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Blaney McMurtry
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Commercial Litigation Update

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This newsletter is designed to bring news of changes to the law, new law, interesting decisions and other matters of interest to our commercial litigation clients and friends.
We hope you will find it interesting, and welcome your comments.

Feel free to contact any of the lawyers who wrote or are quoted in these articles for more information, or call the head of our Commercial Litigation group:

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"...business people are now financing litigation for strangers in Ontario with a view to turning a profit, and this is emerging as big business."

THIRD-PARTY FUNDING OF COMMERCIAL LITIGATION IS BECOMING INCREASINGLY COMMON IN ONTARIO

Catherine MacInnis

Commercial actors who want to begin a lawsuit in Ontario but don't have the money on hand or want to minimize their costs may turn to third parties to help them in funding the litigation.

Courts have traditionally taken a dim view of third-party litigation funding. Today, however, as the costs of civil litigation rise in Ontario, the courts appear to be reconsidering their traditional stance on "litigation trafficking" in favour of encouraging more access to justice.

In that context, business people are now financing litigation for strangers in Ontario with a view to turning a profit, and this is emerging as big business.

While this funding has the potential to ease the financial burden on plaintiffs, there are inherent risks in it that must be managed appropriately. Parties considering third-party litigation funding must work with counsel to ensure that their best interests are being served.

The long-standing disdain for third-party litigation funding was born from the idea that allowing pathological profiteers to run lawsuits in which they had no legitimate interest encouraged frivolous litigation and was contrary to the public interest.

In fact, until relatively recently such agreements were usually found to be illegal. To be sure, third-party litigation funding raises many ethical issues for lawyers, chief among them: potential pressures on confidentiality and lawyer-client privilege because the people paying the piper are neither a party to the dispute nor that party's lawyer.

The reality is, however, that without these sources of funding, a certain percentage of legitimate civil cases may never see the light of day. The question is: at what price?

There are three types of litigation funding that we see emerging:

1. Third-party funding for class actions;
2. Litigation loans for individual civil litigants; and
3. Funding agreements between financing companies.

1. Recent Developments in Third-Party Litigation Funding in Class Actions

In May, 2012, Justice Paul M. Perell of the Ontario Superior Court of Justice issued a decision in *Febr v. Sun Life Assurance Co. of Canada* that, while going a long way towards legitimizing third-party litigation funding in class actions, also sought to create some ground rules. In particular, Justice Perell found that third-party funding in class actions must be transparent and must be reviewed by the courts to ensure that there are "*no abuses or interference with the administration of justice*." Justice Perell also refused the

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"Given that commercial litigation funding is a relatively new phenomenon that is virtually unregulated in Ontario, it is not surprising that a few opportunists have emerged."

Catherine MacInnis is a member of Blaney McMurtry's Commercial Litigation Group. She provides practical business advice to domestic and international clients on a broad range of matters, including contractual and commercial disputes, class actions, shareholder and partnership disputes, and regulatory matters. She has acted for creditors including financial institutions and leasing companies, as well as debtors.

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plaintiffs' motion to seal the information disclosed on the motion approving the third-party funding agreement on the basis that there was no confidentiality or privilege in such agreements. (Privilege exists only between the lawyer and the client. If additional parties are involved, the privilege may be lost.)

More recently, in July, 2013, Justice Perell was again asked to approve a third-party funding agreement in a different class action: *Bayens et al. v. Kinross Gold Corporation*. This time, he took the opportunity to summarize the state of the law in this emerging field. Among other things, he found that: while third-party funding agreements are not necessarily illegal anymore, in some instances they still may be; in the class-action context these agreements must be pre-approved by the court to ensure that there is no injustice; and in order for these agreements to be legal, they must not compromise or impair the lawyer-client relationship or the lawyer's duty of loyalty and confidentiality to his client. Nor may they impair the lawyer's professional judgment in the carriage of the litigation.

