SUPREME COURT OF NOVA SCOTIA

Date: 20240409
Docket: Hfx No. 514712
Registry: Halifax

Between:

Steven Estey as litigation guardian for Isai Estey

Plaintiff

v.

The Attorney General of Nova Scotia representing His Majesty the King in right of the Province of Nova Scotia

Defendant

Decision on Motion for Approval of Litigation Funding Agreement

Judge:	The Honourable Justice Frank P. Hoskins
Heard:	June 8, 2023, in Halifax, Nova Scotia
Counsel:	Brian Hebert, James Sayce and Jamie Shilton, for the Plaintiff Alison Campbell and Adam Norton, for the Defendant

By the Court:

Facts and Background

[1] In December 2021, the Plaintiff retained Mckiggan Hebert Lawyers to represent the proposed class. The Plaintiff filed a notice of action and statement of claim on October 24, 2022.

[2] The Plaintiff has filed an application seeking an order to approve a third-party funding agreement. The Plaintiff's lawyer McKiggan Hebert and the third-party funder entered into a consortium with Koskie Minsky LLP to advance the Plaintiff's claim (together as "counsel"). Counsel facilitated a funding agreement (the "Funding Agreement") with Hereford Litigation Finance 1 Limited ("the Funder"). The Funder agreed to pay disbursements and any adverse costs awards in exchange for compensation to be drawn from the damage award if the Plaintiff is successful. Before signing the Funding Agreement, the Plaintiff's litigation guardian (who at the time was Isai's father Steven Estey) reviewed the agreement and received independent legal advice.

[3] In August 2023, Steven Estey passed away. As a result, Isai's mother Anne MacRae replaced Steven Estey as Isai's litigation guardian.

[4] The Plaintiff has brought a motion for this court to approve the Funding Agreement.

The Evidence Proffered in this Motion

[5] The Plaintiff has submitted the following in support of this motion:

- Affidavit of Steven Estey, dated March 24, 2023;
- Affidavit of Steven Estey, dated April 28, 2023 with the Funding Agreement attached as an exhibit;
- Affidavit of Anne Macrae dated December 21, 2023;

- Affidavit of Brian Herbert, a lawyer at the firm McKiggan Hebert, who is acting as class counsel;

- Affidavit of Elly Brindle, a partner at Hereford Litigation, the proposed funder for this class action;

- Affidavit of Adam Tanel, a partner at Koskie Minsky LLP, who represents the Plaintiff;

- Affidavit of Madeline Carter, a lawyer at Wagners, who provided independent legal advice to the Plaintiff; and

- A factum of the moving Plaintiff.

[6] The Defendant, the Attorney General, took no position on this motion.

Issue

[7] The only issue is whether the Funding Agreement should be approved.

Relevant Legal Principles

Class Proceedings Act

[8] The Nova Scotia *Class Proceedings Act*, S.N.S. 2007, C. 28, provides a mechanism for a representative party to enter into an agreement to pay for legal fees and disbursements. Such agreements are subject to the following conditions under section 41:

> 41 (1) An agreement respecting fees and disbursements between a solicitor and a representative party must be in writing and shall
>
> (a) state the terms or conditions under which fees and disbursements are to be paid;
>
> (b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding;
>
> (c) where interest is payable on fees or disbursements referred to in clause (a), state the manner in which the interest will be calculated; and

> (d) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the application of the solicitor.
>
> (3) An application under subsection (2) may
>
> (a) unless the court otherwise orders, be made without notice to any other party; or
>
> (b) where notice to any other party is required, be made on the terms or conditions that the court may order respecting disclosure of the whole or any part of the agreement respecting fees and disbursements.

[9] The *Act* does not contemplate funding agreements related to non-counsel participants in the litigation and provides no guidance on how to govern these types of agreements. However, there is legislation in Ontario that provides a useful framework.

