

# SPECIAL COSTS FOR SPECIAL OCCASIONS INCLUDING BREACH OF SETTLEMENT AGREEMENT

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In a recent decision, *Shewchuk v. IBM Canada Limited*, 2017 BCSC 2211, the British Columbia Supreme Court ordered IBM Canada to pay special costs for its conduct following the company's breach of a settlement agreement with Steven Shewchuk, a former employee. Special costs are an extraordinary remedy granted by the court where there has been misconducts by the unsuccessful party deserving of rebuke.

In June 2016, Mr. Shewchuk received notice from IBM dismissing him from his employment. Shortly thereafter, Mr. Shewchuk commenced a claim against IBM for wrongful dismissal. The claim was settled on the eve of summary trial. The terms of the settlement had been agreed to, and counsel for the parties were in the final stages of arranging for payment and executing documents to end the matter. In one letter, Mr. Shewchuk's counsel misstated a figure. He quickly informed IBM in a follow-up letter of the error. The error was minor and did not impact the agreed upon net payable amount of the settlement, which was correctly stated in both the original and follow-up letter. IBM's counsel did not acknowledge the letter or the correction, but about a month later delivered to Mr. Shewchuk's counsel a cheque in apparent satisfaction of the settlement. The amount, however, was \$5,250 less than he was entitled to pursuant to their agreement.

Mr. Shewchuk's counsel wrote a number of unanswered emails to counsel for IBM requesting that they rectify their error and pay the full amount agreed upon in the settlement agreement. IBM eventually replied and stated that they refused to pay the difference on the basis that Mr. Shewchuk would be able to recover the deficit upon filing his tax returns in 2018. Unsatisfied with IBM's response, Mr. Shewchuk's counsel commenced a court action to recover the outstanding amount owing pursuant to the settlement agreement. A month later, IBM delivered a cheque to Mr. Shewchuk's counsel for the outstanding \$5250.

Mr. Shewchuk's counsel pursued the court action, seeking a declaration that IBM had breached the settlement agreement and special costs on account of IBM's actions. Justice Voith agreed and found that IBM acted in a "high-handed manner in repeatedly failing to respond to correspondence it had received." Justice Voith also noted that there was no basis for IBM's claim that the modest error, that did not impact the net payable amount, caused confusion to the degree that IBM's actions were justified. In fact, he stated that IBM's "ongoing fixation on a modest error...[was] not forthright or believable" and that there was no reasonable

explanation for IBM's continued reliance on an error that had been corrected. Justice Voith went on to say that IBM had lacked candour and forthrightness in its dealings, and their conduct had wrongfully caused financial stress on Mr. Shewchuk's already strained financial situation. In all of the circumstances, Justice Voith considered IBM's action to be "reprehensible" in the "broad sense of the word."

The decision is an indication from the court that sophisticated commercial entities are expected to quickly and efficiently fulfill their settlement obligations. If there is any confusion regarding these obligations, parties have a duty to seek and provide clarity quickly and candidly. Unsubstantiated allegations of confusion and error will not provide relief for failure to fulfill settlement obligations and the dilatory party may face an award of special costs for their actions.

by Ruth Nieuwenhuis and Grace Shaw, Articled Student

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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