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BRIEFING NOTE

Divergent case authority on whether ATE insurance premiums can be claimed against an opposing party in Ontario and British Columbia litigation

Providers of After The Event (ATE) insurance have been marketing in British Columbia extensively as of late. Until recently the availability of this coverage against adverse costs awards was not widely known but that is changing rapidly.

Since Milanetti J.'s ruling in *Markovic* v. *Richards*, 2015 ONSC 6983, judges in both Ontario and British Columbia have followed its reasoning and denied claims by plaintiffs for the cost of premiums for After The Event (adverse costs) insurance coverage (e.g., *Valentine* v. *Rodriguez-Elizalde* 2016 ONSC 6395 & *Wynia* v. *Soviskov* 2017 BCSC 195).

More recently however, Salmers J. of the Ontario Superior Court reached the opposite conclusion in *Armstrong* v. *Lakeridge Resort Ltd.*, 2017 ONSC 6565 and ATE providers are referencing this case in their marketing materials. The court noted that counsel for the defendant had cited *Markovic* for the proposition that the disbursement claim for the premium should be denied. At paragraph 21 the court responded:

> With respect, I disagree. In this case, the costs of advancing even the claims on which the plaintiffs were successful were extremely large. Also, in general, even the strongest claim of a plaintiff may not be successful depending on how the evidence comes out and how it is perceived by a trier of fact. Without costs insurance, the fear of a very large adverse costs award would cause many plaintiffs of modest means to be afraid to pursue meritorious claims. It is in the interests of justice that plaintiffs be able to pursue meritorious claims without fear of a potentially devastating adverse costs award. Additionally, I am satisfied that it was reasonable for the plaintiffs to have advanced their claims as they did because there were genuine triable issues on all claims that were advanced. Accordingly, the claim for the costs insurance premium will be allowed.

Unfortunately prior to reaching this conclusion, the court did not address the criticism set out by Milanetti J. in *Markovic* regarding access to justice and claims for ATE premiums. Consider the following commentary found in paragraph 7 of that case:

> 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. Such disbursements have not, as far as I am aware, ever been entertained in Canada and have

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> certainly not been the subject of legislative reform as was the case in the UK. I can think of no policy reason that such should be compensated as a taxable 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.

As the court in *Armstrong* was ruling in a manner contrary to prior binding authority, the failure to address the reasoning above is problematic. Appellate review of this decision would therefore be welcome in order to clarify whether access to justice can trump the deleterious effects on the litigation process noted by Milanetti J.

In British Columbia, a party's disbursements may be recoverable if they were necessarily or properly incurred in the conduct of the proceeding. The BC Court of Appeal in *MacKenzie* v. *Rogalasky* 2014 BCCA 446 stated that a party can recover disbursements:

> [T]hat arise inherently and directly from the issues in the case which relate … to the direction, management, or control of litigation and which pay for materials and services used to prove a claim or defence … expenses [that] do not arise from the nature of the allegations or the conduct of proceedings … from unrelated causes including the financial circumstances of a party … do not fall within the meaning of the word "disbursements" in the context of a costs rule … To be recoverable a disbursement must arise directly from the exigencies of the proceeding and relate directly to the management and proof of allegations, facts and issues in litigation, not from other sources.

The BCCA went on to note that the costs regime is not designed to provide full indemnity to litigants for their expenses but rather to provide predictable and consistent awards that would allow for rational risk assessment throughout the litigation process. Parties who may be required to pay for a disbursement would need to be in a position to know what it might be and not subject to private financial arrangements that have not been disclosed. Ontario case law suggests that the existence of ATE policies should be disclosed but is divided on whether details regarding the coverage must be provided (contra *Abu-Hmaid.* v. *Napar*, 2016 ONSC 2894; pro *Fleming* v. *Brown*, 2017 ONSC 1430). Much will turn on the terms of the policy in question.

In any case, while ATE coverage is beneficial in reducing risk for litigants, it does not assist them in proving elements of their case as pled and as such this writer anticipates that future claims in BC for the associated premiums will face an uphill struggle.

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