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LITIGATION LOAN INTEREST AS A RECOVERABLE DISBURSEMENT

The landmark New Brunswick Court of Appeal decision in ***LeBlanc v. Doucet et al.*** (2012), 394 N.B.R. (2d) 228 recognizes that access to justice is very often a money problem and goes a long way to help litigants overcome this very common obstacle.

The Court's own headnote, at the beginning of its decision posted on its Website October 18, 2012, sums up the legitimacy and significance of a relatively new means of acceeding to justice for impecunious plaintiffs or those of modest means:

> « The appellant, Francis LeBlanc, lacked the means to finance the underlying action in damages. His impecuniosity compelled him to take out loans from an independent third party to cover litigation expenses, all for the purpose of securing access to justice. Although there is no provision in the *Rules of Court* that expressly allows interest on such loans as a "disbursement", sub-para. 2(14) of Tariff "D" of Rule 59 fills the gap. It suffices that the loans were "necessarily incurred" to secure the just determination of the proceeding and that the interest rates were "reasonable". The evidence shows that these conditions were met in the present case. Accordingly, the clerk was duty bound to allow, as a disbursement, the interest ($12,665.41) on the loans required to pay the disbursements he had approved.
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> The Court, having previously allowed the appeal, orders the respondents to pay the amount claimed by Mr. LeBlanc ($12,665.41) as well as costs throughout, which are fixed at $8,500.00. »

Let me now give you **a brief history of the progression of this case.**

Francis LeBlanc was a 17 year old young man when he became the victim of a road traffic accident on September 23, 2004 in Val D'Amour, Restigouche County, New Brunswick. His motocycle was forced off the road when a N.B. Power truck travelling in the opposite direction took a curve too widely, i.e. in Mr. LeBlanc's lane of travel.

This ditching of his motocycle caused him very severe injuries.

When he initially retained my services to advance an action in damages against N.B. Power and the driver of its truck, I explained to him that I would take his case on a contingency fee basis but that I could not finance his disbursements on top of that. We agreed that Francis, who had by that time attained the age of majority, would have to pay his disbursements as they became incurred so I asked him to request the opening of an initial $10,000.00 credit margin from his financial institution for the purpose of paying these disbursements.

We signed a contingency fee agreement to that effect.

Francis attended the credit union in Val D'Amour, N.B. and it refused to grant him the requested credit margin. He then went to the Royal Bank of Canada in Campbellton, N.B. and was also turned down. These two financial institutions did not want to assume this type of risk, i.e. civil litigation the outcome of which was most uncertain.

Francis LeBlanc, the impecunious plaintiff, thus turned to Seahold Investments Inc. to finance his litigation expenses and he borrowed the necessary funds from this litigation funder, as the need arose, when needed, at the rate of 2.4% per month, compounded monthly.

The issues of liability and damages in the case were severed and a 5 day trial on liability was held before Mr. Justice McNally in Campbellton, New Brunswick, on November 12, 13 and 14 2008 and January 27 and 28, 2009.

Francis LeBlanc won and the defendants were held 100% liable for the losses and damages occasioned to the plaintiff as a result of their negligence. Mr. Justice McNally concluded his decision dated May 19, 2009 by the following words:

> « Pursuant to rule 59.01 of the **Rules of Court** I fix the plaintiff's costs on the liability portion of this action at $20,000.00 plus his taxable disbursements to date. »

The defendants appealed the liability decision but their appeal was eventually dismissed.

In the meantime, Francis Leblanc requested and obtained an assessment of his disbursements in Campbellton, N.B., before Deputy Registrar Grégoire Boudreau, Q.C., the assessing officer.

The assessing officer allowed various disbursements of $16,512.00 and disallowed other disbursements totalling $23,881.00 which last sum comprised $14,158.00 interest on Seahold Investments loans taken out to pay for all disbursements, those he allowed as well as those he disallowed.

Francis appealed the assessing officer's ruling to the Court of Queen's Bench of New Brunswick solely on the narrow question of the refusal by the taxing officer to allow him interest on the disbursements which he had himself approved.

