area of concern by academics and members of the judiciary.<sup>939</sup> The Law Commission of Ontario found the Ontario Class Proceedings Fund is used heavily for a range of public interest cases, including class proceedings for employee overtime recovery, breaches of government duty of care in the operation of facilities for disabled minors, and environmental damages.<sup>940</sup> The Ontario Class Proceedings Fund also deals with lengthy and complex appeals, and unpredictable adverse cost awards have taken their toll on the fund. The Law Commission of Ontario notes judges recognize the purpose of the Ontario Class Proceedings Fund and its vulnerable funding situation—but they are nonetheless bound by the rules of court to award costs.<sup>941</sup>

The Law Commission of Ontario highlights three sustainability issues of the Ontario Class Proceedings Fund:

1. The CPF is not publicly insured, and if it were to ever run out of money, there would be no way to ensure the Fund would remain operational. There is no statutory requirement for the government or the Law Foundation to replenish its funds.
2. There is no guarantee that courts will agree that a case covered by the CPF does engage the public interest, nor that a discount on a costs award will be provided to account for the nature of the CPF and its limited funds. The jurisprudence of costs in class actions lacks consistency, and this makes it difficult for the CPF committee to evaluate risk when choosing potential cases.
3. The statutory 10% levy on successful cases lacks flexibility to account for the range of cases, and is not competitive with third-party funders who can offer lower rates for lower risk cases.<sup>942</sup>

---

<sup>938</sup> Law Commission of Ontario, *supra* note 87.

<sup>939</sup> *Ibid* at 6.

<sup>940</sup> *Ibid* at 6, citing *Fresco v CIBC*, 2012 ONCA 444, 111 OR (3d) 501 (unpaid overtime); *Seed v Ontario*, 2012 ONSC 2681, [2012] OJ No 2006 (QL) (government duty of care); and *Smith v Inco*, 2012 ONSC 5094, [2012] OJ No 4225 (QL) (environmental damages) [*Smith*].

<sup>941</sup> The Law Commission of Ontario cited *Smith*, where an adverse award was ordered against the Ontario CPF for \$1.766 million dollars—an amount that was half of what was sought by the defendant. The costs were cut to recognize the purpose of the Ontario CPF as “facilitating access to justice for large groups of the population who may wish to pursue a class proceeding. However, the Fund is not bottomless and a costs order that would cripple the Fund should not be made as it could unduly stifle subsequent claims” at para 107.

<sup>942</sup> Law Commission of Ontario, *supra* note 87 at 7.

### Fonds d'aide aux recours collectifs of Québec

In Québec, the *Fonds d'aide aux recours collectifs* (*Fonds*) has operated since 2005, and shares some similarities with the Ontario Class Proceedings Fund. It is a statutory body established by legislation<sup>943</sup> and operates under the provincial Ministry of Justice. It is self-administered by three commissioners appointed by the government, in consultation with the Barreau du Québec, and the Commission des services juridiques.<sup>944</sup> However, the fund primarily offers financial assistance for class proceedings. Rather than funding the entire case, the *Fonds* provides funds for litigants to pay for legal fees (unless a lawyer or firm agrees to enter into a contingency fee agreement), in addition to funds for disbursements. If the case is successful, the money is paid back into the fund.

The *Fonds* relies on income-based screening as an initial intake qualification. Applicants seeking funding from the *Fonds* must provide an affidavit attesting to their income and assets, and a detailed written statement of facts for the committee to evaluate. The committee is statutorily required to assess whether a case is likely to be certified (if it has not already been certified), and the likelihood of success.<sup>945</sup>

Once funding is approved, the enabling statute requires the *Fonds* to enter into an agreement with the applicant or their legal counsel to outline the amount of funds and how they will be spent, how funds will be advanced, reporting of accounts and expenditures, how funds will be repaid in the event of a successful case, and under what circumstances funding can terminate.<sup>946</sup>

### Court Challenges Program of Canada

One option reviewed by consultation participants is the possibility of extending the concept of a class proceedings fund to other public interest cases—such as human rights and *Charter* cases.

Consultation participants spoke highly of the Court Challenges Program, a federally funded program designed to provide legal assistance to litigants pursuing important

---

<sup>943</sup> *Loi sur le Fonds d'aide aux actions collectives*, F-3.2.0.1.1; initially operating under the regulation *Règlement sur la régie interne et la conduite des affaires du Fonds d'aide aux recours collectifs*, c R-2.1, r 4, of the *Loi sur le recours collectifs*, LRQ, c R-2.1, s 39 [*Loi sur le Fonds d'aide aux actions collectifs*].

<sup>944</sup> “The Commission des services juridiques is the agency responsible for applying Québec’s Act respecting legal aid and the provision of certain other legal services and for ensuring that legal aid is provided to any eligible person who applies for it.” For more information, visit its website: <<https://www.csj.qc.ca/commission-des-services-juridiques/lang/en>>.

<sup>945</sup> *Loi sur le Fonds d'aide aux actions collectives*, *supra* note 943 at s 23.

<sup>946</sup> *Ibid* at s 25.

public interest litigation on *Charter* issues.<sup>947</sup> Established in 1978, the original Court Challenges Program was created to clarify constitutional language rights, but expanded between 1982 and 1985 to include language and equality rights under the *Charter*.<sup>948</sup> The program temporarily terminated in 1992, but was re-opened in 1994 through the Court Challenges Program of Canada, a not-for-profit organization created to administer the original program's mandate of providing funding for cases that would clarify and assert language and equality rights under the Canadian Constitution. In September 2006, the program ceased accepting applications for funding, and was effectively abolished. However, in 2008 an out-of-court settlement reached between the Government of Canada and the Fédération des communautés francophones et acadienne du Canada enabled the Court Challenges Program to continue funding cases already approved prior to its closure, and to create the Language Rights Support Program.<sup>949</sup>

In February 2016, the House of Commons Standing Committee on Justice and Human Rights began a study on access to justice, which considered options to reform and reinstate the Court Challenges Program.<sup>950</sup> On review of the Committee's report, mandate letters issued from the Prime Minister to the Minister of Heritage and the Minister of Justice and Attorney General of Canada committed to re-establish the Court Challenges Program.<sup>951</sup>

---

<sup>947</sup> The Court Challenges Program of Canada, online: <[www.ccppcj.ca/en/about.php](http://www.ccppcj.ca/en/about.php)>.

<sup>948</sup> The Government of Canada, "Summary report on the Court Challenges Program consultations—March-April 2016", (Her Majesty the Queen in Right of Canada, 2016), at 4, online: <[canada.pch.gc.ca/DAMAssetPub/DAM-PCH2-PCH-InstitutionalProfile/STAGING/texte-text/rapportConsultationsPCJ-ReportConsultationsCCP\\_1470837519978\\_eng.pdf](http://canada.pch.gc.ca/DAMAssetPub/DAM-PCH2-PCH-InstitutionalProfile/STAGING/texte-text/rapportConsultationsPCJ-ReportConsultationsCCP_1470837519978_eng.pdf)>.

<sup>949</sup> *Ibid.*

<sup>950</sup> House of Commons, Standing Committee on Justice and Human Rights, *Access to Justice Part 1: Court Challenges Program: Report of the Standing Committee on Justice and Human Rights*, (September 2016) (Chair: Anthony Housefather).

