

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOSEPH HESS, SOPHIE AVINGAQ, MELISSA HESS, NUQLU HESS,  
FREDERICK HESS by his next friend, JOSEPH HESS, and  
JACOB HESS by his next friend, JOSEPH HESS

Plaintiffs

- and -

TOWN OF IQALUIT and ROCH LESSARD INCORPORATED

Defendants

- and -

NUNASTAR PROPERTIES INC. and 902776 N.W.T. LIMITED

Third Parties

MEMORANDUM OF JUDGMENT

[1] The within proceeding is an action for damages arising out of a motor vehicle accident which occurred in Iqaluit in August 1995. Following trial in May 2010, for reasons stated at 2010 NWTSC 62, the Court determined:

- (a) that both the plaintiff and the defendants were negligent, and liability was apportioned 75% to the plaintiff, and 25% to the defendants;
- (b) that general damages were assessed at \$5,000.00 and special damages at \$18,235.15;
- (c) that the plaintiff accordingly have judgment in the amount of \$5,808.79; and,
- (d) that counsel provide written submissions on the matter of costs.

[2] I have now received and considered counsel's submissions with respect to costs.

[3] Notably, the defendants, on three separate occasions prior to the commencement of trial, offered to settle the within litigation:

- (a) by letter of October 14, 2008 (nineteen months prior to trial) the defendants offered to settle for \$25,000.00;
- (b) by letter of May 9, 2010 (seventeen days prior to trial), the defendants offered to settle for \$50,000.00; and,
- (c) by a written Offer to Settle dated May 17, 2010 (nine days prior to trial) the defendants offered to settle for \$75,000.00. This Offer was open for acceptance until May 21, 2010 (four days prior to trial).

[4] None of these offers were accepted by the plaintiff.

[5] As can be seen, the judgment obtained by the plaintiff at trial is less favourable than the terms of each of the Offers to Settle. It is primarily for this reason that the defendants seek costs of this proceeding.

[6] It is clear from the *Rules of Court* (Rules 193 - 206, Rule 643) and from jurisprudence on the topic that the Court's discretion in the awarding of costs includes the power to use costs to encourage parties to settle litigation and to sanction litigants' behaviour which increases the duration and expense of litigation. See *British Columbia (Minister of Forests) v. Okanagan Indian Band* 2003 SCC 71; *Fallowka v. Royal Oak Ventures* 2008 NWTCA 9; *Mangelana v. McFadzen* 2005 NWTSC 54.

[7] A reading of subrule 201(2) indicates the type of severe cost consequences that can flow from a situation similar to the situation of the plaintiff in the within proceeding:

- 201 (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.

*(Emphasis added)*

[8] In their within application for costs of these proceedings the defendants do not rely specifically on Rule 201. In the May 9, 2010 offer, the defendants conclude by stating “this offer will be made as a formal offer to settle pursuant to Rule 201” - presumably that was not done. As for the May 17, 2010 Offer to Settle, a) it was not made outside the 10 day period contemplated by Rule 201(2), and b) it expired before the commencement of the trial; hence Rule 201(2) is not, strictly speaking, applicable.

[9] The defendants do submit, however, that the defendants “should be entitled to enhanced party - party costs by virtue of the individual and combined effect of all three offers”.

[10] As stated earlier, the Court has a discretion to award costs consequential on a litigant's refusal to accept a reasonable offer made in a reasonable time prior to trial.

[11] In the circumstances of this case, the offer to settle made by the defendants in the letter of May 9, 2010 was reasonable, and was made at a time when the plaintiff and his counsel were aware of all of the available evidence and were able to reflect upon and make a reasoned decision on that offer.

[12] Accordingly, I direct that the plaintiff is entitled to party - party costs up to and including May 9, 2010, and the defendants are entitled to party - party costs of these proceedings subsequent to May 9, 2010. The plaintiff's judgment and costs are offset against the defendants' award of costs.

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

Dated at Yellowknife, NT  
this 3<sup>rd</sup> day of November 2010

Counsel for the Plaintiff: Hugh Latimer  
Counsel for the Defendants: Sheila MacPherson

S-1-CV 07218

---

IN THE SUPREME COURT OF  
THE NORTHWEST TERRITORIES

---

BETWEEN:

JOSEPH HESS, SOPHIE AVINGAQ, MELISSA HESS,  
NUQLU HESS, FREDERICK HESS by his next friend,  
JOSEPH HESS, and JACOB HESS by his next friend,  
JOSEPH HESS

Plaintiffs

- and -

TOWN OF IQALUIT and ROCH LESSARD  
INCORPORATED

Defendants

- and -

NUNASTAR PROPERTIES INC. and  
902776 N.W.T. LIMITED

Third Parties

---

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

---