Law's Financialization: Litigation Finance and Multilayer Access to Justice in Canada

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Abstract

In the aftermath of the Global Financial Crisis, states around the world have experienced sustained growth in the emerging industry of litigation finance in light of the perceived insularity of courtrooms from the instabilities and fluctuations of financial markets. In Canada, this nascent industry has been dominated by class actions given the high costs, risk exposures, and attractive rewards associated with collective redress. Such investments have been legitimated as promoting access to justice, a fundamental human right. This paper traces the historical and contemporary development of this legal dynamic of financialization by documenting the progressive liberalization of maintenance and champerty laws from the nineteenth century to the current period through a series of case studies, before exploring the legal economics of the emerging industry in Canada. In so doing, this paper critically examines the impacts of law's financialization on multilayer access to justice.

Keywords: financialization, access to justice, litigation finance, class actions, third party litigation funding

Résumé

Au lendemain de la crise financière mondiale, des États du monde entier ont été le théâtre d'une croissance soutenue de l'industrie émergente du financement de litiges, une croissance tributaire de l'insularité perçue des salles d'audience ainsi que des instabilités et des fluctuations des marchés financiers. Au Canada, cette industrie naissante a été dominée par les recours collectifs eu égard aux coûts élevés, à l'exposition aux risques et aux récompenses attrayantes qui sont tous associés auxdits recours collectifs. De tels investissements ont d'ailleurs été légitimés au nom de l'accès à la justice, un droit humain fondamental. Avant d'explorer l'économie juridique de cette industrie émergente au Canada, cet article illustre le développement historique et contemporain de la dynamique juridique de la financialisation en documentant la libéralisation progressive des lois sur le soutien abusif et la champartie entre le XIXe siècle et la période actuelle, et ce, à travers une série d'études de cas. Ce faisant, cet article examine, d'une manière critique, les impacts de la financialisation du droit sur l'accès à la justice à de multiples niveaux.

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Mots clés : financiarisation, accès à la justice, financement de litiges, recours collectifs, le financement de litiges par un tiers

Introduction

In the aftermath of the Global Financial Crisis, states around the world have experienced sustained growth in the emerging industry of third party litigation finance ("litigation finance"). The perceived insularity of courtrooms from the instabilities and fluctuations of financial markets is a major factor of this growing appeal in the early years of the post-2007 period. As the CEO of LexShares, a former mergers and acquisitions banker at Deutsche Bank, observes: litigation investments are "completely uncorrelated, zero-beta assets that are not influenced by broader economic factors," which is to say, "it doesn't matter what the stock market does – commodity prices, interest rates, none of that is having a direct impact on investment in litigation, which is really operating inside a courtroom vacuum" (PYMNTS 2016). Such investments are simultaneously portrayed to justice stakeholders as promoting access to justice, a fundamental human right. This raises questions about the extent to which financial capital promotes access to justice by marketizing civil justice systems.

Despite this transformative global development, litigation finance has been largely neglected in extant financialization research. Legal research has similarly neglected to situate litigation finance within the broader financialization phenomenon, which itself is a transformative development. The term *financialization* has been broadly defined in this context as the "increasing role of financial motives, financial markets, financial actors and financial institutions in the operation of the domestic and international economies" (Epstein 2005, 3) in light of the increasing concentration of income at the highest levels which reduces effective demand and precipitates the movement of capital towards "speculative profit opportunities outside the 'real economy'" (Streeck 2016, 67; Stiglitz 2013). This article focuses on the movement of financial capital towards such "speculative profit opportunities" in civil justice systems. In bridging this divide, this paper traces the historical and contemporary development of this legal dynamic of financialization by documenting the liberalization of maintenance and champerty laws from the nineteenth century to the current period through a series of case studies, before exploring the legal economics of the emerging industry in Canada from the perspective of multilayer access to justice.

Although litigation finance applies in a variety of consumer and commercial contexts spanning the breadth of domestic and international law, the nascent industry has been dominated by class actions in Canada in light of the high costs, risk exposures, and attractive rewards associated with collective redress. The demand for litigation finance is based on the dual factors of (1) risk aversion and (2) budget constraints on the part of class action firms. This emerging industry is developing at the same time as the globalization of class actions, which have proliferated globally as legal transplants from their modern origins in American procedural law. Several states have adopted some form of representative or "class" proceeding, including Argentina, Australia, Brazil, Canada, Chile, China, Denmark, Finland, Germany, Indonesia, Israel, Italy, Mexico, The Netherlands, Norway, Portugal, Russia, South Africa, Spain, Sweden, Taiwan, and the United Kingdom, while other

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states have debated introducing such procedures, including Austria, France, Poland, and the European Union. The dominance of class actions as investment opportunities for financial capital is aided by this globalization of class actions that exponentially expands the litigation finance market. To date, several states around the world have allowed litigation finance, including Australia, Austria, Brazil, Cayman Islands, Denmark, England and Wales, Germany, Hong Kong, Ireland, South Korea, The Netherlands, New Zealand, Poland, Singapore, Switzerland, and the United States.

The primary objective of this article is to trace the development of litigation finance through a contextual analysis of key dynamics of the liberalizing, monetizing, and securitizing imperatives of this emerging industry. In so doing, this article provides a conspectus of the impacts for multilayer access to justice moving forward. The term "multilayer access to justice" has been developed in this article to refer to access to justice in the context of class actions. "Multilayer" refers to the multiple layers of interests at stake in class actions: individual, collective, and public (Wrbka, Van Uystel, and Siems 2012).

