COURT OF APPEAL OF
NEW BRUNSWICK

157-11-CA

FRANCIS LEBLANC, by his litigation guardian Albertine LeBlanc

(appellant plaintiff) APPELLANT

- and -

ARMAND DOUCET and THE NEW BRUNSWICK POWER CORPORATION

(respondent defendants) RESPONDENTS

LeBlanc v. Doucet and the New Brunswick Power Corporation, 2012 NBCA 88

CORAM:
The Honourable Chief Justice Drapeau
The Honourable Justice Richard
The Honourable Justice Quigg

Appeal from a decision of the Court of Queen's Bench:
October 28, 2011

History of Case:

Decision under appeal:
2011 NBQB 301

Preliminary or incidental proceedings:

Court of Appeal :
2012 NBCA 66
[2011] N.B.J. No. 430
2010 NBCA 13

Court of Queen's Bench:
2009 NBQB 140

Appeal heard:
May 15, 2012

Judgment rendered:

FRANCIS LEBLANC, par sa tutrice d'instance Albertine LeBlanc

(demandeur appelant) APPELANT

- et -

ARMAND DOUCET et SOCIÉTÉ D'ÉNERGIE DU NOUVEAU-BRUNSWICK

(défendeurs intimés) INTIMÉS

LeBlanc c. Doucet et Société d'énergie du Nouveau-Brunswick, 2012 NBCA 88

CORAM :
L'honorable juge en chef Drapeau
L'honorable juge Richard
L'honorable juge Quigg

Appel d'une décision de la Cour du Banc de la Reine :
Le 28 octobre 2011

Historique de la cause :

Décision frappée d'appel :
2011 NBBR 301

Procédures préliminaires ou accessoires :

Cour d'appel :
2012 NBCA 66
[2011] A.N.-B. n° 430
2010 NBCA 13

Cour du Banc de la Reine :
2009 NBBR 140

Appel entendu :
Le 15 mai 2012

Jugement rendu :

2012 NBCA 88 (CanLII)

October 18, 2012

Reasons for judgment by:
The Honourable Chief Justice Drapeau
Concurred in by:
The Honourable Justice Richard
The Honourable Justice Quigg

Counsel at hearing:

For the appellant :
Maurice F. Bourque, Q.C.

For the respondents :
Henry J. Murphy, Q.C.

THE COURT

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.

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.

Le 18 octobre 2012

Motifs de jugement :
L'honorable juge en chef Drapeau
Souscrivent aux motifs :
L'honorable juge Richard
L'honorable juge Quigg

Avocats à l'audience :

Pour l'appelant :
Maurice F. Bourque, c.r.

Pour les intimés :
Henry J. Murphy, c.r.

LA COUR

L'appelant, Francis LeBlanc, ne disposait pas des moyens requis pour financer l'action en dommages-intérêts sous-jacente. Son impécuniosité l'a contraint à faire des emprunts d'un tiers indépendant pour couvrir les frais afférents au litige et, par voie de conséquence, lui permettre d'avoir accès à la justice. Quoiqu'aucune disposition des *Règles de procédure* ne prescrive explicitement l'exigibilité à titre de « débours » des intérêts sur ces emprunts, le sous-par. 2(14) du tarif « D » de la règle 59 comble cette lacune. Il suffit que les emprunts aient été « indispensables » à l'atteinte d'une solution équitable de l'instance et que les taux d'intérêt soient « raisonnables ». La preuve démontre que ces conditions ont été remplies en l'espèce. Il s'ensuit que le greffier devait approuver, à titre de débours, les intérêts (12 665,41 $) sur les emprunts requis pour payer les débours qu'il avait approuvés.

La Cour, ayant préalablement accueilli l'appel, ordonne aux intimés de payer la somme réclamée par M. LeBlanc (12 665,41 $) et les condamne au paiement des dépens à tous les niveaux, lesquels sont fixés à 8 500 $.

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English version of the judgment of the Court delivered by

DRAPEAU, C.J.N.B.

I. Introduction

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[1] Is the party liable for an adverse party's costs required to reimburse the interest on a loan the latter had to take out to cover his or her litigation expenses? To the great dismay of the appellant, Francis LeBlanc, the officer tasked with assessing the disbursements he was entitled to recover pursuant to a decision of the Court of Queen's Bench concluded Rule 59 of the *Rules of Court* constrained him to answer that question in the negative. He therefore dismissed the claim for reimbursement of interest on the loans Mr. LeBlanc had been compelled to take out for the purpose of financing the underlying action against the respondents. The clerk also disallowed other claims, but that facet of his decision is not under appeal.

[2] Despite her disagreement with an important feature of the reasoning underpinning the clerk's answer, a judge of the Court of Queen's Bench dismissed Mr. LeBlanc's appeal "on motion" under Rule 59.11(8). In her view, the dismissal of the claim for reimbursement of interest was consistent with the law, notwithstanding the error that wound its way into the clerk's reasoning (see 2011 NBQB 301, 387 N.B.R. (2d) 1). Mr. LeBlanc urges us to intervene, arguing the dismissal was based on an erroneous interpretation of the pertinent legislation. Following the hearing and after giving due consideration to the points made by the parties, we allowed the appeal with reasons to follow (see 2012 NBCA 66, [2012] N.B.J. No. 260 (QL). Briefly, they are as follows.

