

Bourgoin v. Ouellette, [2009] N.B.R.(2d) TBEEd. FE.013

Luc Bourgoin (Plaintiff) v. Tina Y. Ouellette and David F. Godreau (Defendants)
(E-C-78-05)

Indexed As: Bourgoin v. Ouellette et al.

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Edmundston
Cyr, Clerk
February 6, 2009.

[TRANSLATION]

I. THE FACTS

[1] **Cyr, J.:** This request for an assessment of costs arises from a civil suit commenced by the plaintiff against the defendants in 2005, following a motor vehicle accident involving the parties, in New Denmark, New Brunswick. A settlement was reached between the parties when the defendants' insurance company agreed to pay the maximum amount of compensable loss, that is, \$500,000 plus \$6,950 for costs and HST of \$903.50 on the costs. According to the report prepared by the plaintiff's actuary, the plaintiff was seriously hurt and his claim could amount to between \$2,041,577.00 to \$2,487,878.00.

[2] The plaintiff's disbursements must now be assessed in accordance with the provisions of the *Rules of Court* of New Brunswick.

[3] The bill of costs, filed on August 21, 2008, by the plaintiff, shows that the total claimed is \$52,214.77, including \$6,950 for lawyer's fees, HST in the amount of \$903.50 \$ on these fees which were settled before the judgment, and disbursements totaling \$44,361.27.

[4] On the amount of \$44,361.27 for disbursements which the plaintiff claims from the defendants, the defendants agree to pay \$23,552.29, leaving a contested balance of \$20,808.98 which must therefore be assessed according to the provisions of Rule 59.11 and Tariff "D".

[5] The documents presented at the hearing were the following:

For the plaintiff:

- the plaintiff's bill of costs;
- a notice of appointment to assess costs, and the notice amended on August 21, 2008, which moved the time fixed for the hearing forward to 9:30 a.m.;
- the affidavit of Jocelyne Moreau, Q.C., an associate at law firm Bourque Voyer & Cie, dated August 14, 2008;
- the affidavit of the plaintiff, Mr. Luc Bourgoin, dated September 5, 2008, and the affidavit of service by Ms. Louise Martin, dated September 5, 2008;
- the affidavit of Mr. Luc Rivest, actuary, dated August 19, 2008;
- the certificate of assessment to be signed by the clerk;
- the plaintiff's brief;
- the plaintiff's book of authorities.

For the defendants:

- the affidavit of Ms. Anne Geldart, insurance adjuster, litigation analyst, dated September 12, 2008;
- the defendants' brief;
- a photocopy of *Sidorsky v. CFCN Communications*;
- a photocopy of *Noon-Ward v. Carlson et al.*

II. ISSUES

[6] When oral submissions were made at this hearing with regard to the assessment of disbursements, the parties' counsels agreed that the following five items were in dispute:

- Costs relating to fees for the services of investigator Jacques LaForge, totaling \$2,623.61 (see Exhibit "B" to affidavit of Luc Bourgoin);
- Costs relating to fees for the services of investigator Lionel LeBlanc, totaling \$732.75 (see Exhibit "G" to affidavit of Luc Bourgoin);
- Invoice of M^e Maurice F. Bourque, c.p. inc. totaling \$495.66 (see Exhibit "Q" to affidavit of Luc Bourgoin);

· Invoice of M^e Maurice F. Bourque, c.p. inc. totaling \$17,495.31 (see Exhibit “R” to affidavit of Luc Bourgoïn with regard to cost of actuarial services);

· Evidence of interest charged by Seahold Investments Inc. to Luc Bourgoïn on the financing of his disbursements in this matter, totaling \$4,231.65 on August 13, 2008, plus daily interest of \$34.06 until August 31, 2008 (see Exhibit “X” to affidavit of Luc Bourgoïn).

[7] I will deal with each of the disputed disbursements in the order above, summarizing the position of each party, and proceed with the assessment in the same order. The first two disbursements, namely the costs relating to the fees for investigation services, will be dealt with together.