<sup>951</sup> Government of Canada, Canadian Heritage, "Government of Canada Reinstates the Modernized Court Challenges Program to Better Defend the Rights and Freedoms of Canadians", (Department of Canadian Heritage and Department of Justice Canada, 7 February 2017), online: <[https://www.canada.ca/en/canadian-heritage/news/2017/02/government\\_of\\_canadareinstatesthemodernizedcourtchallengesprogra0.html](https://www.canada.ca/en/canadian-heritage/news/2017/02/government_of_canadareinstatesthemodernizedcourtchallengesprogra0.html)>. A leading constitutional case in support of the need for reinstatement of the Court Challenges Program of Canada is the 1985 Supreme Court of Canada decision in *Re Manitoba Language Rights* [1985] 1 SCR 721, 19 DLR (4<sup>th</sup>) 1 SCC. Brought as a reference case, the court reviewed Manitoba's legislation on French language printing in its statutes, regulations, and other orders, rules, by-laws, etc. The court considered whether the Constitutional and provincial statutory requirement for laws to be printed in both English and French were mandatory, and whether laws not printed as such were valid. The court also examined the force and effect of the untranslated laws, and any inconsistencies in the provincial legislation. The court held the Constitutional and provincial statutory requirements were mandatory. Laws not printed in both languages were deemed of temporary force and effect until they were translated and re-enacted in both languages.

Per the February 2017 news release, the objective of the new CCP is “to provide financial support to Canadians to access the courts for the litigation of test cases of national significance, to help clarify and assert certain constitutional and quasi-constitutional official language rights and human rights in Canada.”<sup>952</sup> Funding from the CCP will be used to develop and litigate test cases, and support various legal interventions, in the following areas:

- Official language rights protected by:
  - sections 93 and 133 of the Constitution Act, 1867;
  - section 23 of the Manitoba Act, 1870;
  - sections 16 to 23 of the Canadian Charter of Rights and Freedoms (the “Charter”);
  - any parallel constitutional provisions; and
  - the linguistic aspect of freedom of expression in section 2 of the Charter when invoked in an official language minority case.
- Justiciable parts of the Official Languages Act, which include:
  - certain sections of Part I (Proceedings of Parliament);
  - certain sections of Part II (Legislative and Other Instruments);
  - Part IV (Communications with and Services to the Public);
  - Part V (Language of Work);
  - Part VII (Advancement of English and French); and
  - section 91 (Staffing).
- Human rights protected by the Charter under:
  - section 2 (fundamental freedoms, including freedom of religion, expression, assembly and association);
  - section 3 (democratic rights);
  - section 7 (life, liberty and the security of the person);
  - section 15 (equality rights);
  - section 27 (multiculturalism) – when raised in support of arguments based on equality rights; and
  - section 28 (gender equality).<sup>953</sup>

Evaluation and decisions over which test cases to fund is determined by two expert panels that cover official language rights and human rights cases.<sup>954</sup>

### Optimal Uses

The consultation participant feedback and research highlight the following optimal uses of publicly funded litigation funds:

---

<sup>952</sup> *Ibid.*

<sup>953</sup> *Ibid* at “Government of Canada, Canadian Heritage”.

<sup>954</sup> A review of the Court Challenges Program website notes it expects to begin accepting applications for funding in the Fall 2017. For further updates, visit its website: <[www.ccppcj.ca/en/news.php](http://www.ccppcj.ca/en/news.php)>.

- **Class proceedings:** These types of funds have been created in response to the class landscape where parties often face a power imbalance. Class proceeding litigation funds help protect a class of litigants from wealthy defendants by retaining legal representation at the outset of a case, and indemnifying them from costs, where applicable.
- **Public interest cases:** What may be a natural off-shoot of the class proceeding model is the use of funds for public interest litigation. Where a case is so important that its decision has a wide impact on the public, a fund could be used to pay for litigation in the same manner as currently done for class proceedings. Human rights and *Charter* cases are two examples where funding can have an important impact.<sup>955</sup>

### Advantages

#### *Helps to fill service gaps*

Consultation participants noted a recurring obstacle in financing litigation and access to subsidized legal services is the issue of service gaps. As with third-party litigation funding, publicly funded litigation funds can offer a financing alternative to clients who lack the means to pay for a lawyer, but who are unable to rely on other subsidized legal services. Despite their public-interest nature, legal services programs and advocacy organizations typically do not fund class proceedings given the length, complexity, and expenses involved. Class-action law firms are highly specialized, and a publicly funded litigation fund can help bridge the gap between litigants who need legal services, and lawyers who are best able to provide those services.

---

<sup>955</sup> Another option for some public interest cases is to seek an interim costs order that the government respondent pay costs to permit the case to proceed. The applicant has to be impecunious, and must meet other criteria to obtain this award. See *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71, [2003] 3 SCR 371 [*Okanagan*]. In *Okanagan*, the Supreme Court of Canada held that, “[i]n special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole” (para 27). Criteria were identified to determine whether there is sufficient justification for an award of interim costs:

Para 40: “1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made. 2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means. 3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.” The Supreme Court of Canada asserted that, “[t]he fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court.”



Consultation participants noted that a well-funded, well-implemented litigation fund could also help with other public-interest cases that would otherwise be unlikely to meet the profitability threshold for private third-party litigation funding. In human rights cases, for example, pecuniary awards are typically very low, but there is a high public interest value to ensure meritorious cases are heard and vigorously argued. A self-sustaining fund could help pay some of the costs of such cases. A publicly funded litigation fund could also be used to fund small class proceedings where a contingency fee is either unprofitable for the law firm, or too onerous for the litigants.

A public fund may also fill the very large gap in services available for appellate proceedings. Consultation participants suggested that public interest appellate decisions often carry more weight than first instance decisions. Public interest decisions help establish precedents for future cases that help shape the law and move it forward. As one participant described, litigants at the first instance often do not believe (or care) that their case has public interest value. Faced with a loss at first instance, litigants are often too discouraged by costs penalties and their lack of resources to consider pursuing an appeal. A publicly funded litigation fund could help litigants pursue appeals in important cases by subsidizing the cost of litigation.

### *Expanding the role of small law firms*

Consultation participants noted that, generally speaking, law firms decide for themselves whether it is in their interests (and their clients' interests) to finance cases in-house. This requires a sophisticated evaluation of potential risks versus potential rewards. Such analysis can only be done well from a wealth of experience, actuarial data, and other evidence.

Class proceedings funds are most useful for small firms with limited experience dealing with class proceedings cases. If the fund subsidizes the cost of retaining a lawyer, they can provide an important safety net for law firms entering the class proceedings market. Administration of the fund can be left to committee members who manage it, allowing the lawyer or firm to focus on the case at hand. Peace of mind is also ensured if a lawyer or firm knows a fund will shelter losses for an unsuccessful case.

One consultation participant noted that, unlike other areas of the law, expenses in class proceedings are very high at the outset—since obtaining class certification is often the greatest hurdle. For example, in Ontario, obtaining class certification can amount to up to 60% or 70% of the total legal fees for a case. Failure to certify can have enormous cost consequences. Even though British Columbia is a “no costs” jurisdiction for class proceedings, consultation participants noted that the benefits of

up-front funding could expand the ability of small law firms to take on class proceedings cases.

### **Disadvantages and potential complications**

#### *Administrative challenges*

What makes publicly funded litigation funds desirable, compared to third-party litigation funding, is government oversight. Consultation participants explained that, because the funds are statutory bodies, they are subject to stricter oversight. This leads to consumer protection at a level not always available in the private third-party litigation funding market. However, as the Law Commission of Ontario notes in its review of the Ontario Class Proceedings Fund, operating a fund of this nature is complex, expensive, and poses serious administrative and sustainability challenges.

By default, applicants to publicly funded litigation funds need to go through an initial screening process akin to those used by provincial legal aid and advocacy agencies.<sup>956</sup> A dedicated administrative framework must be established to screen cases, evaluate the merits, perform risk-benefit analysis, and administer and maintain the funds. The screening process can be an obstacle to both the fund (expense of time, resources and administrative costs) and applicants (who must participate in the complex application process).

