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BRIEFING NOTE

Litigation Finance – A Great Coastal Divide?

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

Divergent trends are emerging on Canada's east and west coasts regarding the question of recovery of litigation financing costs against opposing parties. This writer has commented on this topic in previous publications (e.g., "Litigation Finance: Access to Justice at what Cost?" *The Advocate* 2011 Vol. 69 Part 5 and Part 6, co-authored with Adam Howden-Duke) identifying lines of cases in New Brunswick, Ontario, and BC suggesting such costs could be awarded as a disbursement in order to ensure access to justice.

The New Brunswick Court of Appeal has ruled that a Plaintiff may seek against a Defendant interest paid on loans in specific circumstances. In *LeBlanc* v. *Doucet*, 2012 NBCA 88, a 17-year-old motorcyclist was seriously injured when he was cut off by the defendant's van and left the roadway. Due to his impecuniosity, the Plaintiff 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). 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 its position the court quoted the author's article noted in the previous paragraph. The Court concluded 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.

In contrast, Mr. Justice Wong of the BC Supreme Court reached a somewhat different conclusion in *Campbell* v. *Swetland* 2012 BCSC 423. The Plaintiff in that case was also a motorcyclist who had an interaction with a car that left her severely injured. The Plaintiff had sought financing for renovations to her home and for her living expenses. The court considered the House of Lords decision in *Lesbosch Dredger (Owners of)* v. *Edison S.S.* (1933) AC 449 and the question of whether the Plaintiff's impecuniosity was extraneous and distinct in character from the tort being litigated. Reference was also made to Alberta and Ontario employment law cases in which interest was denied for personal expenses (*Millman* v. *Leon's Funiture Ltd.* [1983] 83 CLLC 14,071 and *Kozak* v. *Montreal Engineering Co.* [1985] 2 WR 641). The court referenced Ontario and BC case law for the proposition that litigation financing costs were not recoverable (*MacKenzie* v. *Rogalasky* 2012 BCSC 156 and *Giuliani* v. *Region of Halton* 2011 ONSC 5119) and thus rejected this claim as a disbursement. This ruling is significant as *MacKenzie* was a Registrar's decision and *Giuliani* was from

Ontario. As such Mr. Justice Wong was not bound by the aforementioned cases.

Unfortunately it does not appear that Mr. Justice Wong was provided with all of the relevant case law on the topic to consider. In Ontario there is parallel authority to *Giuliani* (*Herbert* v. *City of Brantford* 2010 ONSC 6528) that supports an award for litigation financing that was not referenced in *Campbell*. *Herbert,* like its predecessor the New Brunswick decision in *Bourgoin* v. *Ouellette* (2009) NBR (2d) 58), discussed access to justice as a public policy rationale for the shifting of litigation financing costs to tortfeasors, consideration of which was similarly absent in the *MacKenzie* decision. It should be noted that a recent article published in the *Columbia Journal of Law and Social Problems* by Prof. B.I. Huang also provides a helpful analytical methodology for use by judges and legislators on this topic.

It should be further noted that there are some factual asymmetries between *Campbell* and *LeBlanc* in that:

1. It does not appear that the litigation loan interest was identified as a subject for compensation in the pleadings in *Campbell*;
2. The Plaintiff in *Campbell* did not proffer evidence of rejection by other financiers;
3. The renovations for the Plaintiff's home in *Campbell* had been started before the accident; and
4. There was evidence that the Plaintiff in *Campbell* could have mitigated by selling assets she held.

While this writer questions whether the court should have considered the last enumerated item above (given the well-established principle that a tortfeasor must take the victim as the tortfeasor finds him or her) the other items in and of themselves may have been determinative of the issue.

As such, the question of whether a litigant could seek financing costs for litigation expenses (e.g., expert retainers, filing fees, and the like) has yet to be determined by a superior court judge in BC. Given the issues noted in the previous paragraph, it may be arguable that *Campbell* is not be the final word on the question of funding living expenses during the litigation process in appropriate circumstances. Furthermore as there is now appellate out-of-province authority supporting the award of interest incurred for litigation expenses as against opposing parties, we can anticipate that this topic will continue to be hotly debated for some time to come.

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.

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