BRIDGEPOINT
GLOBAL LITIGATION SERVICES

May 11, 2018

By email to LawCommission@lco-cdo.org and by courier

Law Commission of Ontario
2032 Ignat Kaneff Building
Osgoode Hall Law School, York University
4700 Keele Street
Toronto, Ontario M3J 1P3

Dear Members of the Commission,

Re: Submission in response to *Class Actions: Objectives, Experiences and Reforms: Consultation Paper (March, 2018) ("Consultation Paper")*

This submission is made on behalf of BridgePoint Global Litigation Services Inc. ("**GLS**") and will address the following question raised in the Consultation Paper:

3. What changes, if any, should be made to the costs rule in the CPA?
   - Should Ontario retain the two-way costs rule?
   - Is the cost of indemnities against adverse costs a concern?
   - Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?
   - Is third party funding a positive development in class action practice? Should it be more tightly regulated?
   - Should the source and extent of funding be disclosed to courts?

A brief history on GLS and its affiliated companies can be found at Appendix A of these submissions.

For the purposes of this submission, the term "class counsel" refers to counsel acting on behalf of the representative plaintiff and the class.

Question 3: What changes, if any, should be made to the costs rule in the CPA?

Sub-Question 1: Should Ontario retain the two-way costs rule?

GLS takes no position on this question.

Sub-Question 2: Is the cost of indemnities against adverse costs a concern?

There are several factors that affect the cost of providing protection against adverse costs in class actions. These factors include the following:

1. The amount of insurance sought. The larger an amount sought, the higher the cost of providing such insurance. The cost can be reduced by staging the amount of insurance required such that

the stage of the litigation will dictate how much insurance is available at that point;

2. Duration. Class actions can take years to resolve. Until then, the insurer is required to set aside reserves until the class action is resolved in case the representative plaintiff is required to pay a cost order. If an action takes 10 years to resolve, these funds cannot be used in other litigation during that time. A provider of such protection must take this into account when determining the cost;

3. Nature/risk. Class actions that are unique or novel can present different risks from class actions that are similar to previously litigated class actions. For example, a product liability class action that has been litigated and successfully resolved in other countries has a higher chance of a successful resolution in Canada; and

4. Damages sought. The cost of providing protection is often examined relative to the protection offered. It is respectfully submitted that the cost should be reviewed in light of the damages sought. Where damages sought are minimal, it may suggest that the potential for adverse costs is low. As such, class counsel may wish to revisit how much protection is required in those circumstances, thereby reducing the cost.

These factors should assist the Committee in understanding how the cost of protection against adverse costs is determined. To date, the Courts have been effective in reviewing litigation financing agreements ("**LFAs**"), especially with respect to the costs that are to be paid to a third party funder upon the conclusion of the litigation, and determining if the LFA is in the best interests of the representative plaintiff and the class.

On a separate note, we should point out that the Commission may wish to approach the Financial Services Commission of Ontario ("**FSCO**") to confirm its position on "indemnities". As outlined below, FSCO has taken contradictory views on "indemnities" and whether they fall under the definition of "insurance" under the *Insurance Act*, RSO 1990, c.I.8[1] ("***Insurance Act***").

Based on our experience through an affiliate, as of July 2016, FSCO was of the view that all indemnities are considered insurance as per the definition in the *Insurance Act*. If this is correct, then any lawyer or law firm that offers an indemnity to a representative plaintiff runs contrary to the *Insurance Act* as there is no apparent exemption under the *Insurance Act*, the *Law Society Act* (Ontario) or the *Solicitors Act* (Ontario).

In the August 2017 decision, *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129, however, FSCO took a different position where it deemed the indemnity contained in the LFA was not insurance.

The Commission should ask FSCO for a definitive, consistent decision. FSCO has advised that they are

[1] S.1: "insurance" means the undertaking by one person to indemnify another person against loss or liability for loss in respect of a certain risk or peril to which the object of the insurance may be exposed, or to pay a sum of money or other thing of value upon the happening of a certain event, and includes life insurance;

working on a decision, but this issue continues to remain outstanding for nearly a year. This indecision or commitment on FSCO's part creates uncertainty in the marketplace and potential exposure for lawyers who provide indemnities to representative plaintiffs in lieu of seeking protection against adverse costs from an appropriate entity.

Sub-Question 3: Should the Class Proceedings Fund have the flexibility to alter its current 10% levy and/or to fund legal fees?

GLS believes that the Class Proceedings Fund (the "**CPF**") should not have this flexibility unless the CPF can demonstrate that it will be sustainable. If the CPF does not charge a levy against the class actions that it funds that could be adequate to offset its expenses (including any cost awards that it pays on behalf of class actions), there could be a shortfall in its financial resources. As identified on page 7 of *Review of Class Actions in Ontario: Issues to be Considered* (Law Commission of Ontario - November 2013), the CPF is not publicly insured:

> ". . . . If the CPF were to run out of funds, there is no statutory guarantee that the government would step in to prevent a fiscal cliff."

Sub-Question 4a: Is third party funding a positive development in class action practice?

> "This brings the discussion to the third economic barrier to access to justice. To return to the example, it would be insane for a claimant with a $100 claim to take on the risk of paying a successful defendant its costs of defending a $100 million aggregate claim. Thus, a class action regime must address the barrier of the representative plaintiff's exposure to costs."[2]

As Justice Perrell's quote above from the *Fehr* decision indicates, there is a barrier to access to justice for representative plaintiffs when deciding if a claim should be pursued.