Applicants can turn to law firms who self-finance or use outside third-party litigation funding agreements. These firms can independently set their own risk-management policies, and take on a broader range of cases, without the administrative hurdles imposed by the publicly funded option. This discrepancy is why the Law Commission of Ontario notes that the levy charged by the Ontario CPF is unsustainable—as market forces may encourage litigants to seek private-funding options.

#### *Discouraging funding structure*

Any litigation fund must be self-sustainable. The Ontario Class Proceedings Fund is sustained by levying an additional 10% charge on any successful awards or settlements funded by the fund—in addition to any other contingency fees collected by the lawyer representing the class. In Québec, funds paid to successful cases are repaid to the *Fonds* at the end of a successful case, based on percentages fixed under regulations.<sup>957</sup> These funding structures may be discouraging to potential litigants. As

---

<sup>956</sup> See above at Chapter 4—Access to Justice and Financing Litigation.

<sup>957</sup> The percentages withheld by the *Fonds* are set-out under the *Règlement sur le pourcentage prélevé par le Fonds d'aide aux actions collectives*, chapter F-3.2.0.1.1. Per r 2, s 1, the percentages withheld

consultation participants noted, since class awards and settlements are divided among the class, it may be that the proportion of funds taken by the fund at the end of a successful case is more than the amount paid to fund the case. Clients who rely on the funds may also feel they didn't get as much as they had hoped.

Even though it may be an advantageous outcome from a sustainability standpoint, publicly funded litigation funds still compete against lawyers willing to finance a case with promises to clients of a larger share of the award. If a client is primarily concerned with the size of the potential award, they may be discouraged to learn that a large part of the award would be lost to a public fund. In this case, they may instead turn to a private funder.

Outside of class proceedings, the disadvantage is starker still. Human rights and *Charter* cases are not lucrative, given prioritization of restorative awards rather than pecuniary ones. High damage awards from human-rights tribunals are uncommon, and never reach the multi-million dollar peaks of class-action cases. A funding model based on levying a portion of human rights or *Charter* awards would not only be unsustainable, but also discourage applicants given the size of potential payout.

### Structural, systemic, or legal changes to consider

#### *Class Proceedings Fund in British Columbia*

British Columbia does not have a publicly funded class proceedings fund to assist low-income litigants in need of financial assistance to start and certify a class proceeding. Nor is there a publicly funded public interest litigation fund for human rights or other public interest cases. Consultation participants noted that such funds could increase access to justice by offering financial support for long, complex, and expensive class proceedings or important public interest cases.

The Ontario Class Proceedings Fund and the Québec *Fonds* are both statutory creations. If a similar body were created in British Columbia, it would require new legislation or an amendment to existing legislation to create it. Amendments to the *Class Proceedings Act*<sup>958</sup> or to the *Legal Profession Act*<sup>959</sup> would be required.

---

from the balance or liquidated claims range from 2% to 90%, depending on the amount of the balance or claim.

<sup>958</sup> *Class Proceedings Act*, *supra* note 69.

<sup>959</sup> *Legal Profession Act*, *supra* note 88. In February 2016, Lord Justice Jackson suggested establishing a not-for-profit third-party litigation funder in the United Kingdom “to back both regular litigation and “deserving” cases which would otherwise not be attractive because of the level of damages sought”, “Litigation Futures: Jackson calls on profession to create not-for-profit third-party funder”,

Consultation participants stated that requiring legislative changes to create a public fund can be challenging, and may prove to be an insurmountable obstacle.

During consultations, one suggestion was to consider whether a not-for-profit society could be established to operate in a manner like the *Fonds* in Québec, but without the direct government involvement. Such a fund could use seed money to fund class proceeding or public interest litigation, and have an agreement requiring the funded plaintiff to repay the funds if successful. This would effectively be a not-for-profit, third-party litigation funder, subject to all the same advantages, disadvantages, and potential complications as that financing alternative.

### *Lawyers funding public interest litigation*

Consultation participants noted that since non-pecuniary awards are often the primary relief sought in human rights or *Charter* cases, an alternative could be to establish a fund that generates funds from lawyers. Rather than asking lawyers and law firms to take on more pro bono work, there may be opportunity to encourage lawyers and law firms to make annual financial contributions to a public interest litigation fund instead. The funds collected could then be used to pay for legal costs and disbursements of public interest cases.

---

(02 February 2016), online: <[www.litigationfutures.com/news/jackson-calls-on-profession-to-create-not-for-profit-third-party-funder](http://www.litigationfutures.com/news/jackson-calls-on-profession-to-create-not-for-profit-third-party-funder)>.

---



### Highlights from Chapter 11—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.

#### *Optimal uses*

- **Class proceedings** (used in class proceedings where parties often face a power imbalance);
- **Public interest cases** (e.g. where the outcome of a case has the potential for a wide impact on the public, such as human rights and *Charter* cases).

Advantages	Disadvantages	Ethics and professional responsibility considerations
<ul style="list-style-type: none"> <li>• Helps to fill service gaps</li> <li>• Expanding the role of small law firms</li> </ul>	<ul style="list-style-type: none"> <li>• Administrative challenges</li> <li>• Discouraging funding structure</li> </ul>	<ul style="list-style-type: none"> <li>• Managing client expectations</li> </ul>

#### *Opportunities for systemic, structural, or legal change*

The consultation participants and research highlighted two ideas where changes could be considered to promote publicly funded litigation funds in British Columbia: develop a class proceedings fund; and lawyer and law firm annual contribution to a public interest litigation fund.



## CHAPTER 12. ALTERNATIVE METHODS OF IMPROVING ACCESS TO JUSTICE

Several ideas were raised to consider other options to improve access to justice that fell outside the scope of the project. While the primary goal of the Financing Litigation Project is to review alternative means of paying for legal services, this study paper would be incomplete without discussion of these ideas.

This chapter outlines five alternative ideas to improve access to justice. The chapter provides an overview of each idea and some background. It does not include a full analysis of how each idea works or could work.

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.

### Increased use of alternative dispute resolution processes

#### *Alternative Dispute Resolution*

Many of the consultation participants suggested that promoting alternative dispute resolution processes could improve access to justice. The BC Supreme Court defines alternative dispute resolution as “a number of approaches that allow parties to resolve disputes outside of the court system. These dispute resolution methods can be used to resolve cases faster and cheaper than going to court.”<sup>960</sup> Alternative dispute resolution processes, such as mediation, have long been used in British Columbia. One consultation participant noted that while a mediation can take as many hours as a trial to reach a resolution, it is far more cost effective for the client in the long run.

The Legal Services Society of British Columbia (LSS BC), in cooperation with Mediate BC, has recently introduced a pilot project that extends six hours of mediation services to both parties in a divorce proceeding if one of the divorcing parties qualifies for legal

---

<sup>960</sup> BC Supreme Court, “Alternatives to Going to Court”, (Guidebooks for Representing Yourself in Supreme Court Civil Matters, July 2010) at 1 online: <[www.supremecourtbc.ca/sites/default/files/web/Alternatives-to-Going-to-Court.pdf](http://www.supremecourtbc.ca/sites/default/files/web/Alternatives-to-Going-to-Court.pdf)>. The Guidebook lists the following four main types of ADR: 1) negotiation, 2) mediation, 3) neutral evaluation, and 4) arbitration. The Guidebook also notes that alternative dispute resolution is more commonly referred to as “appropriate dispute resolution” as fewer and fewer cases make their way to trial.



aid.<sup>961</sup> Additional time with the mediator is available on a sliding-scale basis for parties who wish to resolve their dispute outside of court. Consultation participants noted this program is promising, as legal advice for mediation proceedings can help achieve better results to clients. A lawyer can offer legal advice to clients at all stages of the mediation: for preparation, explaining a client's legal options, offering emotional support, and transforming memoranda of understanding, or minutes of settlement, into binding agreements.

