

## **EDUCATIONAL NOTE REGARDING LITIGATION FUNDING APPROVAL MOTIONS**

This Educational Note is effective as of September 2020 and relates to Superior Court of Justice proceedings under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”).

- The purpose of this Educational Note is to assist counsel in preparing materials and argument for motions to approve litigation funding agreements in class proceedings.

- **ISSUES TO CONSIDER ON THIRD PARTY FUNDING MOTIONS**

On a motion seeking approval of a litigation funding agreement, the moving party should be prepared to address considerations that include the following:

- (a) whether the litigation funding agreement impairs the lawyer-client relationship;
- (b) whether the litigation funding agreement impairs or compromises the lawyer's duties of loyalty or confidentiality, including the carriage or control of the litigation on behalf of the proposed representative plaintiff or class members;
- (c) whether the litigation funding agreement diminishes the proposed representative plaintiff's rights to instruct counsel and control the litigation;
- (d) whether the proposed representative plaintiff received independent legal advice with respect to the funding agreement;
- (e) whether the litigation funding agreement over-compensates the litigation funder for assuming the risk of an adverse costs award;
- (f) whether the litigation funding agreement contains a term confirming that the funder is bound by the deemed undertaking rule and also bound to keep confidential any privileged information;
- (g) whether the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the litigation funding agreement.

**3. PRINCIPLES TO CONSIDER ON LITIGATION FUNDING MOTIONS PER THE CPA AND THE DECISION IN *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974 (affirmed in *Houle v St. Jude Medical Inc.*, 2018 ONSC 6352 (Div. Ct.))**

- (a) litigation funding agreements are not *per se* illegal on the grounds of champerty or maintenance;
- (b) court approval is required before a litigation funding agreement will be operative and in force and shall be sought as soon as practicable after the agreement is entered into, with notice to the defendant;
- (c) the court has jurisdiction to make an approval order binding on the class pre-certification of the class;
- (d) litigation funding must be transparent and reviewed by the court to ensure there are no abuses or interferences with the administration of justice;
- (e) litigation funding agreements are not, in themselves privileged documents;
- (f) the court must be satisfied that, as a result of the litigation funding agreement, the representative plaintiff will not become indifferent to providing instructions to class counsel in the best interests of the class members;
- (g) the court must satisfy itself that the proposed litigation funding agreement is necessary in order to provide the proposed representative plaintiff and the class members with access to justice;
- (h) it is not necessary for the proposed representative plaintiff to first apply to the Class Proceedings Fund before a proposed litigation funding agreement with a private funder will be approved;
- (i) if funding was sought from and denied by the Class Proceedings Fund, the court shall not take that fact into account in determining whether or not to approve the litigation funding agreement;
- (j) the court may take into account the Class Proceedings Fund's uncapped 10% net levy on recovery to assist it in determining whether the proposed litigation funding agreement is fair and reasonable in all of the circumstances;

- (k) the proposed litigation funding agreement must be served on the defendant, but the plaintiff may redact any information in the agreement which may reasonably be considered to confer a tactical advantage on the defendant;
- (l) the unredacted litigation funding agreement must be provided to the judge, but shall not form part of the court file.

Balancing of what is fair and reasonable is an exercise of the Court's discretion that will turn on the particular facts of each case.