

CITATION: Berg v. Canadian Hockey League, 2016 ONSC 4466
COURT FILE NO.: CV-14-514423CP
DATE: 20160707

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
SAMUEL BERG) *Theodore P. Charney* for the Plaintiff
)
Plaintiff)
)
- and -)
)
CANADIAN HOCKEY LEAGUE, ONTARIO)
MAJOR JUNIOR HOCKEY LEAGUE,)
ONTARIO HOCKEY LEAGUE, WESTERN)
HOCKEY LEAGUE, QUEBEC MAJOR)
JUNIOR HOCKEY LEAGUE INC.,)
WINDSOR SPITFIRES INC., LONDON)
KNIGHTS HOCKEY INC., BARRIE COLTS)
JUNIOR HOCKEY LTD., BELLEVILLE)
SPORTS AND ENTERTAINMENT CORP.,)
ERIE HOCKEY CLUB LIMITED, GUELPH)
STORM LIMITED, KINGSTON)
FRONTENAC HOCKEY LTD., 2325224)
ONTARIO INC., NIAGARA ICEDOGS)
HOCKEY CLUB INC., BRAMPTON)
BATTALION HOCKEY CLUB LTD.,)
GENERALS HOCKEY INC., OTTAWA 67'S)
LIMITED PARTNERSHIP, THE OWEN)
SOUND ATTACK INC., PETERBOROUGH)
PETES LIMITED., COMPUWARE SPORTS)
CORPORATION, SAGINAW HOCKEY)
CLUB, L.L.C., 649643 ONTARIO INC c.o.b.)
as SARNIA STING, SOO GREYHOUNDS)
INC., McCRIMMON HOLDINGS, LTD. AND)
32155 MANITOBA LTD., A PARTNERSHIP)
c.o.b. as BRANDON WHEAT KINGS.,)
1056648 ONTARIO INC., REXALL SPORTS)
CORP., EHT, INC., KAMLOOPS BLAZERS)
HOCKEY CLUB, INC., KELOWNA)
ROCKETS HOCKEY ENTERPRISES LTD.,)
HURRICANES HOCKEY LIMITED)
PARTNERSHIP, PRINCE ALBERT RAIDERS)
HOCKEY CLUB INC., BRODSKY WEST)
HOLDINGS LTD., REBELS SPORTS LTD.,)
QUEEN CITY SPORTS &)
ENTERTAINMENT GROUP LTD.,)

SASKATOON BLADES HOCKEY CLUB)
 LTD., VANCOUVER JUNIOR HOCKEY)
 LIMITED PARTNERSHIP, 8487693)
 CANADA INC., CLUB DE HOCKEY JUNIOR)
 MAJEUR DE BAIE-COMEAU INC., CLUB)
 DE HOCKEY DRUMMOND INC., CAPE)
 BRETON MAJOR JUNIOR HOCKEY CLUB)
 LIMITED, LES OLYMPIQUES DE)
 GATINEAU INC., HALIFAX MOOSEHEADS)
 HOCKEY CLUB INC., CLUB HOCKEY LES)
 REMPARTS DE QUEBEC INC., LE CLUB)
 DE HOCKEY JUNIOR ARMADA INC.,)
 MONCTON WILDCATS HOCKEY CLUB)
 LIMITED, LE CLUB DE HOCKEY)
 L'OCEANIC DE RIMOUSKI INC., LES)
 HUSKIES DE ROUYN-NORANDA INC.,)
 8515182 CANADA INC. c.o.b. as)
 CHARLOTTETOWN ISLANDERS, LES)
 TIGRES DE VICTORIAVILLE (1991) INC.,)
 SAINT JOHN MAJOR JUNIOR HOCKEY)
 CLUB LIMITED, CLUB DE HOCKEY)
 SHAWINIGAN INC., and)
 CLUB DE HOCKEY JUNIOR MAJEUR VAL)
 D'OR INC.)

Defendants)

Proceeding under the *Class Proceedings Act, 1992*)

HEARD: June 24, 2016

PERELL, J.

REASONS FOR DECISION

[1] This is a motion without notice for approval of a third party funding agreement among: (a) Samuel Berg, the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; (b) his lawyers, the proposed Class Counsel, Charney Lawyers Professional Corporation; and (c) BridgePoint Global Litigation Services and BridgePoint Indemnity Company (Canada) Inc. (collectively “BridgePoint”). Mr. Berg also seeks an order sealing the court file. In the alternative, if the court is not prepared to hear the motion without notice to the Defendants, Mr. Berg seeks leave to bring on the motion with a sealed record that would not be served on the Defendants or to bring on the motion with a redacted record, with the redactions to be determined by the court on this motion.

