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ARTICLE

Ontario Divisional Court Confirms Parameters Of Third Party Litigation Funding Agreements

In a recent decision, *Houle v. St. Jude Medical Inc.*, the Ontario Divisional Court dismissed an appeal from the judgment of Justice Perell at the Superior Court of Justice and confirmed the parameters of acceptable third party litigation funding agreements in class actions.

Houle is a proposed product liability class action which concerns the alleged negligent design and manufacture of cardiac defibrillator devices that were surgically implanted in the proposed class members. The representative plaintiffs retained class counsel on a contingency fee basis whereby counsel would receive 33% of any recovery in the lawsuit. The retainer agreement specified that the issues of disbursements and adverse costs would be dealt with in a separate litigation funding agreement between the plaintiffs and a third party funder, Bentham IMF Capital Limited.

Under the litigation funding agreement, Bentham agreed to pay a portion of class counsel's services as the litigation progressed, in addition to budgeted disbursements and any court-ordered costs. Class counsel agreed to lower their share of any proceeds to between 10 and 13 percent, depending on the speed with which the litigation was resolved. In exchange, Bentham was to receive between 20 and 25 percent of the potential proceeds of the class action. Bentham also had the right to terminate the litigation funding agreement in certain circumstances.

At the Superior Court, Justice Perell refused to approve the litigation funding agreement as drafted by the parties. Instead, he conditionally approved an arrangement that would allow Bentham to collect 10 percent of the proceeds, with any amount over 10 percent being subject to court approval. He justified this approach by comparing it to the Class Proceedings Fund, which covers disbursements and accepts the risk of an adverse costs award in exchange for 10 percent of any funds received by the class. Justice Perell reasoned that the pre-approved recovery protected Bentham from taking on the risk of funding the litigation, and protected class members from overcompensating Bentham because the court must approve the balance of the contingency fee.

Justice Perell also took issue with the litigation funding agreement's termination clause, noting that it interfered with the plaintiffs' litigation autonomy and gave Bentham control over how the litigation would be run. Justice Perell resolved this issue by making any termination subject to court approval.

In dismissing the plaintiffs' appeal, Justice Myers of the Divisional Court agreed with Justice Perell's reasons. Justice Myers specifically rejected the argument that a litigation funding agreement is an ordinary commercial bargain, noting that "unlike other commercial arrangements, there are broader interests at play with third-party funding agreements that the court must weigh and consider that are fundamental to protecting the administration of justice from harm."

The Divisional Court decision in *Houle* confirms that in assessing novel forms of third party litigation funding agreements, the law will continue to be concerned to protect vulnerable parties whose recovery is the subject of a proposed bargain. It will also continue to be concerned with the potential for harm to the administration of justice that could accrue if the court is seen to allow third parties to the litigation to profit unduly from or unreasonably control that litigation.


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