[3] While it is true no provision of the *Rules of Court* expressly allows for the recovery of the interest claimed, I am of the view such redress is authorized by sub-para. 2(14) of Tariff "D" of Rule 59, which prescribes that allowable disbursements include "[a]ll other reasonable expenses necessarily incurred, when allowed by the assessing

officer". There is no doubt that the cost of the loans in question constitutes an expense arising from the action Mr. LeBlanc was required to commence in order to vindicate his right to reasonable compensation for the injuries and losses he suffered by reason of the negligence of the respondent, Armand Doucet. That action culminated in a judgment exonerating Mr. LeBlanc from any liability for the accident and, more importantly, obligating the respondents to pay costs and disbursements (see 2009 NBQB 140, 344 N.B.R. (2d) 359).

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[4] In my view, and for the reasons expounded upon hereinafter, the cost of the loans is an "expense" within the meaning of sub-para. 2(14). Moreover, the record shows and, in fact, the clerk found Mr. LeBlanc lacked the means to finance the litigation and his impecuniosity resulted in the loans that generated the interest in issue. Accordingly, it is an expense that was "necessarily incurred". Finally, I am driven to conclude the interest claimed was "reasonable" since the respondents adduced no evidence to establish Mr. LeBlanc could have borrowed money at a rate of interest lower than the one he negotiated with the independent third party.

[5] Correlatively, it is my view that the judge of the Court of Queen's Bench erred in law in rejecting the affidavits tendered by Mr. LeBlanc to pinpoint the amount of interest in issue. Unlike ordinary appeals, and as indicated, the present appeal was initiated "on motion". Having regard to the context, Rule 39 ("Evidence on Motions and Applications") comes into play and, as a result, the affidavits were admissible. They show the interest on the loans required to pay the disbursements approved by the clerk amounted to $12,665.41. Accordingly, I would order the respondents to reimburse that sum.

[6] In my view, the foregoing adumbration of the situation reflects a correct interpretation of the *Rules of Court* and an accurate understanding of the applicable procedure. As well, there is every reason for satisfaction with the resulting regime, one that contributes significantly to improving access to justice for the citizens of our province. As the Chief Justice of Canada, the Honourable Beverley McLachlin, regularly

reminds us, access to justice is one of the cornerstones of the rule of law, and it behooves courts, whenever possible, to do their part in fashioning means conducive to its improvement. Courts must walk the talk.

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II. The Contextual Framework

[7] Let us first review the facts and the other relevant features of the record. On September 23, 2004, Mr. LeBlanc was seriously injured when the motorcycle he was driving left the roadway on Route 270, commonly known as "Val d'Amour Road", just south of Campbellton. That exit from the roadway became necessary when a van owned by the Power Corporation, and driven by Mr. Doucet, crossed into Mr. LeBlanc's lane of travel as it came out of a curve that he was about to enter.

[8] Mr. LeBlanc was 17 years old at the time of the accident. He lived with his parents and was still in school. He had just completed a job interview at a Canadian Tire store in the area. The affidavit evidence before the clerk established the injuries Mr. LeBlanc suffered in the accident prevented him from carrying out remunerative work, and his Section B weekly disability benefits amounted to less than $200.00.

[9] According to that evidence, when he commenced the underlying action against Mr. Doucet and the Power Corporation, Mr. LeBlanc lacked the financial wherewithal to cover litigation expenses. Of course, Mr. LeBlanc and his counsel could easily foresee those expenses might well become particularly onerous once the respondents filed a statement of defense in which they denied all liability for the accident and asserted Mr. LeBlanc was the sole author of his misfortune.

[10] With a view to securing a source of payment for litigation expenses, Mr. LeBlanc attended upon two financial institutions, the Caisse Populaire Atholville-Val d'Amour and the Royal Bank of Canada (Campbellton branch). Both refused to grant him a line of credit due to his lack of financial means and the unpredictability of the action's outcome. Mr. LeBlanc then turned to another independent source of financing, Seahold

Investments Inc., which, over the years, lent him sums totaling $26,276.20. As of October 27, 2009, the interest owing was $14,158.45.

[11] On May 19, 2009, following a trial restricted to the issue of liability, a judge of the Court of Queen's Bench found the version of the essential facts put forward by Mr. Doucet and other witnesses called by the respondents could not be accepted, and burdened them with full liability for the accident. The judge also directed the respondents to pay costs of $20,000.00, plus "taxable disbursements to date". A clerk was then tasked with the assessment of the disbursements pursuant to the *Rules of Court*.

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[12] The affidavit which Mr. LeBlanc swore and filed at the hearing before the clerk particularizes the expenses he incurred in the prosecution of his action, and which were targeted for approval and reimbursement. Those expenses totalled $40,434.65, including the interest ($14,158.45) on the loans from Seahold Investments. In his affidavit, Mr. LeBlanc offered the following explanation in support of his contention the interest was a necessary and reasonable expense:

> [TRANSLATION]
> As a result of my going off the road on September 23, 2004, which was caused by the defendants, I have suffered very serious physical and psychological injuries which have prevented me from working since the day of the motor vehicle accident to this day, and which will prevent me from working for the rest of my life.
>
> In order to properly prepare my case for trial, my lawyer informed me and I thus have reason to believe that the above-mentioned disbursements were necessary and reasonable. My lawyer informed me at the beginning of our solicitor-client relationship that these disbursements were to be paid as they were incurred.
>
> As a young person with no capital and a low income (I was only receiving $184.64 in weekly benefits under Chapter B of my automobile insurance policy), I applied to my usual financial institution, Caisse populaire Atholville-Val d'Amours, as well as to the Royal Bank of Canada in