Class action litigation can be a complex and high-risk business. They are highly capital-intensive and the duration is difficult to predict. The need for third party funding has been long recognized as a requirement in class actions. This can be seen with the existence of the CPF[3] (now in existence for over twenty years) and the Fund d'aide aux recours collectifs in Quebec[4]. Further, legislation in various provinces has recognized the demands of a class action are such that class counsel must seek financing from outside sources.[5]

Law firms offer legal services for class actions on a contingency fee basis. Under the terms of a typical class action contingency fee retainer agreement, law firms are obligated to pay for the disbursements and other "out of pocket" costs of the litigation (which may range from $100,000 to over $1,500,000

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[2] *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715, para. 52 ("***Fehr***").

[3] *Law Society Act*, R.S.O. 1990, c.L.8, ss.59.1-59.5, O.Reg 771/92

[4] *An Act Respecting the Class Action*, R.S.Q., c.R-2.1

[5] See Appendix B. Alberta legislation permit representative plaintiffs to seek third party financing. In other provinces, class counsel are permitted to include in their notice of certification a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

depending on the nature and complexity of the class action) and invest their time over many years to litigate the class action. They do not bill and receive legal fees until the class action is finally resolved. If the class action is unsuccessful, they lose 100% of their investments in disbursements and receive no legal fees.

In successful class actions, law firms will recoup their investments in disbursements and will generate significant legal fees to compensate them for their investment of time and money. Disbursements typically represent a small percentage of the underlying class action relative to the expected value of legal fees, which are substantially higher and represent the "true" economic return for law firms. However, law firms need to continue paying for salaries, rent and other overhead expenses. Accordingly, disbursements can have a major impact on a law firm's cash flow and liquidity position.

Until the resolution of a claim, a law firm must rely on various methods to finance the class action, the most popular means being to supplement the cash flow of the law firm by taking on non-class action files or obtaining lines of credit. While the former would require law firms to spend time away from class action work, the latter requires the law firm to make regular payments in the interim whether it be interest alone or a combination of principal and interest. Drawing on personal assets can also pose a problem as those funds can be tied up in the class action rather than be used to pay overhead.

If law firms do not have access to sufficient capital to finance their disbursements, a higher likelihood exists that their lack of investments will materially impact the value of the class actions and, as a result, law firms' economic returns will suffer since legal fees represent a percentage of the total value of each class action.

Many law firms are no longer willing or able to accept 100% of the financial risk associated with prosecuting class actions independently, without assistance from co-counsel or a third party funder and/or insurer. In effect, law firms have been acting as merchant banks for their clients, but without access to adequate capital to effectively finance the cash investment required to prosecute such claims. There is a major funding gap in the market as banks and other traditional sources of capital will not offer financing for class actions. In addition to insurance for adverse cost awards, law firms are also looking for insurance to protect their investments in disbursements and financing for disbursements themselves. These are the key factors driving the demand for third party financing in this market.

While the CPF and the Fund d'aide aux recours collectifs (Quebec) both offer financing for disbursements and protection against adverse costs, there can be restrictions or what can be offered by such public funds. Further, the CPF must charge a 10% levy as per its enacting statute, which denies it the ability to be flexible in terms of pricing to meet a representative plaintiff's needs. With the advent of third party funding, representative plaintiffs and counsel can be given greater access to greater amounts of capital and coverage at a lower cost, resulting to greater access to justice.

In short, the use of third party funding offers the following relief to class counsel:

1. A dedicated resource for financing expenses and disbursements of the class action;
2. The ability to free up capital to fund overhead;
3. Access to class actions that would otherwise not be able to advance;
4. Lawyers can focus on the class action itself rather than spend time arranging for funding for the

class action or determining how to manage its overhead, including potentially taking on non-class action files; and

5. Lower cost to the class in exchange for obtaining financing and/or protection against adverse costs.

Sub-Question 4b: Should it be more tightly regulated?

a. Insurance

Given that FSCO's position with our affiliate that indemnities for adverse costs are considered insurance, we believe that this aspect of third party funding should be regulated.

As mentioned earlier under Sub-Question 2, the Commission may wish to approach FSCO to obtain clarity as to whether indemnities offered in LFAs are considered insurance as this may dictate the type of regulation required.

b. Financing

With respect to the regulation of financing for disbursements and other expenses, there are several factors to consider. These include the following:

1. The assessment. Class actions currently require an assessment for any litigation financing application. Unlike mortgage lending, it can be difficult to standardize. The nature of the class action will dictate the scope and review required. For example:
    a. A product liability class action will be more expert intensive than a privacy breach class action; and
    b. A class action that seeks damages against a regulated entity will have different risks from a class action against a private commercial entity or an individual;

2. Financing sought. It will be dependant on the type of action. Product liability class actions require more experts and disbursements while a privacy breach class action will require significantly less;

3. Duration. Class actions can be unpredictable. It can take years for a class action to obtain certification because of the appeals that can arise from the original certification decision;

4. Class counsel experience. The experience of class counsel in the class action in particular and class actions in general can affect the duration and the resolution of the class action;

5. Class counsel participation. Class counsel are often active participants in obtaining financing and protection and will advise their clients on the terms provided; and

6. Court approval. All LFAs currently require the approval of the Court in order to be enforceable. The Court is in the best position to assess if the agreement will benefit the class and any impact of the third party funder in the litigation. If the LFA is not approved by the Court, it cannot be

enforceable against the class and no payments can be made to the third party funder under the LFA upon the resolution of the class action.