III. COSTS OF INVESTIGATION SERVICES

[8] In his affidavit, Luc Bourgoïn states that, on his counsel’s advice, two resource persons were hired as investigators, Jacques Laforge and Lionel LeBlanc. They visited the scene of the accident on Route 108 East, in New Denmark, New Brunswick. The investigators also interviewed the witnesses identified in the police reports in order to establish the defendants’ liability.

[9] As part of his disbursements, the plaintiff claims the costs relating to the fees of the two investigators under s. 2(14) of Tariff “D” of Rule 59 of the *Rules of Court* of New Brunswick, as expenses allowable at the discretion of the assessing officer. Section 2(14) reads as follows:

TARIFF “D”

TARIFF OF DISBURSEMENTS ALLOWABLE TO A PARTY ENTITLED TO COSTS

2(14) All other reasonable expenses necessarily incurred, when allowed by the assessing officer.

[10] The plaintiff relies on *Al-Karim Kassam and Shamshuden Kassam v. Victor Dragish, Dragish Enterprises Ltd. and 111996 Holdings Ltd., all carrying on business as Dragish Auto Body and Darrel Dragish* (1991), 123 A.R. 161 (Alta. Q.B.) where the court allowed costs relating to an investigator’s fee as a reasonable expense and therefore as a “proper” expense. The relevant rule in force in Alberta was worded as follows:

All reasonable and proper expenses should be allowed.

In that case, an investigator's fee was at issue. The Alberta Court of Queen's Bench (Veit, J.) allowed this cost, which amounted to \$279.60, based on the principle that the expense was reasonable and proper. According to the court, the scene of the motor vehicle accident which gave rise to the action had an unusual configuration and the expert had to track down witnesses.

[11] In the instant case, the plaintiff submits that an investigation was necessary and that it was not the responsibility of his counsel, namely Maurice F. Bourque, to go and interview potential witnesses since doing so would have put him in a precarious situation, should he have had to testify later against a hostile witness. In addition, the plaintiff maintains that his counsel must not subscribe affidavits in this matter. In support of this assertion, the plaintiff invokes *Walsh v. Nicholls et al.* (2004), 273 N.B.R. (2d) 203, where the New Brunswick Court of Appeal expressed its disapproval of such a practice on the part of counsel.

[12] For their part, the defendants, represented by Lucie Richard, Esq., argue that the plaintiff's counsel should not have contracted out to the two investigators one or several tasks which were his own responsibility, that is, the gathering of necessary evidence in his client's case and the assessment of this evidence. In support of this argument, some witness statements gathered by the investigators and appended to Luc Bourgoin's affidavit were not disclosed in the plaintiff's Affidavit of Documents.

[13] In support of their position, the defendants invoke *Sidorsky v. CFCM Communications*, 1998 ABCA 127 (CanLII), where the Alberta Court of Appeal held that the cost of tracking witnesses is not allowed in the context of an action. For example, the preparation for the trial should not be sub-contracted to another law firm. In addition, the Court of Appeal acknowledged that there was no evidence as to the necessity of hiring an investigator to do the work.

[14] As the Alberta Court of Appeal found in the abovementioned matter, there was no evidence as to the necessity of hiring an investigator in the instant case. Among other things, the witnesses were all fairly known and lived in the New Denmark or Grand Falls area of New Brunswick, where the accident happened, and for the most part their names appeared in the police reports.

[15] I do not agree with the plaintiff's argument that his counsel could have placed himself in a position of potential conflict if a witness had to be declared hostile. In my opinion, this situation, although unusual, is better addressed by the rule directing that a witness who contradicts his previous statements of fact be declared a hostile witness. That a counsel must testify about the facts pertaining to the statement of a witness who is declared hostile does not, in my view, prevent him from continuing to represent his client and fulfilling his mandate until the end of the trial. For all the aforementioned reasons, I do not allow the plaintiff's disbursements for the investigators, Jacques Laforge and Lionel LeBlanc, as reasonable expenses necessarily incurred within the meaning of s. 2(14) of Tariff "D" of the New Brunswick *Rules of Court*.

IV. COST OF SERVICES PROVIDED BY M^e MAURICE F. BOURQUE, c.p. inc.

[16] During this hearing for the assessment of costs, it was agreed that the challenged disbursements of \$495.66 would be reduced to the amount of \$123.92, refundable to the plaintiff by the defendants.

