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# Not Just a Formality: Offers to Settle and their Cost-Related Consequences

These materials were prepared by Alexander DC Kask, Partner, and Norika Takacs-Rehm, Articled Student, both of Guild Yule LLP, Vancouver, BC for the Continuing Legal Education Society of British Columbia, February 2020.

# NOT JUST A FORMALITY: OFFERS TO SETTLE AND THEIR COST-RELATED CONSEQUENCES

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## I. Introduction

We now have over a decade of jurisprudence considering offers to settle under Rule 9-1. In previous papers we have attempted to identify trends and principles of application.[1] Given the number of relevant cases that have been decided during that time, it would be beyond the scope of this paper to provide an exhaustive review of the case law concerning Rule 9-1. Instead, we aim to provide a working framework to aid in bringing and defending applications for costs under Rule 9-1.

This paper first sets out the main components and underlying principles of Rule 9-1. Second, it considers how the court's discretion has been applied in relation to what is perhaps the central

1 This paper is an update of "So You Beat Your Offer To Settle … Now What? Bringing and Defending Applications for Costs under Rule 9-1" by Taylor-Marie Young & Alexander DC Kask for the CLEBC *Costs 2015 Update* course (October 2015). Also see "Formal Offers under Rule 9-1 of the BC Supreme Court Civil Rules" by Alexander D.C. Kask for the CLEBC *Civil Litigation For Legal Support Staff: Advanced Issues—2011 Update* course (November 2011).

consideration in the exercise of awarding or denying costs orders—reasonableness. Then, a handful of unlisted but potentially relevant factors are highlighted for the reader. Finally, the paper closes with a discussion of best practices for Rule 9-1 costs applications.

## II. First Principles

There are four principle aims underlying Rule 9-1. In *Giles* v. *Westminster Savings Credit Union,* 2010 BCCA 282, the court sets out at paragraph 74 that Rule 9-1 is meant (1) to deter frivolous actions or defences; (2) to encourage conduct that reduces the duration and expense of litigation and to discourage conduct that has the opposite effect; (3) to encourage litigants to settle whenever possible, thus freeing up judicial resources; and (4) to require litigants to make a careful assessment of the strengths and weaknesses of their cases.

The mechanism that allows offers to settle to achieve these aims is found under Rule 9-1(4). This subsection simply allows the court to consider an offer to settle when exercising its discretion in relation to costs. A court may be asked to consider costs and the implications of an offer to settle whenever the offering party 'beats' its offer at trial.[2]

The court's discretion under Rule 9-1, though broad, is limited in the sense that it may be exercised to impose only the enumerated costs options as set out in Rule 9-1(5)[3]:

> (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.

These options are complicated by Rule 9-1(6), which sets out four factors that animate the court's discretion. These factors are:

> (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;

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2 Note, however, the decision of *CP* v. *RBC Life Insurance Co.*, 2015 BCCA 30. The Court of Appeal held at para. 92 that a trial judge has no discretion to award double costs to a defendant where the plaintiff has been successful in any measure at trial.

3 Like Rule 37B(5) under the former BC Supreme Court Civil Rules, options under Rule 9-1(5) are a closed set; no other options are available: *Evans* v. *Jensen*, 2011 BCCA 279.

(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.

The following section discusses the court's application of these factors.

## III. Discretion

The factors under subrule 9-1(6) are permissive. Consequently, their application has been unpredictable and highly fact-dependent. Understanding the exercise of the court's discretion then requires an appreciation for the nuances of both the applicant and the respondent's perspective.

In an earlier paper[4] on this topic, O'Byrne and Parsons observed that the court's application of the factors under Rule 9-1(6) had been uneven. At times it relied on one factor exclusively and, at other times, balanced all four factors. A review of the case law reported in the last few years suggests the court is trending toward application of a single factor, namely reasonableness, more often than it performs a fulsome balancing of all four factors.[5] The analysis in relation to reasonableness is to be made with reference to the offeree's knowledge of case at the time that the offer was open for acceptance however analysis in relation to the other factors may involve hindsight.[6]

Recently, the Court of Appeal in *Cottrill* v. *Utopia Day Spas and Salons Ltd*., 2019 BCCA 26 at paragraph 30, has framed the issue, not as whether the offer was reasonable, but whether it was unreasonable to refuse it. This conception of Rule 9-1(6) was based on a decision by Mr. Justice Gomery in which he explained the distinction as follows:[7]

> [24] In my opinion, the wording of the subrule stating this consideration is important. The consideration is not whether it would have been reasonable for the plaintiff to have accepted the offer. It is whether the plaintiff ought reasonably to have accepted the offer. The difference is this. An offer might be such that a reasonable plaintiff could choose to accept it or not. One might term it "a reasonable offer". On the other hand, to say that an offer ought reasonably to have been accepted is to say that a reasonable person should have accepted it. It was unreasonable to refuse it.
>
> [25] According to the distinction I am drawing, having regard to the wording of the subrule, the consideration is not whether the offer was a reasonable offer. It is whether it was unreasonable for the plaintiff to refuse it.
>
> [Emphasis in original]

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4 "The Current Offer to Settle Regime: What We Have Learned in the Early Years" by Karen O'Byrne & Ryan W. Parsons for the CLEBC *Costs 2012 Update* course (May 2012).