GLS proposes that the Committee consider adopting a Code of Conduct with respect to financing, similar to what one of its affiliates worked on with the Ontario Trial Lawyers' Association for providing financing to plaintiffs and law firms in the personal injury market. A copy of the Code of Conduct that GLS's affiliate helped bring to fruition is enclosed. GLS proposes that the following elements be considered as part of such a code that third party funders must do in the class action space:

1. Agree to operate in compliance with all Canadian laws;

2. Agree to provide information to representative plaintiffs and class counsel to ensure complete transparency of cost and risk including details concerning all fees and administrative charges and rates of interest (including sample charts);

3. Agree that the company's website, promotional materials and legal documentation shall be clear and transparent;

4. Agree to be responsible for compliance with applicable financial industry protocols;

5. Avoid any conflict of interest or potential conflict of interest;

6. Refrain from paying any referral fee or transfer of funds to any party;

7. Agree to protect client confidentiality and client privilege; and

8. Agree to require all representative plaintiffs and class counsel to discuss with each other the third party funding process.

GLS welcomes the opportunity to work on developing such a code with the Committee.

Sub-Question 5: Should the source and extent of funding be disclosed to courts?

GLS is not opposed to the disclosing the source of funding, but is opposed to disclosing the extent of funding. LFAs are an extension of class counsel's retainer agreement with the representative plaintiff. Disclosure would imperil solicitor-client privilege and litigation privilege which, if not protected, would adversely affect access to justice for the class, risk a fair trial, and harm the administration of justice. If the terms were disclosed to the defendant (and to the public), this would present a tactical advantage to the defendant and make the representative plaintiff more vulnerable.

The following are a few of the reasons as to why disclosure of the LFA should be restricted:

1. The defendant would see the "road map" for the representative plaintiff's litigation plan with the

revelation of the limits, conditions, and staging of funding; changes in the amount of protection during the course of litigation; and, where applicable, the representative plaintiff's counsel's valuation of the claim where fees represent a percentage of the claim and change over predefined intervals;

2. If amount of insurance is known to the defendant, this would put the representative plaintiff at a disadvantage when it comes time to negotiate costs as the defendant may not settle for less than or equal to the amount of protection obtained;

3. The defendant could try to escalate the costs of the litigation beyond the coverage offered. If the representative plaintiff is unable to obtain supplementary coverage to cover the extra costs, then the litigation may need to be abandoned; and

4. The defendant may also attempt to exploit the exclusions in the LFA if they know the terms of the protection offered. This could force the representative plaintiff to abandon the claim for fear that there will be no coverage.

In short, disclosure of the LFA is outweighed by the possible deleterious effects to the representative plaintiff's and class members' privilege and access to justice.

Closing

Third party financing and insurance respond to a need in the class action space. Class counsel face significant difficulty with financing class actions given the available resources without access to third party financing. Class counsel face potential conflicts of interest for providing an indemnity to the representative plaintiff in addition to providing an indemnity that is contrary to the *Insurance Act*. Representative plaintiffs are unwilling to act unless there is insurance to protect them as an adverse cost award against them could destroy them financially.

We would be pleased to speak with the Commission at its convenience to provide any further assistance in improving the class actions process in Ontario. We can be reached at 647-427-3922 or tsang@bpfin.com.

Yours Truly,

Grace Tsang
Vice President, Legal and Compliance

Enclosures

1. Tar Ponds Press release
2. Wyeth Funding decision
3. OTLA Code of Conduct

APPENDIX A
Background

BridgePoint Global Litigation Services Inc. ("**GLS**") is the leading provider of financial services to the Canadian personal injury litigation and class action markets.

GLS (together with the rest of its affiliated companies, "**BridgePoint**") is a unique company in the Canadian class action markets. Since BridgePoint's first company was established in 2005, it has had a proven track record of providing financing solutions that meet the specialized needs of legal claimants, their lawyers and the experts involved in developing their legal claims. BridgePoint's legal risk assessment team consists of former counsel and law clerks who have experience in a wide range of areas, including personal injury and class actions, and are uniquely qualified to evaluate and underwrite applications for litigation financing solutions. Its senior management team brings over 60 years of combined investment banking, financial services and operating experience. By offering a form of responsible lending services, BridgePoint has earned the trust of the Canadian legal community and has developed relationships with over 1,000 law firms across Canada

In 2009, GLS introduced legal cost protection to the Canadian legal services market as the first private litigation finance organization in North America to obtain court approval for a litigation financing agreement ("**LFA**"). Through its affiliation with BridgePoint, GLS is the only litigation finance organization with the ability to offer integrated litigation risk management solutions – financing and legal cost protection. GLS has become Canadian counsel's "first call" when seeking litigation solutions for class actions.

BridgePoint has been on the forefront of the plaintiff settlement lending, legal expense insurance and class action industries:

1. In 2012, BICO Risk Management Inc. (previously known as BridgePoint Indemnity Company (Canada) Inc.) was established to underwrite legal cost protection risk for personal injury claims. BICO Risk Management Inc. has become the leading provider of legal cost protection in Canada.
2. In 2016, BridgePoint developed (with the Ontario Trial Lawyers Association) the Code of Conduct for litigation financing.
3. In 2016, BridgePoint participated in the British Columbia Law Institute's paper: *Study Paper on Financing Litigation*.
4. BridgePoint has been a speaker at various legal conferences on the topic of litigation financing, legal cost insurance and class actions.
5. Since 2009, GLS has set precedents for court approval of its LFAs in class actions brought in Alberta, British Columbia, New Brunswick, Nova Scotia and Ontario. This includes the decision in *Stanway* v. *Wyeth* where, in May 2014, GLS was the first litigation finance organization to obtain Court approval in British Columbia for its financing agreement[6].

[6] *Stanway v. Wyeth*, 2014 BCSC 931

APPENDIX B
Legislation that allows Representative Plaintiffs to seek Third Party Financing

Province	Legislation	Section
Alberta	*Class Proceedings Act*, SA 2003, c C-16.5	39(8) Representative parties may seek funding of their costs and disbursements from other persons and organizations, including persons who are not members of the class.