[2] At the return of the motion, I adjourned the motion on terms. I made the following endorsement:

This is an *ex parte* motion in a proposed class proceeding under the *Class Proceedings Act, 1992* for the approval of a third party funding agreement between the Plaintiff Samuel Berg and a third party funder. Mr. Berg also asks that the motion record be sealed and that the court rule that the order can be made without notice to the Defendants. For written reasons to follow, I am adjourning the motion to August 3, 2016 on the following terms:

- (1) the motion record, factum, and the book of authorities shall be sealed pending further order of this court;
- (2) Mr. Berg shall retain, at the expense of Charney Lawyers PC, a lawyer to provide him with independent legal advice about the legality of the proposed third party funding agreement along with his retainer agreement and any other agreements with his lawyers and proposed Class Counsel;
- (3) the lawyer providing the independent legal advice shall provide a written opinion including his or her recommendation as to whether Mr. Berg should agree to the third party funding agreement;
- (4) the lawyer's written opinion shall be provided to the court; and,
- (5) before providing the opinion, the independent lawyer shall be provided with a copy of the record and the pleadings and all agreements between Mr. Berg and his lawyers.

[3] What follows are my reasons for adjourning the third party funding motion on terms.

[4] Up until relatively recently, contingency fee agreements in which a lawyer would share a portion of his or her client's recovery in exchange for charging no fees in prosecuting the action and, most particularly, third party funding agreements in which a stranger to the litigation would finance and take on the risk of an adverse costs award for a share of the client's recovery in the event of success, were illegal in Ontario as constituting champerty and maintenance. I discuss the development and the change in the law at some considerable length in *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715 and *Bayens v. Kinross Gold Corporation*, 2013 ONSC 4974.

[5] As I explained in those decisions, contingency fee agreements and third party funding agreements are no longer categorically illegal. However, if the agreements overreach and are unfair and unreasonable from the client's perspective, or if the agreements interfere or potentially could interfere with a lawyer's professional responsibilities to his or her client or to the court, or if the agreements interfere or potentially could interfere with the administration of justice or a fair adjudication of the dispute, then the agreements would be illegal. Depending on their nature and design, it is also possible that a third party funding agreement might be illegal for non-compliance with statutes regulating insurance or investment contracts or securities. However, if the agreements do not overreach or interfere with the lawyer and client relationship or the administration of justice, or some regulatory provision, then they are permissible and justified as a means to afford plaintiffs access to justice.

[6] As for the current state of the law in Ontario about third party funding agreements, the key judgments are: *McIntrye Estate v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257

(C.A.), *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (S.C.J.), *Dugal v. Manulife Financial Corp.*, 2011 ONSC 1785, additional reasons 2011 ONSC 3147; *Fehr v. Sun Life Assurance Company of Canada*, *supra*; *The Trustees of the Labourer's Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation*, 2012 ONSC 2937; and *Bayens v. Kinross Gold Corporation*, *supra*.

[7] In *Bayens v. Kinross Gold Corporation*, *supra*, at paras. 40-41, I extracted certain principles that had developed in the still nascent Canadian law about the regulation of third party funding agreements; I stated:

40. A note of caution is necessary because the concept of third party funding is a work in progress and subsequent cases may identify problems that I have overlooked.

41. To be more expansive, I can extract the following principles from the developing case law that support the conclusion that the court should approve the funding agreement in the case at bar:

- Third party funding agreements are not categorically illegal on the grounds of champerty or maintenance, but a particular third party funding agreement might be illegal as champertous or on some other basis.
- Plaintiffs must obtain court approval in order to enter into a third party funding agreement.
- A third party funding agreement must be promptly disclosed to the court, and the agreement cannot come into force without court approval. Third party funding of a class proceeding must be transparent, and it must be reviewed in order to ensure that there are no abuses or interference with the administration of justice. The third party agreement is itself not a privileged document.
- The court has the jurisdiction to make an approval order binding on the class pre-certification of the class: *Fehr v. Sun Life Assurance Company of Canada*, 2012 ONSC 2715; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1785; *Metzler Investment GMBH v. Gildan Activewear Inc.*, [2009] O.J. No. 3315 (S.C.J.), *contra*.
- To be approved, the third party agreement must not compromise or impair the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the representative plaintiff or the class members.
- To be approved, the third party funding agreement must not diminish the representative plaintiff's rights to instruct and control the litigation.
- Before approving a third party funding agreement, the court must be satisfied that the representative plaintiff will not become indifferent in

giving instructions to Class Counsel in the best interests of the class members. (To speak colloquially, the concern is that insulated from an adverse costs award and with a modest individual claim to compensation, the representative plaintiff will not have any “skin in the game” with a resultant diminished commitment to advance the class action on behalf of the class.)

