Guild Yule LLP

# RECENT DEVELOPMENTS IN BC RELATING TO CLAIMS FOR LITIGATION FINANCING EXPENSES

Alex D.C. Kask
February 2014

# Recent Developments in BC relating to claims for Litigation Financing Expenses

In September 2011, Adam Howden-Duke and I co-wrote an article titled "Litigation Finance: Access to Justice at What Cost?" that was published in two issues of the journal *The Advocate*.[1] In it, we analyzed the case law concerning third-party financing of litigation disbursements in light of the public policy rationale for access to justice. We concluded that in appropriate circumstances financing of this sort was required and set out suggestions on how the financiers could be regulated to avoid injustice.

In this paper, I will consider the rulings on this topic that have been made since that article in *The Advocate*. To that end, I will be referencing appellate authority from New Brunswick as well as superior court authority in BC and Ontario.

In Ontario initially there was a retreat from the support for litigation financing found in of *Herbert* v. *City of Brantford*.[2] The subsequent ruling in *Guiliani* v. *Region of Halton*[3] concerned the costs of an 11-day trial of a claim for MVA-related injuries. The Plaintiff was claiming costs and disbursements of approximately $788,000 in a matter in which the damage award totaled $375,000. Lexfund Inc. had provided a $150,000 loan with a rate of 3.5% interest compounded monthly (an effective annual rate in the region of 50%). When combined with an additional underwriting fee and other expenses, the amount owing was $379,625.71 as of the date of the costs judgment, an effective annual interest rate approaching 150%. Perhaps unsurprisingly, the amount claimed on taxation was significantly less ($92,734.26) - possibly calculated to fall below the rate in the *Criminal Code* (an effective annual rate on this latter sum would be 59.53%). Murray J. ruled nonetheless that the loan would not assist access to justice but would instead be an impediment to it. The interest claim was denied in its entirety (as opposed to substituting a lesser amount), although the court did allow pre-judgment interest on the allowed disbursements – an interpretation of the Ontario statue in line with current BC case law on the *Court Order Interest Act*.

More recently in *Warsh* v *Warsh*,[4] the Ontario Supreme Court of Justice reviewed some of the competing case law in Ontario, BC, and New Brunswick, and denied a claim for reimbursement of debts incurred to cover litigation expenses (on a personal line of credit with a 7.75% interest rate and a credit card with a 19% interest rate) in a family law case. The court was not satisfied that the evidence established that she was impecunious nor that she had pursued the least costly forms of financing available to her. The court commented:

---

[1] The full text of which is available at http://www.guildyule.com/cms/images/M_images/the%20advoate.pdf and http://www.guildyule.com/cms/images/M_images/advocate.pdf

[2] 2010 ONSC 6528 http://www.canlii.org/en/on/onsc/doc/2010/2010canlii68257/2010canlii68257.pdf

[3] 2011 ONSC 5119 http://canlii.ca/en/on/onsc/doc/2011/2011onsc5119/2011onsc5119.pdf

[4] 2013 ONSC 1886 http://www.canlii.org/en/on/onsc/doc/2013/2013onsc1886/2013onsc1886.pdf

> [34] In my view the policy implications of awarding interest on litigation costs as a disbursement are significant and I decline to exercise my discretion to make such an award where the issue has not been properly argued and where a more fulsome policy development process is plainly required.

Unfortunately the court did not consider the prior binding authority of *Herbert* v. *City of Brantford,* to which I had referred earlier. Accordingly one cannot read too much into the comments in this case regarding whether the Ontario courts have the ability to make such an award. In the end, I anticipate that these awards will remain something that will be considered on a case-by-case basis in future Ontario cases.

New Brunswick was the first Canadian jurisdiction to address the question of litigation finance for litigation expenses in the context of access to justice (in *Bourgoin* v. *Ouellette*[5]). It was also the first to provide appellate commentary on the subject. In *LeBlanc* v. *Doucet*,[6] an impecunious 17-year-old motorcyclist injured in a motor vehicle incident took out a loan with Seahold Investments to cover his litigation expenses at a monthly compounding rate of 2.4% (approximately 32.9% per annum).[7] He had been previously rejected by two other financial institutions. The principal sum had been $26,276.20 and the amount of interest was $12,665.41. In considering this topic, the Court of Appeal quoted this author's aforementioned article in *The Advocate* regarding the question of necessity. The Court of Appeal concluded unanimously that while their *Rules of Court* did not expressly allow for the award of such interest as a disbursement, where such financing is necessarily incurred to obtain access to justice and the rate is reasonable, it will be ordered.

The development of the case law in BC has followed a more a rocky path. Early Registrar's[8] and Judge's[9] rulings suggested the interest/financing costs were not recoverable as disbursements.[10] With the passage of time, however the cases have for the most part adopted an analysis similar to that found in *The Advocate* article.

The first step in this new direction was Mr. Justice Savage's ruling in the appeals for *Chandi* v. *Atwell* and *MacKenzie v. Rogalasky*,[11] which were heard together. This was the first ruling in

---

[5] 343 N.B.R. (2d) 58, 2009 CanLII 27242 (NB Q.B.)
http://www.canlii.org/en/nb/nbqb/doc/2009/2009canlii27242/2009canlii27242.pdf
[6] 2012 NBCA 88 http://www.canlii.org/en/nb/nbca/doc/2012/2012nbca88/2012nbca88.pdf
[7] Note that this is the same lender and the same rate that was charged to the plaintiff in *Bourgoin* – a figure that was 4½ times the annual post-judgment rate of 7% allowed under the New Brunswick *Rules of Court*
[8] *MacKenzie v. Rogalasky* 2012 BCSC 156 which involved a $25,000 loan plus a $1,250 underwriting fee that was subject to 2% monthly compounding interest
http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc156/2012bcsc156.pdf
[9] *Campbell* v. *Swetland* 2012 BCSC 423
http://www.canlii.org/en/bc/bcsc/doc/2012/2012bcsc423/2012bcsc423.pdf
[10] or at least not the portion owing on the loan in excess of what might be otherwise payable under the *Court Order Interest Act* (*Chandi* v. *Atwell* 2011 BCSC 1498 involving a law firm's charge of 10% interest on disbursements and a loan for with an interest rate of 12% or prime plus 7.5%, whichever was higher)
http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1498/2011bcsc1498.pdf)
[11] See footnotes 7 and 9 above

