

LITIGATION LOANS AND ADVERSE COST INSURANCE

THE USE OF PLAINTIFF LITIGATION LOANS ACROSS CANADA

Litigation loans remain a relatively novel issue in Canada, with widespread intra-provincial disagreement on their treatment. Globally, however, they are becoming a staple feature, especially in the personal injury field, indicating their use and prominence will be a growing feature of our legal system in the coming years (*Victoria Shannon Sahani, "Judging Third-party Funding"* (2016), 63 UCLA L. Rev. 388, at p. 396). Within a moderately brief period of time, public policy surrounding litigation loans, as well as their judicial treatment, has shifted toward their acceptance. It is becoming more widely accepted that third party litigation loans act to bolster the integrity of the justice system. However, it remains to be seen if Canada's judicial system will follow this course, as currently **only Nova Scotia and New Brunswick Courts have held that the interest accrued on a litigation loan is recoverable.**

The use of litigation loans, and the allowance to recover the interest on these loans as a disbursement, could increase access to justice for impecunious plaintiffs who are otherwise unable to fund litigation. This may be especially true for matters where plaintiff counsel requires a plaintiff to obtain a litigation loan at the outset of their retainer agreement (*Bourgoin c Oullette, 2009 CarswellNB 207*). Litigation loans required at the outset of a retainer will mitigate the risks faced by plaintiff's counsel, in addition to increasing access to justice.

There are several lending agencies in Canada who provide litigation loans (i.e. CaseMark, Lifeline Litigation, and Nudorra Capital Loans). Their interest rates range from 15 to 24%. With these substantial rates, tort defendants in provinces which allow for the recovery of the accrued interest on these loans must consider the existence of a litigation loan as part of their strategy.

Litigation Loans - Rule/Statute	Summary
ALBERTA	
Litigation loan interest is not recoverable as a disbursement, but the Court has been deliberate in leaving the door open for further discussion on the issue.	<p>In <i>Do (Next friend of) v Sheffer</i>, 2010 ABQB 422, the Court declined to allow the interest on the loan to be recovered as there was no precedent in Alberta for this type of disbursement, nor was it contemplated by the <i>Alberta Rules of the Court</i>. Additionally, there was no evidence before the Court as to the appropriateness or necessity of the loan. The Court left open the door for consideration when there is evidence of a party taking out a litigation loan because they are impecunious.</p> <p>In <i>Klychak v Samchuk</i>, 2012 ABQB 85, the Court relied on <i>Do v Sheffer</i> in stating that "It may well be that, in appropriate circumstances, the cost of third party litigation funding is itself a recoverable cost".</p> <p>In <i>Park Avenue Flooring Inc. v EllisDon Construction Services Inc.</i> 2016 ABQB 332, a corporate plaintiff sought to recover the interest on their litigation loan, relying on the New Brunswick Decision, <i>Bourgoin</i>. The Court distinguished the case finding that here there was no information about what the funds were used for.</p>
BRITISH COLUMBIA	
Litigation loan interest is not recoverable.	In <i>Mackenzie v Rogalaski and Chiandi (Guardian ad litem of) v Atwell</i> , 2014 BCCA 446, the Court held that the interest on litigation loans is not recoverable as a disbursement, as the term disbursement refers to expenses arising directly from issues in the case, not the circumstances of the litigant. Further, the Court held costs are only recoverable through the legislation, and the legislature did not intend to make recovery of interest expenses recoverable where they were not recoverable generally.
MANITOBA	
	There is currently no case law regarding litigation loan interest being recoverable for Manitoba.
NEW BRUNSWICK	
Litigation loan interest is a recoverable disbursement.	In <i>Bourgoin c Oullette</i> , 2009 CarswellNB 207, the Court cited the statement of Chief Justice Beverly McLachlin, as she then was, in a presentation where she highlighted the financial constraints faced by middle-class Canadians who cannot afford the cost of legal services, denying them access to justice. The Court awarded the plaintiff the interest on the loan.