Solicitation for Contributions in a Notice of Certification

Province	Legislation	Section
Alberta	*Class Proceedings Act*, SA 2003, c C-16.5	20(8) With the permission of the Court, notice given under this section may include a solicitation of contributions from class members to assist in paying lawyers' fees and disbursements.
British Columbia	*Class Proceedings Act*, RSBC 1996, c.50	19(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.
Manitoba	*The Class Proceedings Act*, C.C.S.M. c. C130	19(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying lawyers' fees and disbursements.
New Brunswick	*Class Proceedings Act*, RSNB 2011, c.125	21(8) With leave of the court, a notice under this section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements.
Nova Scotia	*Class Proceedings Act*, SNS 2007, c.28	22(8) With leave of the court, an application under this Section may include a solicitation of contributions from class members to assist in paying solicitors' fees and disbursements
Ontario	*Class Proceedings Act*, 1992, SO 1992, c.6	17(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

CNW
A PR NEWSWIRE COMPANY

January 22, 2015 11:07 AM - Financial - Financial Services

Tar Ponds Cost Award to be Paid by Law Firms and Third Party Financing Company

HALIFAX/LONDON, ON/TORONTO, Jan. 22, 2015 /CNW/ - In March 2004, five residents of Sydney, Nova Scotia commenced a class action with respect to the contamination of their properties as a result of the operation of coke ovens and steel operations in the nearby Sydney Tar Ponds. Their properties were contaminated with highly toxic substances including, in certain instances, arsenic, lead, polychlorinated biphenyls (PCBs), and polycylic aromatic hydrocarbons (PAHs). The Governments of Nova Scotia and Canada were named as defendants for their role in the operation of the Sydney Tar Ponds and the resulting contamination.

The class action law firms, Wagners and Siskinds LLP, were retained to act on behalf of the representative plaintiffs and the class. BridgePoint Global Litigation Services Inc. provided the representative plaintiffs with a $500,000 indemnity to help offset any order made against the representative plaintiffs to pay the defendants' costs.

Although the claim was initially certified by the Supreme Court of Nova Scotia as a class action, the representative plaintiffs were not successful on an appeal before the Nova Scotia Court of Appeal. The representative plaintiffs sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. On January 15, 2015, the Supreme Court of Canada dismissed the leave application with costs.

The Nova Scotia Court of Appeal has ordered the representative plaintiffs to pay $737,876.62 to the Governments of Canada and Nova Scotia for their costs of the certification motion, the appeal and the reconsideration motion. BridgePoint Global Litigation Services Inc., will pay $500,000, and Wagners and Siskinds LLP will pay approximately $240,000 to satisfy the defendants' cost award as well as any costs ordered by the Supreme Court of Canada.

Wagners, Siskinds, and BridgePoint are proud to stand by the citizens of Sydney, Nova Scotia, and protect the representative plaintiffs against the financial consequences of adverse cost awards.

Wagners is recognized as one of Nova Scotia's leading serious injury law firms. They are dedicated to representing people whose lives have been altered as the result of a debilitating accident and are class action lawyers representing clients in Nova Scotia, New Brunswick, Prince Edward Island and beyond.

Siskinds LLP is a full-service law firm based in London, with an office in Toronto. Siskinds LLP has earned worldwide recognition for its work in plaintiff-side class action litigation.

BridgePoint Financial Group is the leading commercial provider of legal cost indemnities and disbursement financing for class action litigation in Canada. In addition, BridgePoint Indemnity Company (BICO) is Canada's leading provider of legal cost protection for personal injury litigation, providing protection for over 10,000 personal injury claims.

SOURCE BridgePoint Financial Group

For further information: CONTACTS: Raymond F. Wagner, Wagners, Halifax, Nova Scotia, Tel: (902) 425-7330; C. Scott Ritchie, Q.C., Siskinds LLP, London, Ontario, Tel: (519) 672-2251; John Rossos, BridgePoint Global Litigation Services, Toronto, Ontario, Tel: (416) 941-9485

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Stanway v. Wyeth Canada Inc.,*
2013 BCSC 1585

Date: 20130829
Docket: S111075
Registry: Vancouver

Between:

Dianna Louise Stanway

Plaintiff

And

Wyeth Canada Inc., Wyeth Pharmaceuticals, Inc., Wyeth Holdings Canada Inc., Wyeth Canada, Wyeth-Ayerst International Inc., and Wyeth

Defendants

Before: The Honourable Madam Justice Gropper

Reasons for Judgment
Re: Directions for Litigation Financing Agreements

Counsel for the Plaintiff:	D. M. Rosenberg, Q.C. D. Lennox N. C. Hartigan
Counsel for the Defendants:	W. McNamara N. D. W. Daube
Place and Date of Trial/Hearing:	Vancouver, B.C. May 8, 2013
Place and Date of Judgment:	Vancouver, B.C. August 29, 2013

Introduction

[1] The plaintiff, Dianna Stanway, seeks directions on the following questions:

a) may a court in British Columbia approve a Litigation Financing Agreement (LFA) in a class proceeding;

b) do the defendants have an interest in the approval of a LFA in British Columbia; and

c) are communications between the plaintiff and the private lender, including the LFA itself or portions thereof, privileged?

[2] This certified class action was filed in 2004. It is scheduled for trial in October 2014. Ms. Stanway hired counsel to represent her. She says she could not afford to pay for legal fees and disbursements and that counsel was therefore retained on a contingency basis. Fees and disbursements are also on a contingency basis and will only be paid if the action is successful out of the recovery.