> Campbellton for a $10,000.00 line of credit to finance these proceedings.
>
> The Caisse populaire Atholville-Val d'Amours refused to grant me this line of credit due to my lack of income and the uncertain outcome of these legal proceedings. [...]
>
> The Royal Bank of Canada also refused to grant me this line of credit due to my lack of income and the uncertain outcome of these legal proceedings. [...]
>
> For this reason, in order to pay the necessary and reasonable disbursements in this matter, I was forced to seek another source of financing, that is, Seahold Investments Inc., whose head office is in Moncton, New Brunswick. [...]
>
> The total amount borrowed from Seahold Investments Inc. to pay for the above-mentioned disbursements is $26,276.20, and the amount of interest owing to Seahold as of November 5, 2009, is $14,158.45. I will then have to pay per diem interest in the amount of $32.22 until the end of November 2009, and interest thereafter will be calculated at the rate of 2.4% per month, compounded monthly, until the date of payment. Annexed hereto and marked with the letter T is a copy of a fax from Seahold Investments Inc. dated October 27, 2009, which sets out the amount to be paid to Seahold.
>
> With respect to the interest owing to Seahold, my lawyer informed me and I thus have reason to believe that this was also a necessary (if not essential) and reasonable disbursement given that without this source of financing for the above-mentioned necessary and reasonable disbursements, I would not have been able to pay these disbursements, and my lawyer would not have been able to put together the evidence necessary to establish the liability of the defendants, before the New Brunswick Court of Queen's Bench, for the fact that I left the roadway, nor the quantum of the damages I suffered as a result.

[13] In a decision rendered on January 13, 2010, the clerk ruled some of the expenses claimed, including the interest on the loans from Seahold Investments, were not allowable under Tariff "D". He dismissed the claim for reimbursement of interest despite

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his finding that the loans were necessary to ensure the action's prosecution to its ultimate conclusion. The clerk's reasons for decision are as follows:

> [TRANSLATION]
> The plaintiff claims the sum of $14,158.45 as interest on a loan of $26,276.20 bearing interest at 2.4% compounded monthly. The evidence shows that the plaintiff did not have the financial means to pursue this action. In May 2007, he approached a Caisse populaire and a chartered bank for a line of credit. He was turned down by both institutions. He then approached Seahold Investments Inc., a company that appears to specialize in financing legal proceedings. The interest rate is 2.4% per month, compounded monthly. The evidence does not indicate the date the loan was taken out, but Appendix D suggests that the amount was borrowed as of February 8, 2007. On October 27, 2009, the amount due on the loan was $40,434.65, of which $14,158.45 represents the interest claimed by the plaintiff as a disbursement.
>
> This is an extraordinary expense and there is no authority under Tariff D to deal with this type of expense. Counsel for the defendant asks that this amount be allowed under section 2(14). He cited three decisions in support of his argument that interest on a loan taken out for the purpose of financing legal proceedings is an allowable disbursement. The decisions are:
>
> *Bourgoin v. Ouellette et al.* (2009), 343 N.B.R. (2d) 58; *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.* (1986), 71 N.B.R. (2d) 168; *Caron v. Steeves*, [2000] N.B.R. (2d) (Supp.) No. 89.
>
> Upon reading *Caron*, I find that this decision has no relevance given that the interest in question was claimed as general damages in that case and not as a disbursement in the calculation of disbursements as between parties. The only decision that deals directly with the issue of interest on a loan as a taxable disbursement is *Bourgoin*. That decision emanated from the calculation of disbursements as between parties by clerk Cyr of Edmundston. His decision to allow the interest as a taxable disbursement was based entirely upon his interpretation of the decision in *Williams*. I quote clerk Cyr at paragraph 59:

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> [TRANSLATION]
> 59. I rely on the decision of the Honourable Justice Jones in *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.*, *supra*, to rule that interest shall be reimbursed to the plaintiff by the defendants.

My understanding of the *Williams* decision is different from that of clerk Cyr in *Bourgoin*. In *Williams*, the appellate court ordered that payment of costs be stayed pending an appeal and, at the same time, ordered that costs bear interest at the rate of 10% from the date of the trial decision. However, it made no similar order pertaining to disbursements.

On appeal of the decision with respect to the calculation of disbursements, Jones, J. stated as follows at paragraph 15:

> The net result is that the recoverable solicitors' costs bear interest at 10% per annum from the 13th of December, 1983, but that disbursements all of which would be incurred before that date do not likewise bear interest.

He was referring to interest on the disbursements, and not to an amount of interest claimed as a disbursement. This is confirmed at paragraph 19 of his decision, which reads as follows:

> 19 I therefore direct that interest be allowed <u>on the disbursements</u> at the rate of 10% per annum from December 13, 1983, to the date of taxation. (Emphasis added [by the clerk].)

The decision could be confusing as there is mention of the fact that counsel for plaintiff Williams had taken out a loan to finance the proceedings and had incurred interest on that loan.

On the other hand, the decision of Jones, J. did not allow an amount representing interest on a loan under the heading of disbursement, but rather ordered interest on disbursements in the same manner as interest on costs, that is, at the rate of 10% from the date of the decision. This is a very important distinction. I am of the view that loan interest goes beyond that which an assessing officer may allow as disbursements

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> between parties. As I have already stated, there is no direct authority under Tariff D to allow this kind of disbursement. Therefore, in order for me to allow such an expense in the context of an assessment of disbursements between parties, there must be clear and unequivocal case law in support of its eligibility.
>
> Counsel for the defendants argues that there is no authority in the *Rules of Court* or in the case law that would allow such an expense with the exception of the decision of clerk Cyr and the decision in *Bourgoin* and that this case wrongly interpreted the decision of Jones, J. in *Williams*. I agree with counsel for the defendants on this point. Counsel for the plaintiff also cites some excerpts from an address given by the Honourable Beverley McLachlin, Chief Justice of Canada. In my view, it would be inappropriate for an assessing officer to rely on sources other than traditional case law.
>
> I am not at all convinced that this type of disbursement was ever contemplated within the context of an assessment of disbursements between parties under Tariff D, s. 2(14). I totally understand the remarks of Mr. Bourque where he states that a plaintiff without means must be creative in finding ways to meet the exorbitant cost of legal proceedings and that this raises important issues with respect to access to justice. Even though I empathize with this argument, I cannot ignore my responsibilities as an assessing officer and the limits of the legislative framework. It is not the role of an assessing officer to make new law. In our common law legal system, this role is reserved for members of the judiciary. Accordingly, I will not allow this disbursement.
>
> [Emphasis added.]