Finally, a few preliminary points need to be noted. First, although this article focuses on litigation finance in class actions, the thesis of "law's financialization" does not apply only to this type of financial activity, but rather extends to include the myriad ways in which financial capital has transformed legal systems and actors, such as the public offerings of law firms (for example, Slater & Gordon, a firm based in Australia, was the first law firm to offer an I.P.O. in 2007). Second, litigation finance is not a homogenous industry with uniform practices. While some financial actors may be open to a host of criticisms raised in this and other articles over questionable practices, others conduct themselves in accordance with codes of conduct to ensure best practices. For example, the members of the Association of Litigation Funders in England and Wales adhere to a Code of Conduct that was published in 2011 by an agency of the United Kingdom's Ministry of Justice, the Civil Justice Council. This Code of Conduct guards against many of the questionable practices that have prompted fervent criticisms in other jurisdictions. There is no such code in Canada. Third, it is beyond the scope of this article to comprehensively examine the disparate developments of litigation finance across every jurisdiction. Instead of providing a high-level overview, this article will rather focus on Canadian developments as a modest beginning to a more detailed examination of the global dimensions of financialized mass litigation in light of the early adoption of class action legislation in Canada compared with similar jurisdictions that have more recently adopted such legislation and permitted such financialization.

Multilayer Access to Justice in Canada

Before exploring litigation finance further, it is instructive to briefly review class action jurisprudence in Canada from an access to justice perspective. In 1978, Quebec became the first Canadian jurisdiction to introduce class action legislation with *An Act Respecting the Class Action*. Common law provinces did not adapt class legislation until Ontario passed the *Class Proceedings Act* in 1992, precipitating British Columbia to adopt similar legislation in 1995, followed by Saskatchewan and

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Newfoundland in 2002, Manitoba in 2003, and Alberta in 2004. These provincial class action regimes have been shaped by a trilogy of decisions released by the Supreme Court in the early 2000s.

The first of these landmark decisions was *Western Canadian Shopping Centres v. Dutton*, S.C.J. 63, [2001] 2 S.C.R. 534 ("*Dutton*"), in which the Supreme Court of Canada held that class actions had sufficient public importance to warrant adoption into Canadian common law (irrespective of provincial statutory regimes). Apart from Prince Edward Island, every province that had not passed class action legislation at the time of the decision has since introduced such legislation. Chief Justice McLachlin reconfirmed the three main advantages of class actions as promoting judicial economy, access to justice, and behaviour modification (2001: 27–29). Among these advantages, access to justice and judicial economy are primary policy objectives, whereas behaviour modification is a secondary objective. The Supreme Court observed that "by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually" (2001: 28). This is the standard "negative value claim" argument in favour of class actions. To highlight their access to justice benefits, the Supreme Court confirmed that "[w]ithout class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims (28)."

In *Hollick v. Toronto (City)*, 3 S.C.R. 158 [2001] S.C.C. 68 ("*Hollick*"), the Supreme Court embraced a flexible and generous approach to certification, which has come to be known as "the *Hollick* approach." Since certification is the most critical battle for prospective class actions, this signalled a positive development for access to justice. In the final case of the trilogy, *Rumley v. British Columbia*, 3 S.C.R. 184 [2001] S.C.C. 69 ("*Rumley*"), the Supreme Court expanded the concept of access to justice beyond exclusively economic factors by recognizing potential social and psychological barriers. The extraordinary nature of the claim—institutional abuse of blind and deaf children—was cited as a primary factor, with the observation that allowing the "suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by class members" (2001: 39). Subsequent class actions, such as the Residential Schools action, testify to the social dimensions of class actions and the ways in which they can promote substantive justice with social benefits.

For the purposes of this analysis, what is important to note from this brief review of Canada's class action trilogy is that barriers to multilayer access to justice are not strictly economic, nor are the types of justice sought in many cases strictly monetary. Many cases involve calls for public apologies, medical programmes, educational initiatives, and other types of non-monetary recoveries. This is important to consider in light of the monetising imperatives of law's financialization discussed below. Given the high costs and risk exposures involved in class actions, however, the *major* barriers to multilayer access to justice are usually economic. This is precisely where litigation finance enters the frame.

Litigation Finance in Canada

Litigation finance refers to the provision of monetary assistance by parties who do not have a direct interest in the litigation for which the financing is provided

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(apart from the financing itself). Strictly speaking, it does not *necessarily* imply that the third party will share in the profits of the litigation. For example, charitable donations do not commonly involve pecuniary interests on the part of third parties. In class actions, however, financial firms universally provide financing for profit. Where the "loser pays" rule is enforced, as is the case in several Canadian provinces including Ontario (the major jurisdiction for class actions in Canada by volume), financial firms often provide indemnification against adverse costs awards. The enforcement of cost-shifting rules such as the "loser pays" rule is a major jurisdictional variation that mediates this type of financialization in Canada and elsewhere. Whether litigation finance addresses the resource constraints or risk exposures involved in class actions (or a combination of both) depends on a range of factors. Either way, the interests of financial firms is pecuniary.

Origin of Litigation Finance in Canada

Litigation finance in Canada emerged in the immediate aftermath of the Global Financial Crisis as financial capital sought new profit opportunities outside the so-called "real economy." The first cases in which Canadian courts were motioned to approve third party financing agreements occurred in 2009 and 2010 in Alberta and Nova Scotia. In these cases, however, the courts did not offer any reasons and any relevant materials were placed under seal. In Ontario, *Metzler Investment GMBH v. Gildan Activewear Inc.* [2009] OJ No. 3315 (SCJ) ("*Metzler*") was the first case in which court approval for a third party financing agreement was sought.

In *Metzler*, the plaintiff sought approval of a financing agreement that it had entered into with Claims Funding International, an Ireland-based financial firm. The proposed financing agreement was fairly straightforward: in exchange for indemnifying the plaintiff in the event of an adverse costs award, Claims Funding International would receive a 7 percent commission on any recovery. Although the court held that it was not possible to conclude that the agreement would "not amount to over-compensation to the extent that it is unreasonable and unfair to those who will bear its expense" (*Metzler* 2009: 12), namely, the class members, out of whose share the commission would have been withdrawn, the case nevertheless opened the door to litigation finance in Ontario by recognizing that such agreements are not "*per se* champertous." The proceeding was eventually settled out of court.