Ontario Class Proceedings Fund

[10] The Provincial Government of Ontario set up a class proceedings fund to support the cost of litigation for plaintiffs involved in class proceedings (*Law Society Act*, R.S.O 1990, c. L.8, Regulation 771/923). The fund covers disbursements and costs that may be awarded against plaintiffs. In deciding whether to provide funds to a plaintiff, the committee in charge of decision-making can consider the following factors:

> 59.3 (3) The Committee may direct the board to make payments from the Class Proceedings Fund to a plaintiff who makes an application under subsection (1), in the amount that the Committee considers appropriate. 1992, c. 7, s. 3.
>
> (4) In making a decision under subsection (3), the Committee may have regard to,
>
> (a) the merits of the plaintiff's case;
>
> (b) whether the plaintiff has made reasonable efforts to raise funds from other sources;

> (c) whether the plaintiff has a clear and reasonable proposal for the use of any funds awarded;
>
> (d) whether the plaintiff has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; and
>
> (e) any other matter that the Committee considers relevant.

Law Society Act

[11] In addition to the Class Proceedings Fund, the *Law Society Act*, RSO 1990 c. 8, states that a party who receives funding from the Class Action Fund, is required to a pay a levy if their claim is successful. The Class Action Fund Regulations set out the levy requirements as follows:

> 10 (1) This section applies in a proceeding in respect of which a party receives financial support from the Class Proceedings Fund. O. Reg. 771/92, s. 10 (1).
>
> (2) A levy is payable in favour of the Fund,
>
> (a) when a monetary award is made in favour of one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act; or
>
> (b) when the proceeding is settled and one or more persons in such a class is entitled to receive settlement funds. O. Reg. 771/92, s. 10 (2).
>
> (3) The amount of the levy is the sum of,
>
> (a) the amount of any financial support paid under section 59.3 of the Act, excluding any amount repaid by a plaintiff; and
>
> (b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes a plaintiff who received financial support under section 59.3 of the Act is entitled. O. Reg. 771/92, s. 10 (3)

[12] Nova Scotia does not have a funding scheme akin to the *Class Proceedings Fund*. Litigants in Nova Scotia must therefore find other avenues to finance the cost of litigation. I refer to the Class Proceedings Fund because it shows that there is an awareness of the elevated costs of pursuing a class action and anticipates that a plaintiff will need to access funds to assist with the cost of litigation. It also provides

a benchmark for assessing the reasonableness of compensation to be awarded to a third-party funder should the Plaintiff's lawsuit be successful.

[13] Because the proposed Funding Agreement does not have legislative basis in Nova Scotia, I must refer to common law principles when determining whether to approve the agreement. One such principle I must consider is the general prohibition against champerty and maintenance.

Champerty and Maintenance

[14] Champerty and maintenance are generally prohibited in litigation to protect the administration of justice and ensure that litigation is not undertaken for an improper purpose. Because this litigation involves a Contingency Fee Agreement and a Funding Agreement, both of which would take a portion of the Plaintiff's proceeds (if the litigation is successful), the principles of champerty and maintenance must be considered.

[15] In *Thomas Fuller Construction Co, (1958) Ltd v Canada (TD),* [1992] 1 FC 512, [1991] FCJ 562, Dube J. defined the principles of champerty and maintenance as follows:

> [15] "Maintenance" has been defined as "maintaining, supporting or promoting the litigation of another". "Champerty" is a bargain to divide the proceeds of litigation between the owner of the liquidated claim and a party supporting or enforcing the litigation…

[16] Gruchy J., in *Ormrod (Litigation guardian of) v Goodall*, 2002 NSSC 243, discussed the law of champerty and maintenance, outlining the basic principles of the doctrine, referring to *McIntyre Estate v. Ontario (Attorney General)* [2001], 53 O.R. (3d) 137, O.J. No. 713:

> [8] Justice Wilson wrote a lengthy and thorough decision which was appealed. The Ontario Court of Appeal stayed the effect of Justice Wilson's decision as it was premature. In its decision, the Court of Appeal traced the common law respecting maintenance and champerty in Ontario and related that history to the *Ontario Statute of Champerty*, 1897, which was still in effect. O'Connor, A.C.J.O. discerned four general principles of the common law of champerty and maintenance and remarked at paras. 34 and 35:

> In summary, I discern the following four principles from a review of the common law of champerty and maintenance:
>
> *Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.
>
> *For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.
>
> *The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.
>
> *When the courts have had regard to statutes such as the *Champerty Act* and the *Statute Concerning Conspirators*, they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.
>
> The above constitute the general principles relating to champerty and maintenance found in the common law. Historically, the courts applied these principles very strictly to contingency fee agreements between lawyers and clients, holding that such agreements were per se champertous without the need to show a specific improper motive.