[14] As indicated, Mr. LeBlanc appealed to the Court of Queen's Bench against the dismissal of his interest reimbursement claim. In a decision dated October 28, 2011, a judge of that Court acknowledged the clerk had erred in law in ruling he could not allow a disbursement unless it was expressly authorized by Rule 59 or by case law:

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> [TRANSLATION]
> The assessing officer stated that in order for him to be able to allow this kind of expense in the context of an assessment of disbursements between parties, there must be clear and unequivocal case law in support of its eligibility.
>
> It is true that if case law existed on this issue that was binding upon the clerk, he would have been required to take it into consideration and, if need be, to apply it according to the principle of *stare decisis*.
>
> On the other hand, the absence of such case law would not preclude him from exercising his discretionary power or impose a limit in this regard. In my opinion, the evolution of common law on the issue of disbursements may be triggered by a decision of an assessing officer in the sound exercise of his discretionary power. If there is no appeal from this decision, or if the decision is affirmed on appeal, then a new precedent is created.
>
> It is my view that the clerk was in fact required to admit and to consider the evidence presented, to hear the parties' arguments on the issue of disbursements, and then to rule on the issue.
>
> For these reasons, I find that the assessing officer erred in his understanding of the scope of his jurisdiction under s. 2(14) of Tariff "D". This amounted to a violation of a principle of law.

After noting the parties had asked her not to refer the matter back to the clerk, the judge decided to hear them on the merits and to settle the dispute between them.

[15] At the hearing, Mr. LeBlanc presented further evidence in the form of an affidavit by Francine Cormier and an affidavit of Hubert Seamans, respectively, the office manager and president of Seahold Investments. The primary objective and effect of those affidavits was to pinpoint the amount of interest due on the loans needed to pay the disbursements approved by the clerk. As stated in the introduction to these reasons, the interest amounted to $12,665.41. After concluding the affidavits could not be added to the record (I infer she formed that view by applying the test for admissibility of new

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evidence in an ordinary appeal), the judge held the clerk's decision was correct and that, as a result, the appeal had to be dismissed:

> [TRANSLATION]
> In my opinion, neither a clerk nor a tribunal should go so far as to expand an award of disbursements to such a degree that the effect would be to finance interest owing on a loan taken out by a person with insufficient resources in order to guarantee that person access to the court. This would be far too broad an approach to the award of disbursements. It might be a laudable goal, but that would fall more within the purview of the legislator than that of the officers of the court.
>
> The grounds of appeal based on [...] access to justice are denied. It is therefore unnecessary for me to rule on the argument raised by the respondents, that is, that in this case the loan and interest on the loan would not be enforceable as this would amount to "maintenance and champerty".
>
> 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 and I order each party to pay their own costs.

III. Analysis and Decision

[16] The Court must rule on two issues. The first is whether the judge of the Court of Queen's Bench, sitting on appeal, erred in law in rejecting the "new" evidence adduced by way of the affidavits of Francine Cormier and Hubert Seamans. The second is whether the interest on loans required to pay the disbursements approved by the clerk should be allowed as a "disbursement". As noted in my introductory remarks, and for reasons that will be expounded upon, I am of the view that the two questions must be answered in the affirmative. All things considered, the pertinent provisions of the *Rules of Court* allow no other result.

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A. *The admissibility of affidavits presented in an appeal on motion*

[17] As a general rule, an appeal under Rule 62 stands to be determined on the basis of the record created in first instance. It is well established that three conditions must be met before further evidence may be admitted on such an appeal: (1) the evidence could not be adduced at trial despite reasonable diligence; (2) the evidence would have affected the outcome of the case, though it need not be dispositive; and (3) the evidence must appear to be credible (see *Workers' Compensation Board of New Brunswick and Ayles v. McCarthy and Eastern Paving Limited* (1982), 42 N.B.R. (2d) 160, [1982] N.B.J. No. 309 (C.A.) (QL)). However, Rule 59 contemplates a different appellate regime.

[18] Indeed, Rule 59.11(8) provides that an appeal from an assessment of costs may be taken "on motion to the court". The effect of the quoted phrase is an appellate regime that allows for a more substantial record than the one compiled for the clerk's consideration. That is so because Rule 39, which deals with evidence on motions, provides, in para. (1), that a party may give admissible evidence by affidavit "unless directed otherwise by these rules or by order". Neither of these exceptions is in play here.

[19] The only other argument against admissibility of the affidavits arises from Rule 39.01(2). It states that "[a] party serving a Notice of Motion or Notice of Application shall serve with it any affidavits which he intends to use at the hearing". In the case at bar, the rejected affidavits were not attached to the Notice of Motion. In fact, they were served at the hearing in the Court of Queen's Bench.