V. COST OF SERVICES PROVIDED BY ACTUARY LUC RIVEST

[17] The next disbursement claimed by the plaintiff is the cost of the services provided by actuary Luc Rivest, amounting to \$16,256.70. Section 2(3) of Tariff "D" under Rule 59 of the New Brunswick *Rules of Court* provides as follows:

2 Disbursements recoverable from opposite party:

(1) Attendance money paid to witness,

(2) Reasonable cost of

(a) plans

(b) models

(c) photographs

when necessary to understand the evidence,

(3) Reasonable cost of

(a) medical reports

(b) hospital reports

(c) reports of experts

intended to be used at trial and which, unless the proceeding is disposed of beforehand, were supplied to the other parties at least 10 days before trial[.]

[18] At para. 19 of his affidavit, the plaintiff annexes Appendix “R”, and Appendix “S” which pertain to the invoice of actuary Luc Rivest, of Westmount, Quebec, showing the following amounts: professional fee, \$15,044.49; expenses, \$438.09; GST, \$774.12; for a total of \$16,256.70. New Brunswick HST, calculated at the rate of 13% on that amount, adds \$2,012.73 to the total. M^e Maurice F. Bourque, c.p. inc.’s invoice (Appendix “R”) shows a total of \$17,495.31, including HST. Luc Bourgoin’s affidavit also includes a time sheet (Appendix “T”) and a copy of Luc Rivest’s report (Appendix “U”).

[19] In addition, the plaintiff filed the affidavit of actuary Luc Rivest which describes the professional services he has provided since April 18, 2007, with regard to the plaintiff’s July 13, 2003, accident, the preparation of a 48-page report and the preparation of 13 appendices consisting of reports and explanatory appendices regarding Luc Bourgoin’s loss of income amounts; the cost of housekeeping assistance, of other recommended care, and of equipment and other self-help devices. The appendices also include the report prepared by occupational therapist Sophie Dupont; other information obtained from the Faculty of Forestry of the Université de Moncton; information obtained from New Brunswick Job Futures and Job Futures Canada; the definition of “forestier” (professional forester); income tax information; information regarding employment benefits and health insurance benefits, Section B benefits under the plaintiff’s insurance policy with Royal SunAlliance, CPP disability benefits; excerpts from an overview of how Canadians spend their time; a copy of a report on Canadian economic statistics prepared by the Canadian Institute of Actuaries; and Luc Rivest’s résumé.

[20] Actuary Luc Rivest states at para. 9 of his affidavit that the preparation of the report took 60 hours, and in addition he had help from an associate.

[21] At the start of his mandate, Luc Rivest’s hourly fee was \$240.00, and his associate’s was \$150.00. These fees were later increased, starting January 1, 2008, to \$250.00 and \$150.00 respectively.

[22] Actuary Luc Rivest subtracted an amount of \$5,000 from his invoice for time spent on the file that may be billed elsewhere (para. 10 of his affidavit).

[23] Mr. Bourque seems to use the services of actuary Luc Rivest frequently. Out of 14 cases, 10 of which were settled out of court and without the defence having had to request a second opinion, Mr. Bourque used Luc Rivest's services.

[24] In this assessment of costs, the necessity of an actuarial expertise, as recognized by New Brunswick courts, is uncontested. What is contested, however, is the amount of \$17,495.31 claimed by the plaintiff as reimbursement of the cost of the actuarial services and the added taxes.

[25] The plaintiff relies on the compensatory principles recognized by our courts to claim full reimbursement of the fees and added taxes paid for Luc Rivest's actuarial services, and to claim full reimbursement of this amount as compensation.

[26] It is uncontested that the report was prepared for this proceeding and was provided to the adverse party at least 10 days before the trial. This case was settled out of court; a copy of the actuary's report was provided to counsel for the defendants.

[27] The defendants do not object to the reimbursement of an amount with regard to the cost of actuary Luc Rivest's report, but suggest to the assessing officer that this refundable cost must be reasonable (emphasis is mine) as set out in the *Rules of Court* of New Brunswick.