Litigation Loans - Rule/Statute	Summary
	In <i>LeBlanc v Doucet</i> , 2012 NBCA 88, the Court relied on <i>Bourgoin</i> finding again that while there is no rule expressly allowing for the recovery of interest on litigation loans, the New Brunswick Rules of Court generally encompassed all “necessarily incurred” disbursements that were reasonable.
NEWFOUNDLAND AND LABRADOR	
Litigation loan interest is not a recoverable disbursement.	<i>Cabana v Nfld and Lb et al</i> (2016 NLCA 75), the Court adopted the ruling from <i>MacKenzie v Rogalasky</i> 2014 BCCA 446, refusing to allow the interest on litigation loans to be recoverable as a disbursement as it would prevent cost awards from being predictable and consistent across similar cases.
NOVA SCOTIA	
Litigation loan interest is a recoverable disbursement.	in <i>National Bank Financial Ltd v Potter</i> , 2014 NSSC 264, the Court held that litigation loans are recoverable as disbursements when there is evidence that a loan was necessary in order for the litigation to proceed or continue.
ONTARIO	
<p>Current case law does not allow for the principal, nor interest accrued on litigation loans, to be recoverable.</p> <p>The Court leaves this decision open for discussion if a case arises where the defendants are aware of the presence of the litigation loan, and if the plaintiff had requested Court approval for the loan.</p>	<p>In <i>Mann v Jefferson</i>, 2019 ONSC 422, the Court held neither the principal nor the interest on litigation loans is recoverable as damages as it is too remote and not reasonably foreseeable.</p> <p>In <i>Davies v The Corporation of the Municipality of Clarington et al</i>, 2019 ONSC 2292, the plaintiff had obtained around \$250,000 in litigation loans. By the date of the trial, the principal and accrued interest on these loans totaled over \$3.1 million. The Court decided there was no legal basis upon which the Court could award the costs of the litigation loans and accrued interest. It reasoned the defendants were not aware of the loans until the trial, had no knowledge of any exposure to paying the interest on these loans, and the plaintiff did not seek approval for his loans. Given these factors, the Court determined it would be grossly unfair to make the defendants pay for the loans and interest.</p>
PRINCE EDWARD ISLAND	
There is no case law determining whether litigation loan interest is recoverable.	<i>Fraser v Runighan</i> , 2018 PESC 26: the Court did not rule on, but did not dismiss the option for litigation loans to be claimed as a disbursement.
QUEBEC	
Litigation loans under the <i>Companies’ Creditors Arrangement Act</i> are permitted if they are reasonable and fair. No case law determines whether Litigation loan interest is recoverable.	In <i>9354-9186 Quebec Inc. v Callidus Capital Corp</i> , the Supreme Court of Canada ruled that per the <i>Companies’ Creditors Arrangement Act</i> , (RSC 1985 c. B-3) litigation funding can be approved by a Judge presiding over the Court proceedings if the Judge believes it is fair and reasonable.
SASKATCHEWAN	
The case law does not establish a mechanism for dealing with “litigation funding agreements” to finance indemnity or disbursements in the event of a failed lawsuit.	In <i>Schneider v Royal Crown Gold Reserve Inc.</i> , 2016 SKQB 278, the Court held there are no public funding agencies that would provide indemnity and disbursement financing for parties in the event their action is lost. This results in the use of third parties for such agreements.

LITIGATION LOANS AND ADVERSE COST INSURANCE

THE IMPACT OF ADVERSE COST INSURANCE ACROSS CANADA

Similar to litigation loans, adverse cost insurance* has become more prevalent across Canada, particularly when it comes to actions involving personal injury (Kris Bon, “[Adverse costs insurance a compensable disbursement](#)” (July 29, 2019) *The Lawyer’s Daily*). Adverse cost insurance provides insurance to a party if their legal action fails, and they are ordered to pay costs to the successful party within the litigation. (*Also known as: trial insurance, after the event or ATE insurance, and legal expense insurance.)

Adverse cost insurance becomes important in the face of an unsuccessful lawsuit when there is a contingency agreement between the plaintiff and their counsel. In this situation, the plaintiff is usually required to pay at least a portion of the successful party’s legal costs, as well as owing their own lawyer the disbursements. Adverse cost insurance provides coverage to address these situations.