[20] In *Chiasson v. Thébeau*, 2009 NBCA 64, 348 N.B.R. (2d) 1, the Court refused to limit the record to affidavits that had been attached to the Notice of Motion:

> A strict interpretation of this rule would indeed suggest that in the case of a motion or application, the applicant may not file or serve any affidavit other than those attached to the Notice of Motion or Notice of Application, as the case may be. However, such an interpretation does not respect the principle set out in Rule 1.03(2), which stipulates that the

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> *Rules of Court* "shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits". Moreover, Rule 2.01 provides that, in extraordinary circumstances of course, "[t]he court may at any time dispense with compliance with any rule, unless the rule expressly or impliedly provides otherwise". As for Rule 3.02(1), it allows a judge to extend the time prescribed by the rules of court.
>
> We are of the opinion that the principles that emerge from the rules can only lead to the conclusion that the application judge erred in law when he concluded that he did not have the power to admit additional affidavits. It was within the judge's discretion to dispense with compliance with Rule 39.01(2) or again to extend the time prescribed to serve the additional affidavits that the applicant wanted to file. Since the decision to reject the additional affidavits was based on an error in law, it does not warrant the deference otherwise afforded to the exercise of discretionary power. In short, the judge's error is such that we are justified in reversing his decision on appeal.
>
> The principles of interpretation require that a flexible approach, rather than a strict one, be taken in interpreting procedural questions. Essentially, a trial judge is given a very wide discretion in deciding some of the numerous procedural questions that may arise during a hearing. In exercising this discretion, the judge must respect the governing principles of interpretation, including in particular the principle set out in Rule 1.03(2). [para. 9-11]

In that case, the affidavits were served thirteen days before the hearing, which, according to the Court, was sufficient notice "to avoid surprise". The Court pointed out that where "the respondent party feels that he or she is at a disadvantage due to the late service [...] there is an array of ways the judge can remedy the situation, including [...] adjourning the hearing" or "admitting additional affidavits from the respondent party" (para. 12).

[21] Where, as here, service has been tardy, the motion judge should adjourn the hearing if it is shown the opposing party will suffer real prejudice unless a reasonable delay is allowed. Sometimes, a few minutes suffice. In the case at hand, the affidavits that were ruled inadmissible specify the amount of interest owing on the loans granted by

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Seahold Investments to cover the disbursements approved by the clerk. That being so, they merely identify the product of a mathematical extrapolation that anyone could make on the basis of the raw data contained in the record assembled for the clerk. Finally, the content of the affidavits was known to the respondents long before the hearing and they never took issue with its accuracy. For those reasons, and with respect for the views to the contrary expressed by the Court of Queen's Bench judge, I conclude the Cormier and Seamans affidavits are admissible.

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[22] As indicated, those affidavits show that, on January 25, 2010, the interest owing on the loans required to pay the disbursements allowed by the clerk amounted to $12,665.41. That is the amount claimed by Mr. LeBlanc.

B. *The eligibility of interest as a "disbursement"*

[23] Paragraph 2 of Tariff "D" of Rule 59 lies at the heart of the present dispute. It sets out the disbursements that may be recovered from an adverse party. Some are identified with specificity in sub-paras. 1 to 13. Interest owing on a loan taken out to pay litigation expenses does not appear on that list. Therefore, whether interest qualifies as a "disbursement" depends upon the scope of sub-para. 2(14), which reads as follows:

TARIFF "D"	**TARIF "D"**
TARIFF OF DISBURSEMENTS ALLOWABLE TO A PARTY ENTITLED TO COSTS	**TARIF DES DÉBOURS REMBOURSABLES À LA PARTIE QUI A DROIT AUX DÉPENS**
[…]	[…]
(14) All other reasonable expenses necessarily incurred, when allowed by the assessing officer.	(14) Tous les autres frais indispensables et raisonnables, s'ils sont approuvés par le fonctionnaire chargé du calcul.

(1) The key principles of interpretation

[24] The *Rules of Court* were adopted by way of regulation, namely Regulation 82-73, made under the *Judicature Act*, R.S.N.B. 1973, c. J-2, and the *Summary Convictions Act*, R.S.N.B. 1973, c. S-15. In *Davis v. MacKenzie*, 2008 NBCA 85, 338 N.B.R. (2d) 232, the Court confirmed the rules stand to be interpreted in accordance with the guidelines provided by the *Interpretation Act*, R.S.N.B. 1973, c. I-13, Rule 1.03(2) and *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2 (QL).

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[25] In that oft-cited case, the Supreme Court of Canada adopted the following principle of interpretation:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [para. 21]

As for s. 17 of the *Interpretation Act*, it states that every provision of a regulation shall be deemed remedial and shall "receive such fair, large and liberal construction and interpretation as best ensures the attainment" of its object. The Legislature has identified, in terms that could not be any more pellucid, the purpose of the rules and its intent regarding their interpretation. Indeed, Rule 1.03(2) provides that "[t]hese rules shall be liberally construed to secure the just, least expensive and most expeditious determination of every proceeding on its merits" (emphasis added). The clerk and the Court of Queen's Bench judge were required to give a liberal interpretation to sub-para. 2 (14), one designed to secure a just determination of the proceeding on its merits. With respect, the interpretation that found favour with them does not comply with that obligation.