[28] Counsel for the defendants, Lucie Richard, invokes *Noon-Ward c. Carlson et al.*, 2006 BCSC 922 (CanLII). In that case, Master Caldwell found that the actuary's report went well beyond what was necessary, reasonable, and proper. He also considered the comments of Proudfoot, J., in *Hall (Guardian ad litem of) v. Strocel*, [1983] B.C.J. No. 506:

I see no error here, the Registrar directed his mind to the appropriate legal principles when he exercised his discretion. It seems as if more and more experts are becoming involved in more and more litigation. I do not wish to be misinterpreted, in most cases they are necessary and are of assistance to the Court. Nevertheless that does not mean that costs of such

experts should not have a limit. The unsuccessful party should only be responsible for a reasonable fee, (a reasonable cost). At the hearing before the Registrar, Dr. Walker was referred to as the "Cadillac" of the economists. If the plaintiff wishes to use a "Cadillac" he may do so, but I do not think that the defendant need pay for that "Cadillac" when the job can be done by others in the industry i.e. an "Oldsmobile" or a "Buick".

[29] Therefore, the assessing officer must determine whether the actuary's invoice covers services of the "Cadillac" kind, or of the "Oldsmobile" or "Buick" kind, that is, if the cost of these actuarial services are reasonable in the circumstances.

[30] As stated by the New Brunswick Court of Appeal, the assessing officer must review the expert's report, otherwise he will not be able to find that the report was necessary and reasonable. See *Moffet (Stephen) Ltd. c. New Brunswick (Minister of Transportation)* (2008), 326 N.B.R. (2d) 242. The Honourable Madam Justice Larlee, of the New Brunswick Court of Appeal, reviewed the fundamental principles and factors a trial judge or assessing officer, as the case may be, must take into account in assessing costs. The assessing officer must meet the same requirements as a trial judge when assessing costs, and in particular exercise a discretion which is considerable but not unfettered. The discretion must be exercised judicially, that is according to the rules of reason and justice, not according to private opinion, according to law, and it must not be arbitrary, vague and fanciful.

[31] Further on, at par. 12, the Honourable Madam Justice Larlee states the following:

In order for disbursements to be reimbursed, there must be a proper evidentiary foundation before the court.

[32] In the instant case, the report of actuary Luc Rivest is attached to the affidavit of the plaintiff, Luc Bourgoïn. In addition, this report is mentioned by the actuary in his own affidavit. This complies with Rule 59.11(7) which requires that the payment or the liability of a cost be established by affidavit.

[33] It remains for me to determine whether the cost of the report was reasonable.

[34] The defendants filed the affidavit of Ms. Anne Geldart, insurance adjuster (litigation analyst), in which she expresses her opinion, based on at least 25 years of experience. According to her, the facts in this case are no more complicated than in other similar cases where an actuarial report was necessary. In support of her position, and in order to show that the fees of actuary Luc Rivest were too high, Ms. Geldart produces along with her affidavit the copies of four similar reports prepared by other actuaries, three of which had cost \$3,252.20, \$1,069.32 and \$2,525, respectively. In Ms. Geldart's opinion, the cost of Luc Rivest's report should not have been higher than \$4,000.

[35] The affidavit of Anne Geldart confirms that an actuary, Ms. Jessie Shaw-Gmeiner, who practices in New Brunswick, but whose office and residence are situated in Halifax, Nova Scotia, is a member of the Society of Actuaries and the Canadian Institute of Actuaries since 1986. Her hourly fee is \$200, with 22 years of practice.

[36] Two other reports, prepared by actuary Paul Conrad, are attached to the affidavit of Anne Geldart. Paul Conrad's fees for the two reports are in the region of \$2,525. His hourly fee is not mentioned.

[37] It is obvious that there is a large difference in the cost of the reports prepared by actuaries Luc Rivest, Jessie Shaw-Gmeiner and Paul Conrad. Of the reports attached to Anne Geldart's affidavit, two are 17 pages long, plus appendices, and the other two are 15 pages long.

[38] The report prepared by Luc Rivest is 48 pages long; the appendices contain 128 pages.

