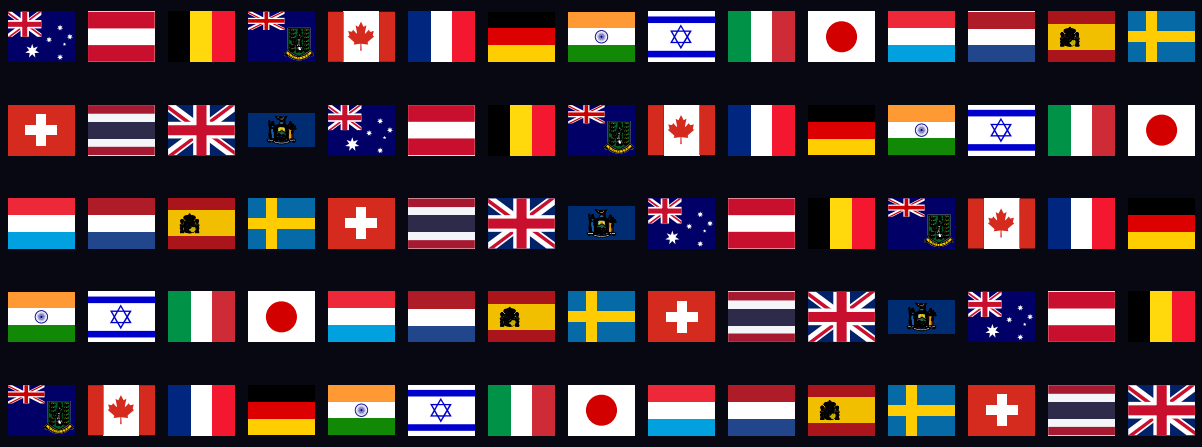
# LITIGATION FUNDING

## Canada



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# Litigation Funding

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including regulation and regulators; funders' rights (choice of counsel, participation in proceedings, veto of settlement and funding termination rights); conditional and contingency fee agreements; judgment, appeal and enforcement; collective actions; costs and insurance; disclosure and privilege; disputes between litigants and funders; and recent trends.

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Generated 09 December 2022

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## REGULATION

### Overview

Is third-party litigation funding permitted? Is it commonly used?

Litigation funding is permitted across Canada, and the courts have demonstrated an openness to it, particularly where funding is seen to promote access to justice. This includes the Supreme Court of Canada, which considered a litigation funding agreement in 9354-9186 Québec Inc v Callidus Capital Corp .

For over a decade, litigation funding has been used to advance class actions, and more recently parties are making use of funding in commercial litigation and arbitration matters, including breach of contract, intellectual property and other business disputes. In the context of class actions and insolvency matters, court approval is generally required, but not where funding is employed for business disputes, where it has been considered a private commercial financial arrangement.

With respect to class actions, judicial approval of funding agreements has become relatively straightforward, and the practice is developing whereby funding is approved on the written record, without opposition.

There is increasing variety in the types of agreement approved. In the early years of class action funding, the funder provided an adverse costs indemnity and a minimal amount of disbursement funding (see, eg, Dugal v Manulife Financial Corporation and Trustees of the Labourers' Pension Fund of Central and Eastern Canada v Sino-Forest Corporation ). More recently, courts have approved far more significant funding amounts, of the magnitude required to advance complex and costly matters (see, eg, David v Loblaw and Difederico v Amazon.com ).

Approved class action funding arrangements have also expanded to include legal fees (in addition to disbursements and costs protection). In the 2019 case, JB & M Walker Ltd v TDL Group , the funder paid all legal fees and disbursements as the case progressed. In 2020, in Drynan v Bausch Health Companies Inc , the funder paid 80 per cent of the legal fees, as well as covering disbursements and the costs indemnity. In these cases, the court was principally concerned with the fairness of the total fee to be paid by the class – that is, the joint fee between the funder and the lawyers, at the conclusion of the case. In Drynan , the court initially expressed concern about the arrangement, but approved it once there was an aggregate cap of 33.3 per cent of the proceeds.

*Law stated - 04 October 2022*

### Restrictions on funding fees

Are there limits on the fees and interest funders can charge?

As with other forms of investment finance, there are no legislative limits on the fees for litigation funding. Some Canadian courts have used the contingency fee regulations as a guideline for suitable fees where the courts have been required to consider a funding agreement. For example, in Schenk v Valeant Pharmaceuticals , the Ontario Superior Court held that a funder could charge up to 50 per cent of the proceeds of the claim, which is consistent with the contingency fee regulations in Ontario.