5 See *Warren* v. *Morgan,* 2015 BCSC 1168; *Tenhunen* v. *Tenhunen,* 2015 BCSC 955; *Grieve* v. *Bennet,* 2015 BCSC 899; *Canuck Security Services Ltd* v. *Gill,* 2015 BCSC 43; *Mayer* v. *Umabao,* 2016 BCSC 2355; and *Barta* v. *DaSilva*, 2017 BCSC 410

6 *Jones* v. *Arjun*, 2015 BCSC 1881

7 *Kobetitch* v. *Belski*, 2018 BCSC 2247

Irrespective of how one frames the issue, where the court has focused on a single factor, it consistently has evidenced a preference for the reasonableness analysis.[8] This aligns with the permissive nature of Rule 9-1(6) and also to the comprehensive aspect of subsection 9-1(6)(a), which strikes at the heart of the issue on a costs application. Consider the following decisions which illustrate how the court's discretion is exercised in light of the sweeping context of each action, as opposed to individual facts.

In *Lindgren (Litigation guardian of)* v. *Parks Canada Agency*, 2018 BCSC 1663, the refusal to accept an offer was deemed reasonable as the offerees were unable to assess credibility before trial of various lay witnesses and employees. This meant that the offerees could not weigh the conflicting narratives and consider which may be believed and hence whether liability would be established.

The court in *The Owners, Strata Plan LMS 3905* v. *Crystal Square Parking Corporation,* 2017 BCSC 929 at paras 22–23, deemed appropriate rejection of an offer that went beyond the scope of litigation and was irreconcilable with the issues that were being tried. The litigation concerned enforcement of positive covenants contained in an air space participant agreement that was registered as an easement against real property. Further in this case, the offer, if accepted, would have tied the parties in a relationship which was already "fraught with conflict".

Another case which looked at the overall parameters and issues of the litigation when deciding whether an offer was reasonable was *Mayer* v. *Umabao*, 2016 BCSC 2355. In *Mayer*, it was held to be reasonable for an offeree to refuse an offer to settle given that there were the number of contentious issues to be tried (i.e., causation for an alleged traumatic brain injury and quantification of a loss of earning opportunity) despite "a very unrealistic assessment of liability" for the subject MVA. The defendants were not penalized for their failure to "accept an offer that might later prove to have been reasonable but might just as well have been proven not to be".

In *Saopaseuth* v. *Phavongkham,* 2015 BCSC 45, the court held that the offer to settle ought not to have been accepted because it had not been broken down into its constituent elements, which made it difficult to evaluate. This was especially true in the context of a defendant who had a legitimate defence to the plaintiff's claim.

Similarly in *Normak Investments Ltd* v. *Belciug,* 2015 BCSC 969, an offer to settle on the basis of the full quantum of the plaintiff's claim provided virtually no incentive to the defendant to settle. The court's decision arose in the context of an action that raised difficult questions respecting the scope of each defendant's duty of care, whether a breach of that duty of care had been shown in the circumstances and, if more than one defendant was found liable, the apportionment of liability as between them.

Needless to say, a detailed offer to settle is not necessarily a reasonable one. Context may determine otherwise. In *Kostecki* v. *Li,* 2015 BCSC 1356, the reasonableness of the offer did not require defendant's counsel to know how the offer was broken down among heads of damage. In the circumstances, it was not a particularly complex case, as it fell within general parameters

8 e.g. *Cost Plus Computer Solutions Ltd* v. *VKI Studios,* 2015 BCSC 1591; *Smith* v. *Neil,* 2015 BCSC 572; and *Loft* v. *Nat,* 2015 BCSC 198.

of cases involving soft tissue injuries. The court held these injuries were not likely to attract hundreds of thousands of dollars or feature centrally in settlement negotiations, and as such, a less detailed offer was acceptable.

In *White* v. *Wang,* 2015 BCSC 1080, the court relied on the reasonableness factor to put the late delivery of an offer into context. According to the court, a late offer may be a reasonable one even when the parties are "poised for trial." In the circumstances, the court exercised its discretion to award costs on the basis of a late offer because all of the pre-trial fact finding has been long completed; all of the evidence had been properly exchanged; trial management or other judicially mandated conferences had taken place and the issues had been canvased. In this context, the parties were in as good a position as they would ever be to assess the relative strengths and weaknesses of the case. Furthermore, the court considered it relevant that counsel who were receiving the offer had considerable experience in litigating and settling claims.

