

# Settlement Essentials

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## OBA Settlement Essentials - Rule 49 Offers

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**Table of Contents**

<b>1.</b>	<b>Introduction .....</b>	<b>1</b>
<b>2.</b>	<b>Understanding the purpose of the rule and the general principles.....</b>	<b>1</b>
<b>3.</b>	<b>Essential terms and conditions.....</b>	<b>2</b>
	(a) Where available .....	2
	(b) Formal requirements of a Rule 49 offer .....	3
	(c) Timing requirements of a Rule 49 offer.....	4
	(d) Substantive requirements of a Rule 49 offer .....	5
	(i) Certainty.....	5
	(ii) Compromise.....	6
	(e) Disclosure of an offer to the court .....	6
<b>4.</b>	<b>Strategic Considerations.....</b>	<b>7</b>
	(a) When to make a Rule 49 offer .....	7
	(b) Making a common law offer as a strategic alternative to a Rule 49 offer .....	8
	(c) Making common law offers concurrently with Rule 49 offers.....	9
	(d) Selling your settlement offer to the offeree .....	9
<b>5.</b>	<b>Cost Consequences: Determining if the Court’s Judgment is as or more Favourable to the Offeror than its Unaccepted Rule 49 Offer .....</b>	<b>10</b>
	(a) Comparability .....	10
	(b) Escalating terms: offers with an ongoing costs or prejudgment interest component .....	11
	(c) Avoid Making a Rule 49 Offer that is an “All-Inclusive Sum” .....	13
<b>6.</b>	<b>Expiry of a Rule 49 Offer .....</b>	<b>14</b>
<b>7.</b>	<b>Withdrawal of a Rule 49 Offer .....</b>	<b>15</b>
<b>8.</b>	<b>Acceptance of a Rule 49 Offer .....</b>	<b>16</b>
	(a) Costs on Acceptance .....	16
	(b) Requiring a release as a term of the Rule 49 Offer .....	17
	(c) Consequences of failing to comply .....	18
<b>9.</b>	<b>Conclusion and Practice Points .....</b>	<b>18</b>
	<b>Annotated Sample of Rule 49 Offer to Settle .....</b>	<b>21</b>
	<b>Rules of Civil Procedure – Rule 49 Offer to Settle.....</b>	<b>25</b>

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## 1. Introduction

Over 96% of civil cases in Ontario settle before trial.<sup>1</sup> Settlements are therefore commonly encountered in a litigation practice at various stages of a matter.

Rule 49 of the *Rules of Civil Procedure* governs all aspects of offers to settle made in writing at various stages of the civil process.<sup>2</sup> An understanding of the mechanics of Rule 49 is important to competently and thoroughly advise your client on i) what constitutes an offer to settle, ii) when to make a formal offer under the *Rules* and iii) how to proceed when served with a Rule 49 offer to settle. Knowing how Rule 49 applies to settlement offers is even more important against the backdrop of rule 3.2-4 of the *Rules of Professional Conduct*, which requires lawyers to encourage their clients to settle whenever possible on a reasonable basis.<sup>3</sup>

## 2. Understanding the purpose of the rule and the general principles

The purpose of Rule 49 is to encourage parties to end litigation more quickly and cost-effectively than by judgment of a court following trial by incentivizing them to make reasonable offers to settle and imposing cost consequences on those who do not reasonably assess the value of their case and accept reasonable offers to settle.<sup>4</sup>

Rule 49.10(1) provides that where a plaintiff makes an offer to settle at least seven days before the commencement of the hearing, which is not accepted by the defendant, and is not withdrawn and does not expire before the hearing, and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs up to the date the offer was served, and substantial indemnity costs from that date, unless the court orders otherwise.<sup>5</sup> Similarly, where an offer to settle is made as above by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date the offer was served, and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise.<sup>6</sup>

Rule 49 is intended to encourage litigants to make and accept reasonable settlement offers, thus discouraging parties from using the judicial process to delay judgment and increase costs unnecessarily.<sup>7</sup> The purpose of Rule 49 is aligned with the principle of interpretation articulated in rule 1.04(1), which encourages the liberal construction of all of the *Rules of Civil Procedure* “to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.”<sup>8</sup>

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<sup>1</sup> Speech by the Honourable Warren K Winkler, former Chief Justice of Ontario (12 September, 2007) at the University of Ottawa Faculty of Law,

<http://www.ontariocourts.ca/coa/en/ps/speeches/civiljusticereform.htm>

<sup>2</sup> *Rules of Civil Procedure*, RRO 1990, Reg 194, rr. 49.01-49.14.

