

PUBLICATION

Formal Offers of Settlement: Utilizing the Rules of Court to Encourage the Early Resolution of Claims

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October 4, 2016

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Settlement is an important consideration in litigation. When appropriate, settlement may reduce litigation costs while obtaining many goals of the litigants. Further, the Alberta Rules of Court are structured so plaintiffs and defendants may use reasonable offers of settlement to encourage a timely conclusion of claims. Those parties that refuse reasonable formal offers of settlement risk increased costs penalties.

Rules 4.24 - 4.29 of the Alberta Rules of Court govern formal offers of settlement. Under the Rule 4.24, a party may issue a formal settlement offer any time after a claim is commenced. However, such offers must be made at least 10 days before a trial, summary trial or a scheduled application. Such offers must be in a specific form and be clear and unequivocal in their terms. A party must accept the offer in accordance with Rule 4.25.

Rule 4.29 sets out the costs consequences of failing to accept a settlement offer. If a defendant makes a formal offer of settlement that is not accepted, and the plaintiff fails to exceed that offer at trial, the plaintiff must pay a portion of the defendant's legal costs incurred after the offer. Further, if the plaintiff's claim is dismissed, the defendant is entitled to "double costs".

Similarly, where a plaintiff makes a formal offer of settlement, which the defendant' refuses, and the plaintiff matches or exceeds their offer, the plaintiff is entitled to double costs for those steps taken after the offer was made. Therefore, formal offers may increase pressure on parties to settle actions.

Rule 4.29(4) sets out specific exceptions to formal offer rule. An exception includes "special circumstances the Court orders that this rule will not apply." One such special circumstance is that offers must be a genuine or bona fide offer of compromise. Offers must be made with a reasonable expectation that they would be accepted. Otherwise, parties could exchange formal offers as a no risk litigation strategy to seek higher costs.

According to the Alberta Court of Appeal in *Allen (Next Friend of) v. Mueller*, 2006 ABCA 101, whether an offer is "genuine" is assessed based on a nonexhaustive list of factors. These factors include:

- i. Whether the offer was reasonable and realistic in all of the circumstances current at the time it was served and remained open;

- ii. Whether the offer included an element of compromise;
- iii. Whether the offer was a realistic reflection of the relative merits of the parties' position;
- iv. The amount or nature of the settlement offer relative to the claim; and
- v. The timing of the offer.

This test considers the surrounding circumstances existing at the time that the offer was served and remained open, as well as the outcome of the trial.

What is genuine and reasonable is highly contextual. For example, in *Franchuk v Schick*, 2015 ABQB 21 a \$1.00 offer of settlement of a defamation claim was seen not to be a good faith attempt at settlement. Rather it was a tactical no lose attempt to obtain double costs. Compare this to *Jama v. Bobolo*, 2002 ABQB 216 where an offer of \$1.00 with a waiver of costs was determined to be a genuine offer of settlement.

Without punitive "hammer" of costs, parties have a reduced incentive to settle. When used properly, offers of settlement can be an effective tool to encourage early resolution of litigation and punish frivolous or unreasonable litigants. Understanding when and how to utilize an offer of settlement in a way that exploits this costs "hammer" requires thorough analysis and advice of experienced counsel. Counsel are equally important in assisting recipients of settlement offers to recognize an appropriate response based on the merits of the case and reasonableness of the offer.

For further information please contact any member of our Commercial Litigation Group.