Whereas *Metzler* introduced litigation finance into Ontario's class action regime with the application of the reasoning of *McIntyre Estate v. Ontario* (Attorney General) [2002] 61 O.R. (3d) 257 (C.A.) ("*McIntyre*") to the class action context, *Dugal v. Manulife Financial Corporation,* [2011] ONSC 1785 ("*Dugal*") established its legitimacy with the approval of the proposed financing agreement. This approval was based on the judgment that the proposed agreement was not champertous given that the financial firm (Claims Funding International) did not "incite or provoke" the litigation and did not have an "improper motive." The propriety of the third party motive was determined according to the reasoning offered in *Metzler* that "the nature and amount of the fees to be paid are critical in determining whether the motivation was improper" (2011: 19). For the court in *Dugal*, "exacting an unfair price for the funding agreement, with the resultant unfairness to the litigant, would be an improper motive" (2011: 20). The concern here is that an "unfair price" would

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unjustly deprive class members of their fair share of any recovery. Ultimately, this criterion was used to determine that the agreement was reasonable in its proposed commission rate and monetary caps. The reasonableness of the commission rate (7 percent) was also favourably compared with the 10 percent levy imposed by Ontario's public funding body, the Class Proceedings Fund. Given that Claims Funding International is based in Ireland without any material assets in Canada, the court also maintained that adequate security should be provided to ensure that the firm had the capacity to satisfy any potential costs award.

Justice Strathy also observed that the "grim reality" (2011: 29) of class actions in Ontario's regime (with its "loser pays" rule) makes it economically irrational for a representative plaintiff to pursue a class proceeding without indemnification. "No person in their right mind," Justice Strathy noted, "would accept the role of representative plaintiff if he or she were at risk of losing everything they own. No one, no matter how altruistic, would risk such a loss over a modest claim. Indeed, no rational person would risk an adverse costs award of several million dollars to recover several thousand dollars or even several tens of thousand dollars" (29). The general response by class action firms to this "grim reality" is to take on the risk by indemnifying representative plaintiffs—or by seeking indemnification from the Class Proceedings Fund. Furthermore, given that indemnification provided by class action firms "impose[s] onerous financial burdens" and "risk[s] compromising the independence of counsel" (29) and that the Class Proceedings Fund is rather selective in choosing which cases to fund and indemnify, Justice Strathy noted that litigation finance ultimately promotes access to justice, a policy objective that would otherwise be "illusory if access to justice were deterred by the prospect of a crushing costs award borne by the representative plaintiff or counsel" (33).

Of course, class action firms are incentivized to off-load the indemnification risk that they assume by pursuing litigation financing, even where this is not in the economic interests of class members. This speaks to the "self-dealing problem" (Sebok 2014) that, in some ways, is pervasive in the business of law but is particularly pronounced at the intersection of class actions and litigation finance since representative plaintiffs are usually "weak" clients and class actions are attorney-driven vehicles.

Ultimately, as a landmark case, *Dugal* provides an instructive overview of the role of litigation finance in promoting access to justice (in the limited sense of providing indemnification). This view is based on Ontario keeping the "loser pays" rule in its class action regime. A legislative intervention that abolishes the "loser pays" rule by extension obviates the need for indemnification. The Ontario Law Reform Commission's influential *Report on Class Actions* ("OLRC Report") actually recommended that the "loser pays" rule be abolished—a recommendation that was obviously not accepted by legislators. It remains to be seen whether such a legislative reform will manifest in the foreseeable future. Indeed, Justice Edward Belobaba recently noted in *Rosen v. BMO Nesbitt Burns Inc.,* 2012 ONSC 6356 that it was a "mistake" not to accept this recommendation and adapt a "no costs" rule (2012: 2).

How the litigation finance industry in Ontario will be affected by such a reform is an open question. A reform that abolishes the "loser pays" rule obviates the need for indemnification against adverse costs awards. This is not inconsequential since

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the primary motive for the pursuit of litigation finance by class action firms in Ontario is indemnification. However, such a reform does not actually address the financing of litigation by third parties. Eliminating the rule obviates the need for adverse costs indemnity, which assuages the risk-exposure concerns of class action firms. This does not impact the pursuit of financing by budget-constrained firms. Despite the "litigation war chests" that firms in Ontario have amassed since the 1990s, moderating the traditional *David vs. Goliath* narrative of class actions, resource disparities nevertheless persist. The availability of commercial funding contributes to evening the playing field by counterbalancing such disparities. It is perhaps unsurprising, therefore, that corporate interests that have historically benefited from such disparities have been the strongest advocates against litigation finance.

International Context of Litigation Finance

The development of litigation finance has not occurred in a "national vacuum." As Hodges, Peynser, and Nurse have pointed out in a recent overview of litigation finance in England and Wales, the emerging industry has developed in an international context "in which arrangements, rules and developments in one jurisdiction can have a major impact on others" and in which financial firms are "investing in cases outside their home jurisdictions" (2012, 37). This has been facilitated by macro-economic shifts, for example, the "new constitutionalism" (Gill 2015; Bakker and Gill 2003), that promote financial liberalization, restrict capital controls, and enable global capital flows. For example, the dominant presence in Canada of Ireland-based Claims Funding International (founded and incorporated in 2008 by the Australian class action firm, Maurice Blackburn Lawyers) testifies to this internationality. In this context, the major constraints on law's financialization have been prohibitions against maintenance and champerty. These are the key laws that have been progressively liberalized to allow for greater financialization, although this has not been uniform across jurisdictions; for example, the Supreme Court of Ireland recently upheld the laws in *Persona Digital Telephony Ltd v. The Minister for Public Enterprise* [2017] IESC 27.

