

More Judicial Interpretation Of Rule 37B

I have blogged many times about the relatively new BC Supreme Court Rule 37B (the rule dealing with formal settlement offers). You can search the archives of this blog to find my previous entries.

[Useful reasons were released today by the BC Supreme Court](#) providing further clarity and development of this rule.

The key facts are as follows:

1. The Defendant delivered a formal offer under the old Rule 37 on August 27, 2007 (rule 37B was not in force at the time). That offer complied with Rule 37.
2. The offer was for a monetary amount within the Small Claims Court jurisdiction.
3. On August 21, 2007 the Plaintiff accepted the offer.
4. The Plaintiff and the Defendant could not agree to the costs consequences of the acceptance and brought application to court.
5. The applicaiton was heard after Rule 37B came into force.

One of the issues that was decided was whether under these facts Rule 37B applied or should the court consider the costs consequences under the old Rule 37? Madam Justice Garson held that Rule 37B applied because:

[10] *Whether R. 37B applies to the Offer in question is determined by the definition of “offer to settle” in R. 37B(1). Rule 37B(1) provides three alternative situations that fall within the meaning of “offer to settle.” The situation applicable to the case at hand is R. 37B(1)(a) and thus paras. (b) and (c) are not applicable.*

[11] *Rule 37B(1)(a) requires three criteria to be met to satisfy the definition of “offer to settle”: first, the offer to settle must have been made and delivered before July 2, 2008; second, the offer to settle must have been made under R. 37 as that rule read on the date of the offer to settle; and third, there must have been no order made under R. 37 in relation to the offer to settle.*

[12] *Applying R. 37B(1)(a) to the facts in this case, I note, the Offer was drafted on August 28, 2007, and delivered on August 29, 2007. This is prior to July 2, 2008; therefore the first criterion is met. The Offer was made pursuant to R. 37 as that rule read on August 28, 2007, and thus the second criterion is met. Lastly, no order was made under R. 37 in relation to the Offer. Thus, R. 37B applies to the offer made by the defendants and the new regime applies.*

[13] *In **Bailey v. Jang**, 2008 BCSC 1372 at para. 10, Hinkson J. held that R. 37B “... applies to offers to settle made both before and after July 1, 2008 where no order as to costs has been made.” (See also **Brewster v. Rominn Laboratories Inc.**, 2008 BCSC 1463 at para. 13.)*

[14] *In this case the defendants argue that because the offer was made and accepted pursuant to R. 37, R. 37 should continue to apply. I cannot accede to that argument in the face of clear legislation to the contrary as well as the two authorities of this Court just mentioned.*

Having decided that Rule 37B applies to these facts (even though the offer was made and accepted before Rule 37B came into force) The court went on to award the Plaintiff her 'costs' despite the fact that the offer was within the small claims courts jurisdiction. In doing so the court provided the following reasons:

[19] *The defendants contend that the plaintiff is not entitled to her costs of the entire proceeding because the settlement is within the monetary jurisdiction of the Provincial Court. Old R. 37(37) provided that a plaintiff was not entitled to costs if the offer accepted was within the jurisdiction of the Provincial Court under the **Small Claims Act** and could have been appropriately brought in the Provincial Court. Rule 37(37) was not carried forward to R. 37B.*

[20] *I turn back to R. 37B(5).*

Cost options

37B (5) *In a proceeding in which an offer to settle has been made, the court may do one or both of the following:*

(a) *deprive a party, in whole or in part, of costs to which the party would otherwise be entitled in respect of the steps taken in the proceeding after the date of delivery of the offer to settle;*

(b) *award double costs of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.*

[21] *On the basis, that I have already decided that the words "after the date of delivery of the offer to settle" means costs incurred from and after the day following delivery, subsection (b) is inapplicable because no costs were incurred by either party after delivery of the offer to settle.*

[22] *The "Cost options" as it is put in R. 37B are prescribed by the rule. In this case the defendants argued that the plaintiff should be disentitled to all her costs because the case was one that ought to have been brought within the monetary jurisdiction of the Small Claims Court. Even if that is one of the factors that could be taken into account under ss. (6), ss. (5) of R. 37B does not permit a court the option of depriving a party (in this case the plaintiff) of her costs before the date of delivery of the offer.*

[23] *The rule only permits the Court to deprive a party, "in whole or in part" of her costs to which she "...would otherwise be entitled....after the date of delivery of the offer to settle;" [emphasis added].*

[24] *Accordingly, there is no basis in R. 37B on which this Court could deprive the plaintiff of costs incurred before the date of the delivery of an offer regardless of whether the ultimate settlement is within the monetary jurisdiction of the Provincial Court.*

Application of Rule 57(10)

[25] *Rule 57(10) of the **Supreme Court Rules** states as follows:*

(10) *A plaintiff who recovers a sum within the jurisdiction of the Provincial Court under the Small Claims Act is not entitled to costs, other than disbursements, unless the court finds that there was sufficient reason for bringing the proceeding in the Supreme Court and so orders.*

[26] *The purpose of R. 57(10) is to encourage actions to be brought and continued in Provincial Court when there is no sufficient reason to expect that the claim might give rise to damages in excess of the monetary jurisdiction of that Court. If the plaintiff proceeds in the Supreme Court, and the resulting monetary judgment falls*

within the jurisdictional limits of the Provincial Court, the plaintiff must justify his choice of forum or be denied costs other than disbursements.

[27] *However, as the action did not actually proceed to trial, R. 57(10) has no application to the case at hand.*

As an ICBC claims lawyer I welcome this judgement and all other judgements giving clarity to Rule 37B. The more consistency this rule receives in its interpretation from the BC Courts the better position all ICBC claims lawyers will be in advising clients about the potential costs consequences of accepting or rejecting formal ICBC settlement offers. I intend to continue to blog about this rule as it receives further judicial interpretation.