(2) Application of those principles to the case at bar

[26] The judge of the Court of Queen's Bench held the interest claimed was not a "disbursement" within the meaning of Rule 59 for the following reasons:

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> [TRANSLATION]
> In the present case, Mr. LeBlanc entered into a contract for a loan from Seahold Investments Ltd. in order to acquire the means to bear the costs of his legal action. The interest did not originate from direct costs the litigant chose to incur, that is, how and what costs he was going to pay in order to prove his case. Rather, these costs were incurred indirectly as a result of the litigant's financial circumstances. Accordingly, I am of the view that the interest claimed is not closely enough connected to obtaining the evidence required to prove his case to constitute a "*disbursement*" as this term is normally understood. [para. 45]

It is perhaps appropriate to acknowledge at this time that English case law, as well as the jurisprudence from South Australia, is generally to the effect that interest on a loan required to finance litigation does not constitute "costs" <u>within the meaning of the procedural rules in force in those jurisdictions</u>. For an understanding of the state of the law in the United Kingdom, see *Review of Civil Litigation Costs* (Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (Norwich: The Stationary Office, 2010), the Act that resulted from this report entitled *Legal Aid, Sentencing and Punishment of Offenders Act 2010-12* (coming into force in April 2013), *R. (Factortame Ltd.) v. Transport Secretary (No. 8)*, [2002] EWCA Civ 932, and *F & C Alternative Investments (Holdings) Ltd. & Ors v. Barthelemy & Anor*, [2012] EWCA Civ 843. That said, the facts in *Burford v. Allan*, [1998] SASC 6693, most closely resemble those of the present dispute.

[27] In that case, the Supreme Court of South Australia dismissed an appeal in which it was asked to rule the interest on a loan taken out to finance an action in damages constituted "disbursements" and therefore "costs" within the meaning of the procedural rules in force in that State. The Court was manifestly reluctant to rule as it did, being of the view that the required interpretation of the pertinent rules brought about an unjust result. The observations on point by Chief Justice Doyle bear recalling:

> For what it is worth, I am of the view that the claim made by the plaintiff is a reasonable one. There are differing views on the appropriate approach to costs in civil litigation. From time to time it is said that costs should not

> be awarded to a successful litigant. Whatever might be the best approach, I must say that while it continues to be that a successful litigant can ordinarily expect to recover costs in accordance with the Rules, it would be reasonable to allow a claim such as was made here to be recovered.
>
> [Emphasis added.]

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For his part, Mulhouse, J. expressed the view, in brief concurring reasons, that although the dismissal of the appeal was obligatory given the applicable rules of procedure, the result constituted an "injustice". I agree. It is indeed fortunate that our *Rules of Court*, unlike those the Court was called upon to construe in *Burford v. Allan*, do not exclude a ruling favourable to litigants in Mr. LeBlanc's shoes.

[28] In that regard, I begin by pointing out that, unlike the situation prevailing in South Australia when judgment was rendered in *Burford v. Allan*, our rules distinguish between costs (see Tariffs "A", "B" and "C") and disbursements (see Tariff "D"). In addition, Rule 59.08(8) forecloses uncertainty on the subject by providing that unless ordered otherwise "a party who is entitled to his costs [...] is entitled on the same basis to his disbursements assessed in accordance with Tariff 'D'." A further distinction: in our province, the Court may allow a self-represented litigant to recover disbursements from an adverse party, which, as Chief Justice Doyle underscores, is not the case in South Australia:

> In *Cachia v Hanes [1994] HCA 14;* (1994) 179 CLR 403 the High Court decided that a litigant in person, who was not a lawyer, could not by way of costs recover compensation for time spent in preparing and conducting his case. The provisions of the *Supreme Court Act 1970 (NSW)* and of the *Supreme Court Rules 1970 (NSW)* appear to be in relevant respects essentially the same as the South Australian provisions set out above. The relevant provisions are set out in the reasons for judgment, but I will refer to some of them briefly. Section 76(1) of the New South Wales Act provides:
>
> > Subject to this Act and the rules and subject to any other Act:

> (a) costs shall be in the discretion of the Court;
>
> (b) the Court shall have full power to determine by whom and to what extent costs are to be paid; and
>
> (c) the Court may order costs to be taxed or otherwise ascertained on a party and party basis or on any other basis.

"Costs" are defined to include "costs of or incidental to proceedings in the Court." "Costs" are defined by s 19(1) to include "fees, charges, disbursements, expenses and remuneration". That provision appears to be to the same effect as s 40 of the Act. It is certainly no narrower. In the New South Wales Rules the expression "costs" appears frequently. Rule 23(2) of the New South Wales Rules provides:

> On a taxation on a party and party basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed.

When allowance is made for the scope of the definition of "costs" in s19(1), r23(2) appears to be to the same effect as r101.16(b) of the Rules.

The approach of the majority (Mason CJ, Brennan J, Deane J, Dawson J and McHugh J) was that the outcome of the case was governed by the meaning of "costs". They said (at 409):

> The "costs" provided for in the Rules do not include time spent by a litigant who is not a lawyer in preparing and conducting his case. They are confined to moneys paid or liabilities incurred for professional legal services. It is only in that sense that the Rules speak of "costs".

Although the focus of this passage is upon the claim advanced by the litigant in person, the reasoning rests upon the conception that "costs" are limited to expenses incurred for professional legal services. Those expenses, of course, will include the expenses that might be incurred by the

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practitioner. The majority made this clear a little later when they said (at 410-411):

> To use the Rules to compensate a litigant in person for time lost would cut across their clear intent. Costs, within the meaning of the Rules, are reimbursement for work done or expenses incurred by a practitioner or practitioner's employee. Compensation for the loss of time of a litigant in person cannot be said to constitute costs within the meaning of the Rules.
>
> This is hardly surprising. It has not been doubted since 1278, when the *Statute of Gloucester* 1278 (UK) 6 Edw. I c 1 introduced the notion of costs to the common law, that costs are awarded by way of indemnity (or, more accurately, partial indemnity) for professional legal costs actually incurred in the conduct of litigation. They were never intended to be comprehensive compensation for any loss suffered by a litigant.