[3] Since 2004, counsel for the plaintiff has advanced disbursements and will continue to do so as necessary. Counsel charges 10% per annum, not compounded, on these disbursements.

[4] Ms. Stanway wishes to negotiate a LFA to help cover the costs of disbursements in this action. Ms. Stanway says she will only enter into a LFA if the following terms are met:

(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.
>
> (h) Confidentiality of American documents: the Plaintiff will not provide the private lender any documents originating from the American Defendants which are subject to the Access Order of May 24, 2006. For greater clarity however, it is the Plaintiff's position that American documents which are publicly available may be shared with the private lender. This would include documents which have been filed as trial exhibits in American proceedings, or which have been posted on the internet by the University of Southern California Drug Industry Document Archive.

Legal Framework

The Legislative Framework in British Columbia

[5] The *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] grants the Supreme Court of British Columbia broad discretion to make orders it considers appropriate for the conduct of a class proceeding to ensure its fair and expeditious determination.

[6] However, the *CPA* limits the Supreme Court and Court of Appeal's jurisdiction to award costs pursuant to s. 37, which provides:

> **37** (1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.
>
> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the

> purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.
>
> (3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.
>
> (4) Class members, other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.

[7] Section 38 governs fee and disbursement agreements between the solicitor and the representative plaintiff. It provides in relevant part:

> **38** (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must
>
> (a) state the terms under which fees and disbursements are to be paid,
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
>
> (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.
>
> (3) An application under subsection (2) may,
>
> (a) unless the court otherwise orders, be brought without notice to the defendants, or
>
> (b) if notice to the defendants is required, be brought on the terms respecting disclosure of the whole or any part of the agreement respecting fees and disbursements that the court may order.
>
> …

[8] The *CPA* does not make any reference to LFAs.

[9] The British Columbia courts have not considered LFAs in the context of class proceedings.

A Comparison of Provincial Class Proceedings Regimes with Respect to Costs

[10] It is important to address the differences between the various costs regimes in place for class proceedings in provincial jurisdictions across Canada.

[11] British Columbia is a "no costs" jurisdiction pursuant to s. 37 of the *CPA*, as are Alberta and Nova Scotia. Ontario and Quebec are costs regimes and have public agencies that provide litigation funding to class action plaintiffs. In Ontario, a class proceeding fund was established under s. 59.1 of the *Law Society Act*, R.S.O. 1990, c. L.8, which is administered by the Law Foundation of Ontario. It assists Ontario plaintiffs with disbursement expenses and indemnifies plaintiffs against adverse costs awards. In Quebec, the Fonds d'aide aux recours collectifs was established by *An Act Respecting the Class Action*, R.S.Q. c. R-2.1. It is an independent agency with board members appointed by the Quebec Ministry of Justice after consultation with the Barreau du Quebec (s. 8). It may assist a Quebec plaintiff with legal fees and disbursements in exchange for a percentage of the recovery in accordance with the regulations.

[12] There is no public agency to assist class action plaintiffs with disbursements in British Columbia.

The Purpose of LFAs and Criticisms

[13] LFAs are another mechanism for raising funds for impecunious plaintiffs to cover costs and disbursements but they have been criticized as perverting one of the key purposes of class proceedings —increasing access to justice.

[14] LFAs have been approved in Ontario (*Fehr v. Sun Life Assurance Co. of Canada*, 2012 ONSC 2715, *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785 and *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2012 ONSC 2937), Alberta (*Hobsbawn v. Atco Gas and Pipelines Ltd.* (May 14, 2009), Calgary 0101-04999 (A.B.Q.B.)) and Nova Scotia (*MacQueen v. Sydney Steel Corp.* (October 19, 2010), Halifax 218010 (N.S.S.C.)).

[15] Adrian C. Lang and Samaneh Hosseini helpfully summarize the concerns expressed in the Ontario decisions about LFAs in their article "The Absent Party: An Examination of Third-Party Funding of Class Actions in Canada" (2013) 41:1 *Advocate's Quarterly* 1 at 18:

> In the decisions released to date, the Ontario courts have found that third-party funding arrangements are not *per se* contrary to the law of maintenance and champerty or public policy. However, the courts have indicated that such arrangements will be carefully scrutinized on a case by case basis and subjected to continued court oversight. By way of summary, the courts have identified the following approaches that will be taken with respect to motions for the approval of third-party funding arrangements:
>
> - 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. The cases to date make it clear that whether the reasonableness of this amount can be ascertained at the early stages of litigation may depend on whether the funder has agreed to cap its fees. While in *McIntyre Estate* [*v. Ontario (Attorney General* (2002), 218 D.L.R. (4th) 193 (O.N.C.A.) at paras. 79 - 80] and *Metzler* [*Investment GMBH v. Gildan Activewear Inc*. (2009), 81 C.P.C. (6th) 384 (O.N.S.C.)] the courts held that it was not possible to assess the reasonableness of fees based on a percentage of recovery at the early stages of litigation, such proposed fees were approved as reasonable in *Dugal* and *Sino-Forest* where the funder had agreed to a cap;
> - 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. For instance, in *Metzler*, the court held that a term allowing the funder to terminate the funding agreement without cause created the potential for conflict of interest as it created the potential for the funder to influence the decision-making within the litigation to fulfill its own motivations; and
> - courts have shown concern about potential improper disclosure of defendants' confidential information to third-party funders who are not parties to the proceedings.

[16] In contrast, the Alberta and Nova Scotia courts (no costs regimes) have not adopted the same critical view of LFA approval. Those courts have approved third party funding arrangements on an *ex parte* basis without releasing reasons (18).