Recourse funding with an interest component must avoid running afoul of provisions in the Criminal Code of Canada regarding criminal rates of interest, but most dispute finance is non-recourse and therefore not captured by lending regulations.

*Law stated - 04 October 2022*

### Specific rules for litigation funding

Are there any specific legislative or regulatory provisions applicable to third-party litigation funding?

For Ontario class actions, a third-party funding agreement is subject to the approval of the court, obtained on a motion of the representative plaintiff made as soon as practicable after the agreement is entered into, with notice to the defendant. To be approved, the court must be satisfied that the agreement is fair and reasonable, will not impair the solicitor-client relationships, and that the funder is able to satisfy an adverse costs award. The process and criteria are set out in section 33.1 of the Class Proceedings Act .

There are no other specific legislative or regulatory provisions governing litigation funding, and this legislation reflects general principles from case law that would have relevance in other parts of Canada.

*Law stated - 04 October 2022*

### Legal advice

Do specific professional or ethical rules apply to lawyers advising clients in relation to third-party litigation funding?

No specific rule covers lawyers advising their clients about third-party funding. However, lawyers owe a duty of candour to their clients on matters relevant to the retainer, which would include potential fee arrangements. In the class action context and as part of section 33.1 of the Ontario Class Proceedings Act, courts consider that the representative plaintiff's receiving independent legal advice with respect to the funding agreement forms part of the basic procedural and evidentiary requirement that should be met.

*Law stated - 04 October 2022*

### Regulators

Do any public bodies have any particular interest in or oversight over third-party litigation funding?

No public body has expressed any particular interest in or oversight of litigation funding. However, to the degree that a litigation funder is also providing insurance to a client, insurance regulators such as Ontario's Financial Services Regulatory Authority or the Financial Institutions Commission of British Columbia may have oversight of the arrangement.

*Law stated - 04 October 2022*

## FUNDERS' RIGHTS

### Choice of counsel

May third-party funders insist on their choice of counsel?

No. Choice of counsel is always the client's exclusive decision.

*Law stated - 04 October 2022*

## Participation in proceedings

### May funders attend or participate in hearings and settlement proceedings?

Anyone may attend a public hearing. With respect to confidential hearings (which are rare in Canada) or settlement proceedings, a funder who has agreed to abide by confidentiality obligations may attend with the consent of the parties. The standing of a funder to participate in hearings will generally be circumscribed by the matters at issue in the hearing. Where the subject pertains to details in the funded litigation, the funder will not in the ordinary course have standing. Where the subject pertains more directly to interests of the funder, as, for example, in a motion for the approval of a funding agreement, the funder may seek to participate in hearings.

*Law stated - 04 October 2022*

## Veto of settlements

### Do funders have veto rights in respect of settlements?

No. Settlement is always the client's exclusive decision. However, funders typically have a right to be informed of settlement negotiations and may offer their input on the merits of the proposed settlement. There are also often contractual safeguards to protect the funder against a client making a commercially unreasonable decision. These may include a requirement that the funder and the client engage in good-faith negotiations on settlement offers or a dispute resolution clause.

*Law stated - 04 October 2022*

## Termination of funding

### In what circumstances may a funder terminate funding?

Termination rights may be negotiated in each funding agreement. The courts have approved agreements for funding of class actions where the funder may terminate its funding with court approval where there has been a breach of the agreement, the lawyers withdraw as counsel or the funder reasonably considers that the proceedings are no longer commercially viable.

With respect to commercial litigation, in Schenk v Valeant the Ontario Superior Court found that a funder's right to terminate an agreement where it reasonably ceased to be satisfied with the merits or commercial viability of the case did not restrict the plaintiff's ability to remain in control of the litigation. The Quebec Superior Court reached the same conclusion in Arrangement relatif à 9354-9186 Québec Inc (Bluberi Gaming Technologies Inc) and Ernst & Young Inc , 2018 QCCS 1040 (aff'd by 9354-9186 Québec Inc v Callidus Capital Corp , 2020 SCC 10 ).

*Law stated - 04 October 2022*

## Other permitted activities

### In what other ways may funders take an active role in the litigation process? In what ways are funders required to take an active role?

Funders are never required to take an active role in the litigation process, but where a funder has legal expertise, it may offer strategic input, as requested by the client.

*Law stated - 04 October 2022*

## CONDITIONAL FEES AND OTHER FUNDING OPTIONS

### Conditional fees

May litigation lawyers enter into conditional or contingency fee agreements?

