Liability for client costs: Protect yourself

Lawyers breathe a sigh of relief after decision in *Attis*

by David Gadsden

A recent Court of Appeal decision, *Attis v. Ontario*[1], has provided clarity on the issue of when counsel will be held personally responsible for legal costs ordered against a client. Although *Attis* deals with this issue in the context of a class proceeding, the decision underscores the importance of certain "best practices" that can be applied universally by litigation counsel to insulate against a client's claim for costs indemnification.

Background and the motion

Attis involved a proposed class action in which government defendants were alleged to have failed or refused to properly regulate the use of breast implants manufactured, distributed, imported and sold in Canada. The plaintiffs' motion to certify the action as a class proceeding was dismissed by Winkler J. (as he then was) on May 3, 2007. Costs were awarded against the plaintiffs in favour of the attorney general for Canada (AG) in the amount of $125,000. The plaintiffs appealed to the Court of Appeal which, on September 30, 2008, dismissed the appeal and awarded further costs of $40,000 against the plaintiffs. An application for leave to appeal to the Supreme Court of Canada was dismissed on April 23, 2009, with costs of $1,086.10 ordered in favour of the AG.

In June 2009, the AG learned that the plaintiffs were impecunious. The AG then brought a motion before Cullity J. seeking to reopen the issue of costs and requesting that the costs awarded to the AG throughout become the responsibility of plaintiffs' counsel.

The evidence of plaintiffs' counsel before Cullity J. was that the plaintiffs were advised of their potential personal liability for the costs of the defendants. Not surprisingly, the evidence of the plaintiffs was that they had not been advised of potential adverse

[1] 2011 ONCA 675

costs consequences. Although notes were taken during the client intake meeting, the notes produced as evidence at the motion made no reference to the plaintiffs' potential exposure to costs. Similarly, a letter confirming the plaintiffs' costs exposure that was believed to have been sent to the plaintiffs by counsel was not able to be located or produced. Cullity J. also noted that the retainer agreement was silent as to the possible liability for the costs of the defendants if the proposed class action was unsuccessful.

On September 10, 2010, Cullity J. ordered plaintiffs' counsel to indemnify the plaintiffs for the costs awarded previously against the plaintiffs in favour of the AG. The basis of the decision was that the plaintiffs had not given their counsel authority to bring the action as counsel had not properly advised the plaintiffs of their potential exposure to costs.

In short, Cullity J. found that:

(i) the plaintiffs had not been properly advised of their potential exposure to costs in the event of the dismissal of the class proceeding;

(ii) as such, their consent to proceed with the action was uninformed, and therefore not consent at all; and

(iii) when a solicitor commences an action without consent or authority from a client, the solicitor should be personally liable for costs. In arriving at his conclusion, Cullity J. relied on, *inter alia*, Rules 15.02(4) and 57.07(1)(c) of the *Rules of Civil Procedure*.

Plaintiffs' counsel appealed Cullity J.'s decision. In allowing the appeal and setting aside the order of the motions judge, a unanimous Court of Appeal panel accepted the appellant's argument that Rule 15.02(4), a rule designed to terminate proceedings where a named plaintiff has not authorized commencement, had no application. The Court held that a defendant, in this case the AG, has no right to inquire into the legal advice given to the plaintiff by the plaintiff's lawyer – this is purely a matter between solicitor and client. The Court reasoned that if a question arises concerning the legal advice a client received prior to conferring authority to commence a proceeding, it is for the aggrieved client to take steps, not a defendant. In fact, one of the plaintiffs in *Attis* took such steps by commencing an action (prior to the motion underlying the appeal) in negligence against plaintiffs' counsel for damages of $250,000 – a factor that was considered by the Court in allowing the appeal.

The Court of Appeal also determined that Rule 57.07(1)(c), which deals with costs unnecessarily incurred as a result of a lawyer's conduct, did not apply as that rule is to be used only in exceptional circumstances and the conduct of plaintiffs' counsel in the case at bar was without reproach.

Finally, the Court of Appeal held that breach of warranty of authority could not be deployed in the circumstances as, even if such a breach existed, it could not have provided the AG with recoverable damages as the plaintiffs were impecunious. To award the AG costs would put the AG in a better position than if the action had proceeded with authority and failed.

Implications of the Court of Appeal decision in *Attis*

Attis represents important appellate Court guidance for the class action bar as, prior to *Attis*, certain decisions, most notably *Poulin v. Ford Motor Co. of Canada*[2], earmarked class counsel as a potential payment source for defendants in situations where the plaintiffs were unwilling or unable to cover costs ordered against them. *Poulin* could also be interpreted as forming a low-threshold for clients, in class actions or otherwise, seeking indemnification from their counsel for costs ordered against them. *Attis* affirms that counsel will only be personally liable for costs in exceptional cases, and that disgruntled defendants do not have standing to challenge the legal advice provided to plaintiffs in the context of conferring authority to commence a proceeding.

Although *Attis* limits a client's ability to seek 'after-the-fact' indemnification from counsel for an adverse costs award, the decision does not preclude such recourse altogether. In fact, *Attis* acknowledges that clients have the ability to pursue claims against their counsel relating to legal advice provided prior to a client's instructions to commence a proceeding. Those claims are properly resolved through an action framed in solicitor negligence, not by way of a motion brought under Rule 15.02(4) or 57.07(1)(c).

Lessons learned

With the above in mind, *Attis* serves as a useful reminder of certain 'best practices' that can be employed in an effort to avoid litigation of this nature altogether. *Attis* underscores the importance for counsel to take detailed notes relating to client intake matters and retainer terms. Any oral discussions relating to retainer terms, expectations and possible adverse consequences of litigation, including potential costs awards, should be thoroughly documented and confirmed, preferably as terms in an executed retainer agreement, so it is clear that the client understood and consented to the specific terms of the retainer. Equally critical is the practice of retaining notes, confirmatory letters and retainer agreements in an orderly filing system such that they can be easily located and produced if necessary at a later time. In *Attis*, had plaintiffs' counsel been able to produce the notes and confirmatory letter that were believed to exist, the plaintiffs' ability to argue uninformed consent would have been limited considerably. ■

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[2] 2007 CanLII 56490 (ON S.C.)