Critics, such as Peter S. Spiro, have pointed out that the "free market" often produces innovations such as litigation finance "in response to problems such as [access to justice], but they are not always *socially beneficial* innovations" (emphasis added); Spiro polemically compares firms that "invest" in litigation as being "very much like the vulture funds that buy distressed debt" (2014). Conversely, proponents of litigation finance have touted the access to justice benefits of allowing justice-seekers to access financing for their meritorious claims. This is particularly evident in the class action context, which typically positions a group of similarly situated individuals with negative value claims against powerful adversaries, for example transnational corporations, with superior resource capacities. By allowing such justice-seekers to access necessary financing and/or indemnification from adverse costs awards, litigation finance can contribute to evening the balance of power in such cases.

At present, various types of litigation finance have developed globally. However, the most robust litigation finance industry has developed in Australia. To the extent that contingency fees operate as an economic alternative to litigation finance,

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it should not be particularly surprising that Australia has been at the forefront of the growing industry, given its regulatory prohibition on contingency fees (and its early adaptation of class actions). Conversely the legalization of contingency fees in provincial class action legislative frameworks effectively reduced demand for litigation finance in Canada (for resource-constrained firms, not those seeking indemnification). At the risk of oversimplifying the economics of class actions, it is safe to suggest that Canada has historically deployed attorneys as economic enablers, whereas Australia has deployed financiers in this capacity.

In a majority decision, the Australian High Court found in *Campbell's Cash and Carry Pty Ltd. v. Fostif Pty Ltd* [2006] HCA 41 (Aus. H.C.) ("*Fostif*") that it was not contrary to public policy for a financial firm to provide monetary assistance and influence the financed litigation with a pecuniary interest. For financiers, investing significant resources and the exposure to high risks of adverse costs awards without any influence (and the expectation of total passivity) may ultimately prove unsustainable. As the industry has grown, financial firms comprised of experienced legal actors have increasingly offered analysis and advice. This is evident in jurisdictions around the world with different responses. For example, the Code of Conduct for Litigation Funders in England and Wales includes provisions that prevent members of the Association of Litigation Funders from controlling litigation or compelling attorneys to breach their professional duties. There is no such code in Canada. Nevertheless, Canadian courts have been vigilant in maintaining the independence of counsel on the question of litigation control. This is especially important in class actions, with their well-documented principal-agent problem. Moving forward, the question of control will likely remain an important point of contestation, as will the "self-dealing problem," which is especially pronounced at the intersection of class actions and litigation finance.

Maintenance and Champerty

The strongest doctrinal objection to litigation finance is rooted in the interrelated laws of maintenance and champerty (Dennis 1890; Winfield 1918; Radin 1935; Bodkins 1935). In the class action context, however, maintenance and champerty have historically been invoked in the debate over the legitimacy of contingency fees. It should also be noted that contingency fees are a central feature of "US-style" class actions and have been polarizing in representative or grouped proceedings around the world. A strong continuity exists in the objections raised against both contingency fees and litigation finance. For example, the OLRC Report observed that with the introduction of contingency fees, the "lawyer acquires an interest in the lawsuit that might come between him and his client [*sic*], not only concerning the amount of the fee but also over the control of the suit on such questions as whether to accept an offer of settlement" (OLRC 1982, 726), which is similarly true in the context of litigation finance insofar as third parties can have pecuniary interests that are competing (or complementary, in optimal cases) to those of class members. This suggests that those who take exception to litigation finance should likely take exception to contingency fees and the many ways in which financial interests apart from those of clients can undermine access to justice. Conversely, those who accept the potential conflicts that may arise in a private legal market

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and seek to address these conflicts through various measures, such as strong(er) regulations, should likely (if cautiously) view the emergence of litigation finance as a promising development for increasing access to justice.

Overview

The OLRC Report defined maintenance as the "officious intermedd[ling] in a suit" (1982, 716) in which the maintainer does not have a proper or legitimate interest. The OLRC Report also recognized that champerty "refers to a species of maintenance in which a person unlawfully maintains an action for a share of the proceeds that may be realised as a consequence of the suit" (1982, 717). More recently, the Ontario Court of Appeal provided a benchmark definition of both doctrines in *McIntyre*, noting that "[c]hamperty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation" (2002, 26). Maintenance does not necessarily involve champerty, whereas champerty necessarily involves maintenance; in other words, "without maintenance there can be no champerty" (2002, 26). As it pertains to litigation finance in class action regimes, the concerns are based on the potentially champertous behaviour in light of the universality of pecuniary interests.

Legislative History of Champerty

The root of Canadian prohibitions on champerty is the medieval English statute *Statutum de Conspiratoribus* (*Statute Concerning Conspirators*) from 1305. The medieval language of this statute was modernized in 1763. This modern prohibition was introduced in 1792 into the former Province of Upper Canada (OLRC 1982, 721), followed by the recently established Province of Ontario's enactment of *An Act Respecting Champerty* (*Champerty Act*), R.S.O. 1897, c. 327, in 1897, which holds (in its entirety) as follows:

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.
2. All champertous agreements are forbidden and invalid.

This statute is directly based on the English prohibition. The language of s.1 of the *Champerty Act* is identical to the modern language of the English prohibition from 1763—the unambiguous prohibition of all champertous agreements of s.2 was a new addition that was formulated by the Ontario legislature in 1897 (*McIntyre* 2002, 20). Although the abuses that the original medieval English statue sought to prohibit are no longer practicable, the prohibition on champerty has evolved to include other abusive practices that are broadly within the purview of the *Champerty Act*. These abusive practices include the prevailing understanding of champertous conduct as the improper profiting by a third party to litigation in which the "champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses" (OLRC 1982, 719).

Notably, maintenance and champerty are no longer common law criminal offences in Canada (given the inclusion of s.9 into the *Criminal Code of Canada,*

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which abolished common law offences in 1953). Unlike similar jurisdictions (for example, England and Australia), however, the *Champerty Act* has not been repealed in Ontario, which has created a legal situation in which courts have legitimated "champertous" conduct without legislative intervention.

