

## BCCA Finds Courts Can Consider Insurance Under Rule 37B

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Very important reasons for judgement were released recently by the BC Court of Appeal addressing a key factor under Rule 37B.

By way of brief introduction Rule 37B is the current rule dealing with formal settlement offers. (*Rule 37B will be replaced with Rule 9 next month but the new rule uses language that is almost identical to Rule 37B*).

A party that beats a formal settlement offer at trial can ask the Court to award them increased costs. One factor the Court can consider in deciding whether to award costs or increased costs under Rule 37B is "*the relative financial circumstances of the parties*".

In most personal injury lawsuits Defendants are insured such that they don't have a significant financial stake in the outcome of the trial. BC Supreme Court judges have been conflicted in whether insurance is a relevant consideration when viewing the financial circumstances of the parties. Today the BC Court of Appeal addressed this issue for the first time.

In today's case ([Smith v. Tedford](#)) the Plaintiff was injured in a motor vehicle collision. Before trial the Plaintiff made a formal settlement offer. Several days into trial the Defendant accepted the offer. The parties could not agree on the costs consequences. The trial judge awarded the Plaintiff costs to the time the offer was made and double costs for the time spent at trial. (You can [click here to read my post summarizing the trial judge's reasons](#)). In doing so the Judge considered the fact that the Defendant was insured with ICBC as relevant to his '*financial circumstances*".

ICBC, on behalf of the Defendant, appealed arguing that the Judge was wrong to consider insurance. In a welcome development the BC Court of Appeal found as follows:

*"While I recognize arguments over the implications of a defendant's insurance coverage being considered in relation to an award of costs may go back and forth, like the judge I consider precluding such from consideration renders an assessment of the parties' relative financial circumstances, at least in a case of this kind, very artificial indeed. Clearly, with ICBC having assumed the defence, the financial ability to defend was much greater than the financial ability to prosecute, and that is of no small importance to considering whether and to what extent the financial circumstances of the parties, relative to each other, bear on an award of costs, where, as here, there has been an offer of settlement made ten days before a trial for the assessment of personal injury damages which was not accepted until the seventh day of trial."*