[17] Lang and Hosseini suggest that there are additional concerns with third-party litigation funding that have not, as of yet, been addressed by the courts. These concerns include "to what extent costs indemnities outsourced to third parties who are removed from the litigation process will be counterproductive to the principle that in appropriate cases, costs should be awarded against unsuccessful representative plaintiffs" (19) and "shifting of costs awards onto third parties is the risk that plaintiffs who are no longer responsible for paying adverse costs awards will turn down reasonable settlement offers and thereby protract litigation and drive costs up further" (20).

Issues of Privilege and Standing with Respect to LFAs

[18] As reviewed above by Lang and Hosseini, a central concern of courts and defendants with respect to LFAs has been improper disclosure of privileged information. This concern was disposed of in *Fehr*. In that decision, Mr. Justice Perell held that LFAs are not privileged. He considered that in a class proceedings context, privilege over a contingency agreement is more illusory than real because an agreement regarding the funding of litigation does not involve solicitor/client communications. He found at para. 77:

> In the case at bar, at this juncture, the nature of the third party agreement is not known, but I foreshadow the discussion below to say that in determining whether to approve a third party agreement, it will be necessary to consider the particularities of the funding agreement. I also foreshadow to say that in my opinion, disclosure of the type and details of the third party funding to the defendant is in the interests of the administration of justice and disclosure to the defendant may help fill an adversarial void in the process of approving or refusing third party funding agreements.

[19] Perell J. held it would be unnecessary and improper for a LFA to disclose information about the merits of the litigation or its conduct because disclosure of

such information would indicate that the third party financer had assumed control of the client's litigation (at para. 130).

[20] He further considered that no privilege attaches to the term of a LFA because it is waived. He observed:

> [139] It is arguable that when a plaintiff applies for third party funding, among other things, he or she puts in issue who is actually controlling the litigation and whether the third party funding agreement is champertous or in compliance with any regulatory regime that might apply. The terms of the agreement may have implications to whether the representative plaintiff and Class Counsel have conflicts of interest. In these circumstances, fairness requires that any privilege associated with the terms of the third party funding agreement be treated as waived.
>
> …
>
> [142] But I add the observation that because there is no privilege in the third party funding agreement, then as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement.

[21] Perell J. recognized the need for transparency in the LFA approval process. He agreed with the conclusions reached by Mr. Justice Strathy (as he then was) in *Dugal* that third party funding agreements were not categorically or necessarily champertous and that there were reasons to approve the third party funding agreement, such as promoting access to justice. However, Perell J. adopted a stricter view of court oversight required for LFAs. He added that the court's jurisdiction over the management and administration of proposed and certified class actions entails that a third party funding agreement must be promptly disclosed to the court and that it cannot come into force without court approval. It must be transparent and it should not be allowed to operate clandestinely (paras. 89 - 90).

[22] In this spirit of greater transparency, the Ontario courts have granted standing to defendants to appear at motions for the approval of LFAs for the following reasons:

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.S.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 financer is not controlling the litigation.

[23] A defendant's right to standing in British Columbia is less certain. Section 38(3) of the *CPA* provides that agreements respecting fees and disbursements between a solicitor and the representative plaintiff may be brought without notice to the defendants. There is no equivalent provision under the Ontario *Class Proceedings Act*, 1992, S.O. 1992, c. 6. This distinction arises from the no costs regime in place in British Columbia. However, it is not clear that the concerns relating to LFAs are diminished in a no costs regime.

Position of the Parties

The Plaintiff

[24] The plaintiff argues that the LFA should be approved in the British Columbia Supreme Court as it advances the best interests of the class members. It also promotes access to justice and greater consumer choice. Finally, it allows plaintiff's counsel to focus on litigating the matter rather than devoting time to addressing the funding of disbursements.

[25] In any event, she says that costs awards are not relevant in British Columbia and the plaintiff will not seek costs indemnity from a private financer.

[26] The plaintiff says the conditions she has set out in the proposed LFA address the concerns raised by the defendants. The terms (particularly paragraphs 4 (g) and (h)) ensure the implied undertaking rule is complied with and the private financer is not controlling the litigation.

[27] The plaintiff also notes that in accordance with s. 38(3) of the *CPA*, the defendants do not have standing to appear on a LFA motion and are not entitled to notice. She points to the no costs regime in Alberta and Nova Scotia, where the courts have approved LFAs under seal through *ex parte* motions.

[28] The plaintiff maintains that some communications must remain privileged. She will have to engage in confidential communications with a private financer. The confidential communications will include an opinion letter from her counsel concerning the merits of the litigation and a litigation budget in respect of the amount of money needed. The plaintiff argues that these "highly sensitive topics" reveal her litigation strategy and trial stamina. Disclosure of this information to the defendants would put her at a severe disadvantage. She refers to *Fehr*, where Perell J. held that while the LFA may not be privileged, other communications related to the agreement are "no business of the defendant" (para. 161).

[29] The plaintiff says that if a LFA is successfully negotiated and approved by this Court, she anticipates disclosing certain terms of it to class members in the notice of certification. The notice will include the fact that a LFA has been negotiated, the incremental costs of the LFA to class members and the right of class members to exclude themselves from the litigation and the LFA by opting out and in. The defendants would receive that information in the finalized notice.

The Defendants

[30] The defendants assert third party funding is a significant issue and has been addressed by different provinces in different ways. They submit that each jurisdiction must develop a practice that is in accordance with the governing legislation for class proceedings.

[31] The defendants say that the plaintiff, thus far, has not disclosed most of the details concerning her intended proposal. It is therefore premature to consider its approval.