<sup>3</sup> The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: LSUC, 2015, s. 3.2-4.

<sup>4</sup> *Data General (Canada) Ltd v Molnar Systems Group Inc*, 1991 CarswellOnt 402 at para 27, 1991 CanLII 7326 (CA); *Lawson v Viersen*, 2012 ONCA 25 at para 20; *McDougall v McDougall*, 1992 CarswellOnt 433 at para 13, 1992 CanLII 7568 (Ont Ct J (Gen Div)).

<sup>5</sup> *Rules of Civil Procedure*, r. 49.10(1).

<sup>6</sup> *Rules of Civil Procedure*, r. 49.10(2).

<sup>7</sup> *Data General (Canada) Ltd v Molnar Systems Group Inc*, 1991 CarswellOnt 402 at para 27, 1991 CanLII 7326 (CA).

<sup>8</sup> *Rules of Civil Procedure*, r. 1.04(1)

### 3. **Essential terms and conditions**

#### **(a) *Where available***

Rule 49 applies to offers to settle made in respect of actions, applications, counterclaims, third party claims, crossclaims and motions.<sup>9</sup> A plaintiff, defendant, applicant or respondent to a proceeding can serve on any other party an offer to settle one or more claims in the proceeding on specified terms.<sup>10</sup>

When a Rule 49 offer is made in the context of a motion, the moving party is the “plaintiff” and the responding party is the “defendant” for the purposes of assessing the offer and cost consequences.<sup>11</sup> A crossclaiming defendant is treated in the same way as a plaintiff for the purpose of Rule 49 offers to settle, and a party in the position of being a defendant against whom a crossclaim is being made, is treated as a defendant for the same purpose.<sup>12</sup>

Like offers to settle made by plaintiffs and defendants, offers in the context of a crossclaim should be clear and unambiguous as to the crossclaim to which they pertain, and to whom the offer is being made.<sup>13</sup>

In a case involving multiple defendants, the plaintiff can offer to settle with any defendant, but the cost consequences in rule 49.10 may not apply where the defendants are alleged to be jointly or jointly and severally liable and rights of contribution or indemnity may exist between the defendants.<sup>14</sup> Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff, any defendant may serve an offer to contribute on any other defendant. Courts can take offers to contribute into account in determining whether another defendant should be ordered to pay costs of the defendant who made the offer or indemnify that defendant for any costs that defendant is liable to pay to the plaintiff.<sup>15</sup>

The same parties who can make an offer to settle can accept it. Exceptionally, while parties under disability can make, withdraw and accept an offer to settle, the settlement must be approved by a judge under rule 7.08 before it will be binding on the parties.<sup>16</sup> However, where an offer to settle is made by a party under disability through their litigation guardian, and is accepted once that party is no longer under disability, it need not be approved by a judge.<sup>17</sup>

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<sup>9</sup> Rule 49.02(1) states that a party to a “proceeding” may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle. Rule 49.14 explicitly extends the application of rr. 49.01 to 49.13 to counterclaims, crossclaims and third party claims, with “necessary modifications.” Rule 49.02(2) states that sub-rule 49.02(1) and rr. 49.03 to 49.14 also apply to motions, with “necessary modifications”.

<sup>10</sup> Rule 1.03 defines a “proceeding” to mean an action or application. Rule 49.01 defines a “defendant” to include a respondent and a “plaintiff” to include an applicant, for the purposes of rr. 49.02 to 49.14. Interpreting r. 49.02(1), courts have confirmed that the offer to settle need not encompass all the claims in the action (see, e.g., [Visneskie v Visneskie](#), 2003 CarswellOnt 1335, 2003 CanLII 2264 (SC)).

