Ontario court requires balance in deciding if third-party funding is fair and reasonable

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Recent amendments to the Ontario *Class Proceedings Act* (CPA) allow a non-party to the litigation to indemnify the plaintiff(s) against an adverse cost award or provide litigation funding to the plaintiff(s) in exchange for a pre-determined share of any monetary award or settlement the class receives. These agreements, known as third-party funding agreements, are contingent upon court approval, among other terms, under the newly added section 33.1 of the CPA.

In *Trueman v. Rogers Communications Canada Inc.*, the Ontario Superior Court outlined the analysis required before approving such funding agreements under section 33.1.

Background

The representative plaintiff David Trueman, on behalf of a class of customers of Rogers Communications Inc. (Rogers), commenced a proposed class proceeding against Rogers. The plaintiff alleges that the defendant provided Rogers customer data to credit-reporting agencies and performed soft credit checks on those customers for marketing and promotional purposes. The plaintiff alleges that such actions were a breach of privacy as the defendant did not first obtain customer consent. The plaintiff has not yet moved to certify the claim as a class proceeding.

Third-party funding agreement motion

On Sept. 26, 2024, the plaintiff brought a motion in writing seeking the court's approval of a third-party funding agreement pursuant to section 33.1 of the CPA. A third-party funding agreement is contingent on court approval and of no force or effect until the Court approves the agreement.

Section 33.1(9) of the CPA sets out the factors for the court to consider before approving a funding agreement:

(9) The court shall not approve a third-party funding agreement unless,

(a) the court is satisfied that,

(i) the agreement, including indemnity for costs and amounts payable to the funder under the agreement, is fair and reasonable,

(ii) the agreement will not diminish the rights of the representative plaintiff to instruct the solicitor or control the litigation or otherwise impair the solicitor-client relationship,

(iii) the funder is financially able to satisfy an adverse costs award in the proceeding, to the extent of the indemnity provided under the agreement, and

(iv) any prescribed requirements and other relevant requirements are met; and

(b) it is a term of the agreement that the funder shall be subject to,

(i) the same confidentiality requirements in respect of confidential or privileged information in the proceeding to which the representative plaintiff would be subject, and

(ii) the deemed undertaking rules set out under the rules of court, as if the funder were a party to the proceeding.

Court decision: Third-party funding agreement is approved

The terms of the proposed funding agreement required the third-party to indemnify the plaintiff for an adverse cost award up to a maximum prescribed amount (amount not disclosed), and in exchange, the third-party funder would receive a premium of up to 10 per cent of any litigation proceeds, up to a maximum prescribed amount (amount not disclosed) (the Agreement).

The Court noted that in this matter, as in other putative class proceedings, the plaintiff's individual damages were disproportionate to the risks of an adverse costs award, such that it was reasonable for the plaintiff to seek a funding agreement that addressed this risk. The Court was satisfied that the proposed Agreement met each of the requirements under Section 33.1(9) of the CPA and approved the Agreement.

In the Court's analysis of whether the Agreement was fair and reasonable, the Court compared the terms of the Agreement to the terms that might otherwise be available to the plaintiff under the Class Proceedings Fund – a statutory entity created to provide financial support and adverse costs indemnity to plaintiffs in putative class proceedings. The Court reasoned that the proposed Agreement was fair and reasonable given 1) the indemnity terms were at least as provident as those under the Class Proceedings Fund, and 2) that the premium owed to the third-party might be less than the premium owed to the Class Proceeding Fund, depending on the quantum of the litigation proceeds.

Ultimately, the Court approved the Agreement as it provided “a reasonable reward to the funder in exchange for the necessary indemnity to permit the action to continue.”

Key takeaways

This decision provides an overview of the Court’s reasoning for assessing the providence of third-party funding arrangements pursuant to the recent amendments to the CPA. Importantly, the Court assessed the fairness and reasonableness of the proposed funding arrangement on a relative basis against the funding terms that might be available to the plaintiff under the Class Proceedings Fund.

The plaintiff bears the onus of demonstrating that any third-party funding arrangement is fair and reasonable, and this decision is a reminder that a Court may consider alternative funding arrangements in making its assessment of proposed third-party agreement.

If you have any questions about class proceedings, BLG’s team of experienced litigators listed below, would be happy to hear from you.

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