Litigation lawyers may enter into conditional or contingency fee agreements, except in criminal or family law matters (some provinces, including British Columbia, allow contingency fee agreements in family law matters with court approval). In July 2021, amendments to the Solicitors Act came into effect in Ontario. They include a requirement to use a standard form contingency fee agreement, and expand the application of contingency fee rules to paralegals.

*Law stated - 04 October 2022*

### Other funding options

What other funding options are available to litigants?

Litigants can negotiate alternative fee arrangements with their counsel. The provinces of Ontario and Quebec have public funds available to cover limited disbursements and legal fees in class actions that meet prescribed criteria, including that the matter be in the public interest.

*Law stated - 04 October 2022*

## JUDGMENT, APPEAL AND ENFORCEMENT

### Time frame for first-instance decisions

How long does a commercial claim usually take to reach a decision at first instance?

Statistics suggest it typically takes three to five years for a commercial claim to reach a decision at first instance.

*Law stated - 04 October 2022*

### Time frame for appeals

What proportion of first-instance judgments are appealed? How long do appeals usually take?

There are no recent pan-Canadian statistics on appeal rates.

In some cases, leave to appeal is required, but others may be appealed as of right. The appeal process typically takes roughly one year where filing an appeal as of right, or after leave if granted.

*Law stated - 04 October 2022*

### Enforcement

What proportion of judgments require contentious enforcement proceedings? How easy are they to enforce?

There is no public data on the proportion of judgments requiring contentious enforcement proceedings when a judgment debtor is either unable or unwilling to satisfy a judgment. Enforcement can be expensive and time-consuming

and can require coordination in multiple jurisdictions. Some of the tools available to assist with enforcement include writ of seizure and sale, garnishment and the appointment of a receiver.

*Law stated - 04 October 2022*

## COLLECTIVE ACTIONS

### Funding of collective actions

Are class actions or group actions permitted? May they be funded by third parties?

Class actions are well established as a means of advancing a claim where there is a common issue between many plaintiffs. They are frequently used in Canada including in relation to securities, consumer protection, human rights violations, employment, franchise and product liability.

A law firm may choose to pay the costs of the litigation and defer its fees, in exchange for a contingency fee upon success. Class actions can also be financed by funders, and much of the early case law regarding litigation funding developed in this context. When litigation funding was first used in class actions, the law firms often deferred their fees and paid many of the out-of-pocket expenses, and the funder provided only an indemnity for any adverse costs award. Since that time, practice and jurisprudence have evolved and it is now common for the funder to pay significant amounts to fund case disbursements, as well as pay for all or a portion of the legal fees, in addition to providing costs indemnity.

*Law stated - 04 October 2022*

## COSTS AND INSURANCE

### Award of costs

May the courts order the unsuccessful party to pay the costs of the successful party in litigation? May the courts order the unsuccessful party to pay the litigation funding costs of the successful party?

In most provinces, the unsuccessful party has to pay a portion of the legal fees and disbursements incurred by the successful party. In Quebec, these costs are quite limited, but in the common law provinces, they can be significant.

Some provinces' class proceedings regimes – British Columbia, Manitoba and Newfoundland – have a 'no costs' rule, where no costs are awarded to either party, in relation to the certification, the common issues trial or appeals.

To date, a court has not ordered an unsuccessful party to pay the litigation funding costs of the successful party.

*Law stated - 04 October 2022*

### Liability for costs

Can a third-party litigation funder be held liable for adverse costs?

In Ontario, the court has inherent jurisdiction to award costs against a non-party to the litigation. However, the courts have cautioned that the right must be exercised 'sparingly and with caution', where the non-party commits an abuse of process. Funding litigation – as long as the claim was not vexatious or spurious – does not meet that criterion ( Davies v The Corporation of the Municipality of Clarington ).

Where a funder has provided an indemnity to a representative plaintiff under an approved funding agreement, the defendants can recover directly from the funder.

*Law stated - 04 October 2022*

## Security for costs

### May the courts order a claimant or a third party to provide security for costs? (Do courts typically order security for funded claims? How is security calculated and deposited?)

Yes, courts may exercise their discretion to require a claimant provide security for costs. In Ontario, a defendant may apply for security for costs if:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has another proceeding for the same relief pending in Ontario or elsewhere;
- the defendant has an order against the plaintiff for costs in the same or another proceeding that remains unpaid in whole or in part;
- the plaintiff is a corporation or a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant;
- there is good reason to believe that the action is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant; or
- a statute entitles the defendant to security for costs.