For plaintiff-side class counsel, these recent cases mean that third-party funding agreements in the class action context must be disclosed quickly, and approved by the courts in a public forum. These developments also mean that parties drafting these agreements must be very careful not to include privileged or confidential information in such agreements because they will be disclosed not only to the court, but to opposing counsel and the public at large.

Once you overcome the procedural hurdles, the costs for the funding will usually be a percentage of the net recovery obtained by the plaintiff. In the *Kinross* case, that would be 7.5 per cent of the net recovery before the class action was certified, and 10 per cent afterwards. In the class action context, the fairness of these lending agreements will be determined on a case-by-case basis.

2. 'Pay-Day Loans' in the Civil Litigation Context

If you Google "legal finance in Ontario," you will find several companies operating in the province whose only business is to invest in litigation for strangers. Not all of them are reputable. Given that commercial litigation funding is a relatively new phenomenon that is virtually unregulated in Ontario, it is not surprising that a few opportunists have emerged.

In a 2011 decision of the Ontario Superior Court of Justice in *Guiliani v. Region of Halton*, Justice John Murray had to consider whether the winning plaintiff in a motor-vehicle accident case should be reimbursed for the loan interest she paid to a third-party litigation funding company. In so doing, Justice Murray was very critical of the rates of interest charged by the funding company which, in the Court's view, were usurious. Even though the terms of the loan only required the plaintiff to pay in the event she was successful, the interest charged on the loan was almost two-thirds of the amount loaned to her by the end of trial, with the funding company having an assignment of the plaintiff's right, title and interest in any proceeds from the litigation.

Justice Murray refused to compensate the plaintiff for the interest charged, noting: "*this Court should not reward, sanction or encourage the use of such usurious litigation loans*." Justice Murray was concerned that allowing plaintiffs to be reimbursed for the interest charged by the third-party lender "*would not facilitate access to justice and would probably bring the administration of justice into disrepute*." The result for the plaintiff was a substantial decrease in the net judgment she obtained.

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"A new Nova Scotia law enacted to prevent cyber-bullying could turn out to be a powerful tool for combating online harassment of your business, your professional practice, and you."

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So, while third-party litigation funding may, in some cases, increase access to justice for plaintiffs, the potential costs are significant and should be considered in advance.

3. Funding Agreements Between Commercial Actors

Funding pool agreements are the most sophisticated of the three types of third-party litigation funding agreements, and can operate as self-insurance for commercial actors in the lending business. For instance, parties that are often involved in the same type of financing agreements (a certain percentage of which have a habit of ending up in litigation) may enter into agreements in advance to manage both credit and litigation risks. One way to do this is to set aside money in a pool every time a financing agreement is struck. Should litigation arise, funds may be available in the pool to pay for it. Generally, in the event of default, only one of the parties to the funding agreement will pursue the litigation on behalf of the 'fund,' meaning that, in a technical sense, at least part of the money used to fund the litigation is derived from a 'third-party' to the action, qualifying them as third-party funding agreements.

The benefit of these agreements is that they can be tailored to the precise needs of the parties entering into them, and it is unlikely that a court will interfere with them – particularly when the bargain was reached between two sophisticated commercial actors. Unlike funding agreements in the class actions context, these agreements don't need to be approved by a court in advance. In fact, if you are lucky, there is no reason that these funding agreements will ever see the inside of a courtroom.

The only difficulty with these funding agreements is that if you do proceed to litigation with a debtor, the *Rules of Civil Procedure* in Ontario require disclosure of a broad array of documents, including insurance policies capable of responding to the litigation. As a result, parties may be required to disclose not only the existence of this type of funding agreement, but the funding agreement itself. With this in mind, counsel drafting these agreements must be careful not to include sensitive, proprietary or confidential information in such agreements. ■

LAW ENACTED TO PROTECT YOUTH FROM CYBER-BULLYING GIVES BUSINESSES A WEAPON TO BATTLE ONLINE HARASSMENT

Danielle Stone

A new Nova Scotia law enacted to prevent cyber-bullying could turn out to be a powerful tool for combating online harassment of your business, your professional practice, and you.

