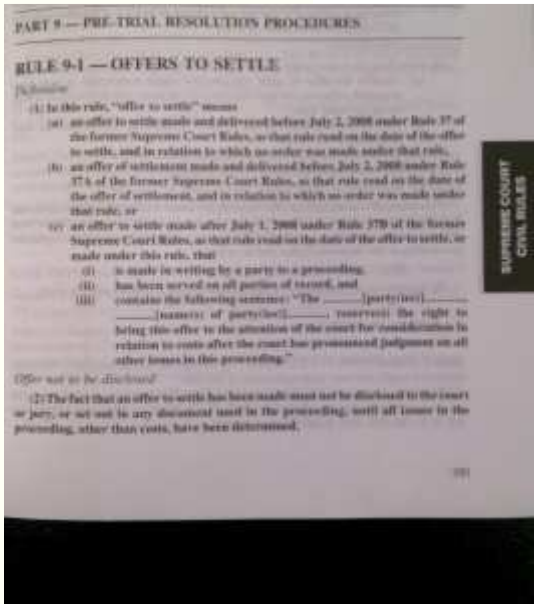
“Special Costs” Clause Takes The Teeth Out Of ICBC’s Formal Settlement Offer


PART 9 — PRE-TRIAL RESOLUTION PROCEDURES

RULE 9-1 — OFFERS TO SETTLE

SUPREME COURT CIVIL RULES

I’ve written many times about the risks and consequences formal settlement offers can create in the course of a personal injury lawsuit. Interesting reasons for judgement were released this week by the BC Supreme Court, Vancouver Registry, refusing to give ICBC double costs after the dismissal of a lawsuit because of a ‘*special costs*‘ clause in their formal offer.

In this week’s case (Wong v. Lee) the Plaintiff was injured in a 2003 motor vehicle collision. She sued her driver but the lawsuit was dismissed with a Jury finding the driver was not negligent. Typically such a result obligates the Plaintiff to pay the Defendant’s costs due to the BC Supreme Court’s Loser Pays system.

Prior to trial ICBC made a formal settlement offer of $60,000. In these circumstances the Court has the discretion to award ‘*Double Costs*‘. ICBC, on the Defendant’s behalf, asked for the Court to make such an order. Madam Justice Dardi refused, however, finding that the ’special costs’ clause which is contained in many of ICBC’s formal settlement offers operates to create uncertainty in the settlement process. The Court provided the following useful reasons:

[27] The plaintiff’s overarching submission is that the inclusion of para. 6 in Appendix A of the Offer to Settle is fatal to the defendants’ application for double costs. The Offer to Settle was subject to the conditions in Appendix A which provides in para. 6 as follows:

Nothing in this offer detracts from the Defendants’ right to seek special costs against the Plaintiff or his counsel above and beyond the Defendants’ entitlement to costs under this offer. Neither the making nor the acceptance of this offer shall be deemed a waiver or estoppel by the Defendants in respect to any reprehensible or improper conduct on the part of the Plaintiff and / or his counsel in respect of this proceeding. [Emphasis added.]

[28] Based upon these terms, even if the plaintiff had accepted the Offer to Settle, the defendants nonetheless would have been at liberty to pursue the plaintiff for special costs. Thus, there was a potential risk that the acceptance of the offer may not have ended all of the outstanding disputes between the parties.

[29] The Court of Appeal, in discussing Rule 9-1(5) in Evans v. Jensen, 2011 BCCA 279, articulated at para. 35 that "the most obvious and accepted intent of this Rule, namely to promote settlement by providing certainty to the parties as to what to expect if they make, or refuse to accept, an offer to settle". The Court reasoned as follows:

[41] This conclusion is consistent with the importance the Legislature has placed on the role of settlement offers in encouraging the determination of disputes in a cost-efficient and expeditious manner. It has placed a premium on certainty of result as a key factor which parties consider in determining whether to make or accept an offer to settle. If the parties know in advance the consequences of their decision to make or accept an offer, whether by way of reward or punishment, they are in a better position to make a reasoned decision. If they think they may be excused from the otherwise punitive effect of a costs rule in relation to an offer to settle, they will be more inclined to take their chances in refusing to accept an offer. If they know they will have to live with the consequences set forth in the Rule, they are more likely to avoid the risk.

[42] This certainty in terms of the result of either making, accepting or refusing to accept an offer is also more conducive to the overall object of the Rules, which is "to secure the just, speedy and inexpensive determination of every proceeding on its merits".

[30] It clearly emerges from the authorities that an important objective of offers to settle under the Rules is to bring certainty and finality to litigation. The reservation of the defendants' right to seek special costs from the plaintiff after the acceptance of the offer is antithetical to this objective. It cannot be said that the Offer to Settle provided a genuine incentive to settle. As was stated inGiles v. Westminster Savings and Credit Union, 2010 BCCA 282 at para. 88, "plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances".

[31] In short, para. 6 in Appendix A of the Offer to Settle militates against an award of double costs…

[34] In weighing all of the factors, the most significant being the inclusion of para. 6 in Appendix A of the Offer to Settle, I conclude that the plaintiff should not be required to pay double costs.