

ICBC Negotiations - Formal Rule 37B Offers And The Effects Of A Counter Offer

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Under the old Rule 37 when a formal settlement offer was made by ICBC the Plaintiff could continue to negotiate and make counter offers without jeopardizing the ability to accept ICBC's formal settlement offer at a later date.

This was so due to rule Rule 37(10) and 37(13) which held that a formal offer to settle did not expire by reason that a counter offer was made.

As readers of this blog know Rule 37 has been repealed and replaced with Rule 37B. What if ICBC makes a formal settlement offer under Rule 37B that does not contain any language addressing under what circumstances the offer expires. Would a counter offer act as a rejection of the formal offer such that it can't be accepted at a later date?

The first case that I'm aware of dealing with this issue was released today by the BC Supreme Court ([More Marine Ltd v. The Ship "the Western King"](#)).

In today's case the Defendant made a formal offer under Rule 37B to settle a lawsuit for "\$40,000 inclusive of interest and costs". The Plaintiff made several counter offers which were not accepted. The Plaintiff then purported to accept the defence formal settlement offer. The parties could not agree on the documents that would be signed to conclude the settlement and the Plaintiff brought a motion to enforce the settlement.

In dismissing the Plaintiff's motion Madam Justice Satanove held that in the circumstances of this case the Plaintiff's counter offer acted as a non-acceptance of the Rule 37B formal offer which then extinguished the formal offer of settlement.

Her summary of the law as applied to this case could be found at paragraphs 5-11 of the judgement which I reproduce below.

[5] *The plaintiffs' argument would have succeeded under the old Rule 37 which provided in subsections (10) and (13) that an offer to settle did not expire by reason that a counteroffer was made, and an offer to settle that had not been withdrawn could be accepted at any time before trial. Rule 37(8) provided that a party could withdraw an offer to settle before it was accepted by delivering a written notice of withdrawal in the prescribed form.*

[6] *However, Rule 37B contains none of these provisions. It simply provides a mechanism for the Court to consider an offer to settle when exercising its discretion in relation to costs. It has been described as "significantly different, and represents a radical departure, from its predecessor Rule 37" (Alan P. Seckel & James C. MacInnis, British Columbia Supreme Court Rules Annotated 2009 (Toronto: Thomson Carswell, 2009) at 372-374).*

[7] *In my view, Rule 37B does not change the common law with respect to settlement agreements, which in themselves are just another form of contract. The old Rule 37 expressly changed the common law in this regard, but the old Rule 37 is repealed. If the Legislature had intended the provisions of old Rule 37(8), (10), and (13) to continue to apply to the new Rule 37B, it would have retained the wording of those subsections.*

[8] *Turning then to the common law of contracts, it is trite to say that a counteroffer constitutes non-acceptance of a previous offer. The previous offer must be revived in order to be accepted after a counteroffer has ensued. (**United Pacific Capital v. Piché**, 2004 BCSC 1524; **Cowan v. Boyd** (1921), 49 O.L.R. 335 (C.A.)).*

[9] *Applying these principles to the chronology of facts in this case, when the plaintiffs issued the counteroffer of January 6, 2009, they were communicating non-acceptance of the Rule 37B offer of November 28, 2008 from the defendants, and this latter offer was no longer extant.*

[10] *The only question that remains is whether the November 28, 2008, offer was revived. The plaintiffs' purported acceptance in their letter of March 3, 2009, could be construed as a form of offer to the defendants in the same terms as the defendants' November 28, 2008 offer, but the defendants' letter of March 5, 2009, once again evidences a counteroffer by its terms. The subsequent correspondence between the parties reflects further negotiations between them, but no consensus ad idem.*

[11] *In conclusion then, based on my interpretation of new Rule 37B, there is no binding separation agreement for me to enforce and the plaintiffs fail in their application.*

This case is a reminder that the common law of contract is alive and well regarding settlement offers under Rule 37B and that many of the statutory terms that applied to Rule 37 formal offers no longer are in place. Formal settlement offers made by ICBC should be carefully scrutinized to see if a counter offer can be made or if doing so will extinguish the formal offer.