OFFERS TO SETTLE
IN THE FEDERAL COURT OF APPEAL AND IN THE FEDERAL COURT

Discussion Paper of the Rules Subcommittee on Offers to Settle

INTRODUCTION

The underlying purpose of the Rules dealing with offers to settle is to provide an incentive to encourage the early resolution of litigation. This results in the reduction of the costs of litigation to the parties, and at the same time, preserves judicial resources.

Parties are entitled to make and accept offers of settlement at any time before a judgment is issued and any written offer to settle will be considered by the Court in assessing the costs under Rule 400(3). In addition to this general rule, there is a need to create an incentive which promotes the early settlement of cases, optimally, before the beginning of the trial or hearing. This is the particular objective of Rules 419 to 421.

The Rules Committee wishes to ensure that these Rules are structured to achieve this objective in an effective manner. Concurring reasons in a recent decision of the Federal Court of Appeal, *The M.V. African Cape v. Francosteel Canada Inc.*, [2003] 4 F.C. 284, have prompted this inquiry. The Rules Committee has formed a subcommittee to look at this issue.

The Subcommittee on offers to settle considers that the best means of achieving this objective are to:

i) impose deterrent costs as of the date of service of a suitable offer to settle with the aim of encouraging parties to present their offers as soon as possible;

ii) require that offers to settle, which will attract the deterrent costs, be served at least a minimum number of days before the beginning of the trial or hearing to ensure that a party considers the offer before the trial or hearing begins;

iii) require that the offer to settle, which will attract the deterrent costs, be left open until the commencement of the trial or hearing and that the offer be accepted before that date; again this requirement stresses that the objective of Rule 420 is to prevent an unnecessary trial or hearing.

It has also been suggested that escalating costs clauses in offers to settle are causing some difficulty in the application of Rule 420.

This paper discusses possible amendments to the Rules that would respond to the concerns raised above and invites comments on Rules 419 to 421 and, more specifically, on the following possible amendments.

A. COSTS SANCTIONS

At present, Rule 420(1) and (2) provide for a regime of party-and-party costs up to the date of the service of the offer and double such costs thereafter to judgment, where the judgment is as favourable or more favourable than the offer to settle (in the case of a plaintiff making an offer) or is less favourable (in the case of a defendant making an offer). In addition, Rule 420(2)(b) provides that where a defendant has made an offer to settle, and the plaintiff fails to obtain judgment, the defendant is entitled to party-and-party costs to the date of service of the offer and to double such costs from that date to the date of judgment.

As mentioned, this Rule is meant to encourage the service of an offer as early as possible in the proceedings. However, it has been suggested that the costs sanctions in Rule 420 should be reconsidered so as to make the Rule more effective.

In particular, the first issue on which the Subcommittee seeks input is whether the current costs sanctions set out in Rule 420 are:

(I) too severe (for example: should costs be 1.5 times the party-and-party costs; see New Brunswick Rule 49.09);

(ii) insufficiently severe (for example: should the Rule provide for solicitor-client costs from the date of service of the offer like in Northwest Territories Rule 201(1)); or

(iii) appropriate given that in exceptional cases the Court has a discretion to order otherwise. ("[u]nless otherwise ordered...").

Discussion point **#1**

Is the level of costs sanctions provided in Rule 420 appropriate?

B. DEADLINE TO PRESENT AND TO ACCEPT AN OFFER THAT WILL ATTRACT THE SPECIFIC COSTS SANCTIONS PROVIDED IN RULE 420.

i) At present, Rule 420 contemplates that to attract the deterrent costs sanctions set out therein, an offer to settle must be open for acceptance until judgment is rendered. With the exception of the *Queen's Bench Rules of Saskatchewan*, there is no such requirement in any of the provincial rules dealing with similar costs sanctions.

The current Rule appears to create an imbalance in favour of the party to whom the offer is made by requiring that it remain open until judgment. This gives the party in receipt of an offer to settle an advantage in that it may wait until the end of the trial to ascertain the strength of the other party's case before accepting the offer. Such a situation also reduces the possibility that a matter will settle before the commencement of the trial or hearing. The Rule also penalizes the party making the offer because if the offer is accepted during the trial or hearing, the offeror, in most cases, cannot recover the trial costs already incurred (see: *African Cape, supra* at paras. 30-32 and the arguments made by counsel in *Gravel and Lake Services Ltd. v. Bay Ocean Management Inc.*, [2002] F.C.J. No. 357 at paras. 13-14 (T.D.) (QL).