[17] As noted above, the prohibition against champerty was put in place to protect litigants in the justice system. However, attitudes have changed over time to become more accepting of funding agreements. As Shaun Finn and Danielle Olofsson note in "Public Sector Personal Information Class Actions in Canada: Context and Case Law", 107 SCLR 323 – 402 (2022):

> [37] As a result of the growing expense of litigating class actions and the risks to which they give rise, consortia (*i.e.*, collaboration between plaintiff lawyers from different firms) and third-party funding have become increasingly common. Although traditionally frowned upon, the financial involvement of non-parties has come to be seen by some as in the interests of judicial economy and access to justice. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, the Supreme Court of Canada noted that "[o]utside of the *CCAA* [*Companies' Creditors Arrangement Act*] context, the approval of third party litigation funding agreements has been somewhat controversial. Part of that controversy arises from the potential of these agreements to offend the common law doctrines of champerty and maintenance." As the Court went on to observe, "[b]uilding on jurisprudence holding that contingency fee arrangements are not champertous where they are not

> motivated by an improper purpose (*e.g., McIntyre Estate*), lower courts have increasingly come to recognize that litigation funding agreements are also not *per se* champertous. This development has been focused within class action proceedings, where it arose as a response to barriers like adverse cost awards, which were stymieing litigants' access to justice." The Court added, however, that "[t]he jurisprudence on the approval of third party litigation funding agreements in the class action context -- and indeed, the parameters of their legality generally -- is still evolving, and no party before this Court has invited us to evaluate it."

[18] By considering the funder's motive for entering into the litigation a court can more readily determine if the potentially champertous arrangement is going to promote access to justice or hinder it.

Case Law

[19] The Plaintiff has directed me to *Houle v St Jude Medical Inc*, 2017 ONSC 5129, where Perell J. set out principles that a court should consider when deciding whether to approve a litigation funding agreement:

> [73] In the context of class proceedings, from the perspective of legal policy about the administration of justice, third-party funding agreements are justified as a matter of necessity. This is the paramount factor, but it is not the first principle or factor to consider. Rather, the first principle or factor in determining whether to approve a third-party funding agreement is whether the procedural, technical, and evidentiary requirements to enable the court to scrutinize the agreement are satisfied.
>
> [75] The second and next factor to consider is the necessity principle. This principle is paramount. If third-party funding is not necessary, it should not be approved. The rationales for allowing what otherwise would be champerty and maintenance, which is to say the officious intermeddling of a non-litigant in another's litigation are that: (a) but for the third-party's financial assistance, the litigant would have no access to justice; and, or (b) but for the third-party's financial assistance, society would be bereft of a means to modify the behaviour of wrongdoers who have harmed a group. One or the other of the rationales for a litigation funding agreement; *i.e.*: (a) enabling access to justice; or (b) discouraging or deterring wrongdoing, must be present or the agreement should not be approved.
>
> [78] Moving on in the analysis, the third principle or factor, which is mandatory, is that the third-party funder make a meaningful contribution to access to justice or behaviour modification. In order to be approved, the third-party funding must not only be necessary, it must also be sufficient to achieve the goals of the class action regime or the administration of justice

> [80]… the fourth principle or factor in determining whether to approve a litigation funding agreement is that the third-party funder not be overcompensated (unduly rewarded) in the particular circumstances of the case for its assuming the risks of the litigation in whole or in part. This penultimate-predominant factor is given substantial weight because overcompensation moves the third-party funder into the role of a champertor.
>
> [88]…the fifth principle or factor, which is mandatory in cases where the Class Members have substantial claims, is that the third-party funding agreement must not interfere with the lawyer-client relationship, the lawyer's duties of loyalty and confidentiality, or the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or class members.
>
> [100] Moving on to the sixth factor or principle, it is that the third-party funding agreement not be illegal on some basis independent of champerty and maintenance. For instance, it is conceivable that a third-party funding agreement, which can be designed in myriad ways, might be subject to regulatory compliance under, say, the *Insurance Act*, *supra* or the Ontario *Securities Act*, R.S.O. 1990, c. S.5. This illegality factor is not engaged in the case at bar.