Preventing Litigation

The primary objective of maintenance and champerty is preventing litigation (not only frivolous litigation). These prohibitions have sought to restrict litigation irrespective of merits. Legal historians have suggested that this normative stance "reflected a deeply entrenched English attitude that litigation itself was a socially disruptive evil" (OLRC 1982, 717). The prohibitions are therefore not reducible to administrative concerns over the clogging of courts through frivolous litigation, but rather encompass a broader social perspective on the undesirability of litigation. This restricted conception of maintenance and champerty has been progressively liberalized since the late-nineteenth century to allow for several exemptions in the provisioning of financial assistance by third parties. This expansion has primarily occurred as a consequent of balancing the countervailing objectives of discouraging litigation and increasing access to justice. Courts have recognized that access to justice has been unduly restrained under stricter conceptions of maintenance and champerty given the historical failure to differentiate between meritorious and frivolous litigation.

These exemptions have been distinguished by the motives attributable to third parties. For example, litigation funds obtained from family members have been adjudged as proper or legitimate by courts. Although such funds are exempted from maintenance restrictions, these exemptions do not extend to champertous agreements. In cases where a third party (family member) has a pecuniary interest in the litigation, a champertous agreement would not be recognized by courts (although enforcement of such familial agreements is predictably difficult) (Puri 1998, 529). Charitable donations and altruistic legal fundraising activities are also treated as exemptions to maintenance.

Notably, such exemptions generally do not feature in class actions. The high costs and risk exposures have restricted the viability of available financing opportunities, contributing to the economic barriers to multilayer access to justice. Legislative initiatives have sought to overcome these economic barriers through various measures, such as legalizing contingency fees, which promotes access to justice by economically incentivizing class action attorneys. In Ontario, this legalization first occurred with the enactment of the *Class Proceedings Act, 1992,* S.O. 1992, c. 6, s.29(2). Accordingly, all fee arrangements must obtain court approval. As pointed out in *McIntyre*, which remains the leading case on maintenance and champerty, it is not the case that "contingency fee agreements can never be champertous," but rather that contingency fee arrangements "should no longer be considered *per se* champertous," and that courts should consider the "circumstances of each case before determining whether or not the "requirements for champerty are present" (2002, 75).

Proponents of litigation finance have argued that the basis of legitimating contingency fees should naturally extend to litigation finance. "The motivations driving lawyers and investors are one and the same," as one commentator has observed,

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which lends credence to the view that "[b]ecause the courts and legislatures have condoned the profit-motive of entrepreneurial class counsel, it is hard to see how the motives of third-party funders could be viewed as obnoxious by comparison" (Senkpiel 2009, 301). These proponents have sought to liberalize or abolish maintenance and champerty laws, with one commentator arguing that the "exceptions are fairly incoherent" and the "justifications are ancient and anachronistic and hold little force in contemporary society" (Puri 1998, 565). In the class action context, proponents have expressed the view that without such financing, a class proceeding may never move past the certification stage. Against the criticism that litigation finance is "morally questionable because it will allow third parties to profit from other people's injuries," some have argued that "it would seem perverse to maintain the status quo and thereby allow wrongdoers to profit from the plaintiff's inability to pursue a legal claim" (563). This latter point is plainly accurate; however, such a view may ultimately overvalue the role of private litigation financiers as facilitators of access to justice and undervalue the role of public funding models such as Ontario's Class Proceedings Fund.

Motive Requirement

Although the differences in the exemptions are obvious—a mother lending money to a daughter is substantively different from a charitable donation to a worthy cause—a common denominator among these exemptions is the determination of the proper or legitimate motive by courts. Whereas courts have historically viewed any form of litigation finance without lawful excuse as amounting to maintenance irrespective of motives, the range of permissible funding sources has progressively expanded through closer motive scrutiny. In the case of a charitable donation, legal fundraiser, or familial donation, determining the motive is fairly straightforward. However, the prospect of mass litigation finance raises a series of concerns that are not necessarily applicable in these exemptions, including the universality of third party pecuniary interests.

Whether and to what extent the motive of financial firms is discernible from the material terms and conditions of financing agreements has thus far been largely neglected in the relevant jurisprudence. Indeed, the literature on litigation finance contracting in general is underdeveloped, with few exceptions, for example, Steinitz and Field (2014). Plainly speaking, it is not self-evident that third party motive is discernible from the material terms and conditions. Although courts have largely considered the matter incontrovertible, it is not immediately clear why the "fairness of the price" is indicative of the propriety of the motive. Financial firms are private enterprises that are motived by profit maximization. Irrespective of commission rates or monetary caps, the primary motive is the profit motive. Material terms and conditions are perhaps less indicative of the propriety of their motives and more indicative of their respective business strategies. It is safe to assume that a hypothetical financial firm does not charge a commission rate of 7 percent (as opposed to 20 percent) out of public-spirited concern for greater access to justice for class members but rather as a consequent of in-house economic calculations and strategic considerations on optimal commission rates (and monetary caps). It is an observation bordering on a truism that such private

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enterprises would charge higher rates if these were acceptable by courts (and class action firms); for example, Australian financial firms generally charge commission rates in the range of 25 percent to 40 percent, at times as high as 60 percent to 70 percent (Kalajdzic, Cashman, and Longmoore, 2012). The tendency of approving financing agreements without usurious or unconscionable commission rates and monetary caps is likely more indicative of the access to justice concerns of *courts* rather than those of *financial firms.* Given that the overriding objective of this process is court approval, negotiations that occur in advance of a tentative agreement often consider the boundaries provided by courts on the acceptability of rates and caps. The immanent criticism here is not that financial firms do not sufficiently prioritize access to justice—these are profit-driven private enterprises, not state institutions motivated by public interests or altruistic actors such as legal charities. Rather, it is an observation that it does not stand to reason that motivations are proper or legitimate by virtue of the material terms and conditions of proposed agreements.

