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CIVIL LITIGATION FOR LEGAL SUPPORT STAFF:
ADVANCED ISSUES—2011 UPDATE
PAPER 6.1

Formal Offers under Rule 9-1 of the BC Supreme Court Civil Rules

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FORMAL OFFERS UNDER RULE 9-1 OF THE BC SUPREME COURT CIVIL RULES

Since 1993, the Formal Offer has been a tool available to litigants that can assist parties and their representatives more effectively manage risk and simultaneously reduce pressure on the courts. From a macro perspective this is desirable as it reduces the total number of claims before the courts and accordingly allows their resources to be focused on truly controversial and intractable matters.[1] Concerns about access to justice from a micro perspective have motivated amendments to the Rules that have added several layers of complexity to this topic and the case law.[2]

In this paper, I will attempt to identify how the discretionary elements found in Rule 9-1(6) have been considered since the implementation of the BC Supreme Court Civil Rules, B.C. Reg. 168/2009, in order that parties may be able to have a clearer idea of what a given Offer may mean to their case.

I. Fundamentals

When a reasonable Formal Offer is not accepted, the offeror may get an award for taxable costs under Appendix B to the BC Supreme Court Civil Rules and conversely the rejecting party is therefore exposed to that higher exposure—be it an award for taxable costs for which the offering party would

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1 This rationale is reflected in the references found in some cases to Offers, which had they been accepted, would have resulted in a "saving to the parties and to the court" (e.g., see *King v. ICBC*, 2010 1742, at para 31 and *Martin v. Lavigne*, 2010 BCSC 1610 at para. 8).

2 Consider Mr. Justice Dley's comments about the "chilling effect" a costs award can have on meritorious claims in *Jayetileke v. Blake*, 2010 BCSC 1478, at para. 32.

not otherwise have been entitled or an award for double the taxable costs. This carrot-and-stick approach has the potential to modify the behaviour of parties and encourage litigants to compromise their claims.

The provisions governing Formal Offers under the BC Supreme Court Civil Rules are as follows:

> Part 9 — Pre-Trial Resolution Procedures
>
> Rule 9-1 — Offers to Settle
>
> **Definition**
>
> (1) In this rule, **"offer to settle"** means
>
> (a) an offer to settle made and delivered before July 2, 2008 under Rule 37 of the former Supreme Court Rules, 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 of the former Supreme Court Rules, 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 under Rule 37B of the former Supreme Court Rules, as that rule read on the date of the offer to settle, or made under this rule, that
>
> (i) is made in writing by a party to a proceeding,
>
> (ii) has been served on all parties of record, and
>
> (iii) contains the following sentence: "The .....*[party(ies)]*....., ...*[name(s) of party(ies)]*....., reserve(s) the right to bring this offer to the attention of the court for consideration in relation to costs after the court has pronounced 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 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 or service 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 or service 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 or service of the offer to settle.
>
> [am. B.C. Reg. 119/2010, Sch. A, s. 21.]

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 served 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.

Costs for settlement in cases within small claims jurisdiction

(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.

Counter offer

(8) An offer to settle does not expire by reason that a counter offer is made.

Unlike the old Rule 37, Rule 9-1 and its predecessor Rule 37B do not utilize a specific form for the text of the Offer other than the text set out at 9-1(1)(c). Rule 37B and Rule 9-1 also added the considerations relating to the reasonableness of the Offer set out currently at Rule 9-1(6). This has introduced several distinct discretionary elements that complicates the question of the effect of any given offer. To this end, it could be argued that the carrot-and-stick effect has been reduced. On the other hand, proponents of this approach say that more flexibility is required to ensure that unjust consequences do not befall litigants after trial.

The balancing act that the judiciary must now make when exercising their discretion in determining costs under Rule 37B (and by extension its successor Rule 9-1) was summarized by Mr. Justice Goepel, in *A.E. v. D.W.J.*, in the following manner:

> I appreciate and accept that notwithstanding the differences between Rule 37B and its predecessors, the underlying legislative policy behind Rule 37B is to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer: *MacKenzie v. Brooks* (1999) BCCA 623, 130 B.C.A.C. 95; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, 55 B.C.A.C. 191 (C.A.); *Radke v. Parry*, 2008 BCSC 1397, 64 C.P.C. (6th) 176. Parties should not however be unduly deterred from bringing a meritorious, albeit uncertain claim, because of the fear that a punishing cost order could potentially wipe out their award of damage award. In that regard I note the comments of McLachlin J.A., as she then was, in *Houweling Nurseries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25, 49 D.L.R. (4th) 205 (C.A.):
>
> > Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful. Moreover, there is a sound reason for keeping costs within relatively modest limits. The possibility of high costs may unduly deter a party from bringing an uncertain but meritorious claim or defence.
>
> Regardless of the merits of the plaintiff's case the defendant's offer to settle cannot be ignored, because to do so would undermine the purpose of the Rule. Having decided to proceed in face of a not insignificant and ultimately successful offer to settle, the plaintiff cannot avoid some consequences.[3]

3 2009 BCSC 505 at para. 61 to 62.

Recently, in *Giles v. Westminster Savings Credit Union*, Mr. Justice Frankel, for a unanimous 3-member sitting of the BC Court of Appeal, recently identified four guiding principles that guide the discretion the courts have when considering awards of costs:

> The purposes for which costs rules exist must be kept in mind in determining whether appellate intervention is warranted. In addition to indemnifying a successful litigant, those purposes have been described as follows by this Court:
>
> > "[D]eterring frivolous actions or defences": *Houweling Nursuries Ltd. v. Fisons Western Corp.* (1988), 37 B.C.L.R. (2d) 2 at 25 (C.A.), leave ref'd, [1988] 1 S.C.R. ix;
> >
> > "[T]o encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect": *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201 at para. 28 (C.A.);
> >
> > "[E]ncouraging litigants to settle whenever possible, thus freeing up judicial resources for other cases: *Bedwell v. McGill*, 2008 BCCA 526, 86 B.C.L.R. (4th) 343 at para. 33;
> >
> > "[T]o have a winnowing function in the litigation process" by "requir[ing] litigants to make a careful assessment of the strength or lack thereof of their cases at the commencement and throughout the course of the litigation," and by "discourag[ing] the continuance of doubtful cases or defences": *Catalyst Paper Corporation v. Companhia de Navegação Norsul*, 2009 BCCA 16, 88 B.C.L.R. (4th) 17 at para. 16.[4]

In the sections that follow I will consider recent case law that has applied these principles, and attempt to identify some patterns that may be of guidance when considering whether to serve a Formal Offer or when preparing its contents.