At the opening of the appeal hearing, the defendants moved for a dismissal of the appeal, arguing that the plaintiff had missed his limitation period to appeal the assessing officer's ruling. This generated a serious collateral battle and delayed the progression of the case but Francis LeBlanc ultimately overcame this legal objection. He was not out of time.

Madam Justice Young of the Court of Queen's Bench in Campbellton eventually dismissed Mr. LeBlanc's appeal on October 28, 2011 in the following words:

> « I am of the opinion that the clerk's ultimate decision not to allow interest owing on the loan as a disbursement was correct. For these reasons the appeal is dismissed... »

Francis LeBlanc then sought leave to appeal to the New Brunswick Court of Appeal and leave was granted by Madam Justice Quigg on November 28, 2011.

The Court of Appeal of New Brunswick heard the parties' arguments on May 15, 2012 in Fredericton and **the appeal was allowed on July 26, 2012 with reasons to follow**.

The reasons were published on October 18, 2012 and were penned by the Chief Justice of New Brunswick, the Honorable J. Ernest Drapeau.

The Court of Appeal held that the interest on the Seahold loans was itself a recoverable disbursement because it constituted a reasonable expense necessarily incurred under subparagraph 2(14) of tariff "D" of rule 59. As you will remember rule 59 is entitled "Costs of Proceedings Between Parties".

The specific section of rule 59 which was interpreted by the Court of Appeal reads as follows:

« **TARIFF "D"**

TARIFF OF DISBURSEMENTS ALLOWABLE TO A PARTY ENTITLED TO COSTS

2. Disbursements recoverable from opposite party:

(14) All other reasonable expenses necessarily incurred, when allowed by the assessing officer. »

The Court of Appeal relied, *inter alia*, on Section 17 of the *Interpretation Act* to give a large and liberal construction to the enabling legislation.

It is worthwhile to quote here the words of the Chief Justice at paragraph 29 of the Court's decision:

> « The wording of sub-para. 2(14) encompasses all "necessarily incurred" and "reasonable" expenses. In light of Rule 1.03(2), I am constrained to construe the expression "necessarily incurred" in the following manner: an expense other than those enumerated in sub-paras. (1) to (13) that was incurred "to secure the just [...] determination" of the proceeding constitutes an "expense necessarily incurred" within the meaning of sub-para. 2(14). »

Moreover, **an assessing officer or a judge called upon to decide on the reasonability of an expense necessarily incurred must not lightly substitute his hindsight vision of the necessity or reasonableness of the expense to that of the plaintiff's lawyer who was advancing on the civil litigation battlefield in the face of tough adversaries**: See paragraph 30 of the Court's decision.

The New Brunswick Court of Appeal also acknowledged and approved the relatively new societal phenomenon of litigation financing by third parties such as Seahold Investments or BridgePoint Financial. The Court thus recognizes that access to justice is mostly a money problem. In approving Francis LeBlanc's approach of borrowing to pay for his expenses and disbursements, the Court, at paragraph 31, removed this often insurmountable barrier to access to justice:

> « The interpretation of sub-para. 2(14) that I favor is without question "liberal", but that is precisely what is called for by Rule 1.03(2). Moreover, my view is that such a "liberal" interpretation is required even if, as the clerk noted, it is not clear whether the authors had in mind the specific expense at issue when they drafted sub-para. 2(14). Recall the wording of that provision targets <u>all</u> necessarily incurred and reasonable expenses, not just the specific expenses that the drafters may have had in mind or those that had been previously allowed. Even if the phenomenon of third party financing of litigation is on the rise these days, one cannot be certain it was unknown when the rules were drafted at the beginning of the 1980's. In fact, the opposite strikes me as plausible. »

Another important statement by the Court of Appeal is that **disbursements to which a party is entitled are not a closed category**. Besides the admissible disbursements specifically listed in the Tariff , they include all other expenses relative to the conduct of the litigation. The assessing officer or judge whose duty it is to allow or disallow them must do so in an evolutionary perspective sensitive to contemporary practices and trends. Here is what Chief Justice Drapeau had to say on this subject, at paragraph 33, quoting the Chief Justice of Canada, the Honorable Beverley McLachlin in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, [1994] S.C.J. No. 65 (QL):

« Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (*Interpretation Act*, R.S.B.C. 1979, c. 206, s.7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice. »

The Court of Appeal then added that the interest rate charged by Seahold Investments to Francis Leblanc was reasonable in light of the risk inherent in civil litigation and that the plaintiff's lawyer was not expected to finance the disbursements himself. The rate of interest allowed by the New Brunswick Court of Appeal in *Leblanc* is not mentioned in its reasons for judgment but it was clearly stated in the affidavits and in the Appeal Book filed in the Court of Appeal that the interest rate was 2.4% per month compounded monthly which represents a 28.8% nominal annual interest rate or an effective rate of 32.94% annually. See paragraph 39 of Chief Justice Drapeau's reasons for judgment.

« Seahold Investments was a source of financing totally independent of Mr. LeBlanc. The interest rate it set reflects an assessment of the risk assumed in granting the loans in question, a risk that two financial institutions had previously deemed prohibitive. Only a foolhardy lawyer would have agreed to undertake that risk.. Parenthetically, I reject the respondent's submission that the *Law Society Act, 1996*, S.N.B. 1996, c. 89, and the rules that govern contingency fee agreements foisted upon Mr. LeBlanc's lawyers the obligation to assume that risk. Frankly, the logic of that argument escapes me and I would have difficulty explaining it. »

Other new law created by this judgment of the New Brunswick Appeal Court is that the burden of proving that a plaintiff has had recourse to unreasonable means in financing his disbursements with a litigation funder such as Seahold rests on the defendants shoulders. Following is the Court's opinion on the burden of proof in such cases, at paragraph 40:

> « In those circumstances, the onus was on the respondents to demonstrate Mr. LeBlanc used unreasonable means to secure a just solution to their legal dispute. The respondents offered no evidence in support of any such hypothesis. As a result, they have failed to discharge the applicable burden of proof (see, by analogy, the principles which govern the assessment of the reasonableness of a plaintiff's choice of medical treatment set out in *Janiak v. Ippolito*, [1985] 1 S.C.R. 146, [1985] S.C.J. No. 5 (QL)). It follows that the interst claimed constitutes a "reasonable" expense within the meaning of sub-para. (2(14). »

Furthermore, our Court of Appeal rejected the respondents' argument that such litigation financing loans and the interest thereon amounted to the torts of champerty and maintenance.

The Court's decision in ***LeBlanc v. Doucet et al.*** is thus a truly great victory for plaintiffs who more often than not have no money to pay the reasonable expenses they will necessarily incur to pursue their claims for damages. Since ***LeBlanc***, and because of it, they can now turn to litigation financing to have access to justice.

Finally, the reason the Court allowed only $12,665.41 in interest is because that is the amount the appellant was claiming at the initial appeal hearing date in the Court of Queen's Bench before Madam Justice Young. Indeed, the appellant had decided at that stage to "freeze" his claim for interest owed to Seahold as of that date. The sum claimed (and eventually obtained in the Court of Appeal of New Brunswick) was the interest owed to Seahold strictly on the disbursements the clerk had himself allowed and it was voluntarily frozen by the appellant as of the very first appeal hearing date. The appellant was not claiming throughout the appeal process the full amount of $14,158.45 which represented interest on disbursements both allowed and disallowed by the clerk at the liability stage of this action.

The quantum of damages issue was finally settled in June 2012 and Mr. Justice Ouellette of the Court of Queen's Bench of New Brunswick approved the Settlement on November 22, 2012. He also approved all the disbursements incurred, including approximately $120,000.00 in interest then owed to BridgePoint Financial which had, near the end of the assessment of damages portion of the case, paid off everything Francis owed to Seahold and continued to finance disbursements. Thank you Seahold and thank you BridgePoint!

And thank you everyone for your interest in this groundbreaking decision which I hope will be used by impecunious plaintiffs, litigants of modest means and their lawyers to gain access to justice.