- Before approving a third party agreement, the court must be satisfied that the agreement is necessary in order to provide the plaintiff and the class members access to justice.
- In seeking approval for a third party funding agreement, it is not necessary to have first applied to the Class Proceedings Fund for funding. If, however, approval from the Fund is sought and refused, nothing can be taken from the fact that the Class Proceedings Fund was not prepared to provide litigation funding.
- Before approving a third party agreement, the court must be satisfied that the agreement is fair and reasonable to the class. The court must be satisfied that the access to justice facilitated by the third party funding agreement remains substantively meaningful and that the representative plaintiff has not agreed to over-compensate the third party funder for assuming the risks of an adverse costs award. (This will be a difficult determination for the court to make, but the comparable benchmark of the Class Proceedings Fund’s percentage uncapped levy may assist the court in determining whether the third party funding agreement is fair and reasonable.)
- To be approved, the third party funding agreement must contain a term that the third party funder is bound by the deemed undertaking and is also bound to keep confidential any confidential or privileged information.
- It is an acceptable term of a third party funding agreement to require the third party funder to pay into court security for the defendant’s costs. (Whether this should be a necessary term in every case has not been determined in the case law.)

[8] As may be noted in *Bayens v. Kinross Gold Corporation, supra*, I cautioned that subsequent cases may identify problems about the approval of third party funding agreements that I had overlooked. The case at bar is a subsequent case, and it does indeed raise problems or concerns.

[9] There are three major areas of concern raised by the case at bar: (1) how should the interests of Mr. Berg be protected and the legality of the agreement be ensured given the clear conflict of interest of his lawyers and the self-interest of the third party funder who has no fiduciary or professional duties to Mr. Berg; (2) whether and to what extent should the defendant be involved in this motion for approval of third party funding; and (3) how can Ontario’s approach be rationalized with the approach in other jurisdictions, where courts in parallel proceedings have approved third party funding agreements without any notice to or involvement

by the defendant.

[10] In regard to the third concern, which is a genuinely new concern, it should be noted that in the case at bar, which involves a class action by hockey players against their hockey leagues for alleged violations of labour and employment rights, there is a parallel class action in Alberta styled *Walter v. Western Hockey League*, and on April 11, 2016, Justice Martin approved a third party funding agreement for the plaintiff in that action. The agreement has identical provisions to the agreement in the case at bar.

[11] Justice Martin made her order on an *ex parte* application, and she sealed her order, the record, and the factum on the motion after making the order. I was told that in Alberta, there is no requirement that the order or the motion material be disclosed to the defendants, and Mr. Berg's counsel submitted that if I were to order disclosure in the Ontario proceeding, it would undermine Justice Martin's Order in the Alberta proceeding and also give the common defendants in the actions a tactical and unfair advantage in both actions.

[12] Other courts in other provinces have proceeded with motions for third party funding without notice and have sealed the file because the disclosure of the agreement would prejudice the plaintiff by disclosing sensitive information to the defendant or by providing the defendant with tactical advantages in the litigation. See: *Roth v. Alberta (Minister of Human Resources and Employment)*, 2005 ABQB 505; *Hayes v. City of Saint John* (April 19, 2016) (SCJ-533-2013); (N.B.Q.C.).

[13] The first two concerns about the legality of the third party agreement and about the involvement of defendants in the procedure to obtain court approval of a third party funding agreement are not new concerns because I considered these matters in *Fehr v. Sun Life Assurance Company of Canada*, *supra*, and in *Bayens v. Kinross Gold Corporation*, *supra*. However, the circumstances of the immediate case have magnified the problems.

[14] In *Fehr v. Sun Life Assurance Company of Canada*, *supra*, at paras. 103-112, 139-142, and 154-158, I discussed the matter of notice to and the involvement of the defendant as follows:

103. The analysis may continue with the dispute between the parties about whether Sun Life is entitled to be given notice and to participate in the funding approval motion. The precise issue is whether Sun Life is "affected" by the motion for approval of the third party funding agreement.

104. It is a principle of natural justice that a party be given notice and have an opportunity to be heard in proceedings that affect his or her interests, and it is a fundamental principle in the administration of justice that court proceedings are public proceedings.