II. Triggering an Effective Formal Offer

The mechanism that brings the costs implications of a Formal Offer into effect is relatively straightforward—did the offering party "beat" the Offer it made? This discussion requires a consideration of whether a plaintiff has been awarded more at trial than the Formal Offer or if the amount obtained at trial was less than a defendant's or third party's Formal Offer. The analysis is however complicated by the factors enumerated in Rule 9-1(6)(b). As such offers that do not meet the basic criterion could theoretically be effective if they do not "beat" the trial result but are reasonably close. Given court's reluctance to engage in 'hindsight 20/20" analysis,[5] it is unlikely that this latter reasoning will have much traction.

The other Rule 9-1(6) factors however have led to a number of decisions, not all of which are consistent with one another regarding the other factors.

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4 2010 BCCA 282 at para. 74.

5 For example, consider the comments of Mr. Justice Hinkson (as he then was) in *Bailey v. Jang*, 2008 BCSC 1372 at para. 24, Madam Justice Humphries in *Lumanlan v. Sadler*, 2009 BCSC 142 at para. 35, Mr. Justice R. D. Wilson in *Sartori v. Gates*, 2011 BCSC 419 at paras. 66 to 68, and Mr. Justice Harris in *Aujla v. Kaila*, 2011 BCSC 466 at para. 9 to 13.

III. The Question of Liability versus Quantum

When considering a Formal Offer, the court will look not only at a party's damages but also the determination regarding liability. In some cases, the final number may have been reduced to take into consideration the contributory negligence of the offeree.

There have been a number of cases in which an Offer was deemed to be of "nuisance value"[6] as it appeared that the Offer was reflecting an amount that would be awarded after a deduction that reflected risk of an adverse finding at trial regarding liability. Costs are more likely to be awarded if the rejecting party's case is obviously weak at the time of the offer.[7]

In the majority of cases however, offers that are for amounts that do not correspond to the claims put forward (e.g., $1, $5, $1,000), will not put the opposing party at risk for a costs award[8] unless the Offer involves a compromise in which the offeror is waiving a counterclaim,[9] or there is a sizeable claim for disbursements.[10]

Overall, from a defence or third party perspective, in cases in which a liability split is likely, there is a likelihood that an Offer for a sum that has been discounted to reflect the liability split may not result in an adverse cost award for the rejecting party.[11]

IV. Knowledge of Rejecting Party

For any Offer to be effective with respect to costs consequences it must have been reasonable at the time it was made. This requires the court to consider the data available to the rejecting party at that time. If that party did not have access to the same data as that which the court ultimately did, the efficacy of the Offer is diminished.

In essence, one must return to a snapshot in time of the information that the rejecting party could utilize in determining whether to accept the offer. The courts will consider what medical information was available to the rejecting party, whether the trial briefs had been filed,[12] whether experts have been subjected to pre-trial depositions,[13] what reports have been disclosed,[14] and whether one could have

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6 As that phrase was used by the BC Court of Appeal in *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 27.

7 *Martin v. Lavigne*, 2010 BCSC 1610 at para. 11 to 12, *Burdett (Guardian Ad Litem) v. Mohamed*, 2010 BCSC 310 at paras. 55 to 61, and *King v. ICBC*, 2010 BCSC 1742 at para. 23.

8 Consider the findings in *Brooks-Marin v. Martin*, 2011 BCSC 497, *Aujla v. Kaila*, 2011 BCSC 466, *Habib v. Jack*, 2011 BCSC 1294, and *Stuart v. Hugh*, 2011 BCSC 575.

9 *Exclusive Flor Sales Ltd. v. Fipke*, 2010 BCSC 1551 at para. 4; also note the commentary of Mr. Justice Cullen in *Oh v. Usher*, 2010 BCSC 122 who concluded a $1 Offer was not "an attempt to achieve a compromised settlement, rather was an attempt to dissuade the plaintiff from proceeding at all" (at para. 12).

10 *Brooks v. Gilchrist*, 2011 BCSC 56 at para. 17.

11 Even if the case is "fraught with risk" to quote Mr. Justice Harris in *Aujla v. Kaila*, 2011 BCSC 466 at para. 11 but it "could not fairly be described as lacking any real prospect of success" *ibid*.; or available data "cast considerable doubt on the likelihood of success" as Mr. Justice ruled in *Brooks-Martin v. Martin*, 2010 BCSC 497 at para. 22 but the evidence did not establish that the party was "bound to fail" *ibid.* at para. 36.

12 *Houston v. O'Connor*, 2011 BCSC 509 at para. 86.

13 *Gregory v. ICBC*, 2010 BCSC 1369 at para. 10.

14 *Demarzo v. Michaud*, 2010 BCSC 1123 at para. 18.

sought further medical opinion evidence.[15] Note however that a particularly well-drafted Offer may be effective even though all of the finalized expert reports had not at that time been served.[16]

V. Relative Financial Circumstances

The question of relative financial circumstances is one that may invalidate an otherwise effective Offer or reduce the costs to be awarded.[17]

There are relatively few cases in which a determination of this subject was made on the basis of a detailed and nuanced analysis of standard financial criteria (e.g., assets, liabilities, income streams, etc.).[18] In time, this may well change.[19]

In any case, the motive for this consideration is to ensure access to justice and to deter oppressive litigation tactics by well-funded parties with the intention of freezing out poorer opponents. As such if there is not evidence of financial difficulty on the part of the rejecting party it will not influence the determination.[20] The question of whether the award of costs would create a hardship for the rejecting party is a relevant criterion but not in cases in which the offering party performed its obligations to the rejecting party.[21] This criterion will be most relevant in cases in which the offeror's misfeasance or malfeasance has created the disparity or financial circumstances.[22] Accordingly, the conduct of offering party in terms of its obligations vis-à-vis the other party and the cause for the offeree's financial situation should be considered when considering whether to serve a Formal Offer.