The *Cyber-safety Act* came into force in August. Thanks to the new *Act*, any electronic communication – including text messages, emails, and even posts on social networks – that might reasonably be expected to "humiliate, intimidate or distress" someone, or cause other damage or harm to their "emotional well-being or self-esteem or reputation" – can be the subject of a lawsuit brought under the legislated claim of "cyber-bullying."

This new form of claim is extremely broad. It applies to people of all ages (not just children), and because "person" is defined so broadly under Nova Scotia law, it also applies to corporations and other entities. It creates claims for conduct that could never be stopped under existing defamation or criminal laws. As drafted, it appears to provide a remedy to people who can establish reasonable feelings of distress or humiliation or that their emotional well-being, self-esteem, or reputation is

"While the new law might be another tool to stop unfair commercial sabotage perpetrated online, it may also be used to curtail free speech."

harmed. These legal rights run broader than traditional libel and slander law.

The *Cyber-safety Act* results from last April's attempted suicide and subsequent death of Dartmouth teenager Rehteah Parsons, which were attributed to online distribution of photos of an alleged gang rape in November, 2011.

As it turns out, however, a piece of legislation intended to protect the young and vulnerable in our society could have far-reaching consequences and could apply to situations not contemplated. What was intended to help protect our children from the consequences of online bullying may be used to check criticism of a commercial nature, too.

But this potentially attractive quality is not without its potentially unattractive consequences. While the new law might be another tool to stop unfair commercial sabotage perpetrated online, it may also be used to curtail free speech. It could stop the publication of statements that are either true or obvious opinions of the author.

It is not difficult to conceive of situations beyond classic cyber-bullying that may fall within the scope of the new legislation. Do you feel like a customer has been harsh in his criticism of your handling of his complaint? Has he posted that criticism along with your name and number on every message board he can find? Does this cause you distress? You now have a potentially new weapon in your arsenal to combat the harassment.

Has an anonymous online poster used Photoshop to transform your corporate profile photo into an embarrassing parody and then posted it online? Do you feel humiliated? The court can intervene in a multitude of ways - from putting a gag order on the cyber-bully through a protective order, to awarding monetary damages in a civil action. It can also compel Internet Service Providers to reveal the name of those anonymous cyber-bullies.

At this time, the biggest limit to this new law is jurisdictional. Only Nova Scotia has passed such a broad law, so unless you can establish a substantial connection to Nova Scotia, it will have no application. Similar laws could emerge in other parts of the country. It has already caught the attention of Alberta. It could conceivably land on Ontario's legislative agenda too.

Meanwhile, companies that are doing business in Nova Scotia or with Nova Scotians, and believe they are being maligned online have new grounds for legal action.

Ontario media and reputation lawyers will, no doubt, be maintaining a watching brief on the situation for clients doing business in Nova Scotia. They can also be expected to keep an eye out for developments in other provinces, where legislators are studying the Nova Scotia statute.

While the *Cyber-safety Act* has praiseworthy intentions, it remains to be seen how broadly it will be interpreted and whether it will survive a *Charter* challenge for being too restrictive of freedom of speech. In the meantime, and in the right circumstances, the new legislation provides a powerful tool for combating online professional, commercial and personal harassment.

(Blaney McMurtry lawyer Danielle Stone was assisted in the preparation of this article by Jessica Freiman, an articling student at the firm.) ■

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"Recent case law, however, illustrates that Courts are looking carefully at each case to determine if one party is responsible to pay monetary damages to the other when there are agreements to agree."

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AGREEMENTS TO AGREE: DO THEY BIND YOU OR NOT? COURT DECISIONS RESTING ON SPECIFIC PROVISIONS

Sarah S. Subhan

Do you have a memorandum of understanding, a letter of intent, or some other "agreement to agree" with a supplier, a customer, an adviser, a partner, a potential purchaser, or some other business party?

