How third-party funding allowed a tiny newspaper to wage legal warfare against Google and Meta

ROBYN DOOLITTLE > CORPORATE LAW REPORTER

PUBLISHED 8 HOURS AGO

UPDATED 42 MINUTES AGO

FOR SUBSCRIBERS

Omni Bridgeway's Paul Rand, centre, Chief Investment Officer-Canada, Naomi Loewith, right, Investment Manager, Legal Counsel, and Geoff Moysa, left, Investment Manager, Legal Counsel.

FRED LUM/THE GLOBE AND MAIL

In the downtown Toronto office of Omni Bridgeway's Canadian operation there are two meeting rooms: Maintenance and Champerty.

For a company that funds commercial litigation in exchange for a percentage of the payout, the room names are a cheeky reference to centuries-old common law doctrines that made it illegal to interfere in someone else's lawsuit – and do so for a profit.

Maintenance and champerty were criminal offences in Canada until 1953. In recent decades, a series of court decisions – particularly in the past six or seven years – has opened the door to third-party litigation funding. Today, this emerging industry has drawn the attention of investors, who are enticed by the promise of returns disconnected from the market. But it has also been heralded as an essential tool for access to justice.

"In a fight of David against Goliath, we make sure David has what he needs," said Omni Bridgeway's managing director in Canada, Paul Rand.

A powerful example is an $8-billion class-action lawsuit brought by the publisher of a small-town Alberta newspaper against two of the world's most powerful companies – Google GOOGL-Q (/investing/markets/stocks/GOOGL-Q/) -0.11% ▼ and Meta META-Q (/investing/markets/stocks/META-Q/) +0.26% ▲ – which is being heard in federal court this week. Omni Bridgeway is partially bankrolling the plaintiff's claim.

The statement of claim, which has not been proven in court, alleges that the tech giants colluded in a complicated conspiracy to rig online advertising. Spokespeople at both tech companies did not respond to requests for comment.

To make their case, the plaintiff's legal team has had to tap some of the world's leading economists and data experts.

"It's very expensive," said the plaintiff's lawyer, David Sterns of Sotos Class Actions. "We'd be blowing in the wind without deep-funded partners like this willing to put up capital for experts."

In the arrangement, Sotos is acting on a contingency basis, while Omni Bridgeway is funding the disbursement costs – things such as expert witnesses – as well as adverse costs, which means that in the event of a loss, it will be liable for the other side's fees. Many Canadian jurisdictions operate on this loser-pays system.

In this model, Sotos and Omni Bridgeway only make money if they win. Mr. Rand says this means the company only invests in cases with merit; it isn't throwing its weight behind frivolous lawsuits. (With maintenance and champerty, the law evolved in part because judges drew a distinction between financing a case and interfering for an improper motive, such as weaponizing the courts to make an adversary's life difficult.)

Browning West says Gildan Activewear failed to vet CEO, calls latest allegations a publicity stunt

Lisa Sygutek, the owner and publisher of the Crowsnest Pass Herald, the Alberta newspaper, says she has spent years watching Big Tech pull away her advertisers. She now delivers the paper herself, because she can no longer afford to pay someone to do it.

"I really felt that somebody needed to step up and say: You know what, you guys – Google and Meta – you're wrong," Ms. Sygutek said. "I may be a tiny little newspaper in Crowsnest Pass, but this matters."

But without funding support, she wouldn't have been able to bring the lawsuit forward.

Elsewhere in the world, regulators and government agencies have gone after Big Tech for alleged improper advertising practices, but the Canadian regulator has been slow to act. In 2020, the Competition Bureau opened an investigation into Google's advertising, but that probe is continuing.

Sotos' Mr. Sterns said that when regulators don't have the resources or inclination to go after corporations, the private bar can step in. But regular people can't take on deep-pocketed Goliaths alone. This is the dynamic that led Canadian courts to soften on maintenance and champerty.

In 2011, the Ontario Superior Court of Justice was asked to consider a funding agreement in which an Irish company, Claims Funding International, would agree to indemnify the plaintiffs in the event of a loss in exchange for a 7-per-cent share of any award up to a certain point.

Justice George Strathy approved the deal, noting that adverse costs can be "astronomical" for anyone besides the rich and powerful: "The grim reality is that no person in their right mind would accept the role of representative plaintiff if he or she were at risk of losing everything they own."

Anthony O'Brien, a partner with Siskinds LLP, noted that in recognition of this fact, Ontario created the Class Proceedings Fund in 1992, which provides financial support to class-action plaintiffs.

"There is an important access-to-justice issue with litigation funding. I have no doubt that there are cases that probably wouldn't get started without some form of litigation funding," Mr. O'Brien said.

Today, judges must still approve arrangements concerning class actions and cases connected to insolvencies because the people affected – who will have to share a potential payout with the funder – may not have had a say in the funding agreement.

In Canada, Omni Bridgeway has been at the forefront. The company, which is publicly traded in Australia, where litigation funding is a big business, set up a Toronto office in 2016. It started with just two staff, including litigator Naomi Loewith, who was poached from Lenczner Slaght LLP.

"I literally had never heard of litigation funding. But I got a call from a headhunter and she's, like, 'Would you be interested in having this conversation?' The more I read, the more interesting it was," Ms. Loewith said. "We get to build a business with litigation and essentially do access to justice for a profit."

Although Omni Bridgeway handles class actions, the bulk of its work is regular commercial litigation, including in a Goliath-versus-Goliath situation. Because of the diligence involved in taking on a case, the company wins the vast majority of the time, historically creating a 120-per-cent gross return on invested capital for investors – or put another way, a 2.2 MOIC, which means the multiple on invested capital.

For investors, the numbers are tempting.

Jerome Hass, a portfolio manager with Lightwater Partners, a Toronto-based long-short hedge fund, said that in 2021 his firm began investing heavily in Burford Capital, the world's largest commercial litigation funder, which is listed on the New York and London stock exchanges.

"What we really like about it is that it has such low natural correlation with the market. It doesn't have wild swings up and down," he said.

Burford's recently released full year and fourth-quarter financial results showed that last year the firm collected US$1.7-billion from cases that settled and US$966-million from cases it won. Of the 8 per cent of cases that weren't successful, Burford only lost US$18-million. In total, the return on invested capital was 82 per cent.

"I think they're off the charts," Mr. Hass said. "People get excited about Canadian banks having 3-per-cent growth a year. These guys are growing greater than 50 per cent per year."

Sign up for the Top Business Headlines: Evening Edition Newsletter. An informative summary of the day's top business headlines, features and columns.

SIGN UP | **EXPLORE NEWSLETTERS**