The order is discretionary, and may not be awarded if the plaintiff can show that it has sufficient assets in Ontario, or that it is impecunious and that an injustice would result if it were not allowed to proceed with its claim.

In Ontario, the Class Proceedings Act provides that the defendant is entitled to obtain security for costs from the funder, subject to the terms of the LFA, if:

- the funder is ordinarily resident outside of Ontario;
- the defendant has an order against the funder that remains unpaid in whole or in part; and
- there is good reason to believe that the funder has insufficient assets in Ontario to pay the costs.

The amount and form of security and the time for paying into court or otherwise giving the required security are determined by the court. In the David v Loblaw class action, the court permitted the funder to post security for costs by way of an undertaking given directly to the defendants.

*Law stated - 04 October 2022*

### If a claim is funded by a third party, does this influence the court's decision on security for costs?

To date, there has not been any indication that the existence of a funder would influence the court's decision on security for costs.

*Law stated - 04 October 2022*

## Insurance

### Is after-the-event (ATE) insurance permitted? Is ATE commonly used? Are any other types of insurance commonly used by claimants?

ATE insurance is permitted, and its use is expanding. Other products, such as before-the-event insurance and legal expense insurance are also used by some clients. The market for these products is not as developed as in some other jurisdictions, such as the United Kingdom.

*Law stated - 04 October 2022*

## DISCLOSURE AND PRIVILEGE

### Disclosure of funding

Must a litigant disclose a litigation funding agreement to the opposing party or to the court? Can the opponent or the court compel disclosure of a funding agreement?

In the class action and insolvency contexts, where the funding will affect the interests of parties who are not signatories to the funding agreement, the agreement must be disclosed to the court. In some provinces (eg, British Columbia, Ontario), the motion for approval must be made on notice to the other party, and in other provinces (eg, Alberta, Nova Scotia) the agreement may be approved ex parte.

In private commercial litigation, there is no requirement to disclose to the court or to the opposing party. In Seedlings v Pfizer , the Federal Court explained that 'the manner in which [a plaintiff] chooses to fund a litigation it has every right to bring is of no concern to the Court or to the Defendant'.

In cases where funding is disclosed and approved, courts have consistently protected the commercial details and allowed the defendants to view only a redacted version of the funding agreement, as full disclosure would compromise the plaintiffs' interests.

*Law stated - 04 October 2022*

### Privileged communications

Are communications between litigants or their lawyers and funders protected by privilege?

Longstanding legal principles in Canada protect communications between litigants/their counsel and funders. First, litigation privilege attaches to all types of communication exchanged between a client/its counsel and a third party when the communication is made for the dominant purpose of litigation. Communications with a funder – which are by definition shared for the dominant purpose of litigation – are captured by this privilege.

Second, solicitor-client privilege protects communications between a lawyer/client and third parties where the communications are 'essential to the maintenance and operation of the solicitor-client relationship'. Documents, discussions and analysis with a funder would directly support or enable the solicitor-client relationship, and should therefore be covered by this privilege as well.

Third, sharing privileged communications with a funder would not be considered a waiver of any privilege, as it would fall within the 'common interest' defence against waiver. That is, where the client and the funder have a common interest in the litigation, or in a proposed commercial transaction (sometimes called 'deal privilege'), the privilege is not waived.

*Law stated - 04 October 2022*

## DISPUTES AND OTHER ISSUES

### Disputes with funders

Have there been any reported disputes between litigants and their funders?

To date, there have not been any reported disputes between litigants and their funders.

*Law stated - 04 October 2022*

### Other issues

Are there any other issues relating to the law or practice of litigation funding that practitioners should be aware of?

There are different considerations for funding related to the commercial or insolvency space, in contrast to consumer funding or litigation lending, which focuses primarily on personal injury claims. An informed lawyer will be alive to the different issues at play.

*Law stated - 04 October 2022*

## UPDATE AND TRENDS

### Current developments

Are there any other current developments or emerging trends that should be noted?

While most reported case law on litigation funding pertains to the funding of class actions, there is considerable use of funding in the commercial and arbitral space, which is not the subject of court approval and therefore not generally public. Nevertheless, anecdotal reports and funders' experience confirm that use of litigation funding by commercial parties has been enjoying increased popularity, both among claimants with limited resources and those that are well-resourced.

*Law stated - 04 October 2022*

# Jurisdictions

| | |
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