The Subcommittee is considering adding a further incentive to settle before the commencement of the trial or hearing by deleting the requirement that the offer to settle remain open until judgment is rendered and by allowing the party making the offer to revoke it at the commencement of the trial or hearing. Thus, to attract the deterrent costs sanctions in Rule 420, a suitable offer to settle need only be left open until the beginning of the trial or hearing. (See for example: Ontario Rule 49.10, Manitoba Rule 49.10(1)(b), Prince Edward Island Rule 49.10(1)(b)).

ii) Furthermore, several provinces require that in order to attract the predictable costs sanctions provided for in their rules, offers of settlement must be made at least a specified number of days before the commencement of the trial or hearing. (See for example: Ontario Rule 49.10, Manitoba Rule 49.10, New Brunswick Rule 49.03, Nova Scotia Rule 41A.09, Prince Edward Island Rule 49.10, Northwest Territories Rule 195.) Again, this is to ensure that the other party has sufficient time to duly consider the offer before the commencement of the trial or hearing.

The Federal Court has often read-in or imposed such a time requirement on the party which has made an offer and subsequently seeks to apply Rule 420. (See for example: *Sanmammas Compania Maritima S.A. v. Netuno (The)*, [1995] F.C.J. No. 1442 at para. 28 (T.D.) (QL); *Gravel, supra* at paras. 19- 21, 24; and *Kirgan Holding S.A. v. Panamax Leader (The)*, [2003] F.C.J. No. 124 (T.D.)(QL)

at paras. 14-21). Thus, the absence of a specific deadline in Rule 420 reduces its effectiveness by making its application unpredictable at times.

The Subcommittee seeks comments on what the appropriate minimum period of time to present an offer to settle which would attract the deterrent costs sanction in Rule 420 should be (see for example: in Ontario, British Columbia, Manitoba and Nova Scotia, a minimum of seven (7) days is required, while in New Brunswick and the Northwest Territories, the minimum period is ten (10) days).

iii) Moreover, Rule 420 could specify that it applies to offers to settle which have not been accepted (see for example: Ontario Rule 49.10). The Rule could also stipulate that it applies to such offers to settle "that have not been accepted before the beginning of the trial or hearing" (see for example: Nova Scotia Rule 41A.09). This requirement would make it clear, once again, that whether or not the party making the offer decides to leave it open during the trial, the party who protracts the litigation by failing to accept a suitable offer before trial should be penalized.

That being said, it is also desirable to encourage settlement during the trial and any offer to settle accepted during that period would still be considered by the Court pursuant to Rule 400(3). The Court could, in its discretion, apply similar costs sanctions (see: *African Cape, supra*). However, the predictable costs sanctions set out in Rule 420 should deal only with offers that prevent the holding of the trial or hearing. Even if the Court continues to retain a discretion in the application of Rule 420 ("[u]nless otherwise ordered"), such discretion should only be exercised in exceptional circumstances so as not to reduce the predictability provided by the Rule.

***Discussion points* # 2-4**

What specific minimum number of days before the commencement of trial or hearing should be specified for the service of an offer to settle to attract the cost consequences set out in Rule 420 (7, 10 or more)?

Are there any specific problems with the proposal to stipulate that offers to settle must be open for acceptance until the beginning of the trial or hearing and must have been accepted by that date?

Do you have any other suggestions to make the Rule more effective in promoting settlement before the beginning of the trial or hearing?

C. ESCALATING COSTS CLAUSES

It has been suggested that escalating costs clauses in offers to settle are causing difficulties in the application of Rule 420. The Civil Rules Committee of Ontario is contemplating changes to Rule 49 to respond to issues arising from the inclusion of escalating costs clauses in offers to settle. The work of the Ontario Committee is of great assistance. Potential problems with such clauses were referred to in a recent decision of the Federal Court (see: *Gravel, supra*).

The concern is that escalating costs clauses in an offer to settle may cause the offeror to lose the benefit of having made the offer to settle because the offer will fall short of the amount in capital and costs awarded by the Court. As mentioned, it is difficult to accurately assess costs by anticipation. These provisions can also be quite complex and their impact on the quantum of the offer difficult for the Court to assess. As a result, the party making the offer may not be able to successfully argue that the costs sanctions under Rule 420 should be imposed.

A solution might be to enable the parties to make offers which do not deal with costs at all. A new Rule 420.01 could be added that would dispose of the costs in such cases. It would provide that if the plaintiff is the offeror, he would be entitled to party-and-party costs up to the date of service and to double such costs between that date and the date of acceptance of the offer. When the defendant is the offeror, a successful plaintiff would be entitled to costs on a party-and-party basis only up to the date of the offer. This new provision would respond to some concerns that the present costs sanctions unduly favour defendants; defendants would no longer be awarded costs in these specific circumstances.

The new Rule 420.01 would then provide that if those offers were not accepted, the Court would assess whether the costs sanctions of Rule 420 should apply by comparing the amount offered (capital and interest) with the amount in capital and interest awarded by the judgment.

This would preserve the right of the parties to make offers with respect to costs on a different basis than that provided in the Rules, knowing that they would then have to deal with the problems outlined above. At the same time, it would provide a solution for those who prefer predictability (see: *Gravel, supra*).

***Discussion points* # 5-6**

Are escalating costs provisions creating difficulties in the application of Rule 420?

Is the solution outlined above suitable?

Comments should be submitted in writing by April 8, 2004 to:

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