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Civil Litigation

Litigation loan companies not on hook for $3.5-million defence legal costs in class action: court

By **Cristin Schmitz**

(October 8, 2021, 3:17 PM EDT) -- In the first known Canadian ruling on a defence motion for legal costs against non-party lenders who helped fund a plaintiff's case, an Ontario judge has refused to order four litigation loan companies to pay to the defendants in a personal injury class action a $3.5-million costs award made against the foreign plaintiff who has no assets in Canada.

Ruling for the second time on massive legal costs run up in a convoluted 22-year-long legal odyssey he called "a poster child for what our civil justice system can no longer accommodate," Ontario Superior Court Justice Mark Edwards dismissed the defence costs motion against four non-party litigation loan companies that was brought by the municipality of Clarington, Ont., Via Rail Canada, Canadian National Railway, and several other defendants in a personal injury class action arising out of a 1999 railway accident: *Davies v. Clarington (Municipality)*, 2021 ONSC 6449.

"While the litigation loan providers may have provided loans to [the plaintiff] with what many would describe as exorbitant rates of interest, it is difficult to see how the extension of such loans amounts to the type of abuse of process canvassed" in *1318847 Ontario Limited v. Laval Tool & Mould Ltd.* 2017 ONCA 184, and in *Marcos v. Lad* 2021 ONSC 4900, Justice Edwards wrote in declining to exercise what he said was his inherent jurisdiction to make a costs award against a non-party.

His judgment, which may well be appealed, appears to be a first in Canada, with Justice Edwards himself observing that the apparent costs test case involves "novel arguments that this and other courts will have to deal with now and in the future."

"While our courts have begun to address issues arising out of the greater prevalence of litigation loans in the civil justice system — and in particular in the context of class actions, there does not appear to be any direct authority in Ontario, or for that matter in Canada as a whole, where a defendant has either sought, let alone obtained, an order against a non-party litigation loan provider to pay a costs award ordered against a party in a civil action," the judge said.

His reasons for judgment examine, and put forward for discussion and consideration by the litigation bar and their clients, the costs approach to litigation funding in England and Wales — which considers that a professional funder who finances part of a claimant's costs of litigation can be liable for the costs of the opposing party to the extent of the funding the lender provided.

Justice Edwards also expresses the view that the litigation loans in the case before him qualified as "third-party funding agreements" which, at common law, required court approval "as soon as practicable" after the agreement was entered into, and with notice to the defendants (notwithstanding that the loans were taken out before such a requirement was "codified" in s. 33.1(2) of Ontario's *Class Proceedings Act*).

The judge also said that once a defendant becomes aware of the existence of litigation loan agreements with the plaintiff, timely notice must be provided to litigation loan funders where the defence intends to seek costs against the lenders as non-parties.

The Lawyer's Daily had not heard back at press time from counsel for the defendants.

Counsel for one of the lenders, Seahold Investment Inc., Ron Aisenberg of Toronto's Kronis, Rotsztain, Margles, Cappel LLP, declined comment, given that the appeal period is still running.

Chief risk officer and general counsel for BridgePoint Financial Services Amanda Bafaro

Amanda Bafaro, chief risk officer and general counsel for BridgePoint Financial Services Inc., another of the lenders, said "we are pleased by the court's decision, which was the only one we believed possible with respect to BridgePoint's funding. Unlike the other named lenders, BridgePoint had no direct relationship to the plaintiff," she said, asserting that what existed was a line of credit to the plaintiff's law firm. "BridgePoint believes the court came to the correct decision on the issue of awarding costs. The law in Canada is settled on this point, and based on the facts of this case, there was no legal basis on which to make such an award against BridgePoint."

Bafaro also highlighted as positive the judge's *obiter* comment, in para. 114 of his judgment, that: "Where need can be demonstrated for a litigation loan; where an advance payment has been refused by the defence and where there has been disclosure to the defence of the litigation loan details, one can foresee possible successful requests by the plaintiff to treat litigation loan interest as a disbursement."

Suggested Bafaro, "the judge has put the defence bar on notice: where, to date, the Ontario courts have been very conservative in their approach to loan interest, the door is definitely now open," she advised. "A very positive takeaway is the clear message that defendants may now be exposed for interest on third-party funding incurred by a plaintiff where the appropriate notice has been given. Insurers deny most advance payment requests by plaintiffs on a knee-jerk basis and with impunity to this point. So much so that many lawyers don't even bother asking third parties for funding. Hopefully, this decision marks a turning point."

Bafaro also said the judgment causes confusion by taking too broad a brush to lenders. "Litigation funding now assumes so many forms and structures that it can't be broadly painted as the court in *Davies* has attempted to do," she said. "Attempting to use one broad brush to paint the entire market won't work."