BC in which the adjudicator was presented with, and referenced, all of the relevant case law on the topic in Canada. As we had predicted in *The Advocate* article, the court applied a previous BC ruling relating to interest charges on MRI scans[12] that accepted them as a recoverable disbursement. Mr. Justice Savage also commented briefly that he was not aware of evidence that gave him concern with respect to the question of the necessity for, propriety of, and interest rate relating to the loans. It should be noted that this ruling is under appeal and will be heard in April 2014.

Subsequently in *Franzman v. Munro*,[13] Master McDiarmid considered a claim of 6% interest by a party's lawyer for disbursements, an amount double that which would be allowable under the BC *Court Order Interest Act*. The court ruled that it was necessary for the plaintiff to incur significant disbursements in order to pursue her claim and that the rate (which was paid from the law firm's line of credit) was reasonable.

One month later, Master McDiarmid denied a claim for interest in *Babb v. Doell*.[14] He ruled that the Plaintiffs had failed to lead evidence on the necessity or propriety of a 15% interest charge payable to the plaintiff's counsel. The court suggests that could have been done by way of an affidavit setting out the plaintiff's financial situation and how the interest rate was determined.

Three months after the *Franzman* ruling, Master McDiarmid once again considered the question of a counsel's claim for interest, in this case at a rate of 10% per annum in *Bodeux* v. *Tom*.[15] In this case he found the loan to be necessary and proper (as the defendants had not led evidence to suggest otherwise) but felt the rate was excessive. The Master considered other cases, including *Franzman* that commented on the expense relating to litigation. Accordingly he opted not to award interest at the 10% rate sought but instead ruled that, "[t]he six percent allowed in *Franzman* was a reasonable amount; economic times have not changed since that decision was rendered in September 2013." Accordingly we can assume that unless prevailing interest rates change in a material way that this figure will be influential in future cases.

Master Young adopted similar reasoning in her *obiter* commentary in *Krenn* v. *ICBC*,[16] stating:

> [36] There is a compelling policy argument that interest should be allowed on disbursement loans, in order to provide access to justice to those members of our society who cannot fund lawsuits upfront and do not qualify for legal aid funding. There is a large sector of our society that falls into the category of the impoverished middle-class. As Mr. Poon submits, many law firms do not wish to pay upfront for disbursements.
>
> [37] The facts of this case are similar to those facts before Registrar Cameron in the *Chandi* decision. In both cases, a settlement was reached reserving the right to assess costs pursuant to the Supreme Court tariff. Registrar Cameron found he

---

[12] *Milne* v. *Clarke* 2010 BCSC 317, 7 B.C.L.R. (5th) 382
http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc317/2010bcsc317.pdf
[13] 2013 BCSC 1758 http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc1758/2013bcsc1758.pdf
[14] 2013 BCSC 2204 http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc2204/2013bcsc2204.pdf
[15] 2013 BCSC 2327 http://canlii.ca/en/bc/bcsc/doc/2013/2013bcsc2327/2013bcsc2327.pdf
[16] 2013 BCSC 810 http://www.canlii.org/en/bc/bcsc/doc/2013/2013bcsc810/2013bcsc810.pdf

> was bound by the law in *Milne*, and so he allowed the interest on the disbursement loan. Registrar Cameron had the benefit of the loan agreement and the knowledge of what interest rate was being charged. He found that interest rate was not reasonable, and he allowed interest at the *Court Order Interest Act* rate.
>
> [38] I have not reviewed the disbursement loan agreement, nor do I know what interest rate was being charged. I do agree with Registrar Cameron that even if we are bound by the decision in *Milne*, as registrars we do retain the discretion to assess the reasonableness of a charge. Even if I find that disbursement loan interest should be allowed in order to provide access to justice to those who cannot afford to fund litigation, that does not mean that I would agree to an unreasonable rate.

Accordingly, we can conclude that at this juncture, if plaintiffs in BC wish to seek interest at a rate exceeding 6%, they will need to provide clear affidavit evidence regarding their financial situation, the propriety of the loan, and the reasonableness of the rate sought in their circumstances. If they fail to do so, the necessity can be implied and propriety can be implied but there is not a guarantee that the court will agree with their claim.

We do not as yet have a comment on what the interest rate ceiling may be for a plaintiff who provides compelling evidence of a particularly dire financial situation (as was the case for the plaintiff in *LeBlanc*). Although in BC no award has been made thus far in excess of 6% annual interest, the necessity test may well dictate rates in excess of that figure. From this perspective, I anticipate that the BC Court of Appeal's ruling in the *MacKenzie* and *Chandi* cases will be instructive.

*Alexander D.C. Kask is a partner with Guild Yule LLP and practices in the areas of professional liability, health law, municipal law, insurance law, administrative law, product liability, highways liability, golf course liability, safety standards regulation, and personal injury litigation. Alex has represented clients at all levels of court in British Columbia and before various administrative tribunals. He has been an instructor for the Vancouver Community College Paralegal Certificate and Diploma Program as well as a contributor and lecturer for the Continuing Legal Education Society of British Columbia.*