105. Generally speaking, the circumstances in which a court will accept submissions *ex parte* are exceptional and limited to situations in which the delay associated with notice would result in harm or where there is a fear that the other party will act improperly or irrevocably if notice were given: *Ruby v. Canada (Solicitor General)*, [2004] 4 S.C.R. 1 at para. 25.

106. As noted above, the Plaintiffs submit that Sun Life is not "affected" by whether or not the Plaintiffs are supported in some way by third party funding.

Sun Life disagrees and submits that it is affected by the prospect of third party funding being approved by the court. Sun Life states that it has an interest in ensuring that: (a) the third party funder is financially capable of honouring its commitments; (b) that the funder's commitment to pay an adverse costs awards is directly enforceable by Sun Life; (c) that the implied undertaking that protects Sun Life's confidential information applies to the funder; and (d) that the integrity of the litigation process and the administration of justice is maintained.

107. I agree that the Defendant is affected by the motion for third party funding. Although the point was not contested, Justice Strathy was of a similar view in *Dugal v. Manulife Financial Corp.*, *supra*, at para. 16, as was Justice Leitch in *Metzler Investment GMBH v. Gildan Activewear Inc.* *supra*, at para. 3.

108. In addition to being affected by the motion for third party funding and, therefore, normally entitled to participate in the process, it is my view that as a policy matter a defendant's participation would be useful and should be permitted. As demonstrated by the immediate case, a defendant might raise issues that should be addressed by the court. In the case at bar, Sun Life submitted that a third party funding agreement might raise the following questions, for which it would be both necessary and helpful to have Sun Life's submissions:

- Whether the third party funding agreement was champertous or otherwise contrary to public policy.
- Whether the third party agreement might be "legal expense insurance," in which case it would be regulated under the *Insurance Act*, R.S.O. 1990, c. I.8, and the court would have to consider whether the agreement complied with the *Act*. The court would also have to consider whether notice of the motion should be given to the regulator, the Financial Services Commission of Ontario.
- Whether the third party funding agreement involved an investment scheme, in which case it might be a "security" subject to compliance with the Ontario *Securities Act*, R.S.O. 1990, c. S.5.
- Whether the third party funding agreement might be illegal under s. 347 of the *Criminal Code*, R.S.C. 1985, c. C. 46 for imposing a criminal rate of interest.

109. There are other issues associated with third party funding agreements that may need to be addressed. There is the concern that the third party funder may compromise the lawyer and client relationship and the lawyer's duties of loyalty and confidentiality or impair the lawyer's professional judgment and carriage of the litigation on behalf of the client. Thus, it may be necessary to review as Justice Strathy did in *Dugal*, *supra*, and as Justice Leitch did in *Metzler Investment*, *supra*, the precise role of the third party funder in the litigation.

110. If any of these issues actually were aspects of the third party funding agreement with Bridgepoint, in my opinion, it would be useful to have full

argument from both parties. If Sun Life were not present, it might be necessary to appoint an *amicus* to fill an adversarial void and to assist the court in making a determination.

111. I observe that the above issues are largely antithetical to third party funding, but it is conceivable that a defendant might support third party funding, since it may be the ultimate beneficiary of it. Thus, it would also be informative for the court to know why a defendant supports or does not oppose the third party funding.

112. Therefore, unless the Plaintiffs make out a case for protecting solicitor-client privilege or make out some other public policy argument, Sun Life should be given notice of the third party funding motion, and it should also receive the motion material to be relied on for the motion, and it should be permitted to participate at the hearing.

....

139. It is arguable that when a plaintiff applies for third party funding, among other things, he or she puts in issue who is actually controlling the litigation and whether the third party funding agreement is champertous or in compliance with any regulatory regime that might apply. The terms of the agreement may have implications to whether the representative plaintiff and Class Counsel have conflicts of interest. In these circumstances, fairness requires that any privilege associated with the terms of the third party funding agreement be treated as waived.

140. In my opinion, a defendant is affected by a third party funding agreement and fairness demands that any privilege associated with the agreement is waived. This conclusion is also consistent with the practice of disclosing the support of the Class Proceedings Fund to the defendant.

141. Thus, on grounds of precedent, policy, and fairness, I prefer the Canadian arguments to the Australian position, which leads to the conclusion that a third party funding agreement is not privileged or if it is privileged, then the privilege is waived.

142. But I add the observation that because there is no privilege in the third party funding agreement, then as a matter of best practices, an applicant for third party funding should not include extraneous and otherwise privileged information in a third party funding agreement.

....

