THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
The Voice of the Legal Profession
La voix de la profession juridique

April 8, 2004

Ms. Éloïse Arbour
Secretary of the Rules Committee
Federal Court of Appeal
Ottawa ON K1A 0H9

Dear Ms. Arbour:

Re Discussion Paper on Offers to Settle

I write on behalf of the Canadian Bar Association to provide comments on the *Discussion Paper of the Rules Subcommittee on Offers to Settle* published on March 11, 2004. Members of the Aboriginal Law, Administrative Law, Civil Litigation, Intellectual Property Law, and Maritime Law Sections of the CBA prepared these comments. All have extensive experience before the Federal Court.

The CBA welcomes the Discussion Paper on offers to settle and agrees that the underlying purpose of the Rules dealing with offers to settle is to provide an incentive to encourage the early resolution of litigation. Our view is that a primary purpose of the costs sanctions imposed by Rule 420 ought to encourage settlement of actions prior to trial.

A. COSTS SANCTIONS

Discussion point #1

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

Our consensus is that the current cost sanctions as set out in Rule 420 are appropriate. "Double party-and-party costs" provides enough client incentive to achieve the objective of a careful evaluation of the offer, without the adverse effect of intimidating a less affluent party into accepting an otherwise wholly unacceptable offer.

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In our view, the discretion of the Court to "otherwise order" incorporates an appropriate balance and safeguard, ensuring that in egregious cases a party may seek higher cost sanctions.

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

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)?

Our general consensus is that offers to settle that will automatically attract the cost consequences of Rule 420 should be served a minimum of 14 days prior to the commencement of the trial. We are of the view that requiring service 7 or 10 days prior to trial is not appropriate because much of the trial preparation will already have been completed by this time. Moreover, within the specific context of Federal Court actions, it is frequently the case that litigants are non-residents (this is especially true for admiralty and intellectual property) and where non-resident parties are involved it can take longer to communicate and negotiate offers and their acceptance.

Although we prefer a rule requiring service of offers to settle 14 days prior to the commencement of trial, we are also of the opinion that settlement offers made out of time should not be ignored by the Court. In appropriate circumstances such offers should be taken into account by the Court when making costs awards under Rule 400.

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?

Our general consensus is that offers to settle that will automatically attract the cost consequences of Rule 420 need not remain open for acceptance until judgment. Our view is that a primary purpose of the costs sanctions imposed by Rule 420 ought to encourage settlement of actions **prior** to trial. A rule that preserves the costs consequences of early offers but which allows the automatic withdrawal of offers upon the commencement of the trial encourages parties to give serious consideration to offers prior to trial. The present rule does not necessarily encourage settlement of actions prior to trial. Moreover, as was pointed out by the Rules Subcommittee, the present rule can penalize the party making the offer when the offer is accepted during the course of the trial.

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

We are of the view that any amendment to the current rules should retain a discretionary power in the Court so it can make orders appropriate to the circumstances. This is one of the strengths of the current Federal Court Rules. The costs consequences of Rule 420 apply "Unless otherwise

ordered by the Court". Likewise, Rule 400(3)(e) allows the Court to take into account "any written offer" when making costs orders. Any amendments to the rules regarding offers to settle should not do away with this discretion. There may be circumstances in which the costs consequences dictated by Rule 420 should not automatically follow and the Court must have the discretion to deal with them appropriately. Similarly, there may be situations in which the costs consequences of Rule 420 are not invoked but the circumstances are such that increased costs are called for. This could be the case where a clear verbal offer is made or where a written offer is made but is defective in some minor particular or, perhaps, is one day late. We are of the view that, notwithstanding the rules on settlement offers, it is important for the Court to retain an over-riding discretion in the matter of costs.

Discussion points # 5&6

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

Is the solution outlined suitable?

We agree that the current application of Rule 420 is causing difficulties. One of the negative consequences of Rule 420 is that some parties are reluctant to put in an offer to settle, as the costs consequences may be too severe. In some instances, parties who are making offers to settle are doing so on the basis that the costs will be assessed at a future date.

The proposed new rule 420.01 would permit the parties to make offers to settle that do not deal with costs at all. This proposal is acceptable. We also recommend that the Court should retain the ultimate discretion to make appropriate costs awards.

We thank you for the opportunity to present the views of the CBA on the issue of offers to settle.

Yours truly,

(Original signed by Trevor Rajah for Martin Mason)

Martin Mason
Chair
Federal Court Bench and Bar Liaison Committee