[20] I find this case to be extremely useful in guiding my analysis of the Funding Agreement. I will apply these principles to my analysis of the Funding Agreement in the next section.

[21] I have also reviewed, *Difederico v Amazon.com, Inc*, 2021 FC 311, wherein the court expanded on the test applied in *Houle*:

> [29] The Court has a supervisory role in class proceedings that requires it to be mindful of the best interests of class members as a whole: *Frame v Riddle*, 2018 FCA 204 at para 24; *Ottawa v McLean*, 2019 FCA 309 at para 13. This includes the best interests of prospective class members, whose interests may not be entirely aligned with those of the representative plaintiffs, class counsel, or third parties who are prepared to fund all or part of the proceeding: see, *e.g.*, *Houle v St Jude Medical Inc*, 2018 ONSC 6352 at paras 22 and 41 (Ont Div Ct) [*Houle 2*]. Accordingly, as with legal fees to be paid from the proceeds recovered in a class proceeding (see Rule 334.4, *Federal Courts Rules*, SOR/98-106), LFAs [Litigation Funding Agreements] entered into in relation to proceedings before the Court must be approved by the Court. This is so even where they have been executed by the representative plaintiffs after having received the advice of independent legal counsel. I note that other courts have reached a similar conclusion: see e.g., *Houle v St Jude Medical Inc*, 2017 ONSC 5129 at paras 63-70 [*Houle 1*], aff'd *Houle 2*, above, at paras 68-70.

> [30] In my view, such prior approval and the Court's powers in this regard are necessary for several reasons. These include ensuring that the Court is able to (i) fulfill its supervisory role in class proceedings falling within its jurisdiction, (ii) manage and control such proceedings, and (iii) protect the administration of justice from abuse…
>
> …
>
> [36] In considering whether that test is met, it is appropriate to consider the following factors:
>
> > i. Have the basic procedural and evidentiary requirements for the Court's consideration of the LFA been satisfied?
> >
> > ii. Is third party funding necessary to facilitate meaningful access to justice?
> >
> > iii. Is the LFA champertous?
> >
> > iv. Is the LFA fair and reasonable to current and prospective class members as a group?
> >
> > v. Will the LFA make a meaningful contribution to deterring wrongdoing?
> >
> > vi. Does the LFA interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?
> >
> > vii. Does the LFA protect relevant legal privileges and the confidentiality of the parties' information?
> >
> > viii. Does the LFA protect the legitimate interests of the defendants?

[22] This test in large part duplicates the principles set out in *Houle*. However, the Federal Court added a consideration of how the funding agreement affects the interests of the defendants to the action, and more explicitly directs courts to consider the agreement's impact on the solicitor-client relationship and counsel's ability to direct the proceeding. In addition to the *Houle* factors, I will turn my mind to those two questions.

Analysis

[23] The Plaintiff has entered into two agreements related to this action, a Retainer Agreement that contains a contingency fee agreement, and the Funding Agreement. Both of these agreements must be considered when I determine whether to approve

the Funding Agreement because the terms of the Retainer Agreement help inform the terms of the Funding Agreement, and whether it is necessary for this litigation.

The Retainer Agreement

[24] The Retainer Agreement is not the subject of court approval, and I need not analyze its for fairness to the Plaintiff. However, I note that the Retainer Agreement provides the basis on which the Funding Agreement was sought. Additionally I will consider the compensation that may be provided to class counsel under the contingency fee agreement when determining if the agreements leave the class with fair compensation if successful in the litigation.

[25] The Retainer Agreement stipulates that counsel will not be liable for any adverse costs awards against the Plaintiff. The agreement also stipulates that McKiggan Hebert intends to apply for adverse costs insurance. Counsel for the Plaintiff indicated at the hearing of this motion that the funding agreement was intended to act as insurance for adverse cost awards.

[26] Finally, the agreement provides that counsel will work on a contingency basis and will receive up to 35% of the net damages award to the class after disbursement have been paid.