154. In any event, the Plaintiffs do not have an unfettered right to access justice unencumbered by exposure to costs. All litigants must abide by the rules that

administer access to justice, and no litigant is entitled as of right to have any economic barriers to access to justice removed. By itself, the desirability or the necessity of a class action does not entitle a plaintiff to immunity from the costs consequences of litigation. If that were the case, Ontario would have adopted a no-costs regime. However, litigation in Ontario, including class actions, comes with exposure to an adverse costs award. To obtain access to justice, the Plaintiffs must play by the rules of the administration of justice, and the rules to access to justice normally require that a plaintiff disclose his or her case for relief to the defendant in open court.

155. As for Bridgepoint, if it does not wish to disclose its pecuniary interest in the litigation, then Bridgepoint should do its business in another less transparent or more disinterested forum.

156. Further, if I am incorrect in concluding that there is no serious risk to the public interest or to the administration of justice, I conclude that it is not the case that there are no reasonable means to prevent the serious risk.

157. Further still, if I am incorrect in concluding that the first two elements of the three-part test for a publication ban, etc. have not been satisfied, the third element is not satisfied.

158. In my opinion, an order restricting or qualifying the open court principle would not outweigh its deleterious effects on the rights and interests of the parties and the public. In my opinion, for the reasons expressed earlier, Sun Life is affected by the motion, possibly adversely affected. And, in any event, the participation of Sun Life would be helpful in determining whether to approve or refuse the third party funding application.

[15] Turning to the case at bar, the application of these principles is problematic because there are several unique features to Mr. Berg's motion for court approval of the third party funding agreement. Unlike the third party funding agreements which have come before the court for approval in other cases, the agreement in the immediate case is not based on a contingency share of the plaintiff's recovery; rather the agreement presented to Mr. Berg has a combination of fees, contingency fees, and interest payments. The formula for the third party funder's recovery is extraordinarily complicated, and it contains several temporal variables and also minimums and maximums. There are charts and tables that attempt to explain BridgePoint's potential recoveries. There are limits and gaps in BridgePoint's obligations to indemnify Mr. Berg for adverse costs consequences. There are complicated provisions about when BridgePoint has a right to withdraw from the agreement. Without getting into the details, the argument in Mr. Berg's factum convinced me that if the agreement with BridgePoint were approved and the Defendants were fully informed of the terms of the agreement, their knowledge of the precise terms of the financing and the indemnity provisions would provide them with tactical advantages in how the litigation would be prosecuted or settled.

[16] After reading the motion record, which had not been served on the Defendants, my initial reaction was that the court was being placed in an impossible situation with several dilemmas to

resolve.

[17] My initial concern was that it appeared to me that Mr. Berg needed to receive independent legal advice about: (a) his contingency fee agreement with Class Counsel; (b) the third party funding agreement; and (c) the interrelationship of the contingency fee agreement and the third party funding agreement.

[18] I was concerned that the court not take on the role of providing legal advice to Mr. Berg about the probity of the various agreements, but I could not ignore that in class actions, Class Counsel are, practically speaking, in a partnership situation with the Representative Plaintiff and there is an obvious conflict of interest in Class Counsel advising their client about the probity of a third party funding agreement.

[19] I was concerned that the court was not institutionally suited to provide legal advice outside of the adversarial system, and I was concerned that defendants cannot and should not be relied on to ferret out the problems with a third party funding agreement, because once their own interests are protected, such as ensuring that they have access to the funds for a costs awards favourable to them, they might be content with the knowledge that the plaintiff was not judgment proof for costs, and thus defendants might rather like the existence of a third party funding agreement.

[20] I was concerned that the third party funding agreement, particularly in combination with the contingency fee agreement, might overreach and might be illegal as champerty and maintenance, but I did not think it was appropriate to rely on the Defendants to make the case against the probity of the third party funding agreement save to protect their own interests. And, to be clear, I was not certain that there was necessarily something wrong with the proposed agreements.

[21] I was concerned that if it was first determined that the third party funding agreement should not be approved because it was illegal or unfair and not in the interests of the putative Class Members, then there was no need to have the agreements and the other sensitive material disclosed to the Defendants.

[22] Because of all these concerns, I decided that some modification was necessary to the principles that I had identified in *Fehr v. Sun Life Assurance Company of Canada, supra* and in *Bayens v. Kinross Gold Corporation, supra*. In particular, the circumstances of the immediate case require a sequential approach that did not involve the Defendants at the outset and that may or may not require their involvement depending on how the request for court approval progresses.

[23] It was for these reasons that I decided to adjourn this motion on the terms set out above.

Perell, J.

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**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

SAMUEL BERG

Plaintiff

– and –

CANADIAN HOCKEY LEAGUE, et al.

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 7, 2016