The court's discretion may also turn simply on the reasonableness of the party considering the offer. In *Johnson* v. *Jamieson,* 2015 BCSC 648, the weaknesses of the plaintiff's case on liability were "quite apparent, his testimony rife with inconsistencies and improbabilities" and he "should have readily recognized the high risk of dismissal that he faced." This plaintiff's failure to accept the offer, which had been open for acceptance for a long period that extended to the eve of the first day of trial, was not reasonable.

Whether it would have been reasonable for a party to have accepted an offer at the time the offer was open for acceptance requires a contextual consideration, as the decisions above illustrate. However, the reasonableness of an offer may fundamentally turn on whether the offer provided the other party a genuine incentive to settle. The Court of Appeal introduced the idea of "genuine incentive" in *Giles, supra,* as follows:

> **88** […] Virtually all litigation comes with a degree of risk. When faced with settlement offers, plaintiffs must carefully consider their positions. However, they should not be cowed into accepting an unreasonable offer out of fear of being penalized with double costs if they are unable to "beat" that offer. Put somewhat differently, plaintiffs should not be penalized for declining an offer that did not provide a genuine incentive to settle in the circumstances.

The question naturally follows, what is a genuine incentive?

Since *Giles,* this passage has been cited in dozens of decisions, although most often it is referenced without elaboration. The following decisions may provide some insight.

In *Tapestry Realty Ltd. (c.o.b. Royal Group-Tapestry Realty)* v. *Mangat,* 2011 BCSC 1415, the court described a settlement offer with a genuine incentive to settle as one that, at the time it is made, amounts to a real, substantial compromise of the offering party's position. The court elaborated on the variability of the genuine incentive factor:

> **30** But having said that, I do not read *Giles* as laying down a requirement that a genuine incentive be found as a precondition to an award of double costs. In the passage quoted above, Frankel J.A. clearly stated that there are no mandatory factors under the Rule. The Court of Appeal acknowledged in *Roach* v. *Dutra*, 2010 BCCA 264, that the amendments to the costs rules embodied in Rule 37B, predecessor to the present Rule 9-1, reflected "a clear movement away from the narrowly formulated, rigidly applied approach to

> double costs which had applied under Rule 37, in particular". To read *Giles* as fettering the discretion of a trial judge in any manner would be a step backwards.
>
> **31** *Giles,* in my respectful view, does stand for the proposition that the degree of risk inherent in an action is one factor which determines whether a settlement offer may be viewed as providing a genuine incentive to settlement. The stronger a plaintiff's case, the less need there is for a plaintiff to compromise. The degree of incentive, in turn, may be weighed in determining whether the settlement offer ought reasonably to have been accepted, in all the circumstances.

In *Ward* v. *Klaus,* 2012 BCSC 99 at paragraph 38, Mr. Justice Goepel took issue with the oft-quoted *Giles* passage set out above. In particular, Goepel J. identified the possibility that the Court of Appeal was suggesting parties who decline offers to settle that do not provide a genuine incentive to settle should be somehow immunized from cost sanctions regardless of the outcome at trial. The court further noted that the fact that an offer does not provide an incentive to settle cannot be determinative of its reasonableness. This is illustrated in cases involving nominal offers, which, as the court observed, may in fact be reasonable and should be accepted if to do so would spare all parties the costs of an expensive trial.

In *Domtar Inc.* v. *Univar Canada Ltd.,* 2012 BCSC 510, the court again held that *Giles* cannot be interpreted as saying reasonable offers must provide a genuine incentive to settle. Further, in order to provide a genuine incentive, an offer need not necessarily compromise the offering party's position. The court applied this relationship between incentive and compromise as follows:

> **45** Domtar did not provide a rationale for the Offer but it clearly reflected its view that Univar's case was weak. I do not agree with Univar that this demonstrated a lack of genuine incentive to settle. The need to compromise will vary according to the strength of a party's case, considered objectively. Here, Domtar held the view, reasonable at the time, that its case was strong and its risk was low. In such circumstances, Domtar should not be required to compromise beyond its own objective assessment of the case in order to obtain the benefit of the double costs rule.

This line of authority appears to suggest that whether an offer provides a genuine incentive goes only to emphasizing the importance of the reasonableness factor, rather than determining the reasonableness of an offer altogether.

Other examples of what may amount to a genuine incentive to settle are instructive. Consider *Wong* v. *Lee,* 2011 BCSC 1087, in which the offering party sought to reserve the right to seek special costs, despite the offer. As such, the court held that the offer could not be viewed as providing a genuine incentive to settle. In *Gichuru* v. *York*, 2012 BCSC 1385, an offer to settle on the condition that the party give up his tenancy within 60 days provided no genuine incentive to settle.