Consultation participants suggested alternative dispute resolution processes, like mediation, can be an effective means of resolving disputes relative to the overall cost, speed, and access to these options. However, alternative dispute resolution processes will not always work for every legal dispute, as some may lend themselves more easily to alternative dispute resolution than others. Lawyers should be encouraged to consider whether alternative dispute resolution is appropriate in the circumstances.

### *Civil Resolution Tribunal*

The Civil Resolution Tribunal (CRT) is a new statutory body: an online dispute resolution tribunal created by the *Civil Resolution Tribunal Act*.<sup>962</sup> The CRT's mandate, per section 2 of the Act, is to offer accessible, speedy, economical, informal, and flexible dispute resolution services by using electronic communication tools for 24-hour a day, 7-day a week facilitation. Salter and Thompson assert that, "[o]ur current access to justice crisis serves as a call to reimagine and redesign public justice processes for civil disputes, centred on the needs of the public."<sup>963</sup> The article includes a discussion on how the civil justice system should be redesigned, as well as an introduction to the CRT and how it operates. The CRT's approach is "user-centric." It places "a high priority on the needs, interests, and limitations of justice system users."<sup>964</sup>

---

<sup>961</sup> More information about the Mediation Referral pilot program is available on the Legal Services Society BC website: <[www.lss.bc.ca/legal\\_aid/mediation.php](http://www.lss.bc.ca/legal_aid/mediation.php)>.

<sup>962</sup> *Civil Resolution Tribunal Act*, SBC 2012, c 25.

<sup>963</sup> Shannon Salter & Darin Thompson, "Public-Centred Civil Justice Redesign: a case study of the British Columbia Civil Resolution Tribunal" (2016–2017) 3 MJDR 113 at 136. For discussion of an online dispute resolution structure in England and Wales, see Judiciary of England and Wales, *Civil Courts Structure Review: Interim Report*, by Lord Justice Briggs (England and Wales: December 2015), online: <<https://www.judiciary.gov.uk/wp-content/uploads/2016/01/ccsr-interim-report-dec-15-final1.pdf>>. See also Nick Hilborne, "Briggs lays out vision for lawyer-free online courts", *LegalFutures* (12 January 2016), online: <<http://www.legalfutures.co.uk/latest-news/briggs-lays-out-vision-for-lawyer-free-online-courts>>.

<sup>964</sup> *Ibid* at 123.

As of June 1, 2017, small claims of up to \$5,000 now fall within CRT jurisdiction (see Chapter 2 above).<sup>965</sup> These changes follow amendments and enactments under Division 3 of the *Civil Resolution Tribunal Act*.<sup>966</sup>

The CRT can resolve small claims disputes for amounts up to \$5,000 (not including interest or dispute-related expenses). The types of small claims disputes include:

- debt or damages
- recovery of personal property
- personal injury
- specific performance of agreements involving personal property or services.<sup>967</sup>

For claims over \$5,000, applicants must reduce the amount to fall at or below \$5,000 for dispute resolution at the CRT. This is known as abandoning the amount over \$5,000. Once abandoned, that part of a claim cannot be claimed for in a later application, either to the CRT or other forum.<sup>968</sup>

The type of strata property disputes being adjudicated by the CRT include:

- non-payment of monthly strata fees or fines
- unfair actions by the strata corporation or by people owning more than half of the strata lots in a complex
- unfair or random, enforcement of strata bylaws (such as noise, pets, parking, rentals)
- failure of a strata to enforce its bylaws
- issues of financial responsibility for repairs and the choice of bids for services
- irregularities in the way meetings, voting, recording of minutes, or other matters are done
- interpretation of the legislation, regulations, or bylaws
- issues regarding common property.<sup>969</sup>

---

<sup>965</sup> Small claims matters brought before the CRT are restricted to amounts up to \$5,000 (not including interest or dispute-related expenses), for debt or damages, recovery of personal property, personal injury, or specific performance of agreements involving personal property or services. For information on what small claims fall outside the jurisdiction of the CRT, see Civil Resolution Tribunal, “Civil Resolution Tribunal Jurisdiction”, online: <<https://civilresolutionbc.ca/resources/crt-jurisdiction/>>. On June 1, 2017, the upper limit for civil claims in Provincial Court was raised from \$25,000 to \$35,000.

<sup>966</sup> *Civil Resolution Tribunal Act*, *supra* note 962.

<sup>967</sup> Civil Resolution Tribunal Jurisdiction, “What types of small claims disputes can I bring to the CRT?”, *supra* note 965.

<sup>968</sup> *Ibid.*

<sup>969</sup> *Ibid* at “Strata Solution Explorer: What are Strata Disputes?”, online: <<https://civilresolutionbc.ca/how-the-crt-works/getting-started/strata-solution-explorer/#what-are-strata-disputes>>.

The cost to file a strata property claim with the CRT is \$150, but the cost can be reduced to \$125 if a party uses the online claims submission tool.<sup>970</sup> To obtain a binding decision from a tribunal member of the CRT, the cost is \$100. If the parties reach an agreement without the need for a binding decision, the fee does not apply.

In cases where the parties are not able to reach agreement through the negotiation or facilitation process, a CRT tribunal member will render a binding decision.<sup>971</sup> The tribunal member can also order a party to pay the other party's reasonable expenses related to a dispute.<sup>972</sup> Those expenses include fees paid to the CRT, and expenses to participate in the dispute resolution process. In extraordinary circumstances, the CRT tribunal member may include the costs to retain a lawyer or representative included in the final award.<sup>973</sup>

In December 2016, the CRT launched a beta version of their Solution Explorer for Small Claims, which they describe as “a tool for helping people manage and resolve disputes in British Columbia. The Solution Explorer uses real expert knowledge to give you legal information and resources to help you manage or resolve your dispute.”<sup>974</sup> Today, the Small Claims Solution Explorer is fully operational to accept all claims under CRT jurisdiction.

### *Quebec PARLe*

Québec has taken a similar approach with development of its own online dispute resolution initiative. On October 7, 2016, the Office de la protection du consommateur launched a pilot project called PARLe—an online system to resolve consumer

---

<sup>970</sup> Civil Resolution Tribunal, “CRT Fees – Strata Disputes”, online:

<<https://www.civilresolutionbc.ca/crt-fees/>>. All fees to participate in the CRT are established pursuant to section 62(2)(m) of the *Civil Resolution Tribunal Act*, and CRT rules 10 to 13.

<sup>971</sup> Civil Resolution Tribunal, “Negotiation”, online: <<https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/negotiation/>>. See also Civil Resolution Tribunal, “Facilitation”, online: <<https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/facilitation/>>.

<sup>972</sup> Civil Resolution Tribunal Rules, (November 7, 2016), rules 14 and 15.

<sup>973</sup> *Ibid*, r 16. A list of all decisions rendered to date is available on its website:

<[decisions.civilresolutionbc.ca/crt/en/nav.do](https://decisions.civilresolutionbc.ca/crt/en/nav.do)>. The CRT website notes that “You are welcome to use a lawyer or a trusted friend or family member to help you with negotiation, facilitation, and the tribunal decision process. But it’s important for you to be there to speak for yourself in the dispute too. If you are a minor or have impaired mental capacity, you are also welcome to use a lawyer to represent you. If you are a minor involved in a personal injury claim, you must use a lawyer to represent you.” For more information, see Civil Resolution Tribunal, “Tribunal Decision Process”, online: <<https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/tribunal-decision-process/>>.