If you do, then you need to understand when such an agreement binds you legally because the Court is finding that some terms in some agreements to agree are "binding" while others are not.

A common principle in agreements to agree is an "agreement to negotiate in good faith." This topic was first discussed in *Deal or No Deal: Do you have a Duty to Negotiate in Good Faith?*, as published in the April 2012 issue of *Commercial Litigation Update*.

In the past, based on prior case law, one could ordinarily expect that an agreement to agree would not be enforceable on the basis that there simply was no contract. Recent case law, however, illustrates that Courts are looking carefully at each case to determine if one party is responsible to pay monetary damages to the other when there are agreements to agree.

In the case of *Georgian Windpower Corporation et al v. Stelco Inc.*, the parties were at all times dealing with each other at arm's length in a commercial context, and were of equal bargaining power for a wind power project. They entered into two agreements to agree -- a memorandum of understanding (MOU) and an Agreement to Establish a Land Lease Easement Agreement (AELLEA). After the signing of both, Stelco (the defendant) sent a letter to Georgian (the plaintiff) terminating both agreements immediately. This led to the litigation.

The Court found that there were binding *and* non-binding terms in the MOU and the AELLEA. It also found that an agreement providing for future agreement can be binding *if* the concept is sufficiently clear and discrete to enable enforcement of the agreement between the parties. This is not always something that can be determined easily after the fact, and in the midst of litigation. In making this determination, the Court will strive to see what the parties' intent was at the time they made the agreement to agree, as well as look to the specific wording in it.

In *Georgian vs. Stelco*, the plaintiff (Georgian) was entitled to damages of $75,000 in total for the wrongful termination -- $1,000 in respect of the defendant's breach of the MOU and $74,000 for the breach of the AELLEA. In making this finding, the Court also found that there was no contractual duty to negotiate in good faith in the circumstances surrounding this particular case. However, the Court distinguished between a case where there is an existing preliminary agreement between the parties and where one of the parties has agreed to use best efforts to carry out a specific term of the agreement and the case where the parties have merely agreed to use best efforts to carry out future negotiations.

Whether a specific term will be found to be enforceable will likely depend on whether there are sufficient criteria to allow the subject variable (the term in question) to be isolated and to stand on its own unambiguously, so as to constitute a true reality - something that can be performed.

The movement away from the principle that 'if there is no contract, then there is no breach of con-

"In the absence of the enforceability of [good faith] provisions, lawyers will have to find other provisions to assure clients who might otherwise be deterred from proceeding with preliminary agreements."

tract' is also evident in *Molson Canada 2005 v. Miller Brewing Co.* In this case, Molson was seeking injunctive relief to prevent Miller from terminating the licence Miller had with Molson. Pending the trial, scheduled for December 2013, Miller was required to continue its Canadian licensing arrangement with Molson.

In this particular matter, since 2010, Molson had failed to meet the targets set by the licencing agreement, as the volume of some Miller brews sold each year in Canada had declined. Given the changing Canadian beer market, the parties got together to negotiate.

The negotiations centred on a possible amendment to the Industry Standard Bottle Agreement (ISBA), which standardizes production of Canadian bottled beer and requires the dark brown glass bottle. One of the hallmarks of many Miller brews is that they are packaged in clear bottles, and because of the ISBA, the clear bottles must be imported from abroad, which adds costs. The parties hoped that the ISBA would be amended to allow for local production of clear bottles, and a letter of intent was drafted in anticipation of this possibility.

Immediately following the letter of intent, the parties signed an amendment to the licensing agreement providing that if the ISBA did not allow for local production of clear bottles, then the parties would negotiate in good faith, and specifically would negotiate about volume targets, marketing and equitable profit splitting.

A short while later it became clear that the ISBA would not likely be amended to allow local production of clear bottles, and Miller began exploring the option of selling its brand beers in Canada without Molson. Ultimately, Miller attempted to terminate the licensing agreement, which sparked the action and the request for injunctive relief.