The Funding Agreement

[27] I will begin my analysis of the Funding Agreement by applying the principles set out by Perell J. in *Houle*. These principles can be considered by asking the following questions:

1. Does the court have the necessary evidence before it to scrutinize the funding agreement?

2. Is the funding agreement necessary?

3. Does the funding agreement make a meaningful contribution to access to justice or behaviour modification?

4. Does the funding agreement create the risk that the funder will be overcompensated?

5. Will the Funding Agreement interfere with solicitor client privilege?

6. Is the Funding agreement illegal on a basis other than champerty or maintenance?

1. Does the court have the necessary evidence before it to scrutinize the funding agreement?

[28] This Court has been provided with a copy of the Retainer Agreement and the Funding Agreement (a redacted copy and an unredacted copy). The Court has also been provided with affidavits of all of the principal actors in the formation of these agreements, most importantly the Plaintiff's litigation guardian(s),

[29] In addition to the Plaintiff's affidavit deposing that he received independent legal advice, I have been provided with the affidavit of Madeleine Cooper, the lawyer who provided the legal advice. I am satisfied that the Plaintiff received adequate advice before entering into the Funding Agreement.

[30] The Defendant has been provided a copy of the Funding Agreement, and though there have been limited redactions, I am satisfied that those redactions do not impact the Defendant's ability to assess the Agreement, and that the redactions protect an important part of the Plaintiff's litigation strategy.

[31] The Plaintiff has provided adequate notice of this motion to the Defendant.

[32] For these reasons, I am satisfied that these documents provide the court with the required evidentiary, procedural, and technical basis on which to assess the Funding Agreement.

2. Is the Funding Agreement Necessary?

[33] The Plaintiff's Litigation Guardian Steven Estey, deposed in his affidavit that he received advice from Brian Hebert regarding the cost of litigating this class action. He was advised that it would be very expensive, and that the cost of legal fees and disbursements would almost certainly exceed an award for an individual plaintiff. He was advised that a possible costs award would be significant.

[34] Mr. Estey deposed that he was unwilling to bear the risk of an adverse costs award on behalf of the whole class on his own and would not proceed with the litigation if he was not protected.

[35] Brian Hebert, the lawyer acting as class counsel, deposed that the firm determined that substantial capital would be required to finance the litigation.

[36] Given the evidence before me, I am satisfied that the Plaintiff would not continue this action without the Funding Agreement. For that reason, I am satisfied that the Funding Agreement is necessary.

3. Does the funding agreement make a meaningful contribution to access to justice or behaviour modification?

[37] As noted above, the Plaintiff would not be prepared to proceed with this litigation without the Funding Agreement to pay the cost of disbursements and adverse costs awards. The evidence before me establishes that the Funder has ample assets to cover any adverse costs. Given that the Plaintiff would not continue with this litigation if the Funding Agreement were not approved, I believe that the Funding Agreement would make a meaningful contribution to access to justice.

[38] Furthermore, as the Plaintiff and Brian Hebert deposed, counsel received several funding proposals and upon reviewing them, determined that this proposal was most favourable to the Plaintiff. Though I do not have details before me regarding the other funding proposals, I accept that this Funding Agreement is the most favourable to the Plaintiff and will best allow the Plaintiff to access justice.

[39] Because this class action addresses ongoing alleged harms to class members, the outcome of the litigation is likely to impact the behaviour of the provincial government regarding those class members. As such the Funding Agreement has the potential to make a meaningful contribution to behaviour modification.

4. Does the funding agreement create the risk that the funder will be overcompensated?

[40] This question addresses the issue of champerty, which prohibits a third party from profiting from another person’s litigation. As noted above, courts are prepared to allow agreements that provide for a third party to obtain some portion of the

proceeds of a successful proceeding so long as the third party is not unreasonably compensated.

[41] In this case the Funding Agreement provides that the Funder will be compensated a maximum of 10% of the net proceeds of the litigation. This significant because it establishes that the Funder's compensation will be calculated after disbursements are repaid and class counsel has received their portion of the proceeds. Rather than getting 10% of the damage award, the Funder would receive 10% of what is left after the first priority payments are made. The order of priority set out in the Funding Agreement accords with the order accepted in *Eaton v Teva Canada Ltd*, 2021 FC 968.