<sup>974</sup> Civil Resolution Tribunal, “Try the Solution Explorer for Small Claims”, (December 21, 2016), online: <<https://civilresolutionbc.ca/how-the-crt-works/getting-started/small-claims-solution-explorer/>>.

disputes.<sup>975</sup> The Cyberjustice Laboratory was funded by the Québec Ministry of Justice to build the system.<sup>976</sup> Although using PARLe is optional, over 20 retailers have agreed to participate.<sup>977</sup>

When dissatisfied customers contact the Office de la protection du consommateur, the Office de la protection du consommateur will determine whether the complaint is against one of the participating retailers. If that is the case, the consumer will be asked to provide details about the claim, and their computer skills, before being given a code to use PARLe.<sup>978</sup> The consumer and retailer have 20 days to resolve the dispute by themselves. After 20 days, and if no resolution is reached, the Office de la protection du consommateur assigns a mediator to the case. If the parties do not reach a solution after 10 days with the mediator, the consumer can bring a small claims case against the retailer. Initial reports show encouraging signs as customers and businesses report satisfaction with the system.<sup>979</sup>

These innovative dispute resolution models serve as examples for future alternative dispute resolution initiatives. If the CRT succeeds at resolving disputes in an affordable and satisfactory way, it could serve as a guide for other administrative tribunals, such as employment standards or residential tenancy.

### **Expanding legal aid: Legal services tax and property liens—a new approach**

Consultation participants shared their disappointment with cuts to government-funded legal aid. As reviewed earlier in the study paper, legal aid funding in British Columbia (and in Canada) has suffered deep cuts, resulting in increasingly limited services.

Two options mentioned by consultation participants to improve funding to the LLSS BC: direct revenue collected from the 7% tax on legal services to legal aid, and revive the property lien provisions of the *Legal Services Society Act*.<sup>980</sup>

---

<sup>975</sup> Office de la protection du consommateur, “PARLe: plateforme d’aide au règlement des litiges en ligne”, (20 December 2016), online: <[www.opc.gouv.qc.ca/a-propos/parle/](http://www.opc.gouv.qc.ca/a-propos/parle/)> [Office de la protection du consommateur].

<sup>976</sup> Karim Benyekhlef & Nicolas Vermeys, “Publicly Funded Consumer ODR Is Now a Reality in Québec”, *Slaw* (10 February 2017), online: <[www.slw.ca/2017/02/10/publicly-funded-consumer-odr-is-now-a-reality-in-quebec/](http://www.slw.ca/2017/02/10/publicly-funded-consumer-odr-is-now-a-reality-in-quebec/)> [Benyekhlef & Vermeys].

<sup>977</sup> Office de la protection du consommateur, *supra* note 975.

<sup>978</sup> Benyekhlef & Vermeys, *supra* note 976.

<sup>979</sup> *Ibid.*

<sup>980</sup> *Legal Services Society Act*, *supra* note 127.

### *Legal services tax*

The tax was initially proposed as a means to fund legal aid in British Columbia. However, since its implementation in 1993, the funds have primarily been allocated to general revenue instead. Subsequent attempts to challenge this distribution of funds were dismissed by the Supreme Court of Canada, which found the government's power to collect, budget, and spend revenue from taxes cannot be interfered with, as it would pose a burden on taxpayers.<sup>981</sup>

Consultation participants observed that, if the legal services tax was used for its intended purpose, legal aid in British Columbia would immeasurably improve. As Rowles and Bildfell cited in their report,<sup>982</sup> in 2014 alone, the discrepancy between revenue collected from the legal services tax, and the money spent on legal aid, was over \$100 million dollars. Given the LSS BC already does so much with so little (it received roughly \$75 million from the government that year), doubling its budget could improve its ability to represent clients, and expand service areas.

### *Property liens*

Sections 14 and 15 of the *Legal Services Society Act* permits the LSS BC to register liens against a client's land and personal property to secure repayment of a client's financial obligation to the LSS BC. When the Act was debated in the provincial legislature, Attorney General Geoff Plant advocated for the provisions, stating this means of financing or subsidizing legal costs has always been used by lawyers in private practice in some form or another. Mr. Plant believed that codifying this power in the Act would allow the LSS BC to generate the revenue needed to reach out and help the broadest range of clientele.<sup>983</sup>

### LIEN AGAINST REAL PROPERTY

The Act states that the LSS BC may register a lien against "any land owned by the client or in which the client has an interest" to secure repayment.<sup>984</sup> The lien creates a legal claim on the real property it is registered against, as security for the client's financial obligation to repay the LSS BC.

---

<sup>981</sup> *Christie, supra* note 110 at paras 13–14.

<sup>982</sup> Anne Rowles & Connor Bildfell, "The Case for Repealing the 2002 *Legal Services Society Act*; Part II: A Call to Action", *The Advocate* (July 2016) at 533.

<sup>983</sup> British Columbia, Legislative Assembly, Hansard, 37th Parl, 3rd Sess, Vol 7, No 2 (May 2, 2002) at 3142–3143.

<sup>984</sup> *Legal Services Society Act, supra* note 127, s 14(2).

### LIEN AGAINST PERSONAL PROPERTY

The *Legal Services Society Act* also permits the LSS BC to register a lien against a client's personal property for failure, on the client's part, to fulfill its financial obligation.<sup>985</sup>

### DISCHARGE

For real and personal property lien registrations, the LSS BC must, without cost to the client, discharge the lien when the matter has concluded, and the client's financial obligation has been repaid.<sup>986</sup>

After discharging a lien, the LSS BC may register a subsequent lien on the same client with respect to a financial obligation owed to the LSS BC under the same or other legal aid contract.<sup>987</sup>

While liens for real property have priority over subsequently registered liens,<sup>988</sup> and liens for personal property have the same priority as a security interest perfected under the *Personal Property Security Act*,<sup>989</sup> the LSS BC may, at its discretion, enter written agreements varying the priority of the liens.<sup>990</sup>

The LSS BC found that, in general, the lien provisions are not a cost-effective option given the limited scope of cases within its mandate that could lead to recovery of expenses. The 2001/2002 LSS BC annual report notes:

Given the scope of anticipated service reductions, the Society will be unable to implement a liens recovery program in the immediate future. The available pool of cases which would have been affected by a recovery scheme is now expected to be so small that the cost of the program would exceed the recoveries generated.<sup>991</sup>

---

<sup>985</sup> *Ibid* at s 15(2).

<sup>986</sup> *Ibid* at s 14(6) and (7) for real property; s 15(5) for personal property. See also s 15(7) for provisions relating to liens against manufactured homes.

<sup>987</sup> *Ibid* at s 14(8) for real property; s 15(5) for personal property.

<sup>988</sup> *Ibid* at s 14(5).

<sup>989</sup> [RSBC 1996] c 359.

<sup>990</sup> *Legal Services Society Act*, *supra* note 127 at s 16.

<sup>991</sup> Legal Services Society BC, "Annual Report 2001/2002" (Vancouver: Legal Services Society, 2002), online:

<[www.lss.bc.ca/assets/aboutUs/reports/annualReports/annualServicePlanReport\\_2001.pdf](http://www.lss.bc.ca/assets/aboutUs/reports/annualReports/annualServicePlanReport_2001.pdf)> at 20.

---

This position was re-affirmed in the following year's annual report, and subsequent discussion with consultation participants confirmed that the liens recovery program was never implemented.<sup>992</sup>

Consultation participants noted that changes to legal aid funding over the years, and the subsequent loss of its capacity to represent clients in profitable cases, would need to be reviewed before a liens recovery program could be reinstated. If the tax on legal services were to be used to fully fund legal aid, for example, the increased funds could expand services and legal aid representation (or the partial subsidization of legal fees) for more profitable cases. This, in turn, could help revive the liens recovery program.