[39] The defendants submit that the fees of actuary Luc Rivest are not reasonable, and that they should only be liable for reasonable costs with regard to such a report, as stated in *Noon-Ward c. Carlson et al.*, supra.

[40] Is Luc Rivest's report of the "Cadillac" kind (reasonable) or rather of the "Oldsmobile" or "Buick" kind?

[41] It should be noted that there are not many Francophone actuaries in New Brunswick. Based on what was said at the assessment hearing, I believe there is at most one bilingual actuary, John Farrell. In the instant case, Mr. Bourque indicated that he uses Luc Rivest's services in most of his motor vehicle accident cases which require the expert services of an actuary. Mr. Rivest practices in Quebec and has 30 years of experience as an actuary. He is a member of the Canadian Institute of Actuaries since 1979 and of the Society of Actuaries (United States) since 1978. His résumé is quite impressive but does not mention whether he was recognized as an expert by the New Brunswick courts.

[42] This actuary's track record, that is, the settlement results for 10 of the 14 cases in which Mr. Bourque retained his services for other clients indicate considerable settlement success. In addition, in his affidavit, Luc Rivest states that in the cases where there was a settlement, the defence did not consider that it would be justified to retain other experts (see s. 16(b) of Luc Rivest's affidavit). Obviously, the consequence of this is that the parties, the lawyers and the administration of justice are spared long trials, resulting in savings in both time and money.

[43] To conclude, I am of the opinion that even though the fees of the actuary seem high, I consider them justified and reasonable in the circumstances. Excepting Ms. Geldart's comments to the effect that in her 25 years of experience as an adjuster (litigation analyst), she has never received or seen an actuarial report costing more than \$17,000, no other evidence was put before me. Perhaps another actuary could have satisfied me that the report prepared by actuary Luc Rivest was of the "Cadillac" kind rather than the "Oldsmobile" or "Buick" kind.

[44] The hourly fees (\$240 and \$250 as of January 1, 2008) charged by Luc Rivest, who has 30 years of experience in the field, seem to me to be consistent with the hourly fee charged by at least one of the experts from the Maritimes, namely Ms. Jessie Shaw-Gmeiner. Ms. Shaw-Gmeiner, who has 22 years of experience, charged \$200 an hour. I find that the hourly fees charged by Rivest and his assistant are comparable to Ms. Shaw-Gmeiner's, taking into account the years of experience of both actuaries.

[45] I consider the cost of the expert report prepared by actuary Luc Rivest to be reasonable within the meaning of s. 2(3)(c) and necessary and reasonable within the meaning of s. 2(14) of Tariff “D” under Rule 59 of the *Rules of Court* of New Brunswick. Therefore, I allow its reimbursement to the plaintiff by the defendants.

VI. INTERESTS OWED TO SEAHOLD INVESTMENTS INC.

[46] It remains to determine whether the interest charged by Seahold Investments Inc. constitutes a disbursement which is refundable to the plaintiff by the defendants, and if so, is a monthly compound interest of 2.4% reasonable?

[47] The plaintiff submits that the interest charged to him by Seahold Investments Inc. is refundable under s. 2(14) of Tariff “D” of the *Rules of Court* of New Brunswick.

[48] Seahold Investments Inc. is a private corporation which provides temporary financing to victims of personal injury who are awaiting insurance claim settlements, allowing them, for example, to keep their house, their vehicle, and to continue caring for their family (see advertising brochure attached to Luc Bourgoïn’s affidavit and marked as Exhibit “W”.) This financing would also apply to legal costs and disbursements in lawsuits pending a settlement, as is the case in this matter. The interest rate charged by this corporation is in the order of 2.4%, compounded monthly. As an example, the compounded interest on a loan of \$1,000 for 12 months would amount to \$329.33. Obviously, this is a very high interest rate when compared to market rates, or even to the rate allowed on judgments under the *Rules of Court* of New Brunswick (Rule 60.08), i.e. 7% per year.

[49] The interest amount claimed by the plaintiff is \$4,231.65 as of August 13, 2008, plus a *per diem* of \$34.06 until August 31, 2008. As of August 13, 2008, the loan principal was \$40,209.31 (see Exhibit “X” attached to Luc Bourgoïn’s affidavit). There is no evidence before me as to whether the amount of \$40,209.31 includes the money loaned and the interest compounded monthly over the term of the loan.