Further examples illustrate, as in the previous section, that whether an offer provides a genuine incentive to settle must be considered contextually. In *Brook* v. *Tod Estate,* 2013 BCSC 330, an offer to settle by accepting 51% liability provided no genuine incentive where the other defendant still had to proceed to trial on the remaining 49% liability. And, in *Saopaseuth, supra,* the plaintiff offered to settle for $44,000 before seeking nearly three times as much at trial. The

court held there was an insufficient basis for the defendant to evaluate whether the original offer provided a genuine incentive to settle because the greater amount of damages was not set out in the pleadings and was not quantified until the start of trial. Simply put: drastic differences in damages in an offer and then at trial do not necessarily mean the first was a bargain.

## IV. Unenumerated Factors

Rule 9-1(6)(d) allows the court to consider any other factor it deems appropriate. These factors are varied and unpredictable. However, the "other factors" subsection allows counsel and the courts to be creative in both bringing and defending costs applications. Loose categories of unlisted but potentially relevant factors are identifiable in the case law. This section considers six of them.

### A. Conduct during the Litigation

Perhaps the most common unlisted factor is the conduct of a party during the litigation.[9] This factor can be identified in a number of cases, although the conduct that attracts a costs award varies. Consider the following manifestations of it:

1. deceitfulness has been identified as a relevant factor in determining a costs application on more than one occasion;[10]
2. in *Western Homes & Management Ltd* v. *Yusuf,* 2009 BCSC 1895 at paragraph 19, the conduct deserving of a costs award included advancing claims that were not pursued, repetition in evidence, and using each hiatus in a trial to gather further evidence;
3. failure to participate in any settlement or trial management discussions in *Northern Sun Developments Ltd* v. *Cook,* 2011 BCSC 1008 at paragraph 55, led to a costs award against the recalcitrant party;
4. in *Hudson* v. *Michaels of Canada,* 2009 BCSC 1587 at paragraph 14, the lack of a counteroffer was considered worthy of justifying a costs award;
5. the party who had taken deliberate steps to attempt to frustrate a transaction was held deserving of a costs award against it in *Hundley, supra* at paragraph 42;
6. in *Frame* v. *Rai,* 2013 BCSC 686, costs were awarded against a litigant who
    a. called numerous witnesses who had no probative evidence (and hence wasted valuable time and court resources);
    b. called witnesses who were evasive, non-credible or who attempted to mislead the court;
    c. refused to negotiate,

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9 *Martin* v. *Lavigne,* 2010 BCSC 1610 at paragraph 14; *Roach* v. *Dutra,* 2010 BCCA 264 at paras 24 and 30.

10 *Lakhani* v. *Elliot,* 2010 BCSC 281 at paragraph 16; *McIsaac* v. *Healthy Body Services Inc.,* 2010 BCSC 1033 at paras. 80–83; and *Hundley* v. *Garnier,* 2011 BCSC 1317 at paragraph 42

d. disputed the testimony of the opposing party without providing evidence to rebut the testimony; and

e. called witnesses who were evasive under cross-examination, lacked credibility and attempted to mislead the court (see paragraph 27);

7. in *Canuck Security Services Ltd* v. *Gill,* 2015 BCSC 43 at paras 64 and 71, the plaintiff's shortcomings in document production were considered a relevant factor in determining a costs award;

8. the court may consider that an unsuccessful party has shown no regard for the costs consequences of their conduct when deciding whether to give effect to an offer to settle: *Wright* v. *Sun Life Assurance Co. of Canada*, 2015 BCSC 1899 at paragraph 24;[11]

9. in *Parmar Estate* v. *Tiwari*, 2016 BCSC 540 at paragraph 25, an award of double costs was denied to a successful plaintiff on the basis that they failed to prove scandalous allegations made against the opposing party; and

10. the court in *Sebaa* v. *Ricci* 2016 BCSC 622 at paras 36 and 45, warned that a plaintiff's refusal to attend for a continued examination for discovery may weaken their claim for double costs.[12]

Further, an essential element to keep in mind, is that a delay on the part of a party in bringing an application for costs may disentitle that party from obtaining double costs as was the situation in *Bay* v. *Pasieka,* 2014 BCSC 809:

> **30** While some delay is understandable, the delay in this case far exceeded a reasonable limit. Excessive delay is, of course, contrary to the object of the Rules as set out in Rule 1-3(1): to secure "the just, speedy, and inexpensive determination of every proceeding on its merits." By waiting so long to deal with the issue of costs, the defendant undoubtedly increased the cost of dealing with the issue for both parties and delayed the final resolution by years. It would be wrong to accept the delay without imposing any consequence on the defendant. It is in the interests of the court and of the parties to resolve disputes as soon as they arise to promote efficient use of court time. The inordinate delay in bringing this application is not acceptable.