She said BridgePoint had a credit facility with the plaintiff's law firm, "much like any bank line of credit used by personal injury law firms to support the demanding cash requirements of a contingency fee-based practice. Like any traditional line of credit, the funds borrowed by the firm were full recourse and guaranteed, the law firm required to service the loan whether their cases are successful or not. This is an important distinction that the court brushed over when it lumped all the lenders into one bucket."

She stressed that law firms are not parties to their client's lawsuit. "There is no obligation on them to disclose their law firm financing arrangements to [defendants'] insurers. To suggest otherwise is unsupportable. We respectfully disagree with the comments in *obiter*."

The defendants in the class action were found liable for the railway accident and settled with almost all the class members.

However, a 106-day trial followed to assess the personal injury damages for a single class member, a Polish national named Zuber, who claimed $50 million in damages, largely for lost income. He was awarded at trial $50,000 in general damages, plus $250,000 in partial indemnity costs against the defendants (the damages award is under appeal).

In a previous costs decision, Justice Edwards refused to allow Zuber to claim as a disbursement any of the approximately $5.5 million in interest he now owes to the four litigation loan companies on total loan principals currently totalling about $500,000: *Davies v. Clarington (Municipality)* 2019 ONSC 2292.

The defendants subsequently moved before Justice Edwards to recoup their partial indemnity costs, awarded in 2019 against Zuber, fixed at about $3.5 million, from the litigation funders Lexfund Inc., Seahold Investments Inc., BridgePoint Financial Services Inc. and Yorkfund Investments Inc.

The defendants argued that the various loans made by the non-party litigation loan companies to help Zuber fund his case over the years were champertous and abusive and therefore the lenders should pay the defence costs previously awarded by the court.

Justice Edwards described the interest accrued and still owing by Zuber as "unconscionable" adding that "the loan agreements did nothing to advance the cause of justice in this case."

But unlike litigation loan agreements in some cases and unlike contingency agreements between lawyers and clients, the various loan agreements here did not give the lenders a share of any damages, nor did they permit the lenders to control or direct the litigation.

"I do not accept that on the facts before this court that the extension of loans to Mr. Zuber amounts to the type of abuse of process envisaged by the Court of Appeal in *Laval Tool* such that this court should exercise its inherent jurisdiction to award costs against a non-party," Justice Edwards concluded.

The judge went on to urge the defence and plaintiffs' civil litigation bar and all litigation users to open up discussions on "the whole issue of litigation costs," including the cost of disbursements and litigation funding, as "the cost of civil proceedings in this province and the country at large present a massive impediment to the ability of most Canadians to access to justice."

He put forward the approach of the English courts with respect to litigation loan providers and their exposure to paying the defendant's costs as a possible part of that discussion.

In his reasons, the judge observed that the case did not settle — despite two pretrial defence offers which exceeded the plaintiff's 2018 $50,000 trial award -- largely because the litigation loans to the plaintiff, at high rates of interest — so greatly exceeded the settlement offers (and even more so the ultimate court award) that the plaintiff would have been left in the hole after paying the litigation loan costs — creating "a massive impediment" to resolution. "The argument and facts of this case demonstrate the need to seriously question how, if at all, a litigation loan will provide access to justice to a Plaintiff in need of financial assistance," the judge said. "This court will never know if an out-of-court resolution could have occurred if Mr. Zuber did not have the massive interest debt he owed to the various litigation loan providers. We do know that his own counsel has expressed his view to this court that the defendants' offers to settle could never have been accepted by Mr. Zuber because of the debt owed to the loan providers. If he had accepted the defendants offer Mr. Zuber would have been left with nothing for himself. Such an outcome is absurd."

The judge echoed comments made earlier by a judge in a different case. "The loan agreements did nothing to advance the cause of justice in this case."

The liability trial of the class action lasted 40 days (ending in a 2008 settlement with respect to a 1999 train derailment by nearly all the class members except Zuber). The damages trial place over 106 days between 2014 and 2017.

Zuber offered to settle for $26.2 million (plus costs) in 2014.

The defendants twice offered to settle: in 2009 for $150,000 (inclusive of prejudgment interest) plus costs and, on the eve of trial in June 2014, $500,000 inclusive of prejudgment interest, plus costs to be assessed or agreed on.

The defence did not learn of the existence of litigation loans until 2012, and did not obtain the loan

documents until 2014.

The four defendants were awarded about $2.5 million in legal costs in 2019 (now grown to about $3.5 million).

The litigation loan companies separately lent the plaintiff a total of about $500,000, at annual interest rates ranging from 18 per cent to 28 per cent (some compounded monthly), pushing Zuber's total loan principal and interest to more than $6 million so far. He is a Polish national and has no assets in Canada.

If you have any information, story ideas or news tips for The Lawyer's Daily, *please contact Cristin Schmitz at* Cristin.schmitz@lexisnexis.ca *or call 613 820-2794*.