[32] The defendants say that even where a LFA can enhance access to justice, this benefit must be balanced against risks, including concern for the torts of maintenance and champerty and the integrity of the court process when it is used as a vehicle for profit or an instrument in the pursuit of an interest other than that of the litigants. The LFA may interfere with the plaintiff's control of litigation. The LFA might encourage the commencement of litigation that would not otherwise be undertaken or continued. The LFA may compromise a lawyer and client relationship and impair the lawyer's professional judgment and carriage of litigation on behalf of the client. Confidential or privileged information may be disclosed to the third party financer. The defendants further note that the third party financer owes no duty of loyalty to the plaintiff as counsel does in a contingency agreement.

[33] The defendants assert that the British Columbia legislature has chosen to address and balance the financial risk to a class action plaintiff by enacting a no costs class action regime. This legislative decision does not support the inference that LFAs should be made available to class action plaintiffs in this province. The defendants argue that the benefit to the plaintiff arising from the approval of a LFA is limited in any event; it is a benefit solely to plaintiff's counsel.

[34] In addition, the defendants argue that the LFA should not be privileged. The defendants must know the case to which they are responding. The Court cannot simply rubber stamp a LFA; rather, it is required to examine and consider its particulars. The Court should have the benefit of the defendants' submissions. In order to make those submissions, the defendants must have access to the LFA. As LFAs are controversial and import serious risks to the integrity and administration of justice, the approval process for a LFA must be transparent.

[35] The defendants argue that they have standing on a motion for approval of a LFA for the reasons set out by Perell J. in *Fehr* at para. 108. The court's practice in respect of *ex parte* submissions has been to only accept them where the delay associated with notice would result in harm or where there is fear that another party will act improperly or irrevocably if notice is given: *Ruby v. Canada (Solicitor*

General), 2002 SCC 75 at para. 25. The defendants argue that they must be afforded an opportunity to be heard as their interests are affected by the introduction of a third party with a specific financial interest in the action against them. Accordingly, they should be given the opportunity to make submissions and provide crucial assistance to the Court.

[36] Finally, the defendants submit that s. 38 of the *CPA* is not applicable as it addresses the approval of an agreement respecting fees between a representative client and her solicitor, not financial arrangements involving a third party.

Analysis

May a British Columbia Court Approve a LFA in a Class Proceeding?

[37] I do not agree with the defendants' position that because the legislature has not specifically referred to LFAs in the *CPA*, they are not available in British Columbia. Indeed, they have been approved in other jurisdictions in spite of there being no reference to a LFA in the governing legislation. Section 12 of the *CPA* gives the Supreme Court of British Columbia broad jurisdiction to make appropriate orders. This similar provision has been relied on by the courts in Ontario and other provinces to approve LFAs provided that certain conditions are met.

Do the Defendants Have an Interest in the Approval of a LFA in British Columbia?

[38] I accept the defendants' position that the LFA may affect their interest in that it introduces a third party with a specific financial interest in the action against the defendants. I also accept that it is a principle of natural justice that a person whose interests are affected by a proceeding be given an opportunity to speak to it. The courts and commentators have raised serious concerns in relation to the approval of LFAs. I have already referred to those concerns as summarized by Lang and Hosseini. The authors' additional concerns are clearly relevant to a costs regime but, in my view, are not relevant to my consideration to a LFA in British Columbia, a no costs regime.

[39] The plaintiff has specifically addressed those concerns in the conditions upon which she will enter into a LFA.

[40] No provision similar to s. 38 of the *CPA* exists in the Ontario legislation. The defendants point out, and I agree, that this provision only refers to agreements between the representative plaintiff and her counsel, not LFAs in particular. While it may be argued that LFAs are an adjunct to the contingency fee agreement, particularly in respect of disbursements, I do not consider that provision stands for the authority that the approval of a LFA is to be done on an *ex parte* basis.

[41] I am convinced that the defendants' input will be of crucial assistance to the Court and on that basis I find it is appropriate to give the defendants an opportunity to make submissions.

[42] I must consider whether the funding agreement appropriately manages the risks to the plaintiff's control of the litigation, the independent professional judgment of counsel and disclosure of sensitive information. While I do not in any way impugn plaintiff's counsel's ability to address these matters, I consider the defendants' participation to be advantageous. This is particularly so in the circumstances of this case where the matter has been certified and there have been several pretrial applications which I have heard and determined. If the representative plaintiff proposed a LFA at the commencement of the litigation, I may have reached a different conclusion.

Are Communications between the Plaintiff and the Private Lender, Including the LFA Itself or Portions thereof, Privileged?

[43] Since I have determined the defendants must have the opportunity to make submissions on the LFA, I do not find that the entire LFA is privileged. Certainly, the confidential communications between the plaintiff, her counsel and a private financer in respect of the merits of the litigation and the litigation budget will be privileged, as well as highly sensitive topics relating to the plaintiff's strategy and trial stamina. There are other features of the LFA to which the defendants will be entitled to access, specifically those addressing the specific concerns which the defendants

raise, including their concerns that the implied undertaking rule is observed and that the private financer is not controlling the litigation.

Conclusion

[44] A LFA may be approved in British Columbia.

[45] Despite this being a no costs regime, it is of benefit to the Court to have the defendants' submissions in respect of particular aspects of the LFA. In future cases, the defendant may not always be granted with respect to applications for court approval of LFAs.

[46] The LFA is subject to privilege in respect of specific aspects: litigation strategy, litigation budget and other "highly sensitive" aspects.

"Gropper J."

OTLA Policy regarding Litigation Loan Companies

OTLA has determined that it should only have business relationships with entities that meet certain criteria which OTLA has deemed to be in the best interests of accident victims who purchase these products. This policy also has a supporting procedure which outlines how the policy will be implemented.

