

*gla*

Date: 2001 07 26  
Docket: CV 06908

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LYNDON ANDERSON

Plaintiff

- and -

BUFFALO AIRWAYS LTD.

Defendant

MEMORANDUM OF JUDGMENT

[1] The plaintiff's within lawsuit against his former employer was dismissed following trial on September 11-13, 2000. Leave was granted to counsel to speak to costs as deemed necessary.

[2] The defendant now applies for costs beyond normal party and party costs.

[3] The basis on which this application is founded is an offer to settle made by the defendant shortly before the trial. That offer was contained in a letter from defendant's counsel to plaintiff's counsel *via* facsimile transmission at 4:50 p.m. Yellowknife time on Friday, September 8, 2000. The trial commenced on Monday, September 11, 2000. In the letter the defendant offered to settle the lawsuit by payment of \$25,000.00 to the plaintiff inclusive of interest and costs.

[4] The trial was of a duration of two and a half days, with four witnesses testifying.

[5] Defendant's counsel acknowledges that, because of the eleventh hour timing of the offer, he cannot rely on the provisions of Rule 201:

201(1) A plaintiff who makes an offer to settle at least 10 days before the commencement of the hearing is entitled to party and party costs to the day on which the offer to settle was served and solicitor and client costs from that day where

- (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the defendant; and
- (b) the plaintiff obtains a judgment on terms as favourable as or more favourable than the offer to settle.

(2) Where a defendant makes an offer to settle at least 10 days before the commencement of the hearing, the plaintiff is entitled to party and party costs to the day on which the offer was served and the defendant is entitled to solicitor and client costs from that day if

- (a) the offer to settle is not withdrawn, does not expire before the commencement of the hearing and is not accepted by the plaintiff; and
- (b) the plaintiff obtains a judgment on terms as favourable as or less favourable than the terms of the offer to settle.

[6] Indeed, Rule 195 makes this clear:

195. Where an offer to settle is made less than 10 days before the day on which the trial or hearing is commenced, the costs consequences set out in rule 201 do not apply unless the offer to settle is accepted before the commencement of the trial or hearing.

[7] Nevertheless, the defendant submits that as costs are in the ultimate discretion of the Court pursuant to Rule 206 and Rule 643, it is still open to the Court to award enhanced costs consequential on a litigant's refusal to accept a reasonable offer prior to trial.

[8] At 3:00 p.m. Yellowknife time on Friday, September 8, 2000, the defendant had made an application to adjourn the trial scheduled to commence September 11. That application was denied. On that application there was evidence that the plaintiff, by then a Calgary resident, had already travelled to Yellowknife in preparation for commencement of the trial.

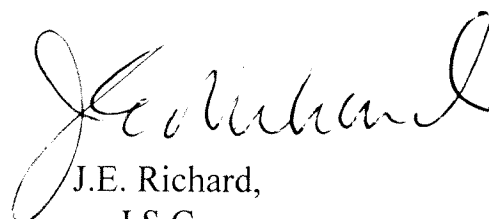
[9] In order for a litigant to become entitled to any benefit (such as double costs or solicitor-client costs) for making an offer to settle the litigation, the other party must be offered a reasonable time to reflect upon and make a decision about an offer of settlement. *Herman v. Miller*, [1988] 2 W.W.R. 72 (Sask.Q.B.); *Haynes v. Fontaine* (1980), 19 B.C.L.R. 51 (B.C.S.C.). What is a reasonable time depends on the circumstances of each case.

[10] Shortness of time is not an irrelevant consideration. In this regard, it is significant that the 10-day provision was specifically included in Rule 201 when that rule was enacted in 1996. This distinguishes the present case from *Larouche v. Shaw*, [1981] A.J. No. 544 (Alta.C.A.).

[11] In the present case, the time allowed (the weekend) was minimal. The plaintiff was simply not afforded a reasonable opportunity to consider the offer prior to trial. By the time the offer was made, the plaintiff had already incurred transportation expenses to Yellowknife, had just successfully defended a last-minute attempt to adjourn the trial, and was in the midst of pretrial preparations.

[12] Accordingly, the application for enhanced costs is denied. The defendant shall be entitled to its party and part costs, in Column 5.

[13] There shall be no costs of the within application.

  
J.E. Richard,  
J.S.C.

Dated at Yellowknife, NT,  
this 26th day of July 2001

Counsel for the Plaintiff: Sheila MacPherson  
Counsel for the Defendant: Robert Kasting

CV 06908

---

IN THE SUPREME COURT OF  
THE NORTHWEST TERRITORIES

---

BETWEEN:

LYNDON ANDERSON

Plaintiff

- and -

BUFFALO AIRWAYS LTD.

Defendant

---

MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE J.E. RICHARD

---

