

## Case Commentary: *Giuliani v. Region of Halton*<sup>1</sup>

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On August 31, 2011, the Ontario Superior Court of Justice rejected the recovery of interest on a third party litigation loan financing the cost of disbursements in *Giuliani*, a personal injury action. Although at first blush it appears this decision is inconsistent with recent Canadian case law allowing interest to be recovered on third party financing for disbursements and treatment costs, one could argue that the *Giuliani* decision is: (i) correct on its facts; and (ii) consistent with *Bourgoin*<sup>2</sup>, *Herbert*<sup>3</sup>, and other court decisions allowing recovery for interest costs where third party financing arrangements are *reasonable* and facilitate access to justice<sup>4</sup>.

To summarize, the plaintiff commenced an action for damages on October 2, 2003 arising from a motor vehicle accident. Before trial the parties agreed on damages in the amount of \$750,000, and left the issue of liability to be determined at trial. After an 11 day trial that concluded in February 2010, the plaintiff was held to be responsible for 50% of the accident, and was awarded \$375,000. However, costs exceeded the judgment, whether claimed on a substantial (\$558,327.53) or partial (\$383,246.90) indemnity basis. Further counsel claimed disbursements of \$229,984.28, which included \$92,734.26 in interest from a litigation loan issued by a third party to pay for the costs of disbursements. On a separate motion to assess costs, the court found that counsel's costs were grossly disproportionate to the nature and complexity of the claim and held that the plaintiff was entitled to costs on a partial indemnity basis of \$104,000 (excluding GST), plus \$121,447.58 for disbursements. Justice Murray rejected the recovery of interest costs. A more detailed explanation follows.

In his reasons, Mr. Justice Murray was highly critical of counsel's conduct of the litigation, particularly her claim for costs. Although the retainer agreement set legal fees at "35% of the total settlement achieved in the action", counsel had argued that this fee was *in addition* to any fees charged in interim accounts. Mr. Justice Murray rejected that interpretation, reviewed the dockets and found:

***"The costs and disbursements claimed by the plaintiff's counsel Ms. Kathy Chittley-Young raise a number of troubling issues. The plaintiff was woman of modest means, who suffered serious injuries in a motor vehicle accident causing permanent impairment, is now faced with another burden of unimagined proportions – a second catastrophic event – her legal costs. The legal costs and disbursements incurred and claimed by Ms. Chittley-Young produce a result that is contrary to the fundamental objectives of access to justice".***<sup>5</sup>

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<sup>1</sup> 2011 ONSC 5119.

<sup>2</sup> *Bourgoin v. Ouellette*, [2009] N.B.R. (2d) TBE d. FE.013.

<sup>3</sup> *Herbert v. City of Brantford*, 2010 ONSC C04-12047.

<sup>4</sup> For a more detailed overview of the case law concerning the recovery of interest please refer to an article titled "THE RECOVERABILITY OF FINANCING COSTS IN PERSONAL INJURY LITIGATION: USING THIRD PARTY FINANCING AS A SHIELD .... AND A SWORD" by the author which can be found at [www.bpfin.com](http://www.bpfin.com).

<sup>5</sup> *Giuliani* at para. 8.

Further, the judge found that the amounts claimed for disbursement were “equally - if not more – troublesome”<sup>6</sup>, for a case that he considered not to be “overly complex”<sup>7</sup>. Consistent with the tests employed in *Bourgoin* and *Herbert*, Mr. Justice Murray weighed the reasonableness of the financing agreement against the plaintiff’s personal circumstances and counsel’s use of the funds and rejected counsel’s argument that the interest costs should be recovered against the defendant by stating:

***“The interest rate on the loan obtained by the plaintiff for disbursements is unconscionable. It is turning the world on its head to assert, as does [counsel] Ms. Chittley-Young, that this is an access to justice issue and that ordering interest payments on the Lexfund [loan] is reasonable. The loan agreement does not facilitate access to justice. This loan agreement does nothing to advance the cause of justice. It is difficult to believe that any lawyer would refer a vulnerable client to such a lender.”***

The judge’s decision is not surprising when it is considered that (i) counsel incurred *excessive* disbursements; (ii) transferred a substantial portion of that risk to her client by convincing her to take out a loan bearing interest at an annual effective rate of 51.10% to finance the disbursements; and (iii) failed to produce any reasonable evidence to support her argument that the agreement advanced access to justice. As Mr. Justice Murray noted “The Court has no evidence by way of affidavit or otherwise to support [counsel] Ms. Chittley-Young’s assertion that without the loan from Lexfund Inc. the plaintiff would have no access to the courts”<sup>8</sup>.

In summary, Mr. Justice Murray’s decision in *Giuliani* is consistent with the tests employed by recent Canadian court decisions allowing the recovery of interest; he assessed the “reasonableness” of the financing arrangement within the context of the plaintiff’s circumstances and counsel’s management of the litigation and found in this particular case that it did not meet the test. He did not strike down the agreement or rule that it was unenforceable.

As a general principle, to order the recovery of financing costs against the losing party, the courts must have residual discretion to decide on a case by case basis whether third party financing agreements are reasonable and advance access to justice. *Giuliani* clearly did not meet this test.

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<sup>6</sup> *Giuliani* at para. 45.

<sup>7</sup> *Giuliani* at para. 38.

<sup>8</sup> *Giuliani* at para. 48.