1. Review and Approval

Any litigation loan company that wishes to sponsor or exhibit at OTLA conferences and events, and/or to advertise in OTLA publications, must comply with the requirements of the this policy and of the supporting procedures. Companies must complete the application process and be approved prior to being permitted to attend at any OTLA conference, advertise in any OTLA publication, speak at or sponsor or exhibit at any OTLA event, or otherwise be affiliated with OTLA.

2. Responsibility of Companies

Companies governed by the policy must agree that:

a) Providers of products and services to personal injury claimants owe a responsibility to clients and their lawyers, to ensure their products/services are suitable;
b) the terms of any loan or insurance are straightforward and transparent;
c) there are no conflicts of interest and no interference or control of litigation;
d) client confidentiality and privilege are protected; and
e) the client's fundamental right to 'access to justice' is enhanced.

3. Requirements of Companies

Companies governed by the policy must:

a) Agree to operate in compliance with all Canadian laws;
b) 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);
c) Agree that the company's website, promotion materials and legal documentation shall be clear and transparent;
d) 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,

e) 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;
f) Agree to be responsible for compliance with applicable financial industry protocols;
g) Avoid any conflict of interest or potential conflict of interest;
h) Refrain from paying any referral fee or transfer of funds to any party;
i) 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;
j) Refrain from requiring the client or legal counsel to provide privileged information as a requirement of entering into a business relationship with a client;
k) Agree to protect client confidentiality and client privilege;
l) Agree to require all claimants to discuss, with their lawyers, their intention to borrow before proceeding with the loan process.

4. Oversight

This policy shall be administered by OTLA's Practice Direction Committee. The Committee will establish procedures for reviewing that companies governed by this policy are compliant. The Committee will further establish procedures to deal with complaints made by OTLA members, clients or other companies who allege that another company is being non-compliant.

If a company is found to be non-compliant, the Practice Direction Committee shall take the appropriate action which may include, but is not limited to, sending a letter of warning, issuing a temporary suspension for a period of time or until certain conditions are met, or permanently banning a company from being associated with OTLA.

Policy Approved: October 27, 2015

OTLA Procedure related to Policy on Litigation Loan Companies

OTLA has established a policy that we should only have business relationships with entities that meet certain criteria which OTLA has deemed to be in the best interests of accident victims who purchase these products. This procedure outlines how the policy will be implemented and monitored.

1. Review and Approval

Any litigation loan (the "company") that wishes to sponsor or exhibit at OTLA conferences and events, and/or to advertise in OTLA publications, must comply with the requirements of the OTLA Policy regarding Litigation Loan Companies (the "policy"). The company must submit a letter of application to the CEO of OTLA for consideration.

The following documents should be attached to the letter of application:

a. Copies of any and all applications, agreements and contracts that the company would ask either the lawyer and/or the client to sign in applying for a litigation loan or legal cost insurance/indemnity product.
b. A signed undertaking, confirming that the company complies with OTLA's policy and that the company will advise immediately if and when it no longer complies with OTLA's policy.

The application will be reviewed initially by OTLA's CEO to ensure it is complete and then forwarded to the Practice Direction Committee for further review and, if appropriate, approval. The Practice Direction Committee may approve the application or may submit it to the Executive Committee and/or the Board of Directors for further review and consideration.

Applications will be reviewed in as timely a manner as possible and there is no guarantee as to the time it will take which is dependent upon committee meeting times.

Companies that have been approved will be entitled to sponsor or exhibit at OTLA conferences and events and/or to advertise in OTLA publications, subject to review from time to time, as the Practice Direction Committee, Executive Committee, and or the Board of Directors deems appropriate.

2. Criteria to be Considered

OTLA will consider the following criteria in reviewing an application from a company:

a) The suitability of the products/services being offered by the company;
b) The transparency and clarity of the terms of all promotional material offered by the company;
c) The transparency and clarity of the terms of any loan, insurance or indemnity being offered;
d) Transparency and clarity regarding all terms, including details concerning all fees and administrative charges, minimum loan periods, and rates of interest (including simple charts);
e) The extent of involvement of the company in the file including any potential for interference with, or control over, the litigation;
f) Any conflicts of interest, or potential for conflicts of interest;
g) Submission of their company's compliance with applicable financial industry protocols;
h) The protection of client confidentiality and privilege;
i) Whether the company requires the lawyer to provide a written analysis or opinion as to the merits of the client's case, and whether they otherwise ask for more than an overview of the file and confirmation that the claim is meritorious;
j) Whether the company offers alternative, less expensive options, such as periodic payments;
a) Whether the company makes efforts to obtain sufficient information about the claimant as to ensure that the requested loan is appropriate, in the circumstances, for that claimant;
b) Whether the company encourages a claimant to speak to his/her lawyer before entering into a litigation loan agreement;
k) The right of clients to make all critical decisions in their case;
l) Issues of champerty and maintenance; and
m) The enhancement of the fundamental rights of clients to access to justice.

3. Monitoring Complaints and Reporting

The Practice Direction Committee shall report regularly to the Board on issues related to the Policy and Procedure regarding Litigation Loan Companies and Legal Cost Insurance/ Indemnity Companies.

4. Membership Training

Training opportunities will be made available to members on an ongoing basis to inform them of potential issues related to this subject. These may occur in the form of webinars, conference presentations, *Litigator* or newsletter articles or possibly roundtables.

The matter will also be referred to the OTLA code Committee for a possible 'Opinion' statement to provide further direction to the members of OTLA.

Procedure Approval: October 27, 2015