In my opinion these passages have a twofold significance. First, the emphasis upon "costs" being professional legal costs, that is reimbursement to a practitioner for work done or expenses incurred by the practitioner. Secondly, the emphasis upon the fact that the award of costs is not intended to be complete compensation for losses suffered by a litigant.

For both those reasons the majority concluded that the litigant in person could not recover compensation for time spent by him in preparing and conducting his case. In principle, I can see no difference between the claim made in that case and the claim made in the present case. First of all, in each case the claim is for an expense that does not represent remuneration paid to a legal practitioner or an expense incurred by the practitioner in the course of representing the client. The claim is for a cost to the client, not to the practitioner. Secondly, each claim seems to rest in part on the premise that an award of costs should adequately compensate a litigant for any cost or loss associated with the conduct of the litigation.

It is surprising that no authority has been found by the parties more closely in point. However, in my opinion the

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> principle that underlies the decision in *Cachia v Hanes* (supra) is that costs recoverable under s. 40 of the Act are a reimbursement for work done or expenses incurred by a practitioner, and do not extend to an expense of the type claimed in the present case. In my opinion the judge was right, for this fundamental reason, to reverse the master's decision on the point.

Finally, and most importantly, the Legislature enjoins us, through Rule 1.03(2), to eschew constructing our rules in a manner that would lead to the unjust determination of a proceeding. I now return to the wording of sub-para. 2(14).

[29] The word "frais [expense]" is not defined in the *Rules of Court*. According to *Le Petit Robert* (2012), the word refers to any expense generated by a transaction. The authors give the following examples: "agio, commission and interest" (emphasis added). Thus, in its ordinary meaning, "frais [expenses]" includes the interest at issue in this case. Moreover, the Legislature did not limit the ambit of sub-para. 2(14) to expenses "similar" to those enumerated in the preceding sub-paragraphs or to expenses incurred by a party or his lawyer that are: (1) directly and immediately connected to "obtaining the evidence necessary for the proceeding"; and (2) "necessary" to obtain such evidence. 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 "expens[e] necessarily incurred" within the meaning of sub-para. 2(14).

[30] In settling any debate on point, the assessing officer must bear in mind that hindsight invariably leads to an assessment that is qualitatively superior to that which the most enlightened and competent person may carry out, when called upon to make decisions whose repercussions stand to be felt in an uncertain future. That officer must also take into account the principle enunciated by the Court in *Van Daele v. Van Daele*, [1983] B.C.J. No. 1482 (C.A.) (QL):

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> There, in my opinion, lies the error of principle into which Mr. Justice Meredith fell. The proper test, it seems to me, from a number of authorities referred to us this morning is whether at the time the disbursement or expense was incurred it was a proper disbursement in the sense of not being extravagant, negligent, mistaken or a result of excessive caution or excessive zeal, judged by the situation at the time when the disbursement or expense was incurred. [para. 11]
>
> [Emphasis added.]

[31] The interpretation of sub-para. 2(14) that I favour 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 all 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 1980s. In fact, the opposite strikes me as plausible.

[32] Be that as it may, sub-para. 2(14) is formulated in very general terms and its drafters must be presumed to have been aware of the rule that an Act or regulation is always speaking. Section 12 of the *Interpretation Act* pertains to this issue and reads as follows:

> An Act or regulation shall be considered as always speaking, and whenever a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the Act or regulation and every part thereof according to its true spirit, intent and meaning.
>
> Une loi ou un règlement est censé toujours parler et, chaque fois qu'une question ou une chose est exprimée au présent, il faut l'appliquer aux circonstances au fur et à mesure qu'elles surgissent, de façon à donner effet à la loi ou au règlement ainsi qu'à chacune de ses parties, selon son esprit, son objet et son sens véritables.

[33] In her book *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis, 2008), Ruth Sullivan posits that a legislative provision drafted in

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general terms, as is the case for sub-para. 2(14), allows the court to extend its scope beyond the specific examples the legislators may have had in mind:

> All legislation confers a degree of discretion on courts or other official interpreters. This is unavoidable because legislative texts are not self-applying. Apart from that, however, a legislature may deliberately confer discretion on interpreters, whether explicitly through the creation of formal powers or implicitly through the use of abstract or of evaluative language such as "public interest" or "reasonable". Subject to any constraints expressed or implied in the legislation, this discretion is properly exercised in the interpreter's own context, taking into account current assumptions and values. This follows from the reasons for which discretion is conferred, namely, to ensure a decision that is sensitive to the circumstances of each case as it arises, and to permit the adaptation of the legislation to a variety of circumstances in an appropriate way. [p. 153]

Even more cogently, McLachlin, J., now Chief Justice of Canada, expressed agreement with that notion 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. [para. 15]
>
> [Emphasis added.]

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[34] The clerk found Mr. LeBlanc did not have the means to finance his action against the respondents. That finding, one of fact, is fully supported by the evidence. In particular, it is not the by-product of some palpable and overriding error in the record's assessment. That being so, the judge of the Court of Queen's Bench, sitting on appeal, was required to accept the finding, given the standard of review applicable to findings of that nature (see, for example, *Kelleher, Hoskinson v. Knipfel (Executors of the Estate of)*, [1982] O.J. No. 3283 (C.A.) (QL)).

[35] Without financial assistance from a third party, Mr. LeBlanc would not have been able to enforce his rights in the courts. The loans granted by Seahold Investments were therefore essential to allow Mr. LeBlanc access to justice, which the judge of the Court of Queen's Bench described as a [TRANSLATION] "common law constitutional right" (para. 39).