[50] The plaintiff also presented into evidence a copy of a letter from his financial institution (The Bank of Nova Scotia) to the effect that on May 24, 2005, the bank was unable to provide Luc Bourgoïn with a \$20,000 line of credit as he did not have an income (see Exhibit “V” attached to Luc Bourgoïn’s affidavit).

[51] In support of the refund of the interest owed to Seahold Investments Inc., Mr. Bourque relies on *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.* (1986), 71 N.B.R. (2d) 168. In that case, the Honourable Mr. Justice Jones, of the New Brunswick Court of Queen’s Bench, allowed the refund, pursuant to s. 2(14) of Tariff “D” under the *Rules of Court* of New Brunswick, of interest the party had paid on disbursements at the rate of 10%. It must be noted that the trial judge had previously fixed a rate of 10% on the costs; however, this did not apply to the disbursements. The Court officer responsible for assessing this item, although favorable to the refund of disbursements to the party, felt obliged to follow *Dillingham Corporation Canada Ltd. v. The “Shinyu Maru”* (1980), 101 D.L.R. (4th) 447.

[52] In that case, the court hadn’t allowed the interest incurred by a party in the posting of a bail bond. However, in *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.*, supra, the Honourable Mr. Justice Jones held that the plaintiff was also entitled to the refund of the 10% interest he had paid on his disbursements over a certain period of time.

[53] Mr. Bourque also cited *Caron v. Steeves*, [2000] N.B.J. No. 310, where the Honourable Mr. Justice Alfred Landry of the New Brunswick Court of Queen’s Bench allowed the unemployed plaintiff the interest she paid on a credit line as a legitimate expense.

[54] In addition, Mr. Bourque maintains that without the assistance of Seahold Investments Inc., his client, the plaintiff Luc Bourgoïn, would not have had the access to justice that he is entitled to. In support of his argument, Mr. Bourque relied on two addresses by the Right Honourable Beverley McLachlin, Chief Justice of Canada, to the Canadian Bar Association Council in St. John’s, Newfoundland, on August 12, 2006, and at the Faculty of Law of the Université de Moncton, in Moncton, New Brunswick, on October 23, 2007.

[55] Ms. Lucie Richard, counsel for the defendants, submits that these expenses are not part of the refundable expenses, since they come under the costs of a contingent fee agreement between a lawyer and a client, under the Rules of the Bar Association of New Brunswick.

[56] Mr. Bourque made no representations with regard to the contingent fee agreement between his firm and his client, but for my own information I reviewed Form I, namely the Contingent Fee Agreement form which the members of the Law Society of New Brunswick are required to use (s. 83 of the *Law Society Act, 1996*), as well as s. 1 to 4 of the *Contingent Fee Rules* under Section 83 of the *Law Society Act, 1996*. The lawyer's contingent fee, exclusive of other expenses, can amount to up to 30% of the total amount recovered, in some cases. As for the disbursements, they are payable by the client under s. 4(1) of Form 1, which reads as follows:

4(1) In consideration of the legal services to be performed by the Lawyer for the Client under this agreement, the Client agrees to pay to the Lawyer

...

(c) in accordance with section 5, all costs, charges, disbursements and taxes directly incurred on behalf of the Client in recovering damages[,]

and s. 5(2) of Form 1 reads as follows:

5(2) The Client agrees to pay to the Lawyer interest at the rate provided under the Rules of Court on judgments, on all costs, charges, disbursements and taxes paid directly by the Lawyer, from the date of actual payment to the date of recovery of payment, if any.

[57] I agree that a lawyer can invoice his client progressively and charge interest at the rate provided under the *Rules of Court* of New Brunswick, that is, the rate of 7% (Rule 60.08). In my opinion, the issue raised here is whether this is the rate I could allow the plaintiff with regard to the interest charged by Seahold Investments Inc.

[58] In the instant case, the interest claimed is the interest charged by Seahold Investments Inc. to the plaintiff, not the interest charged by the lawyer to his client. As well, no evidence was led with regard to a contingent fee agreement between the plaintiff and his [lawyer].