### *A new approach*

On March 3, 2017, the Benchers of the Law Society of British Columbia (Law Society of BC) approved the Legal Aid Task Force report on its vision for the future of legal aid.<sup>993</sup> The report suggests a principled approach for enhancing legal aid and to address budgetary concerns. In the Task Force's view, the Law Society of BC has been silent on legal aid issues for the last 15 years.<sup>994</sup> The Task Force states that:

The focus of the report differs from other papers, reports and articles on the state of legal aid that have been prepared over the years. It has not been prepared to tell other organizations what they should do. Rather the purpose is to determine what the Law Society's principled policy position – or vision – should be concerning publicly funded legal aid. By adopting a Law Society vision, the Benchers will be better able to engage in discussions and work to promote legal aid in a principled manner. The recommendations in this report aim to establish principles for what legal aid ought to encompass with the view that, should the government adopt similar principles, it will be better able to identify what constitutes an appropriate level of funding to give effect to the objects of legal aid.<sup>995</sup>

As part of its study, the Task Force surveyed 845 lawyers to “obtain a better understanding of the economics of practising legal aid.”<sup>996</sup> Of the respondents, 58% had taken a legal aid referral. Respondents note the primary motivation for taking on a legal aid case is “a commitment to social justice.”<sup>997</sup> However, the leading reasons to

---

<sup>992</sup> For recent discussion of legal aid funding in Ontario, see the Ontario Superior Court case of *Abdulaali v Salih*, 2017 ONSC 1609, [2017] OJ No 1255 (QL).

<sup>993</sup> The Law Society of British Columbia, “A Vision for Publicly Funded Legal Aid in British Columbia”, (3 March 2017), online: <<https://www.lawsociety.bc.ca/Website/media/Shared/docs/initiatives/LegalAidVision2017.pdf>> [Law Society of BC].

<sup>994</sup> *Ibid* at 18.

<sup>995</sup> *Ibid* at 2.

<sup>996</sup> *Ibid* at 25.

<sup>997</sup> *Ibid*.

avoid legal aid work are tariff rates, administrative hurdles with the legal aid billing model, and a lack of coverage for other practice areas.<sup>998</sup>

Looking at the economics of offering legal aid services, the survey reports that 40% of respondents make no profit when providing legal aid services.<sup>999</sup> At present, LSS BC tariff rates (based on year of call, issue date of each representation or duty counsel contract, and the service) range from \$83.90 per hour (up to 4-year call) to \$92.29 per hour (10 or more years of call).<sup>1000</sup> Survey respondents suggest they “would need to make \$150 an hour to break even on a legal aid retainer.”<sup>1001</sup>

The report makes two recommendations, to be implemented by the Benchers:

1. Adopting the vision for legal aid set out in the report
2. Establishing a Legal Aid Advisory Committee within the Law Society.<sup>1002</sup>

The Task Force offers examples of what the Law Society of BC can do to implement this new principled vision, including encouraging the practice of criminal law, considering legal aid for Continuing Professional Development credit, adding legal aid modules to the Professional Legal Training Course, promoting limited-scope retainers, and creating legal aid participation awards.<sup>1003</sup>

### The promotion of *cy-près* orders

The doctrine of *cy-près* arises from equitable principles. Its origins lay in the court’s equitable jurisdiction to decide whether a charitable gift bequeathed upon death should not be implemented because the gift is impractical or illegal. Instead, the court

---

<sup>998</sup> Respondents reported a need for coverage in the following areas: custody/guardianship (49%), mental health reviews (47%), child support (46%), access/parenting time (46%), and child abuse (45%).

<sup>999</sup> *Ibid.*

<sup>1000</sup> Legal Services Society BC, “LSS Tariffs—General Terms and Conditions”, (April 2015, updated January 2017), online: <[www.lss.bc.ca/assets/lawyers/tariffGuide/gtc/gtcJanuary2017.pdf](http://www.lss.bc.ca/assets/lawyers/tariffGuide/gtc/gtcJanuary2017.pdf)> at 18. Note an enhanced fee rate of \$125 per hour is available for attendance and preparation by senior counsel.

<sup>1001</sup> *Ibid.*

<sup>1002</sup> For further discussion on expanding legal aid, see also the Canadian Bar Association, “An Agenda for Justice: Platform considerations presented by the Canadian Bar Association, BC Branch”, (February 2017), online: <[https://www.cbabc.org/CBAMediaLibrary/cba\\_bc/pdf/A4/An-Agenda-For-Justice-2017.pdf](https://www.cbabc.org/CBAMediaLibrary/cba_bc/pdf/A4/An-Agenda-For-Justice-2017.pdf)>; Ministry of the Attorney General, “Ontario Providing Improved Access to Legal Services: Province to Increase Legal Aid Eligibility Threshold on April 1, 2017”, (Ontario: 27 March 2017), online: <<https://news.ontario.ca/mag/en/2017/03/ontario-providing-improved-access-to-legal-services.html>>.

<sup>1003</sup> Law Society of BC, *supra* note 993 at 13–15.



may direct that the gift be given to another charity in line with the donor's intentions.<sup>1004</sup>

Over the years, the doctrine expanded to include court awards in addition to testamentary charitable gifts. In British Columbia, section 33(2)(b) of the *Class Proceedings Act*<sup>1005</sup> gives courts broad discretion to direct some or all of the amounts awarded under the Act into court, or "some other appropriate depository" as it considers appropriate. The Law Commission of Ontario notes in its report on class actions that, in theory, this option is useful when it is impracticable or impossible for an award to be distributed to the class—the funds are paid *somewhere* and avoid reverting to the defendant if unclaimed.<sup>1006</sup>

The Law Commission of Ontario raised caution about *cy-près* orders, citing the example from *Garland v Consumer Gas Co.*<sup>1007</sup> In *Garland*, the court ordered that a part of the award be diverted into a fund to help low-income families pay their heating bills—even though the heating bills would ultimately flow back to the defendant gas company. When the gas company raised its prices, it effectively double-dipped by collecting higher payments from consumers, and *re-collecting* the damages from the lawsuit.

Recently, British Columbia examined the above issue, and considered an alternative model. Rather than allowing awards to be diverted freely, the Law Society of BC proposed that, for pro bono litigation, courts could order that awards be diverted to the advocacy group who provided pro bono representation.

In early 2014, the Law Society of BC resolved at its annual meeting to support, in principle, "pro bono cost awards."<sup>1008</sup> They also resolved to work with Access Pro Bono on legislative changes to create the necessary framework for this practice. The proposal was supported by a range of high-profile legal professionals, including the

---

<sup>1004</sup> An in-depth review of the origins of the *cy-près* doctrine and its traditional applicability to charitable trusts has been published in a report by the former Law Reform Commission of British Columbia (predecessor to the BCLI): Law Reform Commission of British Columbia, "Report on Informal Public Appeal Funds—Report no 129" (January 1993) at 8; online: <<https://www.bcli.org/project/informal-public-appeal-funds-1993>>.

<sup>1005</sup> *Class Proceedings Act*, *supra* note 69 at s 33(2)(b). In Ontario, the *Ontario Class Proceedings Act*, *supra* note 930 sets out a similar provision under section 26(2)(b).

<sup>1006</sup> Law Commission of Ontario, "Review", *supra* note 87 at 12.

<sup>1007</sup> *Ibid.* citing *Garland v Consumer Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629 ("*Garland*").

<sup>1008</sup> The Law Society of British Columbia, "Benchers Meeting Draft Minutes, January 24, 2014", (January 2014), at 12; online at <[www.lawsociety.bc.ca/docs/about/agendas/2014-01-24\\_agenda.pdf](http://www.lawsociety.bc.ca/docs/about/agendas/2014-01-24_agenda.pdf)>.

then-Attorney General of BC the Honourable Barry Penner, QC, and the then-President of the Law Society, Gavin Hume, QC.

