BENTHAM IMF

Bentham IMF Capital Limited
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Class Actions – Objectives, Experiences and Reforms

Consultation Paper, March 2018

Submission from Bentham IMF Capital Limited, 31 May 2018

1. Bentham IMF Capital Limited ("Bentham IMF") is pleased to make these submissions to the Law Commission of Ontario in relation to its consultation paper on Class Actions – Objectives, Experiences and Reforms. Bentham IMF has noted the mandate of the research project and the three objectives of class actions – access to justice, judicial economy and deterrence. Bentham IMF's business involves providing access to justice for its clients and class members in funded class actions.

2. These submissions are provided in addition to the interview conducted with Bentham IMF's, Chief Investment Officer, Tania Sulan, on 17 May 2018.

Background – Bentham IMF

3. Bentham IMF is a company registered in British Columbia, licensed to do business in Ontario, Quebec and Alberta and is the Canadian arm of IMF Bentham Ltd. ("IMF"), one of the oldest and most experienced commercial funders in the world. IMF has fourteen offices around the world, and has been listed on the Australian Securities Exchange (ASX: IMF) since 2001. Since that time, IMF has funded 166 cases to completion, resulting in over AUD 2.1 billion in recoveries.

4. In January 2016, Bentham IMF opened its first Canadian office in Toronto. Bentham IMF provides litigation finance and investment capital to plaintiffs and law firms for large scale disputes in Canada and for international arbitration. Bentham IMF's Code of Best Practices may be found at https://www.benthamimf.ca/funding#the-funding-process.

5. Bentham IMF's focus in Canada is commercial litigation. Bentham has agreed to fund six single-party claims and one class action. The single-party cases include a patent matter, construction dispute, breach of contract dispute and an international arbitration.

6. The litigation funding agreement ("LFA") for the class action that Bentham has agreed to fund has been the subject of judicial consideration: *Houle v. St Jude Medical Inc.,* 2017 ONSC 5129. As set out below, this case represents the first time that a Canadian court has considered a "hybrid" model where class counsel are paid a portion of their fees as the case progresses, and a partial contingency fee upon success.

Class Action Funding in Ontario

7. Ontario courts first considered a class action litigation funding arrangement in 2009: *Metzler Investment GMBH v. Gildan Activewear Inc.*, 2009 CanLII 41540. A suite of cases followed, including *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785, *The Trustees of the Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937, *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974 and *Marriott v. General Motors of Canada Corporation,* 2018 ONSC 2535.

8. In these cases, the litigation funder agreed to provide an adverse costs indemnity and limited disbursements funding (c. $50,000) in exchange for a percentage of the recoveries. In exchange for providing the indemnity and limited disbursements, courts have approved funder recoveries of up to 10% of the award (*Bayens*).

9. Whilst offshore funders have provided this limited form of funding, Bentham IMF has not provided such funding. This is in part due to the decisions of Financial Institutions Commission of British Columbia[1] and the Financial Services Commission of Ontario[2] that a provision of a stand-alone adverse costs indemnity is insurance for which the provider must be licensed.

10. In *Houle*, the representative plaintiffs and their counsel proposed a different arrangement. Under the LFA (if approved by the Court):

    a. Bentham agreed to pay, on a non-recourse basis, (a) 50% of the reasonable docketed time of Class Counsel up to a prescribed maximum amount (the maximum amount being based on the amount budgeted by class counsel); (b) the disbursements incurred by Class Counsel up to a prescribed maximum amount; (c) any court-ordered costs that may be assessed against the Houles; and (d) any security for costs ordered by the court.

    b. In exchange, if the litigation is successful, Bentham will receive a between 20% and 25% of the proceeds, depending on when the matter resolves. If the case is successful, Bentham will lose its investment, and pay any costs awards in favor of the defendant.

    c. Class Counsel, in exchange for taking the matter on a partial contingency fee basis, will receive between 10% and 13% of the recovery.

11. This "hybrid model" is different from the funding offered by the Class Proceedings Fund in a number of respects as follows:

	Class Proceedings Fund	Proposed 'Houle' Hybrid Model
Class Counsel Fees paid?	No	Yes – either partial or full fees
Experts of choice	Consultation with Fund required and disbursements approved in stages	Experts of choice, up to the maximum budgeted amount under the LFA (which amount has been set by class counsel)
Return Structure	Reimbursement of disbursed amount plus 10% return of net litigation proceeds	% return only

[1] Cease and desist order dated 30 June 2016 - https://www.fic.gov.bc.ca/index.aspx?p=enforcement/financial_institutions
[2] Interim cease and desist order dated 7 July 2016 - https://www.fsco.gov.on.ca/en/about/enforcement/cdo/pages/co-bridgepoint.aspx

12. Justice Perell expressed concern about two features of the LFA. The Divisional Court has granted leave on those questions. The appeal is expected to be heard by the Divisional Court in late 2018.