## B. Acceptance in the Hands of Another

The fact that acceptance of the offer lays in the hands of one party on behalf of another may also be a relevant factor. In *Meghji* v. *Lee,* 2014 BCCA 105, the trial judge awarded double costs to the plaintiff after the date of an offer to settle made to the defendant Ministry of Highways and Transportation, the defendant ICBC, and the defendant driver, Mr. Lee. Mr. Lee was impecunious and his liability was not contentious.

The defendants appealed the double costs award on the basis that the trial judge did not give sufficient consideration to the fact that the offer was made to two defendants, neither of

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11 For example, disregard for directions and deadlines and the filing of lengthy, irrelevant and inadmissible affidavits.

12 However, while the claim for double costs may be weakened in this scenario, it is not necessarily lost if an offer made by the "evading" party is reasonably capable of acceptance by the opposing party: paragraph 45.

whom ought reasonably to have been required to accept it without contribution from the other. At the time of the offer, the parties knew Mr. Lee carried the minimum statutory third party liability insurance coverage, that he lived at home with his parents, and that he had such limited assets as to be insignificant to the settlement discussions. Counsel argued he could not have settled the claim because the offer to settle exceeded Mr. Lee's insurance coverage.

The court held that, in the circumstances, a factor open to the trial judge to consider was the fact that acceptance of the offer on behalf of Mr. Lee lay in the hands of ICBC. Ultimately, the appeal was dismissed and the court was not satisfied that either the Ministry or ICBC could rely on the other's intransigence for not accepting the offer. So while it is a potentially relevant factor, the fact that acceptance of an offer lays in the hands of one party on behalf of another does not save either party from a costs award where they unreasonably passed on an offer. In the court's words, "such a dispute between defendants is not a bar to the plaintiff's claim for costs arising from their collective failure to come to grips with the settlement offer and accept it in circumstances where the judge has found that it reasonably ought to have been accepted."

In *Meghji,* the role of insurance was considered a factor that played into each party's decision not to accept the offer to settle, including Mr. Lee's. Typically the role of insurance has arisen under subsection 9-1(6)(c), the relative financial circumstances of the parties. In *Meghji*, however, the court held at paragraph 126 that, "in cases where insurance plays a significant role in the acceptance or rejection of settlement offers, the objectives of the *Rules* can only be furthered by costs orders that take the insurance into account."

## C. Why the Claim Failed

In *A.E. (Litigation guardian of)* v. *D.W.J.,* 2009 BCSC 505 paragraph 59 and 60, aff'd 2011 BCCA 279, the court held it may be appropriate to consider the circumstances of the plaintiff's claim and why it failed when considering a costs application:

> **60** Civil cases are determined on the balance of probabilities. In many cases, it is difficult to tell, particularly in advance of trial, on what sides the scales will ultimately fall. If the scales are neatly balanced, as they were in this case, it is a factor that the court can properly consider in determining cost consequences under Rule 37B [now Rule 9-1].

In *A.E.,* the court observed that the plaintiff's claim did not fail because of her lack of credibility or because she was at any significant fault. Rather, the claim failed on what the court described as a "complex causation issue," in particular, whether a motor vehicle accident caused the plaintiff to suffer from Dissociative Identity Disorder.[13]

Another complex causation case is *Gonzales* v. *Voskakis,* 2013 BCSC 675. The court cited *A.E.* and included its consideration of the plaintiff's claim, including the causation issue, under its reasonableness analysis. In contrast is *Wright* v. *Hohenacker,* 2009 BCSC 996, which involved a plaintiff alleging headaches and psychological problems affecting her ability to work. At paragraph 36, the court distinguished the circumstances from the complex causation issue in *A.E.,* in part because the defendant had not raised causation at trial.

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13 Formerly labelled Multiple Personality Disorder

## D. Prejudice to the Plaintiff

While remaining alive to the intent that Rule 9-1, in part, serves a deterrent function[14], an issue that has troubled the judiciary for many years (indeed back to when formal offers were governed by Rule 37 of the previous *Supreme Court Rules of Court*) has been the risk that a vigorous approach to awarding costs may have a chilling effect on future claimants who may have legitimate claims. This has continued in relation to how the court has applied Rule 9-1(6)(d).

In *Houston* v. *Houston,* 2011 BCSC 803, the court noted that an order of double costs would likely put considerable burden on the plaintiff, who was 91-years-old when the trial took place.

