

## Here We Go Again - Rule 37B Amended

June 24th, 2009

A year ago the BC Rule dealing with formal offers in the BC Supreme Court, Rule 37, was repealed and replaced with Rule 37B. One of the primary differences between the rules was the greater discretion given to trial judges in awarding costs to litigants after beating a formal settlement offer at trial.

I have [written about every Rule 37B case that came to my attention](#) over the past year keeping track of the judicial development of this rule. Now, after being in force for a short period of time, Rule 37B is being amended with the changes taking effect on July 1, 2009.

The new changes seem to be in direct response to a [recent judgement of Mr. Justice Goepel](#) where he decided that Rule 37B does not give judges the discretion to award Defendants their trial costs after beating a formal offer of settlement at trial. This interpretation was great for Plaintiffs in personal injury claims because it diminished the financial risks for personal injury trials that did not proceed favorably. I thought that the Court of Appeal would likely determine whether Mr. Justice Goepel's interpretation was correct but this no longer will be necessary as the Rule amendment specifically addresses this point.

Interestingly, the new rule does not specifically address whether a Defendant being insured is a relevant factor for the court to consider when looking at the 'financial circumstances of the parties'. BC Courts have been inconsistent in determining whether this is a relevant consideration in ICBC Injury Claims.

As of July 1, 2009 the new Rule will read as follows:

### **Rule 37B – Offer To Settle**

*[B.C. Reg. 221/90 as amended July 1, 2009]*

#### **Definition**

*(1) In this rule, offer to settle means*

*(a) an offer to settle made and delivered before July 2, 2008 under*

*Rule 37, as that rule read on the date of the offer to settle, and in*

*relation to which no order was made under that rule,*

*(b) an offer of settlement made and delivered before July 2, 2008*

*under Rule 37A, as that rule read on the date of the offer of*

*settlement, and in relation to which no order was made under that*

*rule, or*

*(c) an offer to settle, made after July 1, 2008, that*

(i) is made in writing by a party to a proceeding,  
(ii) has been delivered to all parties of record, and  
(iii) contains the following sentence: “The ....[name of party making the offer].... reserves the right to bring this offer to the attention of the court for consideration in relation to costs after the court has rendered judgment on all other issues in this proceeding.”

**Offer not to be disclosed**

(2) The fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined.

**Offer not an admission**

(3) An offer to settle is not an admission.

**Offer may be considered in relation to costs**

(4) The court may consider an offer to settle when exercising the court’s discretion in relation to costs.

**Cost options**

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

- (a) deprive a party, in whole or in part, of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some 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;*

*(c) award to a party, in respect of all or some of the steps taken in the proceeding after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;*

*(d) if the offer was made by a defendant and the judgment awarded to the plaintiff was no greater than the amount of the offer to settle, award to the defendant the defendant's costs in respect of all or some of the steps taken in the proceeding after the date of delivery of the offer to settle.*

**Considerations of court**

*(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.*

*(7) A plaintiff who accepts an offer to settle for 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. An offer to settle does not expire by reason that a counter offer is made.*

**Appendix B**

**Scale of Costs**

*2 (6) If an offer to settle is made under Rule 37 after December 31, 2006 and before July 2, 2008, any costs payable on acceptance of that offer must, unless the court otherwise orders, be assessed under Scale B.*

*(7) If an offer to settle is made under Rule 37B after July 1, 2008, any costs payable on acceptance of that offer must, unless the court otherwise orders, be assessed under Scale B.*