VI. The Role of Insurance

The question of financial disparity can also consider the availability of insurance to one of the litigants.[23] This availability will not in all cases preclude an award of costs but may result in an award of taxable costs instead of double costs from the date of the offer.[24] As with other factors relating to

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15 *Miller v. Boughton*, 2011 BCSC 632 at para. 48.

16 *Jack v. Tekavec*, 2011 BCSC 171 at paras. 42 to 45.

17 *Gregory v. ICBC*, 2010 BCSC 1369 at para. 13.

18 Consider the detailed analysis of Mr. Justice Pearlman in *McIsaac v. Healthy Body Services Inc.*, 2010 BCSC 1033 at paras. 76 to 79.

19 For now there is a tension between on the one hand Rule 7-1, which has been scaled back in comparison to the *Peruvian Guano* relevance standard under the old BC Supreme Court Rules, along with limits on the length of examinations for discovery under Rule 7-2, and the other hand, the need for parties to discover opposing parties with respect to their financial means for the purposes of Rule 9-1(6)(c).

20 *MAC Marketing Solutions Inc. v. 0718698 BC Ltd.*, 2010 BCSC 1968 at para. 7.

21 *King v. ICBC*, 2010 1742 at para. 29; failure by the offeror to perform obligations can negatively influence that party's ability to seek costs pursuant to an Offer as well (*Jayetileke v. Blake*, 2010 BCSC 1478 at para. 31).

22 *Gatzke v. Sidhu*, 2011 BCSC 1214 at para. 16.

23 The early case law on this topic generally did not consider it appropriate to consider the availability of insurance however more recent cases have tended to do so more readily. Most notably, in *Smith v. Tedford*, 2010 BCCA 302, Lowry J.A., stated that were a judge not to consider the availability of insurance when considering the relative financial circumstances of the parties, it would render the analysis "very artificial indeed" (at para. 19).

24 *Gregory v. ICBC*, 2010 BCSC 1369 at paras. 9 and 13.

relative financial circumstances, the impact of the insurance on the conduct of the litigation will influence the weight to be given to this fact when considering the relevant offer.[25] The courts also appear to be more willing to assume that insurance coverage is available in cases involving ICBC, and less so for other insurers.[26]

VII. Complex Causation

In cases involving multiple accidents or indivisible injury that may be the subject of multiple actions, it may not be appropriate to give effect to offers in any single action involved therein. In *Danicek v. Li*,[27] injuries from a motor vehicle accident exacerbated injuries arising from a nightclub fall. Mr. Justice Kelleher noted that although the defendant's Offer in that case had been beaten by a factor of 50, that it was not unreasonable for the plaintiff to reject it given the complexities concerning causation of the injuries in that case.[28]

VIII. Claims Under $25,000 in Value

If a court determines that a party should have known that its claim was worth less than $25,000 or did not have another good reason for litigating at the Supreme Court level at the time the lawsuit was commenced, then as per Rule 14-1(10) and Rule 9-1(7) that party is precluded from seeking costs (or double costs[29]) and can seek only disbursements. This is a ruling that does not involve an exercise of discretion.[30]

The analysis however concerns the plaintiff's knowledge at the time the action was commenced—the plaintiff is not obligated to continue monitoring the action nor to transfer the action down to Provincial Court thereafter.[31] If the plaintiff requires relief that is not available at the Provincial Court level, such as an injunction, then that party may be able to seek its costs even though the final quantum was below $25,000.[32]

One should also recall that if a party accepts an Offer that does not exclude costs, the court's discretion to determine whether a claim is within Small Claims jurisdiction is lost.[33] As such, a party is not able to accept an Offer under $25,000 and then argue that only the amount of the Offer plus disbursements are payable.

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25 *Hunter v. Anderson*, 2010 BCSC 1591 at paras. 21 to 22.

26 Consider Mr. Justice Burnyeat's analysis in *Martin v. Lavigne*, 2010 BCSC 1610 at paras. 23 to 27, in particular his concerns regarding whether the evidence established that the insurance that may be available did in fact cover the subject matter of the case. Of course ICBC insureds may also be left in the same position if, for example, they do not have coverage due to a breach of the policy. One cannot assume that in every such case ICBC would have introduced itself as a statutory third party under s. 77 of the *Insurance (Vehicle) Act*.

27 2011 BCSC 444.

28 *Ibid*., at para. 27.

29 *Cue v. Breitkreuz*, 2010 BCSC 1323 at para. 8.

30 *Cairns v. Gill*, 2011 BCSC 420 at para. 23.

31 *Dempsey v. Oh*, 2011 BCSC 627 at para. 11.

32 *Rowe v. Thomson*, 2011 BCSC 617 at para. 5.

33 *Sahonta v. Sandulo*, 2011 BCSC 87 at paras. 28 and 36; *Buttar v. Di Spirito*, 2009 BCSC 72 at para. 17.

IX. Other Factors

Rule 9-1(6)(d) allows the court to consider "any other factor the court considers appropriate"—this has included deceitfulness, conduct of during the litigation, lack of a counteroffer, and overwhelming success at trial.

A party's dishonesty may affect its ability to receive costs.[34] As such where the admissible evidence indicates there has been with respect to material facts in the case, this may disentitle a party who otherwise may be able to receive costs.

