After the Event Insurance - Levelling the Playing Field?

Canadian case law concerning ATE insurance

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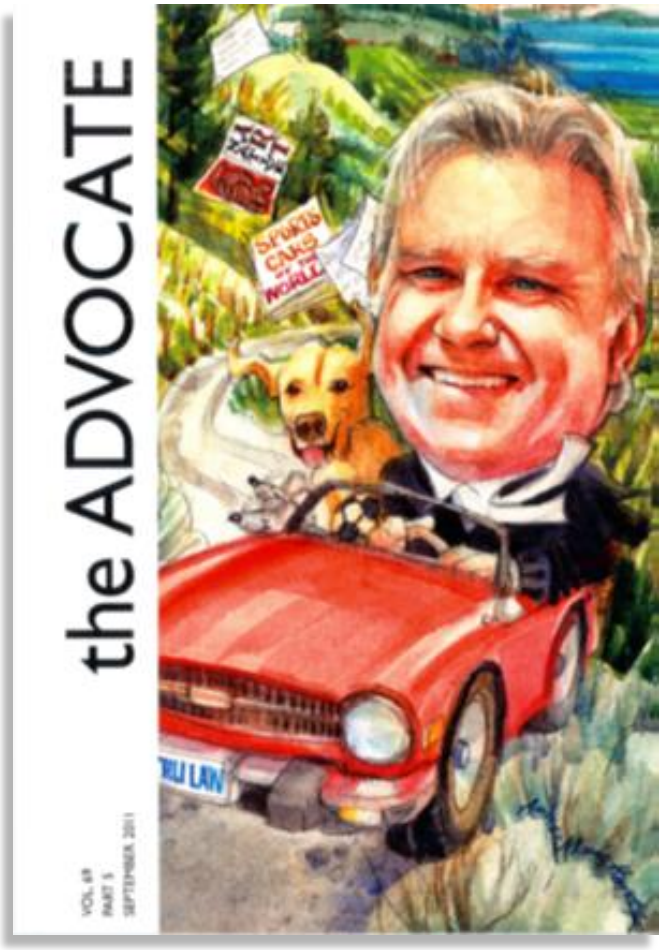
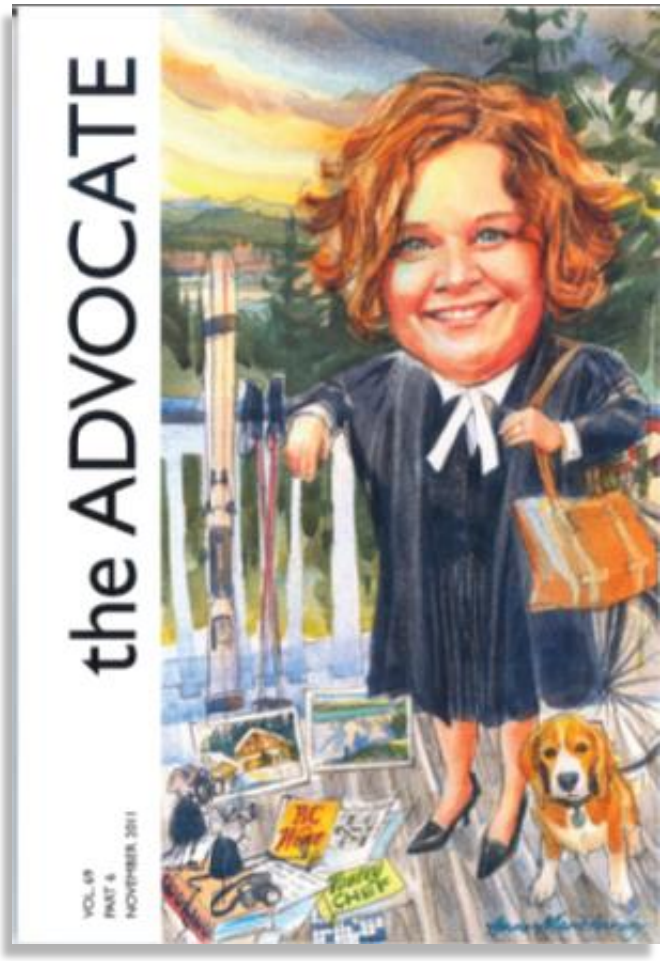
ATE policies & litigation finance

- Both potentially raise questions in relation to Maintenance, Champerty, and Access to Justice
- Canadian case law has evolved in a manner different from UK and US
- Issues identified and considered in articles by Adam Howden-Duke and I in our 2015 presentation to this group and our papers that were published in *the Advocate* in 2011.





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Ontario Case Law on ATE

Markovic v. *Richards, et a*l. 2015 ONSC 6983

Foster v. *Durkin* 2016 ONSC 684

Valentine v. *Rodriguez-Elizalde* 2016 ONSC 6395

Alary v. *Brown* 2015 ONSC 3021

Abu-Hmaid v. *Napar* 2016 2894

Marcovic v. *Richards*

- Plaintiff had been successful in a trial by jury
- Majority of costs issues addressed in a previous ruling
- Remnant questions regarding prejudgment interest rate and whether defendant should pay insurance premium for ATE policy from DAS Canada
- Premium would *not* have been charged if the claim had been dismissed

Marcovic v. *Richards (cont'd)*

- ATE coverage was for plaintiff's disbursements and adversary's costs in the event of a dismissal.