Adverse Cost Insurance - Rule/Statute	Summary
ALBERTA	
	There is currently no legislation or case law which that has considered the impact of adverse cost insurance in Alberta.
BRITISH COLUMBIA	
The costs associated with insurance is not a proper or necessary disbursement incurred in conducting litigation and is not recoverable.	In <i>Wynia v Soviskov</i> , 2017 BCSC 195 the Court held that the cost of an insurance policy protecting a plaintiff from adverse costs/disbursements is not recoverable, as the disbursement must have been necessarily or properly incurred in the conduct of the proceeding. The costs of an adverse costs/disbursements insurance policy do not arise from the exigencies of the litigation and do not relate directly to the direction, management, or control of the litigation used to prove the claim against the defendants.
MANITOBA	
	There is currently no legislation or case law which that has considered the impact of adverse cost insurance in Manitoba.
NEW BRUNSWICK	
	There is currently no legislation or case law which has considered the impact of adverse cost insurance for New Brunswick.
NEWFOUNDLAND AND LABRADOR	
	There is currently no legislation or case law which has considered the impact of adverse cost insurance for Newfoundland and Labrador.
NOVA SCOTIA	
	There is currently no legislation or case law which has considered the impact of adverse cost insurance for Nova Scotia.
ONTARIO	
<p>In Ontario, Plaintiffs must disclose the existence of an ATE insurance policy (<i>Abu-Hmaid v Napar</i>).</p> <p>Current case law is split regarding the production of the policy itself. Generally, if the plaintiff is the policy holder, the policy must be produced (<i>Fleming</i>). However, if plaintiff’s counsel or their</p>	<p>In <i>Abu-Hmaid v Napar</i>, 2016 ONSC 2894, the Court held the plaintiff must disclose the existence of an ATE insurance policy.</p> <p>Producing the Policy</p> <p>There is conflicting case law as to the obligation to produce an ATE insurance policy.</p> <p>If the plaintiff is the policy holder, the Court has held this policy needs to be produced to the defendants: <i>Fleming v Brown</i>, 2017 ONSC 1430; r. 30.02(2) <i>Rules of Civil Procedure</i> RRO 1990, Reg. 194.</p> <p>However, if the policy holder is the plaintiff counsel’s firm, the policy does require production: <i>Jamieson v Kapashesit et al</i>, 2017 ONSC 5784; followed in <i>James v McGuire</i>, 2020 ONSC 914.</p>

Adverse Cost Insurance - Rule/Statute	Summary
<p>firm is the policy holder, the policy does not need to be produced. (<i>Jamieson</i>). Currently, tort defendants do not have a priority claim over ATE insurance funds to cover first their costs, followed by the disbursements.</p> <p>Current case law suggests that ATE insurance policy premiums are compensable disbursements.</p>	<p>Priority to policy proceeds In <i>Peter B. Cozzie Professional Corporation v Szot</i>, 2019 ONSC 1274, the funds available under an ATE insurance policy did not cover both the plaintiff's disbursements, and the costs. The plaintiff authorized the funds to cover first the disbursements, followed by the costs. The defendant challenged this, arguing they were entitled to priority over the ATE policy proceeds, but the Court rejected this argument as it lacked a legal basis.</p> <p>Recovery of premium In <i>Little v Floyd Sinton Limited</i>, 2018 ONSC 3165 and other earlier cases, (<i>Valentine v Rodriguez-Elizalde</i>, 2016 ONSC 6395, and <i>Markovic v Richards</i>, 2015 ONSC 6983) the Court held ATE insurance policy premium were not assessable disbursements. However, in <i>Steward et al v Wood et al</i>, 2019 ONSC 3931, the Court held the ATE insurance policy premium was a compensable disbursement, as it related to an access to justice issue.</p>
QUEBEC	
<p>Adverse cost insurance is well established in Quebec, but there is no discussion as to any obligations on the plaintiff if they have obtained this type of policy.</p>	<p>A typical policy covers the opponent's adverse costs and the plaintiff's own disbursements in the event of a loss.</p> <p>Insurers who provide adverse cost insurance must obtain a license from the relevant authority.</p>
PRINCE EDWARD ISLAND	
	<p>There is currently no legislation or case law which has considered the impact of adverse cost insurance for Prince Edward Island.</p>
QUEBEC	
<p>Adverse cost insurance is well established in Quebec, but there is no discussion as to any obligations on the plaintiff if they have obtained this type of policy.</p>	<p>A typical policy covers the opponent's adverse costs and the plaintiff's own disbursements in the event of a loss.</p> <p>Insurers who provide adverse cost insurance must obtain a license from the relevant authority.</p>
SASKATCHEWAN	
	<p>There is currently no legislation or case law which that has considered the impact of adverse cost insurance in Saskatchewan.</p>



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