Substantively speaking, such profits are generally withdrawn directly out of any recovery of the financed litigation; that is, every dollar in profits is a dollar that is not distributed to class members. Interestingly, Australia, which has otherwise been the global leader in litigation finance, only recently allowed "common fund orders" in *Money Max Int Pty (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148. Prior to this decision, the terms of a financing agreement only applied to class members who had agreed to such terms. This created a "free rider problem," where class members were incentivized to refrain from agreeing to the financing agreement, since they would benefit from the financing either way. Now, the terms of an agreement apply to all class members, with or without their consent. This allows financiers to withdraw their portion from the total recovery, rather than only from the recovery allocated to those who had signed the agreement. It is beyond the scope of this article to examine the attributes of Australian class actions in greater detail (especially its "closed class"/"open class" dynamic), but for the present purposes it suffices to note that Canadian regimes operate on a common fund basis.

Finally, the potential for collusion between attorneys and financiers can compound the problem of misaligned economic interests already extant in class actions as financing agreements with unreasonable terms may be pursued against the interests of class members. As Michael Trebilcock and Elizabeth Kagedan (2014) have pointed out, this type of collusion can "stifle or misrepresent the value of the claim to the class representative, who is insufficiently informed or incentivised to carry out his [*sic*] role as agent and monitor of these arrangements," which would ultimately result in "all class members receiving a lower share of the award than the risks justify" (65). This exploitation of informational advantages and the capitalization of imbalanced power relationships would "yield an unreasonably low class-member pay-out, compromising access to justice objectives" (67). As Wendel (2014b) observes, these risks can be mitigated, at least in part, with proper regulatory oversight.

As a matter of policy, litigation finance may accentuate the deterrence function of class actions irrespective of the extent to which funds distributable to class

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members are diminished. This effectively elevates behaviour modification as a secondary policy objective to the status of a primary objective (on par with access to justice and judicial economy). From an access to justice perspective, the issue becomes whether and to what extent litigation finance serves to increase access at the expense of justice; in other words, whether and to what extent procedural access (that is, a day in court) takes precedence over substantive justice (that is, a fair and equitable recovery). It is also instructive to observe that litigation finance is drawn towards high-value cases with reasonably predictable degrees of success. This usually means securities actions, which are already dominant in Canadian class action regimes, over cases with greater public interests. Given that access to justice is increasingly moving towards substantive justice considerations in recent "waves," it is important to consider the ways in which substantive justice is impacted by this type of financialization.

Marketization, Securitization, and Monetization

As an "investment opportunity," the class action offers the potential for significant returns for financial firms. It has been described as "a hot new investment commodity with high levels of reward not available in traditional investment vehicles" (Cameron and Kalajdzic 2014, 3). The desirability of such attractive rewards is reinforced by a settlement culture distinguished by an adversarial void during approval hearings, as well as limited notice practices and inefficacious class objectors. These facets create favourable settlement conditions for attorneys and financiers to maximize profits.

Although the prospect of a healthy portion of a class action recovery is axiomatically a major attraction for potential investors, the most attractive feature may be the extent to which such investments are sheltered from the instabilities and fluctuations of financial markets. Class actions are particularly attractive to potential investors as ways to "diversify their investment portfolios and achieve gains in bad markets" given that such investments are "potentially independent of economic conditions, since the prospects of winning a case depend on its merits, not the economy" (Senkpiel 2009, 311).

The perceived insularity of such investments is based on the stability and proper functioning of publicly-funded civil justice systems. Clearly the formal logic of this viewpoint does not account for the myriad ways in which social, political, and economic conditions can influence the behaviour of legal actors who may otherwise be integrated in unstable or fluctuating global markets; for example, a heavily leveraged firm may be compelled to accept a settlement that may otherwise have been deemed unacceptable in a more favourable economic climate. This is also applicable to both corporate and governmental defendants, who can be influenced in numerous ways by shifting conditions. Be that as it may, this widespread perception has contributed to the sustained growth of litigation finance in the aftermath of the Global Financial Crisis in jurisdictions where such practices are permissible, as well as the legitimation of litigation finance in jurisdictions where such practices have historically been prohibited. It is perhaps ironic (and almost tautological) that this type of financialization is viewed as an advantageous development by prospective investors given

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the insularity of such investment vehicles from the instabilities generated by financialization.

At present, the primary impediment to such investments is their illiquidity. The absence of a secondary market for trading litigation investments *qua* securities generally obliges financial firms to commit to the duration of the financed proceeding (unless litigators violate the material conditions of the financing agreement, which may permit firms to withdraw). The average duration of a class action in Canada is approximately three years—a timeframe that could be extended to decades in protracted litigation battles. The preference of financial capital for greater liquidity has been a major contributing factor in the growing consensus about the inevitability of the securitization of litigation investments in Canada. A critical enabler of financialization, securitization in class action regimes already dominated by securities actions and investor disputes is a testament to how thoroughly financialization has penetrated civil justice. Even proponents have signalled that securitization would create "insurmountable conflicts" (Steinitz and Field 2014, 741). The prospect of derivative markets for betting on the outcome of litigation is similarly foreseeable.

For critics, the rapid growth of litigation as an investment commodity has sparked a veritable "arms race" (Triedman 2016) in an industry that "takes the casino-style gambling on equities and derivatives into the courtroom, with investors placing a bet on justice" (Dayen 2016). As the *New York Times* series on litigation finance—a project started by the Center for Public Integrity—observes: the industry is "a child of the subprime revolution, the mainstream embrace of high-risk lending" and it "sits somewhere between banking and gambling," with financiers who "place their bets" after "consult[ing] databases showing the results of similar lawsuits, just as appraisers value homes based on recent sales" (Applebaum 2010, November 14). For proponents, to the extent that class actions have been instruments of private enforcement of laws and regulations that have been negligibly enforced by public bodies, the prospective securitization of litigation is a positive development that harnesses the power of financial capital to promote "access to justice" while spreading the associated risks. The industry, according to this view, allows cases to be resolved on their merits rather than on the resource disparities of litigants. This is a great aspiration from an access to justice perspective. That said, in the aftermath of the Global Financial Crisis, the spreading of risks (or their notional "diffusion") should no longer be viewed as an automatically positive or benign process. With securitization, civil justice systems could be exposed to future financial crises to a much greater degree than currently possible.