- Milanetti J. notes that unlike the UK, in Canada did not undertake legislative reform that addressed ATE coverage expressly

Marcovic v. *Richards (cont'd)*

"While it is clearly the plaintiff's prerogative to obtain ATE insurance, I do not accept that such premium should be reimbursed by the defendants as a compensable disbursement. … Existence of the policy may well provide comfort to the plaintiff, it is however an expense that is entirely discretionary, does nothing to advance the litigation, and may in fact even act as a disincentive to thoughtful, well-reasoned resolution of claims."

[paragraph 7]

Foster v. *Durkin*

- Motor vehicle personal injury claim
- Jury determined plaintiff was 20% at fault after a 2-week trial
- Disbursement claim for premium on another DAS ATE policy
- Court states it would "discount" that claim for the reasons set out in *Marcovic*
- Lump sum award of $72,000 inclusive of disbursements & GST

Valentine v. *Rodriguez-Elizalde*

- Motor vehicle personal injury claim
- Jury awarded damages in excess of two formal offers plaintiff had made prior to trial
- Court considers collateral benefit deductions, indemnity for costs, and disbursements (which included the premium for an ATE policy)

Valentine v. *Rodriguez-Elizalde (cont'd)*

"I agree with the defendant that the cost of adverse cost insurance, or after-the-event insurance ("ATE"), is not an assessable disbursement. Such insurance is not necessary for the plaintiff to advance or develop the various heads of damages claimed in this action." [paragraph 71]

Alary v. *Brown*

- Claim for injuries suffered as a result of a battery
- Motion for security for costs
- Court considers significance of a Bridgepoint Indemnity $100,000 ATE policy purchased by the plaintiff (the premium for which was $4,500)

Alary v. *Brown (cont'd)*

"The availability of an adverse costs insurance policy is not equivalent to the payment of a fixed amount of money into Court, but I find that it is a factor which mitigates against ordering security for costs. The … insurance policy purchased by Alary does not contain a term stating that the insurer would pay for legal costs incurred by the defendant seeking security for costs up until the policy was cancelled or terminated. Notwithstanding, I find that the existence of the adverse insurance policy, even without the term that the insurer would be pay costs for a defendant up until it was cancelled, is still a factor to be considered." [paragraph 24]

Alary v. *Brown (cont'd)*

Court rules that:

- it would not be just to require the plaintiffs to pay $93,000 security for costs
- Plaintiffs must advise the applicant defendant if immediately if the adverse costs insurance policy is terminated or cancelled

Abu-Hmaid v. *Napar*

- Personal injury claim arising from 2 MVAs
- Determination regarding an objection at an examination for discovery of the plaintiff
- Counsel for the defendants asked if the plaintiff had obtained ATE coverage or would do so in the future
- Master D.E. Short considers Ontario Rule 30.02(3) which has identical wording to BCSC Civil Rule 7-1(3)

Abu-Hmaid v. *Napar (cont'd)*

- "I think it is adequate to simply advise whether or not any coverage of this nature has been obtained, and to keep that information current, by way of an implied disclosure obligation up to the date of trial." [paragraph 27]
- "I do feel, however, that there is at present "a distinction without a difference" between a policy that would provide "indemnification" under section under rule 30.02 (3) (a) and a policy that "insures" against the costs portion of a judgment in the action. Thus any contract providing similar coverage, regardless of what it is called, ought to be subject to this disclosure requirement." [paragraph 28]

BC Case Law on ATE

Wynia v. *Soviskov* 2017 BCSC 195

(January 19, 2017)

Wynia v. *Soviskov*

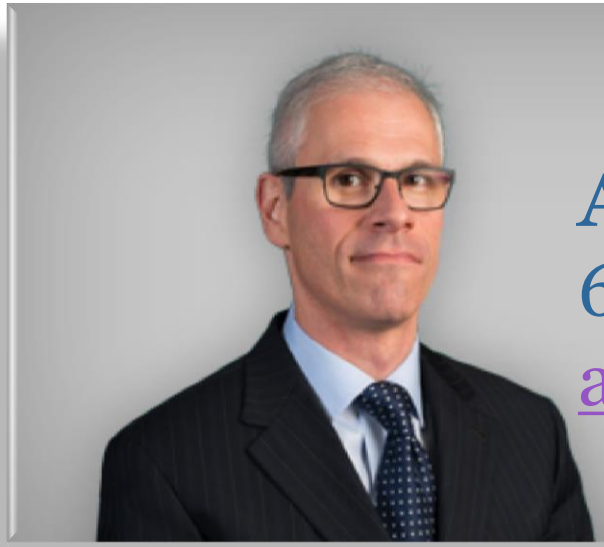
- Taxation concerning disbursement claims for courier expenses and ATE policy premium
- Registrar Neilsen considers whether BCSC Civil Rule 14-1(5) should require the defendant to pay for the premium
- Court quotes *Markovic* and applies the BC Court of Appeal ruling *MacKenzie* v. *Rogalasky* 2014 BCCA 446, which concerned litigation finance expenses

Wynia v. *Soviskov (cont'd)*

"In my view, applying the reasons of the BCCA in *MacKenzie v. Rogalasky,* supra, the cost of insurance coverage is not a proper or necessary disbursement incurred in the conduct of the proceeding. No doubt it provides a measure of financial comfort to the plaintiff, however, it does not arise from the exigencies of the proceeding and relate directly to the direction, management, or control of the litigation used to prove a claim against the defendants. Accordingly, the cost of the insurance coverage is disallowed." [paragraph 7]

Points for consideration

- No appellate authority in BC or Ontario thus far
- Will *Alary* and *Abu-Hmaid* be adopted in BC in relation to Rule 7-1(3)?
- Will *Alary* be adopted in BC in relation to security for costs applications?
- Professional liability – exposure for counsel who fail to advise clients of ATE coverage available
- Any other questions?



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