The conduct of parties or their counsel during the litigation may be considered, including the scheduling of hearings when opposing counsel are not available and providing inadequate responses to Notices to Admit or Demands for Particulars,[35] failing to comply with orders relating to disclosure,[36] or being repetitive in presenting evidence, advancing claims that were not pursued, and unduly lengthening trial.[37]

A failure to compromise, for example in the form of a counteroffer, may be considered by the court, although it is not as yet clear what weight may be provided to this criterion.[38] A pre-litigation Offer by a party may be considered as well.[39]

If a party beats his Offer to a degree that it results in a net savings to that party (that the rejecting party did not accept it), then that may invalidate an Offer that should have otherwise been accepted.[40]

X. Best Practices

It goes without saying that clarity is a key element of any effective Offer to settle. One should set out in an unambiguous manner what subject matter is being sought and what element of compromise is being provided. To this end, "all in" offers lack the clarity that is desirable since a court would have to determine the taxable costs and disbursements that would have been payable and subtract them from the amount offered to determine the actual Offer for the claim. This introduces a layer of uncertainty that is not in the interest of the offering party in my opinion.

One must be careful not to demand things that in the circumstances it would not be logical for the opposing party to do. As such, an offer can be invalidated by a demand that an employer/defendant provide a "satisfactory letter of reference" as part of a settlement in a wrongful dismissal case in which inadequate performance is alleged.[41]

Creative attempts at compromise that meet the needs of the circumstances of the dispute may, however, be given full effect. As such, in a dispute between neighbours relating to their view, an Offer

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34 *Lakhani v. Elliott*, 2010 BCSC 281 at para. 16 and *McIsaac v. Healthy Body Services Inc.*, 2010 BCSC 1033 at paras. 80 to 83.

35 *Martin v. Lavigne*, 2010 BCSC 1610 at para. 14.

36 *Roach v. Dutra*, 2010 BCCA 264 at paras. 24 and 30.

37 *Western Homes & Management Ltd. v. Yusuf*, 2009 BCSC 1895 at para. 19.

38 *Exclusive Flor Sales Ltd. v. Fipke*, 2010 BCSC 1551 at para. 7.

39 *Hutson v. Michaels of Canada*, 2009 BCSC 1587 at para. 12.

40 *Gatzke v. Sidhu*, 2011 BCSC 1214 at paras. 13 to 15.

41 *Bomford v. Wayden Transportation Systems Inc.*, 2010 BCSC 1721 at paras. 18 and 19.

to keep vegetation trimmed to a fixed height behind a wall in exchange for a dismissal order did result in an order for double costs.[42]

It is wise to give a party adequate time to consider the Offer tendered. This will be a fact-driven exercise defined in large part by the data available to party considering the offer. In personal injuries cases, periods of between several days[43] and six months[44] have been deemed reasonable for a party to consider the Offer proffered.

With respect to form, a party will be in the best position to rely upon its Offer when the Offer itself sets out the reasons why the Offer should be accepted. As such the Offer should be drafted with a consideration of what the judge at trial would be considering when trying to determine its reasonableness. This 'snapshot' of the issues and data available at that time, if effectively drafted, will greatly aid the trier of fact to understand the compelling reasons for why the Offer should be accepted. The Offer should set out the relevant facts, expert evidence, statutes and case law that supports the offering party's position, and why the amount offered is a compromise distinct from what could be obtained by that party in court. This may mean that the Offer in form will resemble a mediation brief or trial brief.[45]

The problem with the approach noted in the previous paragraph is that it requires knowledge of the case that few litigants will have until after extensive discovery has taken place. If one wishes to file a Formal Offer early in the proceedings, it is unlikely that one will have the data, documents, and admissions that would allow for a detailed offer in the form noted above. Hopefully cases involving early offers to settle will recognize the desirability of having early Formal Offers made and will therefore give effect to them even if they lack the detail of Formal Offers made after discovery has been conducted (and certainly after expert reports have been exchanged).

XI. Conclusion

The question of how the discretionary factors will be treated by a court considering a Formal Offer is a complex and largely fact-driven exercise. Navigating the case law on this topic is a confusing and frustrating undertaking given the number of divergent cases one finds. Unfortunately it would appear that in many cases the judges considering the issues in their cases were not provided with sufficient case law on the subject to keep their decisions in line with previous authority. Accordingly, what I have attempted to do is to identify trends in the law since the BC Supreme Court Civil Rules came into effect rather than to provide an exhaustive explanation of all available cases on the topics I have addressed.

It is anticipated that this area of the law will continue to evolve in the years to come. It is hoped that this paper may be of assistance to you in determining the circumstances in which such an Offer may serve its purposes both to one's client and by extension to the court system as a whole.

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42 *Silcox v. Field*, 2010 BCSC 1550 at paras. 2 and 10.

43 While in the following cases, not all of the offers gave rise to costs consequences, the court did rule that the following periods were reasonable for acceptance: for offers made on the eve of trial it was seven days in *Hunter v. Anderson*, 2010 BCSC 1591 at para. 24, six days in *Roach v. Dutra*, 2009 BCSC 693 at paras. 36 to 37; for offers made three weeks before trial it was deemed to be seven days in *Coquitlam v. Crawford*, 2008 BCSC 1507 at para. 20, and in *Bailey v. Jang*, 2008 BCSC 1372 at paras. 6 and 41.

44 *Miller v. Boughton*, 2011 BCSC 632 at paras. 37 and 48, for an Offer made prior to when a key medical report had been maintained and after which the court concluded a second opinion would have taken six months to obtain.

45 A useful discussion of the elements of an effective Offer can be found in Mr. Justice Savage's ruling in *Jack v. Tekavec*, 2011 BCSC 171 and the form of Offer is reproduced therein. I have attached a copy of this case to these materials.

XII. Appendix—Jack v. Tekavec, 2011 BCSC 171

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Jack v. Tekavec,*
2011 BCSC 171

Date: 20110211
Docket: S7677
Registry: Campbell River

Between:

Edward Alexander Jack

Plaintiff

And:

Louis Peter Tekavec and
Louis Peter Tekavec doing business
as Goldcrest Apartments

Defendants

Before: The Honourable Mr. Justice Savage
Reasons for Judgment

Counsel for the Plaintiff:	S.J. Gordon
Counsel for the Defendants:	D.H. Christie
Written Submissions of the Plaintiff:	January 28, 2011
Written Submissions of the Defendants:	February 2, 2011
Reply Submissions of the Plaintiff:	February 3, 2011
Place and Date of Judgment:	Campbell River, B.C. February 11, 2011

I. Introduction

[1] Following my decision in *Jack* v. *Tekavec*, 2010 BCSC 1773, Jack applies to settle the form of order and address costs.