In the written reasons for granting Molson's request to prevent Miller from terminating the licencing agreement, Mr. Justice Herman J. Wilton-Siegel of the Ontario Superior Court of Justice stated as follows:

> Ultimately, any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed. The issue is not whether a court should imply an obligation to negotiate in good faith as a matter of commercial morality, but rather whether the parties themselves understood from the circumstances which an express commitment to negotiate in good faith was given, and intended in those circumstances, that any breach of the specific commitment was to have some legal consequences.

This reasoning is understandable, as it was apparent from wording in the agreement to agree that the parties had committed to work through their issues despite the difficult market.

Parties rely on good faith provisions by revealing proprietary information, investing time and money in projects, and securing or extending credit. In the absence of the enforceability of these provisions, lawyers will have to find other provisions to assure clients who might otherwise be deterred from proceeding with preliminary agreements.

With all of this being said, an important basic lesson with respect to developing and implementing agreements to agree persists -- take care when drafting and before signing any type of negotiation agreement, as you may find yourself bound to

"John is the director of the HCLA's pro bono legal clinic, which offers free legal advice to disadvantaged members of our community."

something before you are ready or, alternatively, believing you have rights when you do not. ■

SPOTLIGHT: JOHN POLYZOGOPOULOS

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John Polyzogopoulos is a partner in Blaney McMurtry's Commercial Litigation Group, with a practice covering a wide variety of commercial and business disputes. He has appeared before all levels of court in Ontario as both trial and appellate counsel, as well as before the Supreme Court of Canada and the Nunavut Court of Justice. He also practices in the area of alternative dispute resolution, advocating for clients before private arbitrators and mediators.

Some of John's representative clients include banks and other financial institutions, receivers and trustees in bankruptcy, various public and private corporations and governments, sports leagues and federations, as well as professionals and individuals.

John has a wealth of experience with the *Business Corporations Act*, acting on behalf of business professionals who are being unfairly treated or oppressed by their partners or co-shareholders, so that they can refocus on growing their businesses. He also helps clients in all aspects of financial restructuring and asset recovery law. John has extensive experience in detecting and investigating fraud and in then pursuing the wrongdoers.

In this day and age, commerce knows no boundaries. John has extensive experience in helping clients enforce foreign judgments against defendants in Ontario and in sorting out which laws apply to, and which court should hear disputes involving, cross-border cases.

John also acts for both plaintiffs and defendants in product liability cases in which defective products caused harm to people or property. In addition, John has experience acting both for and against various levels of government and in navigating the added layer of complexity that matters involving governments sometimes bring.

As a sports enthusiast, John has been lucky enough to have been able to fuse his passion for sports with his work, representing both local and national amateur hockey associations in various contentious matters. This has allowed him to gain insight into the issues and challenges facing not-for-profit and charitable entities.

A past President and board member of the Hellenic Canadian Lawyers' Association (HCLA), and fluent in Greek, John is the director of the HCLA's *pro bono* legal clinic, which offers free legal advice to disadvantaged members of our community.

A memorable time in John's career was attending at the Supreme Court in March 2013 with his partner, Lou Brzezinski, to argue a Securities Law matter, entitled *Patricia McLean v British Columbia Securities Commission*. The matter relates to the time-period within which a provincial securities commission must commence a proceeding for securities-related violations, following which such proceedings will be statute-barred. The decision of the Supreme Court is still under reserve.

During his time away from the office, John enjoys reading, history, catching up on sports, and spending time with family and friends.

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John's favourite quote is from the famous epitaph engraved on the cenotaph of the 300 Spartans who perished at Thermopylae in 480 B.C. in battle with the Persian army. It epitomizes the courage and personal sacrifice that is sometimes required in respecting and obeying the law:

> "*Go, tell the Spartans, thou who passest by, that here obedient to their laws we lie.*"

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