[36] The importance of access to justice in our society is a theme the Chief Justice of Canada addresses on a regular basis in her public interventions, excerpts of which are reproduced in *Bourgoin v. Ouellette et al.* (2009), 343 N.B.R. (2d) 58, [2009] N.B.J. No. 164 (Q.B.) (QL):

> [TRANSLATION]
> The privilege of living in a peaceful society where the principle of the rule of law applies brings with it for us, who are the key players in the legal field, an added obligation. This obligation is the civic duty to maintain, in Canada, public confidence in the legal institutions, and especially in the legal system. In order to maintain confidence in our legal system, it must be, and must be seen to be accessible to Canadians. Yet the time and cost it takes to get a matter to trial is moving beyond the resources of the average Canadian and the number of litigants who represent themselves is on the rise. We cannot allow this to continue.
>
> [...]
>
> The history of the Bar Association and of the judiciary in Canada is that of the struggle to provide Canadians with an

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> efficient and affordable justice system. However, the cost of legal services today is unfortunately a factor which limits access to justice for many Canadians. For the wealthy, and for large companies, access to justice is not a problem. The same applies to the very poor: despite the shortcomings which exist in some regions, they have access to legal aid, at least in cases of serious criminal charges which could lead to jail time. Rather, it is the most numerous group, that of middle-class Canadians, which is most affected. This is because these people have a certain income. They have a few assets, maybe a small house, and this disqualifies them for legal aid. The choices they have are none too encouraging: they can exhaust the family assets in a trial, represent themselves, or simply give up. The cost of justice, which could represent taking out a second mortgage on the house or using money saved for retirement or for the children's education, should not be so high. [paras. 60-61]

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[37] In another speech given on March 8, 2007, before the Empire Club of Canada in Toronto, Chief Justice McLachlin made the following remarks regarding the problem of access to justice:

> The result may be injustice. A person injured by the wrongful act of another may decide not to pursue compensation. A parent seeking custody of or access to the children of a broken relationship may decide he or she cannot afford to carry on the struggle – sometimes to the detriment not only of the parent but the children. When couples split up, assets that should go to the care of the children are used up in litigation; the family's financial resources are dissipated. Such outcomes can only with great difficulty be called "just".
>
> [Emphasis added.]

(see online: Supreme Court of Canada, http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp).

[38] The loans taken out by Mr. LeBlanc were necessary to prevent a most unjust outcome for his legal dispute with the respondents: the settlement of his claim for a pittance or perhaps even its abandonment. It follows the interest due on those loans constitutes "[an expense] necessarily incurred" within the meaning of sub-para. 2(14). I now turn to the question of whether that expense was "reasonable".

[39] Seahold Investments was a source of financing totally independent of Mr. LeBlanc. The interest rate it set reflected 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 respondents' 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. In any event, the rate of interest in question is comparable, if not identical, to the one allowed by another clerk in *Bourgoin v. Ouellette*. I note in passing that, in "Litigation Finance: Access to Justice at What Cost?" (2011), 69 Advocate 717, the authors Adam Howden-Duke and Alex Kask suggest the following explanation for the clerk's decision in that case: "the tortfeasor had to take his victim as he found him, and the unwillingness of orthodox financiers to support the litigation undertaking meant that high interest rates were part of the plethora of losses the tortfeasor was required to compensate" (p. 718). Finally, there is nothing in the record to suggest Seahold Investments acted in bad faith or that Mr. LeBlanc could have borrowed the money he needed at a lower interest rate.

[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 interest claimed constitutes a "reasonable" expense within the meaning of sub-para. 2(14). The only outstanding issue arises from the respondents' objection based on the torts of champerty and maintenance.

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(3) The torts of champerty and maintenance

[41] As stated in *United Steelworkers of America, Local 1-306 v. Irving et al. and Fortis Properties Corp*, 2007 NBCA 16, 312 N.B.R. (2d) 224, "New Brunswick is one of the few jurisdictions where the common law torts of champerty and maintenance have not been abolished". In *Halsbury's Laws of England*, 4th ed., Volume 9(1) (London: Butterworths, 1985), those torts are defined as follows:

> Maintenance may be defined as the giving of assistance or encouragement to one of the parties to the litigation by a person who has neither an interest in litigation nor any other motive recognized by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action. [para. 850]
>
> [Emphasis added.]

[42] In my view, an inappropriate motive should be seen as a constituent element of the torts of champerty and maintenance (see Poonam Puri, "Financing of Litigation by Third-Party Investors: A Share of Justice?" (1998), 36 Osgoode Hall L.J. 515, at para. 22). No such motive percolates from the record. At any rate, in formulating sub-para. 2(14) in terms sufficiently broad to cover interest on a loan required to cover allowable disbursements, the Legislature effectively excluded consideration of common law torts from its application.

IV. Conclusion and Disposition

[43] The appellant, Francis LeBlanc, lacked the means to finance his action in damages against the respondents. 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. While no provision of the *Rules of Court* 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 those loans were "necessarily incurred" to secure the just

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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 cover the other disbursements he had approved. In short, these are the reasons that caused me to join my colleagues in reversing the decision of the judge of the Court of Queen's Bench, sitting on appeal, which upheld the clerk's rejection of Mr. LeBlanc's interest reimbursement claim.

[44] In the result, I would order the respondents to pay the amount claimed by Mr. LeBlanc, namely $12,665.41. I would further order them to pay costs throughout, which I would fix at $8,500.00.

J. ERNEST DRAPEAU,
CHIEF JUSTICE OF NEW BRUNSWICK

WE CONCUR:

J.C. MARC RICHARD, J.A.

KATHLEEN A. QUIGG, J.A.

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