[59] I rely on the decision of the Honourable Mr. Justice Jones in *Williams et al. v. Saint John, New Brunswick and Chubb Industries Ltd.*, supra, to find that interest is refundable to the plaintiff by the defendants.

[60] If the interest is refundable, it remains for the rate to be determined. As Mr. Bourque put it so well in his submission, access to justice in Canada is fundamental. He quotes the Right Honourable Beverley McLachlin, Chief Justice of Canada, in an address delivered in St. John's, Newfoundland, on August 12, 2006, to the Canadian Bar Association (p. 4):

[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.

[61] Again, I quote from an address the Right Honourable Chief Justice delivered at the Faculty of Law of the Université de Moncton on October 23, 2007 (p. 2):

[TRANSLATION]

The history of the Bar Association and of the judiciary in Canada is that of the struggle to provide Canadians with an 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.

[62] In the instant case, the plaintiff is a young man who was a first-year forestry student at the Université de Moncton, Edmundston campus, when the accident interrupted his studies. Neither he nor his family could afford to fund such an

action. Very considerable legal expenses, like an actuarial report at the cost of \$17,495.31, had to be made to bring his case to court.

[63] The only option which seemed to be open to him in order to have access to justice, claim his rights and obtain such a considerable settlement, was to get a loan from a financial institution able to support his allowable disbursements for the duration of the action. Seahold Investments Inc. was the institution which agreed to do it, at a very high interest rate, but also at an elevated risk to itself. It must be noted that the Bank of Nova Scotia did not want to take on this risk for a lesser amount.

[64] It is my opinion that this expense was also necessary and reasonable within the meaning of s. 2(14) of Tariff "D" under the *Rules of Court* of New Brunswick. Consequently, I am allowing the refund of the interest owed by the plaintiff to Seahold Investments Inc., in the amount of \$4,231.65 as of August 13, 2008, plus daily interest of \$34.06 up to August 31, 2008.

VII. CONCLUSION

[65] The total allowable disbursements for necessary and reasonable expenses recoverable by the plaintiff from the defendants is \$22,340.04, including \$17,495.31 for the fee charged by actuary Luc Rivest, and \$4,844.73 for the interest owed to Seahold Investments Inc. as of August 31, 2008. This does not include the amount of \$123.12 already agreed on by the plaintiff and the defendants for the disbursements with regard to M^e Maurice F. Bourque, c.p. inc.

Order accordingly.

Editor: Giovanni A. Merlini

[End of document/fin du document]

[par. 10]

[TRADUCTION]

Tous les autres frais raisonnables et convenables devraient être remboursables.

[par. 28]

[TRADUCTION]

Je ne vois aucune erreur en l'espèce. Le greffier s'est appuyé sur les principes juridiques appropriés lorsqu'il a exercé son pouvoir discrétionnaire. Il semble que de plus en plus d'experts se trouvent mêlés à de plus en plus de litiges. Je ne souhaite pas que mes propos soient mal interprétés; dans la plupart des cas, les experts sont nécessaires et utiles à la cour. Toutefois, cela ne signifie pas que les coûts relatifs à leurs services ne devraient pas avoir une limite. La partie qui n'a pas eu gain de cause ne devrait être responsable que de frais raisonnables (des coûts raisonnables). À l'audience devant le greffier, on a qualifié M. Walker de « Cadillac » des économistes. Si le demandeur souhaite avoir recours à une « Cadillac », il est libre de le faire, mais je ne pense pas que le défendeur doit être tenu de défrayer les coûts de cette « Cadillac » si le travail peut être fait par d'autres professionnels de ce domaine qui seraient plutôt des « Oldsmobile » ou des « Buick ».

[par. 60]

[TRADUCTION]

Pour maintenir cette confiance dans notre système de justice, celui-ci doit être accessible aux Canadiens, et il doit sembler être accessible aux Canadiens. Pourtant, le temps nécessaire pour mettre une affaire au rôle et les coûts que cela entraîne deviennent inabordables pour le Canadien moyen, et le nombre de parties qui se représentent elles-mêmes augmente. Nous ne pouvons pas permettre que cela continue.