[2] With respect to the form of order, there is no issue that Jack is entitled to interest on past wage loss and special damages pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79, see s. 1(1).

[3] With respect to costs, at the conclusion of the Judgment I provided that if costs were not agreed to they could be spoken to. Costs follow the event and Jack was successful at trial.

[4] The result at trial was an award of damages of $322,463.78. Jack delivered an offer to settle the action by letter dated December 4, 2009, in the amount of $300,000 plus assessable costs and disbursements. The letter was addressed to Tekavec's solicitor as Tekavec was represented at the time. There is no issue regarding receipt. A copy of this letter is attached and marked as Schedule "A".

[5] Jack says that the offer to settle ought reasonably to have been accepted when made, that at trial he beat the offer, and that the other circumstances militate in favour of an award of double costs. Tekavec appears not to have attended to the matter as he should, and his response to offer a "six pack" at a trial management conference is indicative of that. According to counsel Tekavec repeated that offer on several occasions.

[6] Tekavec, through his new counsel, argues that the offer was unclear, equivocal, not open for any definite period, provided no genuine incentive to settle, and was untimely. Counsel argues that Jack should only be entitled to costs but not double costs.

II. Rule 37B & Rule 9(1)-(5)

[7] The purpose of the rules with respect to costs is well set out in the decision of Mr. Justice Hall in *Catalyst Paper Corporation* v. *Compahnie de Navegacao Norsul*, 2009 BCCA 16. Hall J.A., noted that the *Rules of Court* are designed to require the parties to make careful assessments of the strengths of their cases at the commencement and throughout the course of litigation. The Rules are intended to encourage reasonable settlements and discourage doubtful cases or defences.

[8] In a recent decision, *Hartshorne* v. *Hartshorne*, 2011 BCCA 29, the Court of Appeal referred to the guiding principles in awarding double costs at para. 25:

> An award of double costs is a punitive measure against a litigant for that party's failure, in all of the circumstances, to have accepted an offer to settle that should have been accepted. Litigants are to be reminded that costs rules are in place 'to encourage the early settlement of disputes by rewarding the party who makes a reasonable settlement offer and penalizing the party who declines to accept such an offer.'

[9] As noted by Greyell J., in *Pham-Fraser* v. *Smith*, 2010 BCSC 694, Rule 37B is intended to cause the parties to pause to consider their respective positions in light of all of the information available and to assess the likely outcome of the trial. See also *Lakhani* v. *Elliott*, 2010 BCSC 281 and *Hutson* v. *Michaels of Canada*, *ULC*, 2009 BCSC 1587.

[10] Pursuant to Rule 9-1, the Court must apply Rule 9-1(5) and Rule 9-1(6) which read as follows:

> (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 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 or service 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 or service 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 or service of the offer to settle.

[am. B.C. Reg. 119/2010, Sch. A, s. 21.]

(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 served 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.

[11] The parties, in their submissions, addressed the form of the offer and the factors referenced under Rule 9-1(6).

III. Form of the Offer

[12] The operative words of the offer are as follows:

> At this time we offer to settle Eddie's claims for $300,000 plus assessable costs and disbursements. The Plaintiff, Eddie Jack Jr., 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.

[13] The last sentence of this paragraph is in accordance with the form required by Rule 9-1(1).

[14] Tekavec says the offer is unclear or ambiguous because it includes the phrase "plus assessable costs and disbursements". I disagree.

[15] Tekavec, in support of his position, relies on the decision of Williamson J., in *Leung* v. *MDSI Mobile Data Solutions Inc.*, 2002 BCSC 1780. In that case it was unclear whether the offer included any sums already paid in a wrongful dismissal action.

[16] In *Hine* v. *Bentley*, [1979] B.C.J. No. 460, 14 B.C.L.R. (S.C.), there was ambiguity which turned on the wording of the offer and what was included in an offer under the former rules.

[17] In the instant case the offer is for a specific amount and assessable costs and disbursements. In *Brooks* v. *Gilchrist*, 2011 BCSC 56, Sigurdson J. accepted that a nominal offer including "disbursements" is compliant with the Rules.

[18] In my opinion the offer does not lack certainty. It is for a specific amount plus a determinable amount.

[19] In the circumstances I would not disallow consideration of the offer based on the fact it was for a specific amount plus assessable costs and disbursements.

IV. Factors Concerning Costs

[20] I turn now to the factors raised by counsel regarding the broad discretion a court has to award double costs.

A. Whether the offer reasonably ought to have been accepted

[21] The reasonableness of the decision not to accept the offer must be assessed by reference to the knowledge of the defendant at the time the offer was open for acceptance. In this case the offer was not withdrawn.

[22] At the time of the offer the examination for discovery of the defendant had been completed. The pleadings were complete. The offer fully sets out the plaintiff's theory of liability. The offer describes the injuries of the plaintiff in some detail. The offer refers both to the plaintiff's wage loss and future capacity loss, the future care and housekeeping services claim.

[23] In short, the offer is fully descriptive of the plaintiff's claim, theory of liability and losses. It was a reasonable offer.

[24] The defendant says that the "...offer was unreasonable in that it did not indicate the full amount of the liability attributed to the defendant...". The offer after discussing liability at length, however, said "It is clear from Mr. Tekavec's evidence and other evidence to be adduced at trial if necessary that Mr. Tekavec will be held 100% liable for the injuries and damages suffered by Mr. Jack". The offer was made to Tekavec alone, who is the only defendant.

[25] The defendant says one should also look to the timing of the offer. The offer was made after the discovery of Tekavec while he had counsel. Tekavec released counsel shortly thereafter and the defendant says that Tekavec should have received another offer in unequivocal and clear terms.

[26] With respect, I do not consider the offer to be equivocal or unclear. Nor do I think that the fact Mr. Tekavec became unrepresented places a new burden on counsel making an offer to settle. Mr. Tekavec had time to review the offer with his then counsel, prior to them parting ways, and time to consult with other counsel should he have wished.