Recognizing the potential obstacles to passing such a legislative amendment, the Law Society of BC encouraged Access Pro Bono to develop standard terms for pro bono retainers that assign cost awards received to the pro bono lawyer, and that the lawyer would undertake to direct to Access Pro Bono.<sup>1009</sup> The motion was carried unanimously. As such, lawyers acting on behalf of advocacy organizations can look to this resolution as a guide for their own retainer agreements. By agreeing with clients to divert some part of an award back to the advocacy group, the organization can benefit from an increased revenue stream. Increased revenue can be used to expand service delivery, offering legal assistance to more clients, and improve access to justice.

### Community Contribution Companies

The Community Contribution Company is a hybrid corporate structure made publicly available in British Columbia in July 2013.<sup>1010</sup> The structure is modeled after the Community Interest Company, introduced in the United Kingdom in 2005.<sup>1011</sup> Nova Scotia is the only other Canadian jurisdiction to introduce a similar hybrid structure.<sup>1012</sup>

The Community Contribution Company model intends to “[allow] entrepreneurs in BC to pursue social goals through their businesses while still generating a profit and providing investment opportunities to like-minded investors.”<sup>1013</sup> The legislative scheme accomplishes this goal by allowing Community Contribution Companies to raise private capital and pay dividends, while imposing limitations and requirements to ensure most of the profits are directed to a social purpose.

The legislation requires that Community Contribution Companies include one or more “community purposes” as a primary goal set out in its articles.<sup>1014</sup> The business

---

<sup>1009</sup> *Ibid* at 12.

<sup>1010</sup> British Columbia, Ministry of Finance, “Legislative Changes Encourage Investment in Social Capital” (2 March 2013), online: <<https://news.gov.bc.ca/stories/legislative-changes-encourage-investment-in-social-capital>>.

<sup>1011</sup> *Companies (Audit, Investigations and Community Enterprise) Act 2004* (UK), c 27.

<sup>1012</sup> *Community Interest Companies Act*, SNS 2012, c 38.

<sup>1013</sup> British Columbia, Ministry of Finance, “Community Contribution Companies”, online: <[www.fin.gov.bc.ca/prs/ccc/](http://www.fin.gov.bc.ca/prs/ccc/)>.

<sup>1014</sup> *Business Corporations Act*, [SBC 2002], c 57, s 51.92. The definition of community purpose is in s 51.91: “‘community purpose’ means a purpose beneficial to (a) society at large, or (b) a segment of society that is broader than the group of persons who are related to the community contribution

must also use the words “Community Contribution Company”, or the acronym “C3”, in the corporate name,<sup>1015</sup> with at least 3 directors.<sup>1016</sup> Other requirements include limiting dividends to 40% of the company’s annual profits,<sup>1017</sup> at least 60% of assets on dissolution distributed to “qualified entities,”<sup>1018</sup> and a yearly “community contribution report.”<sup>1019</sup> To date, there are only 59 Community Contribution Companies in British Columbia.<sup>1020</sup>

A recent article by Gail Henderson considers the potential for Community Contribution Companies to facilitate access to justice initiatives.<sup>1021</sup> Henderson proposes two ways Community Contribution Companies can achieve this.

The first option is to structure law firms as a Community Contribution Company to pursue social goals as a part of their mandate.<sup>1022</sup> The second option is for free legal clinics to obtain funding from a subsidiary Community Contribution Company law firm in the form of donations.<sup>1023</sup> Henderson notes this model is currently used by the charity, Community Advice and Law Service in England, with a subsidiary Community Interest Company law firm.<sup>1024</sup> As Henderson points out “[t]hese arrangements provide not only a potential source of funding for the free legal clinic, but also somewhere to refer clients the clinics cannot assist.”<sup>1025</sup>

To have a significant impact on how law firms and clinics are funded, both options require reforming rules that prevent non-lawyer ownership of law firms.<sup>1026</sup> This

---

company, and includes, without limitation, a purpose of providing health, social, environmental, cultural, educational or other services, but does not include any prescribed purpose”.

<sup>1015</sup> *Ibid* at s 51.921.

<sup>1016</sup> *Ibid* at s 51.93.

<sup>1017</sup> *Ibid* at s 51.94; BC Reg 63/2013, s 4.

<sup>1018</sup> *Ibid* at s 51.95(2)(b); BC Reg 63/2013, s 8. The definition of “qualified entity” is in s 51.91:

““qualified entity” means (a) a community service cooperative as defined in the Cooperative Association Act, (b) a registered charity as defined in section 248 (1) of the Income Tax Act (Canada) or another qualified donee as defined in section 149.1 (1) of that Act, or (c) a prescribed entity or class of entities”.

<sup>1019</sup> *Ibid* at s 51.96.

<sup>1020</sup> Obtained searching terms “C3” and “Community Contribution Company” from database in BC Registry Services, “Research Name Choices”, online: <<https://www.bcregistrynames.gov.bc.ca/nro/>>. Search current as of June 27, 2017.

<sup>1021</sup> Gail E Henderson, “Could Community Contribution Companies Improve Access to Justice?”, (2016) 94:2 The Canadian Bar Rev 209.

<sup>1022</sup> *Ibid* at 234. Henderson suggests there is no reason why law corporations could not be Community Contribution Companies under the current legal framework in BC.

<sup>1023</sup> *Ibid* at 230.

<sup>1024</sup> *Ibid* at 229-230.

<sup>1025</sup> *Ibid* at 230.

<sup>1026</sup> *LPA*, *supra* note 88 at s 82(1).

would allow law firms to attract non-lawyer investors.<sup>1027</sup> Having access to a broader pool of capital could allow law firms to pursue a business model that promotes access to justice (e.g. providing low-cost legal services) without incurring significant debt and risk to fund the initiative. Until reforms are made to permit non-lawyer ownership, funding for these initiatives remains limited to other lawyers.

Henderson argues that concerns around non-lawyer ownership of law firms are less applicable to Community Contribution Companies.<sup>1028</sup> For Henderson, the strongest policy consideration against non-lawyer ownership is the profit motive compromising a lawyers' willingness to maintain their ethical and professional responsibilities. In the case of Community Contribution Companies, restrictions around distribution of dividends makes it so that profit maximization is unlikely to be the only goal, or even the main goal. Additionally, shareholder primacy is unlikely to compromise legal ethical obligations, as the Community Contribution Company expressly requires directors and officers to "act with a view to the community purposes of the company set out in the articles."<sup>1029</sup>

### New business models

One consultation participant suggested that unbundled legal services not only help improve access to affordable legal services, but they also represent an entirely new business model for lawyers and law firms.<sup>1030</sup> Unbundled legal services represent a new approach to the delivery of legal services that focuses more on establishing a new type of client relationship through discrete-task delivery. The exercise of dividing litigation into discrete projects for the lawyer and client also encourages discussion about alternative options for resolution that fall outside the courts. While BCLI did not research what these models might be, BCLI notes that academics are working on new ideas.

---

<sup>1027</sup> As Henderson points out this is currently the case in the United Kingdom with the CIC model. See Roberta S Karmel, "Will Law Firms Go Public?" (2013) 35:2 U Pa J Intl L 487 at 511–514 cited in *ibid* at 228.

<sup>1028</sup> Henderson, *supra* note 1021 at 235–236.

<sup>1029</sup> *Business Corporations Act*, *supra* note 1014 at s 51.93.