[42] The quantum being capped at 10% is reasonable. It is equivalent to the 10% cap set out in the Ontario Class Proceedings Fund and is significantly lower than the compensation allowed in other cases. For example, in *Drynan v Bausch Health Companies Inc*, 2020 ONSC 4379, the court approved a funding agreement that provided for a funder to receive up to 25% of the proceeds of the litigation.

[43] However, the average compensation for funders is typically lower, in the range of 8-10%. For example, in *Eaton*, the court approved a funding agreement that provided the funder with a 10% return of the claim proceeds. The agreement also included a cap on the compensation that the funder could receive, which differed depending on how far the litigation progressed. In finding that the return would not overcompensate the funder, the court held:

> [30] The second consideration that is relevant to assess at this step in the analysis is whether fees set forth in the LFA exceed the outer limit of what might possibly be considered reasonable, fair or proportionate. Once again, there is no evidence to suggest that this may be so and I have no reason to be concerned in this regard. This is because the Funding Fee (10% of the Remaining Claim Proceeds) is within the range of similar fees that have been approved by Canadian courts: see e.g., *Difederico*, above at para 55; *Flying E Ranche Ltd. v Canada (Attorney General)*, 2020 ONSC 8076, at para 34 [*Flying E*]; *Houle 1*, above, at para 83.
>
> [31] This is particularly so when one considers that the Funding Fee is subject to a sliding scale cap that ranges from $5,000,000 to $45,000,000, depending on when the Class Proceeds are received. Considering that the plaintiff is seeking damages of $2.75 billion in this proceeding, these caps will ensure that the Funding Fee will be well below 10% for more than 80% of the potential outcomes in the proceeding between complete success (recovery of $2.75 billion) and complete failure (a zero recovery).

[44] The amount claimed in this proceeding is far less than the $2.75 billion claimed in *Eaton*, and for that reason I am satisfied that a compensation cap is not necessary.

5. Will the Funding Agreement interfere with solicitor client privilege?

[45] I interpret this question as being concerned with sharing confidential information between the Plaintiff and their counsel, and the Funder.

[46] The Plaintiff agreed to a list of warranties and covenants set out in Schedule 3 of the Funding Agreement, one of which is that the Plaintiff will disclose "the full detail of all legal advice" he has received (clause 3). The Plaintiff also agrees to inform the Funder of "any matters that might affect Hereford's [the Funder's] evaluation of the strength of the claim and/or any counterclaim or adverse claim and its decision to fund the Proceedings" (clause 8). The schedule also anticipates the Funder requesting updated opinions from the Plaintiff's counsel about the merits of the case.

[47] These clauses represent a significant incursion into solicitor-client privilege. However, they are curtailed by the confidentiality provisions in clause 8 of the Funding Agreement, which require the Funder to treat any information it receives as confidential, and not to use the information for a purpose outside of these proceedings (clause 8.6). Furthermore, clause 8.3 requires the Plaintiff to provide information that is not protected by solicitor-client privilege, implicitly suggesting that the Funder will not seek information that is covered by solicitor-client privilege.

[48] Based on the above-noted clauses I am satisfied that the Funding Agreement will not interfere with solicitor client-privilege.

6. Is the Funding agreement illegal on a basis other than champerty or Maintenance?

[49] There is no evidence before me to suggest that the Agreement was made on an illegal basis. I am satisfied that the Agreement was entered into for the purpose of assisting the Plaintiff to advance the litigation and for no other improper purpose.

[50] Furthermore, there are no statutory or regulatory conflicts with this Funding Agreement.

Difederico questions

[51] As I noted above, in *Difederico,* the court identified two additional questions that I will consider when determining whether to approve the Funding Agreement:

1. Does the Funding Agreement protect the legitimate interests of the Defendants?

2. Does the Funding Agreement interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

1. Does the Funding Agreement protect the legitimate interests of the Defendants?

[52] The Defendant has taken no position on this motion. I have no evidence before me that the Funding Agreement would impact the Defendant's legitimate interests.