Consultation Question 3:

- **Is third party funding a positive development in class action practice? Should it be more tightly regulated?**
- **Should the source and extend of funding be disclosed to courts?"**

13. Bentham IMF is of the view that third party litigation funding is a positive development in class action practice as it facilitates access to justice. As Justice Strathy explained in *Dugal v. Manulife*: *"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"* [para. 28].

14. Further, the hybrid funding model allow firms who might not be able to or want to offer their services on a full contingency basis to take on class action cases. As the Class Proceedings Fund provides a costs indemnity, and pays approved disbursements on a staged basis, the lawyers working with the Fund must agree to carry all of their fees in exchange for a contingency fee at the conclusion. The hybrid funding model allows lawyers to receive payment for a portion of their fees as the case progresses, and to pay associates, clerks and other timekeepers. This opens the door to more law firms acting in class actions, and creates additional choice of lawyers for clients. As Justice Perell noted in *Houle*, "*the novelty of the hybrid retainer that combines a partial contingency fee with a fee-for-services retainer strikes me as a positive factor . . . This approach which partially protects the financial and human capital of class counsel may expand the roster of firms prepared to assume the risks of class action litigation"* [para. 79].

15. Bentham IMF is not averse to properly considered regulation. In the class action space, given the courts' supervisory role to protect the interests of the class and the requirement for approval of any funding agreement for it to be binding on the class, regulation may be superfluous. If regulation were to be considered, a key aspect would be capital adequacy of the funder, to guard against the risk of an under-capitalized funder failing to meet its contractual commitments.

16. Disclosure of the source and extent of the funding within the class action context enables the court to protect the interests of individuals who are not before the court. However, where a representative plaintiff receives independent legal advice, and the LFA does not give the funder control over the litigation or an excessive return, Bentham IMF's view is that the court should not interfere with the contract.

17. In addition, the extent of the funding should not be disclosed to the defendants, as this information may give the defendants a strategic advantage.

Consultation Question 4:

Is the current process for settlement and fee approval appropriate?

- **Is the legal test for settlement approval sufficient?**
- **Which factors should the court consider in awarding counsel's fees?**
- **Should counsel's fees be proportional to or dependent on class recoveries?**

- **Should fees be awarded on a sliding scale, that is, a reduced percentage of recovery as the size of recovery increases?**
- **What changes, if any, should be made to the process by which fees are awarded?**
- **Is there a role for *amicus curae* at the settlement and/or fee approval?"**

18. If all or part of a litigation funder's fees are to be approved at the conclusion of a case, there should be a presumption, if the representative plaintiff received independent legal advice before entering into the LFA, that the funder's fee is a fair and reasonable reflection of the risk of agreeing to fund the case. Absent such presumption, a set of factors should be developed to ascertain what is an appropriate fee.

Consultation Question 12:
In addition to the issues listed in this paper, are there provisions of the CPA that need updating to more accurately reflect current jurisprudence and practice? Is so, what are your specific recommendations?"

19. To avoid delay, consideration should be given to clarifying that the appeal route related to any approval (or failure to approve a LFA) decision should proceed directly to the Court of Appeal.

Other:

20. Although not related to the consultation questions directly, at page 14 of the 'What have we heard?' section, the paper states

> *"Many interviewees, including plaintiff counsel, stated that litigation funding agreements (whether the Class Proceedings Fund or third party) support access to justice. They also stated that the current legal test for approval is generally appropriate. Many class action counsel states that litigation funding supports smaller firms practicing class actions litigation.*
> *On the other hand, some interviewees were concerned that litigation funding arrangements may not be sufficiently transparent. Some interviewees also asked whether litigation funders influence outcomes, including settlement decisions."*

21. It is unclear why some interviewees were concerned about transparency of litigation funding arrangements, as the funding agreements must be approved by the court. As part of that process, the litigation funding agreement is disclosed to the court and to the defendant (in some cases, limited parts, such as the legal budget, are redacted before being provided to the defendant). As a result, the court has full insight into the agreement.

22. With respect to the ability to influence outcomes, the *Houle* LFA specified that the representative plaintiffs had "the sole and exclusive right to direct the conduct of the Proceedings and to settle the Proceedings." Bentham does not have any control over settlement decisions.

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