In *Gonzales, supra,* the defendant sought an award of costs based on its offer to settle for an amount that exceeded the modest award the plaintiff went on to win at trial. The plaintiff argued that she would suffer prejudice in the form of a costs award that would negate her entire judgment and leave her significantly in debt. The court acknowledged that such circumstances may be a relevant factor. However, weight given to the factor cannot override the purpose of the Rule:

> **45** […]"[i]t is not the court's function to ensure that a plaintiff makes a net recovery from an action when it has ignored a reasonable offer. That would defeat the purpose of the Rule and does not accord with common sense".
>
> **46** While one might have great sympathy for Ms. Gonzales given the circumstances, the underlying behavior modification objective of the Rule is to encourage settlement of claims where appropriate. It is not to encourage plaintiffs to "take a flyer" and litigate each and every claim in any circumstance, without any costs consequences arising from an offer to settle.

In *Bay, supra,* the plaintiff argued against the costs application on the basis that the defendant's delay in bring the application had caused her prejudice. Between the trial and the costs application, counsel argued her memory had diminished, her computer software had changed, and support staff had mistakenly dismantled part of the file. The court was satisfied that the delay in the circumstances "far exceeded the reasonable limit" and, as such, was contrary to the object of the Rules set out in Rule 1-3(1). Further, by waiting to deal with the issue of costs, the defendant had "undoubtedly increased the cost of dealing with the issue for both parties". The court would have awarded the defendant double costs had there been no delay. The costs application was brought three and a half years after trial.

In *Cairns* v. *Gill,* 2011 BCSC 420, the court provided a comprehensive discussion of the effect a costs award would have on the plaintiff when the defendants' anticipated costs far exceeded the plaintiff's judgment at trial. The court held at paragraph 59 that such an order would not only have a very negative effect on the plaintiff but also have "the broader effect of further discouraging those with legitimate claims from bringing their actions in this court when the defendant, funded by an insurer, has deeper pockets with which to bear the risk of a plaintiff achieving only a minor or, indeed, a pyrrhic victory."

In *Cairns,* the plaintiff was marginally successful at trial and agreed to forego her costs after the date of service of the offer to settle. The court had also denied her disbursements from the

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14 *Barta* v. *DaSilva*, 2017 BCSC 410 at paragraph 14.

date of the offer, which occurred very early in the proceedings. The defendants sought their costs after the date of the offer, and were denied on the basis that it would have been excessive and unjust. Overall, the court held that such an award would not be in keeping with the relatively low offer, the relative financial circumstances of the parties and the need to avoid decisions that inappropriately discourage plaintiffs from pursuing valid claims.[15]

## E. Self-Represented Litigants

As the cost of litigation continues to rise, so too does the incidence of self-represented litigants navigating the court system. As this shift takes place in the legal landscape in British Columbia, lawyers, paralegals and articled students must be cognizant that an opposing party may not have an equivalent grasp on the procedures and principles that we are exposed to on a regular basis.

Of course, while one must always take care to refrain from giving legal advice to the opposing side, the case of *Mac* v. *Mak*, 2016 BCSC 1804, raises the possibility that in evaluating an offer to settle, a court can take into account the explanation, or lack thereof, that is given to a self-represented litigant at the time the offer is made. In *Mac*, the first offer which was made to the self-represented litigants did not sufficiently address the consequences of rejecting that offer, that is, double costs at trial, and the court held that this was a factor to consider in the assessment of the costs award.

## F. After-the-Event Insurance

On the costs application in *Clubine* v. *Paniagua*, 2018 BCSC 1076, it was disclosed that the plaintiff had purchased After-the-Event ("ATE") insurance prior to the trial. While the ATE insurance would not have paid for the plaintiff's costs following the date of the offer, the plaintiff explained that the ATE insurance would have covered the defendant's disbursements and costs from the date of the offer if costs were awarded against the plaintiff and would also have paid for the plaintiff's disbursements incurred but not awarded from the date of the offer. At paragraph 28 of *Clubine*:

> **28** The defendant submits that the ATE insurance effectively undermines the intent of the offer to settle rule. It allows a plaintiff to avoid the punitive costs consequences of the rule, ignore reasonable offers to settle, and with impunity take their chance at trial. The winnowing function of the costs rules is obviated by ATE insurance; doubtful cases can proceed through litigation without risk of adverse costs consequences. I conclude in this case that this insurance had such an effect.

The court found that the defendant had made reasonable efforts to settle the matter and that cost consequences should follow for the plaintiff's failure to accept those reasonable efforts. The ATE insurance was a factor that "strongly weigh[ed] in favor of the defendant's costs application."

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15 This line of reasoning was followed in *Bains* v. *Antle*, 2017 BCSC 590, where the court found that the plaintiff's victory at trial would be pyrrhic if she were required to pay the defendant's costs from the date of their offer – an offer which was substantially higher than the award rendered at trial (aff'd: *Bains* v. *Antle*, 2019 BCCA 383).