A broader concern of turning courts into financial markets is the deeper penetration of market rationalities into civil justice. This could corrupt the civil justice process under the auspices of promoting "access to justice." In a sense, this is a long-standing concern, as Yeazell (2001), Steinitz and Field (2014), and others have observed, "most of the important phenomena of modern litigation are best understood as results of changes in the financing and capitalization of the bar" (2014, 711). The strong preferences of financial capital for short-term gains—which the financialization literature alternatively refers to as "short-termism," "earnings management," and "managerial myopia" (Stiglitz 1989; Bhojraj and Libby 2005;

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Mizik 2010; Dallas 2011)—can negatively impact justice-seekers by increasing early settlement pressure. This is a striking concern in jurisdictions where the industry is unregulated and firms do not adhere to codes of conduct. Such firms do not have fiduciary duties towards class members but rather owe such duties to their shareholders, whose investment preferences can contradict litigation strategies that are beneficial to class members. As Elizabeth Chamblee Burch has observed, financial firms may be incentivized to "pressure plaintiffs to settle early, so that they can report higher quarterly profits" (2012, 1319) for their shareholders. Litigators and financiers can also be incentivized to "collude with the defendant if the deal financially benefits them, pressure plaintiffs to accept an offer through questionable means, and misallocate settlement funds if it is necessary for achieving the deal's required consensus" (1319). Steinitz and Field (2014) have floated the possibility of imposing a fiduciary duty on financiers to plaintiffs as a way of minimizing the conflicts created by profit maximizing imperatives, but this has so far gained little traction.

Finally, the marketization of civil justice can also reinforce the monetization of multilayer access to justice given that financial firms are principally motived by profit maximization rather than access to justice. This motivation incentivizes financiers and litigators to compel representative plaintiffs to pursue monetary over non-monetary recoveries. This is worrisome in socially beneficial cases favouring preventive measures and deterrence over (or in addition to) compensation. For example, environmental claims often involve social calls for restoration of polluted land, air, and water, as well as other forms of redress, including detoxification, public apologies, medical programmes, educational initiatives, and so forth. Even proponents of litigation finance have recognized that "a socially undesirable element to the commodification of legal claims is to purely monetise all legal recovery, thereby dramatically affecting choice of remedies" (Steinitz 2011, 1321). This monetization can occur with the active or passive participation of litigators working on contingency fees who similarly prefer monetary over non-monetary recoveries. It goes without saying that this objection is redundant in cases where only monetary recoveries are sought. At present, litigation finance in Canada has focused on securities actions rather than cases with greater public interests that would likely feature calls for non-monetary justice.

Moving Forward

The contentious debate over litigation finance has developed within the parameters of the prevailing market rationality. Consequentialist and jurisprudential objections have largely been advanced without axiological or deontological critiques. The "perceived repugnancy" of litigation finance in Canada "appears to be related to the potential abuses rather than a moral statement" that litigation "should not be subject to market forces" (Puri 1998, 564).

Interestingly, the most vociferous critics of litigation finance have been corporate actors who otherwise uphold free market ideology and self-regulatory models. The most prominent example has been the U.S. Chamber of Commerce's Institute for Legal Reform, which has released a series of media-friendly publications and increased political lobbying against litigation finance in the United States.

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According to the Chamber of Commerce, litigation finance "represents a clear and present danger to the impartial and efficient administration of civil justice" based on four public policy concerns: (a) increase in frivolous litigation; (b) abdication of litigation control; (c) prolongation of litigation; (d) potential ethical problems (Beisner and Rubin 2012, 4–6).

As such, the Institute for Legal Reform advocates for a "robust oversight regime" that includes the creation of a federal agency "empowered to make rules and regulations in pursuit of its mandate and to enforce any laws, rules, or regulations governing [litigation finance]" (Beisner and Rubin 2012, 2). According to this view, the potential risks of litigation finance "are simply too acute to be left to industry self-regulation" (7). Presumably the Institute for Legal Reform considers the acuteness of these risks to be worse than those posed in other areas for which deregulatory campaigns have been waged, including against environmental, financial, health, employment, and consumer regulatory protections. Nevertheless, the matter of regulation is an ongoing debate in numerous jurisdictions, including Australia, Canada, and the United States. In Canada, there is no statutory framework for regulating litigation finance. The Law Society of Upper Canada has adopted a "wait and watch" approach for regulating the industry, which has effectively allowed the industry to stay unregulated apart from judicial scrutiny in case-by-case interventions.

The Institute for Legal Reform has reinforced these consequentialist and jurisprudential concerns with quasi-moral anti-commodification objections to the effect that litigation finance is "antithetical to the free enterprise system because it allows private parties to subject businesses involuntarily to the coercive effects of our litigation system, all for the purpose of profit" (15). It is not difficult to interpret such criticisms in a strategic light; that is, as stemming from concerns over the potential consequences for corporate (mis)behaviour rather than concerns over the administration of justice. By striving to curtail litigation finance, such corporate interests are effectively seeking to cut off the funding source for private enforcement against corporate wrongdoing. As Wendel observes, an "objection to the commodification of civil justice by [litigation finance] is likely to be *purely strategic* unless it is part of a broader theoretical agenda that seeks to displace economic modes of valuation from areas of life in which they do not belong" (2014a, 659). The objections of groups such as the Chamber of Commerce transparently evince such strategic manoeuvring. This does not suggest that the litigation finance industry in Ontario should remain unregulated. Given the extant principal-agent problem associated with class actions, the inclusion of other economic interests that can diverge from those of class members, especially absent class members, warrants greater attention. This will certainly be the case with the prospective securitization of litigation—a facet of contemporary finance that has proven to require strong regulatory oversight.