[27] With respect to timing, it is clear that the defendant did not yet have the final medical reports of the plaintiff. In counsel's submission she indicates that the reports were personally served on the defendant on June 14, 2010. That said, the injuries suffered were fully described and the effects on the plaintiff were also reviewed in the offer.

[28] In my view, consideration of this factor favours the plaintiff.

B. Relationship between Settlement Offer and Judgment

[29] The amount of the offer compares favourably with what was awarded at trial. The amount of the offer is $300,000 plus assessable costs and disbursements. Excluding assessable costs and disbursements, the amount awarded at trial is $322,463.75. Pursuant to the *Court Order Interest Act*, there is court order interest added on past wage loss and special damages.

[30] The offer is significantly less than that awarded after trial.

[31] In my view consideration of this factor favours the plaintiff.

C. Relative Financial Circumstances of the Parties

[32] The plaintiff is a working man of First Nations origin. He is paid hourly for operating heavy equipment during the working season in northern British Columbia where he regularly works.

[33] The defendant owns six real properties including the apartment building where the accident occurred. There are no financial charges, liens or other interests indicated on title. A garnished bank account produced over $92,000.

[34] Consideration of this factor favours the plaintiff.

D. The Defendant was Self-Represented

[35] At trial the defendant was self-represented. At discovery and at the time the offer was made the defendant had counsel. The defendant had counsel at the time the pleadings were filed. There is no question that the defendant had the wherewithal to hire counsel but simply chose to defend the matter himself.

[36] In these circumstances this is a neutral factor.

E. The Complexity of the Issues

[37] The defendant argues that the complexity of the issues would make it difficult to assess the offer. The events giving rise to the claim are relatively straightforward. The defendant's involvement and position as landlord was well known at discovery. As the owner and manager of the building where the events occurred the defendant had familiarity with the surrounding factual matrix.

[38] The form of the offer sets forth with clarity the theory of liability, the injuries, the impact of the injuries on the plaintiff and the damages suffered. In my view this factor is neutral.

F. The Defendant did not take the Litigation Seriously

[39] The plaintiff describes a course of conduct by the defendant that indicates he did not take the litigation seriously.

[40] There is reference to several offers to resolve the matter from the defendant based on a "six pack" of beer and later a nominal offer of $10,000. The plaintiff sought mediation but the defendant did not respond to requests to participate in the process to appoint a mediator. The materials filed by the defendant do not take issue with these matters as facts.

[41] I think it clear that the defendant did not treat the litigation as he should have. That said, he knew that the plaintiff had fallen from a considerable height and was badly injured. Despite appearances, the defendant is a sophisticated businessman who has had considerable material success.

V. Conclusion

[42] I have found the offer clear and not equivocal. It was fully descriptive of the plaintiff's case and the claims made. The plaintiff did considerably better than the offer which was a reasonable offer. The only thing lacking in the offer were medical reports describing the permanent effects of the injuries. These were prepared and personally served on the defendant in June 2010.

[43] The defendant was represented by counsel when he received the offer. Although the defendant was later self-represented he had the means to hire counsel and is a successful businessman. The relative financial circumstances of the parties favour the plaintiff.

[44] As the medical evidence was delivered in June 2010, at that point it would have reinforced the fact that Jack suffered serious injuries with permanent sequellae. In my opinion the plaintiff is entitled to double costs at Scale B.

[45] I would award double costs from Appendix B at Scale B from July 1, 2010.

[46] The plaintiff is entitled to the costs of this application.

The Honourable Mr. Justice Savage

SCHEDULE A

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Our File No. 44,375
December 4, 2009

HAROLD A. HENNING
Barrister & Solicitor
201-901 Island Highway
Campbell River, B.C. V9W 2C2

WITHOUT PREJUDICE

FAX TO 250-830-0032
FAXED

Dear Mr. Henning:

RE: Eddie Jack Jr.
Date of Loss: June 2, 2007

As you know we act for Edward Jack Jr. ("Eddie") with regards to injuries and damages he sustained as a result of a 3 storey fall from a balcony at the Goldcrest Apartments in Gold River on June 2, 2007 (the "Accident").

Background

[redacted] He works as a heavy equipment operator in northern British Columbia and the Territories. Prior to the Accident, Eddie was in good health.

The Accident

Eddie was home from work enjoying a holiday. On the afternoon of June 2, 2007 he went over to visit friends for drinks. His friends are tenants at the Goldcrest Apartments in Gold River, B.C.

Eddie went out onto the balcony of the apartment for a cigarette. He leaned back on to the railing. It gave way and Eddie plummeted to the ground.

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Liability

The Defendant owner of the Goldcrest Apartments is Louis Tekavec. Mr. Tekavec testified in examination for discovery that he has owned the apartments since 1994 and never had a building inspection done prior to purchase but rather "self-inspected". It was appraised shortly after purchase (Q 84, 85 & 90 examination for discovery transcript Louis Peter Tekavec). He testified that at the time of the Accident and for some time prior to the Accident he had no insurance being denied same from the insurer. This was confirmed by the previous insurer. He claims he was denied insurance because some of the, in total 8, buildings on 2 properties were not tenanted and therefore empty. We are advised that the buildings are not habitable. Mr. Tekavec testified that the subject building is the "youngest" building and was finished in 1972 (Q 83 examination for discovery transcript Louis Peter Tekavec).

Mr. Tekavec testified that the tenant of the subject apartment is Julia Mark who has 3 children and at some time after she moved in, "She took in this guy by the name of Bruce Billy". (Q 73-76 examination for discovery transcript Louis Peter Tekavec).

Ms. Mark has lived in the subject apartment about 1 year at the time of discovery (August 25, 2008) and was in the process of moving out at the time of examination for discovery (Q 79 & 80 examination for discovery transcript Louis Peter Tekavec).

The subject building along with others were also in very bad condition as shown by pictures taken shortly after the Accident. Admittedly, on a cursory glance the buildings look good but on closer inspection the deficiencies become patently obvious.

Mr. Tekavec testified that the property the Accident happened on was the property which has 1 apartment building on it (the other adjacent property having 7 buildings on it) (Q 13-19 examination for discovery transcript Louis Peter Tekavec).