<sup>1030</sup> See *supra* note 289, at 4, where McGee, QC notes, "In addition to increasing access to legal services, unbundling can be a lucrative and viable business model for lawyers. The number of self-represented litigants is growing, and many of them are looking for some form of legal advice, coaching or representation." See also *supra* note 289, at 13, "Unbundled Legal Services: A Viable Solution for Lawyers and Clients" wherein Kari Boyle, Project Manager of the Mediate BC Family Unbundled Legal Services Project, notes that "Unbundling is a very promising business model to close the access-to-justice gap." See also Alex Robinson, "LSUC benchers push back decision on ABS", *Canadian Lawyer* Legal Feeds (30 June 2017), online: <[www.canadianlawyermag.com/legalfeeds/author/alex-robinson/lruc-benchers-push-back-decision-on-abs-7513/](http://www.canadianlawyermag.com/legalfeeds/author/alex-robinson/lruc-benchers-push-back-decision-on-abs-7513/)>.

University of British Columbia, Peter A. Allard School of Law Professor, Andrew Pilliar,<sup>1031</sup> has also explored the idea of a new business model in terms of how law firms can adapt their practices to use profits as a mechanism to finance litigation. In 2015, Professor Pilliar conducted a case study of Pivot Legal Society<sup>1032</sup> to assess how a public interest advocacy model could be applied in a private law firm setting.<sup>1033</sup> Professor Pilliar continues his research in this area.<sup>1034</sup>

---

<sup>1031</sup> Andrew Pilliar, online: <<https://www.grad.ubc.ca/campus-community/meet-our-students/pilliar-andrew>>.

<sup>1032</sup> Pivot Legal Society is a public interest legal advocacy organization in Vancouver's Downtown Eastside. Services include litigation, public education, and advocacy. Pivot Legal Society offers litigation, public education, and advocacy services in four policy areas: police accountability, health and drug policy, homelessness, and sex workers' rights. For more information on Pivot Legal Society, visit its website: <[www.pivotlegal.org/](http://www.pivotlegal.org/)>.

<sup>1033</sup> Andrew Pilliar, "Exploring a Law Firm Business Model to Improve Access to Justice" 2015 32: 1 Windsor Y B Access Just 1.

<sup>1034</sup> See also Andrew Pilliar, "Law and the Business of Justice: Access to Justice and the Profession/Business Divide" 2014 11 J L & Equal 5; YouTube, "Why You Should Care About Access to Justice—TEDx" (November 25, 2013), online: <<https://www.youtube.com/watch?v=P63p8lBFsr8>>; Andrew Pilliar, "What Will You Do About Access to Justice This Year?" (nd), *Legal Aid Ontario* (blog), online: <[blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/](http://blog.legalaid.on.ca/2014/02/04/andrew-pilliar-what-will-you-do-about-access-to-justice-this-year/)>.

---

## Highlights from Chapter 12—Alternative Methods of Improving Access to Justice

Several ideas were raised to consider other options to improve access to justice that fell outside the scope of the project. BCLI project staff conducted a preliminary review of the following five alternative ideas:

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.

### *Ideas to consider*

1. **Increased use of alternative dispute resolution processes**
  - a. Alternative dispute resolution—use of mediation services for parties who qualify for legal aid in divorce proceedings can help promote better case outcomes;
  - b. Civil Resolution Tribunal—cost-effective, user-centred process to resolve strata and small claims disputes. Encourages use of facilitation or negotiation services to reach agreement; and
  - c. Quebec PARLe—online dispute resolution initiative to resolve consumer disputes.
2. **Expansion of legal aid**
  - a. Legal services tax—direct revenue collected from the tax on legal services to legal aid;
  - b. Use of property liens under the *BC Legal Services Society Act*.
3. **Promotion of *cy-près* orders**
  - a. Incorporate terms in pro bono retainer agreements to allow clients to assign part of a cost award back to the advocacy group to increase its revenue stream.
4. **Community Contribution Companies (C3s)**
  - a. Structure law firms as C3s to include social goals as part of its overall mandate;
  - b. Donations from subsidiary C3 law firms to free legal clinics.
5. **New business models**
  - a. Use of unbundled legal services for development of new business model.



## CHAPTER 13. CONCLUSION

This study paper offers an introduction to the various ways people finance litigation in British Columbia. While it focuses on the leading financing models available today, it recognizes that other options may also exist. By examining the application of each financing option on the Canadian and international stage, this study paper intends to also highlight some of the key challenges that may be impacting its use in British Columbia. The goal of this project is to offer insight into past, current, and potential future financing options to encourage further discussion and development of ideas on how to improve access to legal services.



## APPENDIX A

### *Participants in Consultation Sessions*

**Hon. Marion Allan**

(Former BCLI Director)  
Retired BCSC Justice  
Associate Counsel,  
Clark Wilson LLP

**John-Paul Boyd**

Lawyer, Legal Academic  
Executive Director,  
Canadian Research Institute for Law and the Family

**Kari Boyle**

Director of Strategic Initiatives,  
MediateBC

**Hon. Ward Branch, QC**

BCSC Justice  
Managing Partner,  
Branch MacMaster LLP

**Barbara Buchanan, QC**

Practice Advisor,  
Law Society of British Columbia

**Jay Chalke**

Ombudsperson  
Office of the Ombudsperson

**David Griffiths**

Lawyer, Manager,  
BC Legal Services Society

**Kim Hawkins**

Executive Director,  
Rise Women's Legal Centre

**Frances Kelly**  
(BCLI Director)  
Staff Lawyer,  
Community Legal Assistance Society

**Martha Jane Lewis**  
Executive Director,  
BC Centre for Elder Advocacy and Support

**Jamie Maclaren**  
Executive Director,  
Access ProBono  
Bencher,  
Law Society of British Columbia

**Hon. Ken Mackenzie, QC**  
(BCLI Director)  
Retired BCCA Justice

**Sharon Matthews, QC**  
Partner,  
Camp Fiorante Matthews Mogerman  
Bencher,  
Law Society of British Columbia

**Janet M. McLean, CAIB**  
BFL Canada Insurance Services

**Doug Munro**  
Policy Lawyer,  
Law Society of British Columbia

**Annette Murray**  
Legal advocate,  
Disability Alliance BC

**John Rossos**  
Chairman and CEO,  
Bridgepoint Financial Group

**Shari Sanders**

Broker Consultant, Western Canada  
DAS Canada

**Thomas Spraggs**

(BCLI Director)  
Barrister,  
Spraggs & Co.

**Emma Wilson**

Executive Director,  
Law Student Legal Advice Program (UBC)

## PRINCIPAL FUNDERS IN 2016

The British Columbia Law Institute expresses its thanks to its principal funders in the past year:

- Law Foundation of British Columbia
- Ministry of Justice and Attorney General for British Columbia
- Notary Foundation of British Columbia
- Real Estate Foundation of British Columbia
- Real Estate Council of British Columbia
- Real Estate Institute of British Columbia
- Strata Property Agents of British Columbia
- Association of British Columbia Land Surveyors
- Vancouver Island Strata Owners Association
- Condominium Home Owners Association
- Ministry of Natural Gas Development and Responsible for Housing for British Columbia
- Employment and Social Development Canada
- Vancouver Foundation
- Coalition of BC Businesses
- BC Government Employees Union
- Health Employees Union
- Ministry of Jobs, Tourism and Skills Training
- Canadian Network for Prevention of Elder Abuse
- BC Ministry of Health - Council to Reduce Elder Abuse
- eHealth Saskatchewan (Vital Statistics)
- Service New Brunswick (Vital Statistics)
- Statistics Canada
- Government of Nunavut (Vital Statistics)
- Ontario Law Foundation Access to Justice Fund
- Canadian Women's Foundation
- Canadian Human Rights Commission

BCLI also reiterates its thanks to all those individuals and organizations who have provided financial support for its present and past activities.