## G. Additional Factors

The variety of factors that crop up under subsection 9-1(6)(d) far exceed the above six categories. For example, in *Miller* v. *Boughton,* 2011 BCSC 632, common sense was referenced at paragraph 54 as a relevant consideration. Notably, in *Grieve* v. *Bennet,* 2015 BCSC 899 at paragraph 60, the court ruled that the jury's intention in making its award to a successful plaintiff is not relevant under Rule 9-1. Additionally, while it was not found to be a separate factor, a credibility assessment of the parties plays a role in every costs application that is made before the court: see *Garib* v. *Archibald*, 2016 BCSC 1082 at paragraph 33.

# V. Applications Seeking Costs: Applicant Versus Respondent

This section briefly canvasses some best practices for bringing and defending an application for costs under Rule 9-1.

## A. Beating the Offer

A potential application to the court to consider costs vis-à-vis an offer to settle arises when the offering party beats its offer at trial. Recent case law suggests that 'beating' an offer is a technical consideration, rather than a symbolic one. In *CP* v. *RBC Life Insurance Company,* 2015 BCCA 30 (leave to appeal ref'd [2015] SCCA 136), the Court of Appeal held that a trial judge has no discretion to award double costs against a plaintiff who has had some measure of success at trial.

In *Wormald* v. *Chiarot,* 2015 BCSC 1671, the *CP* decision was used to reject the applicant's argument that it should be awarded double costs on the basis of its substantial success at trial. The plaintiff was awarded a mere $5,100 for minor scars, bruising, scrapes and cuts she suffered in a motor vehicle accident. She had originally claimed approximately $250,000 in damages, including for psychiatric injuries. Nonetheless, the court, citing *CP* at paragraph 91, held that double costs should not be available:

> **91** …A plaintiff who obtains a judgment for less than an offer to settle is already subject to sanctions. R. 9-1(6)(a) allows the court to deprive the successful plaintiff of costs to which it would otherwise be entitled. Rule 9-1(5)(d) provides an even more punishing outcome as the plaintiff is not only deprived of costs he or she would otherwise receive, but must also pay the defendant's costs subsequent to the offer to settle. To also allow a defendant double costs would skew the procedure in favour of defendants and unfairly penalize and pressure plaintiffs.

The plaintiff's "success" in *CP* was similarly symbolic. She was awarded $10,000 in damages for mental distress. Her original claim was approximately $1.5 million in damages.

## B. Assessing the Offer's Suitability for a Costs Application

The fact that the offering party beat its offer at trial requires counsel to next consider a series of threshold issues when considering whether one's client may be able to successfully seek costs against the opposing party. These considerations apply equally to the party served with an application and to the party faced with defending against an order for costs.

***Was the offer clear and unambiguous?*** This consideration is arguably the most important. Bringing an application for costs based on an offer to settle that attempted to 'tie up loose ends' by, for example, including outstanding Part 7 claims, are more difficult to evaluate for reasonableness. Similarly, 'all-in offers' that include costs and disbursements are not clear, as they require the court to calculate taxable costs and disbursement that would have been payable in order to assess whether the true offer.

For more specific offers, if, before trial, an offeree does not question the offeror about terms the offeree thought were troublesome, the offer is unlikely to be found ambiguous.[16]

***What is the effect of the timing of the offer, if any?*** As you would expect, this is a highly fact-driven consideration. There is competing case law to support the timeliness of any offer, from the very early to the very late. However, the potential applicant ought to be asking whether the other party had substantially all of the information required to make an informed decision at the time the offer was served. The timing of the offer to be relied on in the application will also determine the date from which costs will be argued for.

***Was the offer made genuinely to promote settlement?*** Expanding on the previous point, a review of the timing of the offer could factor into the court's determination as to whether an offer to settle was genuine or tactical. A party who makes a merely tactical offer risks rejection of their costs application. In *Böhmer* v. *Burns Lake Native Logging Ltd.,* 2018 BCSC 1198, the late timing of the defendant's offer, which was made on the eve of trial, in addition to the nominal size of the offer, lead the court to conclude that the defendant's offer was only a tactical step in an attempt to obtain double costs. Ultimately, the court declined the defendant's double cost application as it would have been unfair to punish the plaintiff in this scenario.

***Was the offer supported by a rationale for acceptance?*** Though related to clarity, this consideration is separate because it is susceptible to the facts of every given case. The requirement for detail in an offer to settle will vary, as is illustrated in comparing *Saopaseuth, supra,* to *Kostecki, supra*. Nonetheless, best practice requires that every offer at least has some evidentiary basis and case law in support. This may include a review of expert evidence in support of the offering party's position, comparable and persuasive case law the offering party expects will be helpful to the court, and identifying the key weaknesses that may have been identified in examination for discovery.

***What is the effect of multiple offers?*** In *ICBC* v. *Patko,* 2009 BCSC 578, the court held that, where multiple offers have been made, it may consider earlier offers even if they have been revoked or expired.[17] Where a number of offers are made, the applicant may rely on the point in time when the earliest offer was made, so long as that amount beats the eventual trial result. This emphasizes the underlying aim of Rule 9-1 to encourage settlement. An offering party

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16 *Vine* v. *Taylor,* 2018 BCSC 1025 at paras 25–32.