He further testified that he is the sole owner and solely responsible for the maintenance of the subject apartment other than perhaps some spiritual assistance (Q 20-37 examination for discovery transcript Louis Peter Tekavec). He testified that he is the manager of the subject apartments and has been the sole manager since about 1999 (Q 54-57 examination for discovery transcript Louis Peter Tekavec).

Mr. Tekavec testified that prior to the Accident he hired outside help to paint, plumb, clean carpets and "things of this nature" (Q 38-47 examination for discovery transcript Louis Peter Tekavec). Wood repairs are his responsibility as he is a carpenter and had previously been a member of the carpenter's union.(Q 48-52 examination for discovery transcript Louis Peter Tekavec). He has an employment history of being in maintenance (Q184 examination for discovery transcript Louis Peter Tekavec).

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Under the *Occupiers Liability Act* [RSBC 1996] c. 337 [hereinafter the "*Act*"] Mr. Tekavec owed to Eddie a duty of care to ensure he was reasonably safe in using the premises. As a landlord, we say that he has a higher standard of care. We rely on the following sections of the *Act*:

Occupiers' duty of care

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

(2) The duty of care referred to in subsection (1) applies in relation to the

(a) condition of the premises,

(b) activities on the premises, or

(c) conduct of third parties on the premises.

(3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to

(a) create a danger with intent to do harm to the person or damage to the person's property, or

(b) act with reckless disregard to the safety of the person or the integrity of the person's property.

(4) Nothing in this section relieves an occupier of premises of a duty to exercise, in a particular case, a higher standard of care which, in that case, is incumbent on the person because of an enactment or rule of law imposing special standards of care on particular classes of person.

Tenancy relationship

6 (1) If premises are occupied or used under a tenancy under which a landlord is responsible for the maintenance or repair of the premises, it is the duty of the landlord to show toward any person who, or whose property, may be on the premises the same care in respect of risks arising from failure on the landlord's part in carrying out the landlord's responsibility, as is required by this Act to be shown by an occupier of premises toward persons entering on or using the premises.

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(2) If premises are occupied under a subtenancy, subsection (1) applies to a landlord who is responsible for the maintenance or repair of the premises comprised in the subtenancy.

(3) For the purposes of this section

(a) a landlord is not in default of the landlord's duty under subsection (1) unless the default would be actionable at the suit of the occupier,

(b) nothing relieves a landlord of a duty the landlord may have apart from this section, and

(c) obligations imposed by an enactment in respect of a tenancy are deemed to be imposed by the tenancy.

(4) This section applies to all tenancies.

Under the *Occupiers Liability Act* [RSBC 1996] c. 337 Mr. Tekavec had a duty of care to his tenants and their guests to provide a reasonably safe premises.

Mr. Tekavec testified he had no regular schedule of maintenance. He dealt with problems as they arose and relied on tenants to let him know what needs to be done (Q107 and 108 examination for discovery transcript Louis Peter Tekavec).

When people move out his system of maintenance is to make the apartments "clean and functional" (Q104 examination for discovery transcript Louis Peter Tekavec).

At the time Ms. Mark moved in he was aware that was some rot on the anchor on the south end of the subject balcony (Q111 examination for discovery transcript Louis Peter Tekavec) but he testifies it was safe (Q109 examination for discovery transcript Louis Peter Tekavec).

He did not fill out condition reports with Ms. Mark at the time of her occupancy as per the *Residential Tenancy Act* [RSBC 1996 c.406] or a "form of any kind" (Q112 and 113 examination for discovery transcript Louis Peter Tekavec).

Mr. Tekavec testified that Mr. Billy had done something towards balcony repair pre-Accident. He said a week pre-Accident he then agreed it could have been six months pre-Accident (Q121, 162 and 186 examination for discovery transcript Louis Peter Tekavec).

He said Mr. Billy had no permission from him and it was stupid behaviour (Q161 examination for discovery transcript Louis Peter Tekavec). He was afraid it was not done right (Q164 examination for discovery transcript Louis Peter Tekavec) and then testified he could see from the ground it was "all wrong" (Q170 examination for

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discovery transcript Louis Peter Tekavec) and it was the work of a two year old child (Q189 examination for discovery transcript Louis Peter Tekavec).

Mr. Tekavec testified that he could have given the tenant proper notice to enter the apartment to inspect the subject balcony or make repairs to the subject balcony but he did not. He testified, "Yeah, I could have done it. I didn't." (Q174 examination for discovery transcript Louis Peter Tekavec).

Mr. Tekavec knew the subject balcony required structural repair since before Ms. Mark moved in. This is a third floor balcony. It was foreseeable to Mr. Tekavec that the failure of the railing could result in a catastrophic accident. It is also foreseeable that a person may lean on a balcony railing which exists for the safety of persons on balconies.

It is clear from Mr. Tekavec's evidence and other evidence to be adduced at trial if necessary that Mr. Tekavec will be held 100% liable for the injuries and damages suffered by Mr. Jack. He failed in his duty of care. The standard of care as a landlord is high. Mr. Tekavec's negligence directly led to the injuries and damages suffered by Mr. Jack as a result of the Accident.

Injuries

Eddie's pelvis was fractured on impact. He suffered bilateral knee effusions, a fracture to both LS transverse processes, disruption of the right sacroiliac joint, and pleural effusions.

He was transferred to the Campbell River Emergency Room by ambulance and then medivaced to Vancouver General Hospital where he underwent surgical repair of his pelvis.

Eddie went into a coma. He regained consciousness and was then induced into a coma as he was so mentally traumatized it was feared he would disrupt his surgical repairs in his agitated state.

While in hospital Eddie suffered respiratory failure, aspiration and pneumonia. An emergency tracheotomy had to be performed to save his life.

Eddie was in intensive care at Vancouver General Hospital for over 2 weeks. He spent about another week at Vancouver General Hospital and was then transferred to Campbell River Hospital. He arrived at Campbell River Hospital June 24, 2007, almost one month post Accident.