Among the enumerated concerns, the second and fourth objections of potential ethical problems and the question of litigation control remain live debates. In Ontario, the first objection that litigation finance encourages frivolous litigation assumes greater significance in the context of class actions since it evokes a primary policy objective of the *Class Proceedings Act*: judicial economy.

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According to this view, class actions preserve judicial resources by aggregating individually viable claims into a single vehicle, preventing duplicative proceedings. Litigation finance is therefore said to contradict this policy objective by encouraging frivolous litigation and draining scarce judicial resources. However, there is no empirical evidence in Canada that financiers have backed unmeritorious or frivolous claims. This objection has been discredited by proponents (for example, Sebok 2011; de Morpurgo 2011). In point of fact, the economic interests of litigation financiers are rooted in pursuing meritorious claims, that is, "winnable cases." This is a major reason why litigation finance has taken hold in jurisdictions with strong reputations for judicial excellence and independence, that is, in civil justice systems where a meritorious case has a higher likelihood of success.

These insights apply to the current landscape of litigation finance. Whether and to what extent such prudent lending and risk management practices of financial firms will remain unchanged with the prospective securitization of litigation is an open question. If the harsh lessons of the Global Financial Crisis are any indication, securitization often encourages originators to lower screening and monitoring standards for lending. This could very well result in increases in financing for frivolous litigation. This is an important dynamic that has been largely neglected in extant research. For now, however, no such increases have been empirically documented.

Finally, it is clear that litigation finance can increase the total volume of litigation. This will add further pressure on civil justice systems that are already resource-constrained in the current economic climate. This objection, however, should be taken critically: to the extent that litigation finance promotes the vindication of rights that would otherwise stay unvindicated, it is a positive development. This is true irrespective of the fact that it increases the total volume of litigation. The objection is effectively an objection to increases in accessibility offered by litigation finance. A better response to this situation would be to increase funding for civil justice systems rather than criticizing increases in the total volume of litigation. Society has progressed and no longer considers litigation a social evil irrespective of merits.

On a related note, the third objection that litigation finance prolongs litigation may be a valid concern in the foreseeable future with the advent of defence-based financing. Of course, defendants have their own access to justice concerns, and the availability of financing for defendants is in some ways as legitimate as plaintiff financing. Finally, if the objection of "prolonging litigation" is based on the idea that resource-constrained plaintiffs (or defendants) would be forced to settle early without financing, then prolonging litigation may very well be a positive development from an access to justice perspective. As a principle, it is better to have cases decided on the merits rather than on the basis of resource disparities.

In some cases, litigation finance can even have the opposite effect of *preventing* litigation. Given the economic interests of litigation financiers in pursuing meritorious cases (that is, "winnable cases") as evaluated by experienced legal actors, the willingness of a litigation financier to back an action can influence the behaviour of defendants in pursuing other means of resolving the dispute apart from litigation. The reverse can be true in the case of defence-based financing.

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Conclusion

In the face of the "crisis" in access to justice, it is incumbent upon justice stakeholders to explore every available means of funding, including through third parties. But we should not lose sight of the fact that this is fundamentally a market-based solution for the high costs and risks associated with civil justice. The view that litigation finance promotes multilayer access to justice by overcoming economic barriers presupposes that the barriers remain for those who are not able to secure such support. These barriers are exacerbated in class actions. Insofar as class actions are a "sport of kings," litigation finance can intensify this capital-intensive sport by crowning select claimants. The global influx of financial capital in this multi-billion dollar industry may even increase these costs and risks, especially with the advent of defence-based financing.

At present, case selection for financiers is based on traditional financial metrics to determine expenditures, risk exposures, case valuations, and legal merits, among other factors. The imperatives of profitability are determinative at this stage. In the reversed-recruitment paradigm of Canadian class actions where attorneys recruit clients rather than clients recruiting attorneys, the criteria for case selection can take on the characteristics of barriers (Molavi 2015). This similarly extends to financier case selection. The critical "access to justice" question that can be raised about entrepreneurial litigation can therefore be raised about litigation finance: What happens to claims that are not deemed sufficiently profitable? This is not to suggest that there is no role for private actors to pursue meritorious claims with public interests. It does not logically follow that simply because a given case is selected on the basis of a profit motive, the case is not also meritorious with a public interest dimension, but rather that meritorious cases with public interests are systematically rejected at the case selection stage on profitability grounds. In Canada, litigation finance has primarily focused on high-value securities actions; that is, cases with high potential rates of return, clear legal merits, and a modicum of predictability. Securities actions are already dominant in Canadian class action regimes over cases with greater public interests. This primacy of securities actions over other types of harmed interests is a cause for concern given that class actions constitute the "primary legal means by which consumers or workers band together to fight corporate abuses" (Brown 2015, 152).

For law and society scholars, the social consequences of a civil justice system that is increasingly influenced by financial motives, financial actors, and financial markets warrant further consideration. Certainly the monetization of justice to the detriment of non-monetary recoveries should be concerning given the "social dimensions" of collective redress. This dynamic stands in stark contrast to recent trends in access to justice research that recognize the importance of moving beyond the "compensationalist paradigm" by embracing forms of justice that may be more meaningful to claims-makers, including social recognition of loss, such as public apologies.

It is finally important to remember that, despite being a multi-billion dollar industry, litigation finance is still in its nascent stages. It is too early to predict how this industry will develop in the coming years, but it is clear that a radical

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transformation is underway that will impact the fundamental democratic institutions of states and societies. Although it has largely focused on class actions in Canada, such financialization applies to virtually every area of the law. For now, most courts and legislatures have legitimated this development as a means of promoting access to justice. Whether and to what extent this important objective will be fulfilled remains to be seen.

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