17 This reasoning has been followed in a number of cases (e.g., *Mitchell Estate* v. *Howard*, 2012 BCSC 1431; *P.H*. v. *Canada (Attorney General)*, 2016 BCSC 173; *Peace River Greenhouses Ltd*. v. *Taylor (District),* 2016 BCSC 1455; *Eccles* v. *Chilliwack (City)*, 2018 BCSC 2285) however there is some contrary authority. In *Bergen* v. *Gaetz,* 2016 BCSC 896 the court ruled that it could not consider an offer to settle that was withdrawn before trial and *Marwood* v. *Bumpercheck Identification Systems Inc.*, 2018 BCSC 16 a supplanted offer was not taken in account.

need not worry that it is postponing the time from which it may claim costs by attempting settlement on the basis of a revised proposal.

***What are the relative financial circumstances between the offeror and the offeree?*** The court may consider the financial impact of the cost award, sought by the applicant, on the respondent. According to the decision in *Ben-Yosef* v. *Dasanjh*, 2016 BCSC 1945 at paragraph 16, any submissions on this point must be substantiated with at least some evidence of what that impact would be.

## C. Preparing for the Application

Preparing submissions to the court under Rule 9-1 requires thorough and careful organization. As the court will be asked to assess the merits of an offer at the time it was open for acceptance, to succeed, one must be able to provide a 'snapshot in time' of the case as it then was, including the relevant evidentiary status and what was likely in the minds of the parties at the material time.[18]

Defending against an application for costs will require an explanation of what information was outstanding at the time of the offer and, further, how that information was critical to informing a decision about whether to accept or reject the offer. This will be more difficult in cases where liability has been admitted, as was demonstrated above in the "complex causation cases."

# VI. Conclusion

Rule 9-1 has been described as a comprehensive regime that provides for the exercise of broad discretion by the court guided by four permissive factors.[19] As we have noted, a number of other considerations can also be relevant, which has meant that the case law arising has been varied, fact-driven, and at time, contradictory. While the court's discretion under Rule 9-1 is constrained only by the costs options set out in Rule 9-1(5), the discretion is decidedly broad and growing. The factors set out in Rule 9-1(6) and the principle aims set out in *Giles, supra*, provide the court with expansive room to determine the appropriateness of costs. This makes outcomes frustratingly difficult to predict.

A central concept throughout the case law is reasonableness, the expression of which is highly contextual. While reasonableness may be defined by whether an offer to settle provided a genuine offer to settle to the other side, it is not determinative. Applicants and respondents ought to recognize the unpredictable nature of applications brought under Rule 9-1. Probability of success can be increased by aligning one's arguments with the statutory purpose behind the rule, namely the principles summarized in *Giles,* and by ensuring at the outset that the terms of the offer are unambiguous and not overreaching. In the case of self-represented litigants, in order to ensure clarity, it would be prudent to state the cost consequences that may follow the refusal of the relevant offer.

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18 However, see *Arsenovski* v. *Bodin*, 2016 BCSC 649 at paragraph 27, where it was the view of the court that it was usually a mistake to draw inferences as to what was unexpressed and in the minds of a party who was making or refusing a settlement offer as this could invite competing evidence to rebut such inferences.

19 *Roach* v. *Dutra,* 2010 BCCA 264 and in *Evans* v. *Jensen,* 2011 BCCA 279

As a result, applications for costs require an investment of time and expense in preparing informative and persuasive materials. That can be mitigated by counsel who keep themselves up to date and who are prepared to navigate the considerable case law that is routinely generated on this topic. Given the multifactorial analysis inherent in this exercise, while there is little certainty of outcome there is however considerable room for creative argument.

**Alexander DC Kask** is a partner at Guild Yule LLP where he practices in the areas of health law, municipal law, general insurance defence litigation, professional liability, and administrative law. He also has experience in product liability, commercial litigation, safety standards regulation, personal injury, and human rights law. He has represented clients at all levels of court in British Columbia and before various administrative tribunals. Alex was called to the British Columbia Bar in 2000 and has focused on civil litigation throughout his legal career. While in Law School he worked for the Royal Canadian Mounted Police as a Litigation Analyst. He is the author of five publications on the Japanese language and has worked as an interpreter and translator.

**Norika Takacs-Rehm** is an articled student at Guild Yule LLP. In her final semester at law school, Norika participated in a full-time Judicial Externship where she conducted legal research and writing for Judges at the Provincial Court. She was also the recipient of the Arthur Close, QC Prize in Advanced Legal Research. Prior to law school, she completed a Bachelor of Arts in Psychology from the University of British Columbia.