Eddie is claiming for the following injuries:

(a) fractured pelvis;

PART 2 of 3
43 pages

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(b) fractured rib;
(c) injury to lower back;
(d) injury to abdomen;
(e) injury to internal organs
(f) injury to legs;
(g) collapsed lung;
(h) tracheotomy;
(i) concussion;
(j) sleeplessness with resulting fatigue;
(k) emotional trauma; and
(l) continuing pain; and
(m) such further injuries as a medical practitioner may advise.

In February 2008, Eddie was advised he required surgical hernia repair as a result of the stitches from his previous surgery not holding. He underwent this surgery at the Campbell River Hospital.

We have been adused by the Ministry of Health Services. They are seeking payment of $68,081.46 under the HCCRA as a result of the Accident to date.

Non-Pecuniary Damages

There is no doubt that Eddie has suffered a great deal of pain, suffering and interference with his life as a result of the Accident.

Rose tells us that when Eddie finally regained consciousness he was disoriented and thought his daughter had been injured and only by letting him to talk her on Rose's cell phone could he be calmed.

Eddie had a very difficult time in the hospital with his injuries and resulting complications.

He was cared for at home by his mother, sister and a nurse. Their home is a split level and Eddie was limited to where he could go in his wheelchair. He was unable to use crutches until 2 months post Accident but was still very limited in his ability to go anywhere or even care for himself.

Eddie's recreation bas been limited by the Accident. Prior to the Accident he enjoyed hunting, fishing, camping and activities with his children.

It has been over 2 ½ years since the accident and Eddie still suffers pain and interference with his life as a result of the Accident and likely always will. If this matter does not settle we will be requesting a medical legal report from an expert to provide evidence as to Eddie's long term prognosis. The trial is scheduled for the April 2010

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assize therefore we will be setting appointments for Eddie to see specialists for early in the New Year.

Caselaw

Sorensen v Klima
A 35 year old hunting guide and oilfield worker was in an MVA fracturing his right hip, knee and ankle. He underwent surgery and remained in the hospital for 1.5 months. He continued physiotherapy for 7.5 months after leaving the hospital and returned to the hospital at that point for further surgery. The plaintiff was expected to experience degenerative hip problems in the future.
Non-pecuniary damages: $117,388 (adjusted for inflation)

Duruisseau v Jako
A 51 year old was a pedestrian in an MVA causing a rib fracture, pelvic fracture, knee and foot dislocations and some internal injuries. She spent 25 days in the hospital and was discharged in a wheel chair. She continued to have pain at the time of the trial and it was expected to develop into arthritic pain.
Non-pecuniary damages: $100,272 (adjusted for inflation)

In consideration of the pain, suffering and interference the Accident has caused Eddie to date and his continuing pain, we assess Eddie's Non-Pecuniary damages conservatively at **$110,000.00**.

Past Wage Loss

Eddie received a phone call asking him to return to work within 1 week of the Accident. Were it not for the Accident, he would have taken this opportunity and been back in Fort St. John. From the time of the Accident to the time he returned to work in October Eddie missed 17 weeks of work. Eddie's hourly rate was $30.00. Based on a 5 day work week and 12 hours per day Eddie's past wage loss is:

17 weeks x 5 days/week x 12 hours/day x $30.00/hour = $30,600

Eddie has also had to stop work since his return as he had to return to the hospital for subsequent surgeries. As a result of his hernia operation in October 2008, Eddie was again unable to work. As a result of this surgery he was unable to work for 4 weeks, after which he was cleared to return to work on light duties only.

4 weeks x 5days/week x 12 hours/day x $30.00/hour = $7,100

Assuming a tax rate of 20%, we assess Eddie's **past wage loss at $30,160**.

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Future Capacity Loss

As a result of this Accident, Eddie is in pain when he works as a machine operator. He continues to work at this point in time, but he is limited in the machines that he is able to use and therefore the work he is capable of completing. We refer to the well known criteria for assessing loss of capacity from the BCCA decision in *Kwei v. Boisclair* [1991] BCJ No. 3344 which are:

> "Some of the considerations to take into account in making that assessment include whether:
>
> 1. The plaintiff has been rendered less capable overall from earning income from all types of employment;
> 2. the plaintiff is less marketable or attractive as an employee to potential employers;
> 3. the plaintiff has lost the ability to take advantage of all job opportunities which might otherwise have been open to him, had he not been injured; and
> 4. The plaintiff is less valuable to himself as a person capable of earning income in a competitive labour market."

In *Sorenson v Klima, supra* evidence was put forth regarding the physical demands of heavy machine operation and the decreased employability of the plaintiff resulting from his injury. He was awarded $160,000 for the cost of retraining and decrease in earning ability.

We assess **Future Capacity Loss at $160,000**

Future Care

We will be advancing a future care cost claim if this claim goes to Court. At this time Eddie receives most of his care through the Band but could quite conceivable require future care as a result of the Accident which would result in out of pocket expenses for Eddie.

Loss of Housekeeping/House Maintenance Capacity

Following his Accident Eddie was completely unable to care for himself. For the first month after Eddie was released from the hospital his mother and sister jointly cared for him. He was unable to do anything for himself. Until the beginning of October Eddie

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had assistance on a daily basis, from a care worker, his mother and his sister. All three care workers were paid by the Mowachaht/Muchlaht. They have advanced an in trust claim for $2,542.00 paid for the care worker.

If this matter continues to trial we will be advancing a future claim under this head of damage.

Summary

Eddie was very seriously injured when he fell from the third storey balcony at his friend's apartment. The apartment was in disrepair in that the balcony railing was rotting and gave way when Eddie leaned on it. Eddie is very active and becomes restless easily. He has fought through the pain in his hips as well as infections and multiple additional surgeries to return to work and his recreational activities. Despite this, his injuries continue to prevent Eddie from working full time and have resulted in considerable financial hardship for Eddie.

At this time we offer to settle Eddie's claims for $300,000 plus assessable costs and disbursements. The Plaintiff, Eddie Jack Jr., 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.

We note that the deadline for a Notice to Mediate is fast approaching and it is our intention to deliver one to you within that deadline.

Yours very truly,

SHOOK WICKHAM BISHOP & FIELD
Per:

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