

More On Rule 37-B

November 3rd, 2008

The first decision that I'm aware of was released today dealing with the costs consequences of accepting a Rule 37 offer under Rule 37B.

The full background facts are not necessary for this narrow post. In this case the defendants made an offer to settle for \$6,000. This offer was made in compliance with the now repealed Rule 37. The offer was made (and accepted) while Rule 37 was still in effect.

The parties could not agree to whether a formal settlement was agreed to nor what the costs consequences were. The Plaintiff applied to court to enforce the settlement. The court application was not heard until October, 2008 (well after Rule 37 was repealed and replaced with Rule 37B)

Mr. Justice Rogers held that in these circumstances a settlement did exist and that Rule 37B is applicable.

Particularly he noted that:

[10] *Like the parties, I am satisfied that the original claim advanced by the plaintiffs in their statement of claim was settled by the parties' exchange of offer and acceptance. There will, therefore, be a declaration that the plaintiffs' claims against the defendants arising out of the writ and statement of claim have been settled. There will be a declaration that the settlement price to be paid to each of the plaintiffs is \$6,000....*

[14] *As to whether Rule 37B applies to the present case, I believe that it does. I have come to that conclusion because the rule permits the court to consider an offer to settle, including one made under Rule 37 but with respect to which no order has been made, when exercising the court's discretion in relation to costs: Rule 37B(4). The court's discretion relating to costs is engaged when a party asks the court to make an order. In the case of an accepted offer to settle, a party may ask the court for a declaratory order or it may apply for judgment in the terms of the settlement. Upon such an application, the court will have discretion as to costs with respect to the application itself and with respect to any costs contemplated by the settlement.*

[15] *In the present case, the accepted offer did contemplate costs in the plaintiffs' proceeding. Those costs were under Rule 37, but that rule has been replaced. The costs contemplated by the settlement must now be taken to be costs under Rule 37B. Therefore, the plaintiffs' present application for a declaration that their action has been settled engages the court's discretion under Rule 37B with respect to the costs of the application itself, and also of the plaintiffs' proceeding as a whole.*

[16] *As noted above, the plaintiffs argue that the court should exercise its discretion in their favour for those steps taken in the litigation up to the date that the defendants delivered their offers to settle. The defendants argue that no order for costs should be made until the counterclaim has been concluded.*

[17] *Because the issue of the plaintiffs' costs of the now settled action falls to be decided under Rule 37B, the court must examine that rule to learn what principles will guide its decision. As to those principles, the new rule says:*

(6) *In making an order under subrule (5), the court may consider the following:*

(a) *whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or on any later date;*

(b) *the relationship between the terms of settlement offered and the final judgment of the court;*

- (c) *the relative financial circumstances of the parties;*
- (d) *any other factor the court considers appropriate.*

[18] *This provision makes it clear that the Legislature intends the court to at least consider conducting a detailed examination into, among other things: the circumstances that pertained at various stages of the litigation relating to the party's knowledge of the strength of its own case and that of its opponent; if the case has gone to trial, the proportionality of the offer to the judgment; and the financial circumstances of all of the parties involved. Presumably, that detailed examination will be based on some form of properly admissible evidence.*

[19] *The scope of the inquiry that the court is expected to make before awarding costs under Rule 37B is, therefore, much wider than was the case under its predecessor rule. Furthermore, the parties to a piece of litigation have, I think, a legitimate expectation that the court will at least put its mind to the factors set out in Rule 37B(6). This raises the question of whether there may be cases where the court can properly decline to analyze a case in light of the factors set out in Rule 37B(6). About that I will say nothing definitive, except that this case does not appear to me to be one in which it would be judicious to ignore Rule 37B(6).*

No order as to costs was made in this case because *"the parties have not adduced sufficient evidence on this application to permit the court to conduct a detailed examination of the factors outlined in Rule 37B(6)."*

This is certainly far from the last of the judicial development of this new settlement rule. I will continue to post and comment about Rule 37B cases as they are released by the BC Supreme Court.

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