[53] The Funding Agreement would not create a power imbalance where the Plaintiff will have significantly greater access to capital to fund the litigation. Indeed, given that the Defendant is a provincial government, and the Plaintiffs are a group of individuals with disabilities, the Funding Agreement removes a power imbalance that would be present if the Plaintiff funded the ligation alone.

2. Does the Funding Agreement interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding?

[54] This question requires me to consider the level of control that the Funding Agreement gives the Funder over the litigation. It is the role of counsel to conduct the litigation and use their professional judgment in determining how best to conduct it. Funding agreements should not interfere with the lawyer-client relationship.

[55] The Funding Agreement acknowledges that the Plaintiff must have full control over the litigation, and provides for that in clause 9 of the Funding Agreement, which states that the Agreement shall not compromise the lawyer client relationship, duty of confidentiality, or counsel's professional judgement (clause

9.2). Furthermore, the agreement states that the Funder will not interfere in the conduct of the proceedings. These clauses satisfy me that the Funder will not try to impact the choices that the Plaintiff and counsel make during the course of the proceedings.

[56] One way in which a funding agreement may interfere with a plaintiff's ability to control the litigation is if the agreement provides the funder with the broad power to terminate the agreement. Though termination clauses are typical in funding agreements, in a class action proceeding additional measures to protect the plaintiff class may be required. The differences between termination clauses in single party litigation and class actions is discussed by Rachel Howie and Geoff Moysa in "Financing Disputes: Third-Party Funding in Litigation and Arbitration", Alta L Rev 465 – 501 (2019)

> [48] In the commercial litigation context, courts have held that reasonable termination rights do not diminish the plaintiff's control over the litigation. To control its risk, an LFA will typically include a provision allowing the funder to terminate on notice. Sometimes that right to terminate is unfettered, and sometimes it requires as a condition precedent that new information emerge that causes the funder to no longer be satisfied about the merits or commercial viability of the litigation. As a balancing factor, the exercise of such termination rights may mean that a funder will no longer be entitled to all or a portion of its contracted for return. In practice, such rights are seldom exercised as, once a funder expends significant capital to fund a case, the incentives of the funder and party are typically aligned to ensure that some return is achieved. For instance, in Schenk, the Ontario Superior Court of Justice examined a lawyer's letter of engagement and the funding agreement itself to conclude that the litigation funding arrangement (including rights to terminate where the funder reasonably ceases to be satisfied about the merits or commercial viability of the case) did not restrict the litigant's ability to instruct counsel.
>
> [49] Courts considering LFA approval in class proceedings may take a different approach, given the policy mandate to protect the interests of class members. For instance, in Houle, the motions judge expressed concern that certain termination rights in the LFA might interfere with the plaintiffs' litigation autonomy, and held that the funder should not have the right to terminate the LFA in circumstances where the funder reasonably considered that the case is no longer meritorious or not commercially viable. The motions judge held that the funder should be able to terminate the LFA in other specific circumstances with court approval.
>
> [50] A funder will typically ask to be apprised of settlement negotiations and may offer non-binding views on the same. Acceptance or rejection of a settlement offer should remain fully within the client's purview so that the funder does not exercise

> control over the conduct of the action. To guard against situations where a client may refuse a commercially reasonable settlement against the advice of their counsel, funders may insert a contractual safeguard. For instance, a funder may require that the parties engage in good faith negotiations on settlement offers, and in a situation where the funder, counsel, and plaintiff cannot agree, that the reasonableness of the settlement offer be referred to an independent arbitrator for binding determination.

[57] In this Agreement, if the Funder terminates, the Plaintiff is entitled to seek out another funder for the litigation.

[58] At the hearing for this matter, I raised my concerns about clauses 15 and 16. Counsel for the Plaintiff advised me that the arbitration clause in the Funding Agreement would prevent an unreasonable termination. I am satisfied that this provision will adequately protect the Plaintiff against unreasonable termination by the funder.

[59] I am also satisfied that the Funding Agreement does not interfere with the solicitor-client relationship, counsel's duty to the class members, or the carriage of the proceeding.

Conclusion

[60] I conclude that this Funding Agreement satisfies the *Houle* and *Difederico* criteria. Accordingly, the Funding Agreement is approved.

[61] There will be no costs on this motion.

Hoskins, J.