<sup>11</sup> See e.g., *Lawyers’ Professional Indemnity Co v Geto Investments Ltd*, 2002 CarswellOnt 769 (SC); *Burmi v Dhiman*, 2001 CarswellOnt 2195 (SC); [Ford v F. Hoffman-La Roche Ltd](#), 2005 CarswellOnt 7599, 2005 CanLII 46753 (Div Ct).

<sup>12</sup> *Tan (Litigation Guardian of) v Diamanti*, 1995 CarswellOnt 1010 (Ont Ct J (Gen Div)).

<sup>13</sup> *Tan (Litigation Guardian of) v Diamanti*, 1995 CarswellOnt 1010 (Ont Ct J (Gen Div)).

<sup>14</sup> *Rules of Civil Procedure*, r. 49.11. The implications of this rule are discussed in more detail under “Cost consequences”, below.

<sup>15</sup> *Rules of Civil Procedure*, r. 49.12.

<sup>16</sup> *Rules of Civil Procedure*, rr. 49.08 and 7.08.

<sup>17</sup> [Mills v Raymond](#), 1997 CarswellOnt 4075, 1997 CanLII 16258 (Ont Ct J (Gen Div)).

**(b) Formal requirements of a Rule 49 offer**

To be a Rule 49 offer, an offer to settle must:

1. be in writing;
2. be effectively delivered to the opposing party;
3. be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted.<sup>18</sup>

The first requirement precludes oral offers to settle from the Rule 49 regime.<sup>19</sup> The purpose of this requirement is “to encourage the making of clear and unequivocal offers which can then be measured against the ultimate outcome of a case in the event that settlement does not occur.”<sup>20</sup> Requiring that Rule 49 offers be in writing helps to promote certainty and efficiency by allowing the parties and the court to easily determine the terms and decide whether the offer has been accepted or withdrawn.<sup>21</sup>

A Rule 49 offer need not be set out in Form 49A; it can be set out in a letter, or may be communicated in email correspondence between counsel.<sup>22</sup>

Provided that the offer comes to the attention of the other party or their lawyer, it will likely be found to have been “effectively delivered.”<sup>23</sup> In one case, the plaintiff served the defendant’s adjuster rather than the defendant’s solicitor of record, but the court held that the offer met the requirements of Rule 49 because the service did not create any difficulty or confusion.<sup>24</sup>

Importantly, if an offer to settle has the above features (in writing, effective delivery, a proposal that can be construed as an offer to settle), it may be presumed to be a Rule 49 offer unless expressly stated otherwise, or unless the offeror can show that s/he did not intend the offer to be a Rule 49 offer.<sup>25</sup> The presumption reflects the policy underlying the introduction of Rule 49, which is to encourage parties to make reasonable offers to settle but to prevent them from later renegeing on those offers without consequence:

Parties should not be at liberty to put forward a proposal which may later enable them to claim the benefits of [Rule 49] but, which at the same time (unless they specifically bargain for it), allows them to escape the

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<sup>18</sup> *Clark Agri Service Inc v 705680 Ontario Ltd*, 1996 CarswellOnt 2889 at para 4 (Ont Ct J (Gen Div)).

<sup>19</sup> *John Logan Chevrolet Oldsmobile Inc v Baldwin*, 1994 CarswellOnt 544 at paras 10-17 (Ont Ct J (Gen Div)). The court in this case held that an oral offer to settle would not qualify under Rule 49 even if the offeree confirmed the offer in writing afterwards. See also, [Veilleux v Ranger](#), 1995 CarswellOnt 1729, 1995 CanLII 7131 (SC).

<sup>20</sup> [Bernstein v Poon](#) 2015 ONSC 2125 at para 47.

<sup>21</sup> Gavin J Tighe, “Rule 49 – Offers to Settle” (2000) 22 Adv Q 500 at 502.

<sup>22</sup> *Clark Agri Service Inc v 705680 Ontario Ltd*, 1996 CarswellOnt 2889 at para 4 (Ont Ct J (Gen Div)).

<sup>23</sup> See for e.g., [Matthew Brady Self Storage Corp v InStorage Limited Partnership](#), 2014 ONCA 858, where the offer to settle was sent by email to the defendant directly from the plaintiff and not copied to their lawyers. The court found this was not a nullity because the offer came to the lawyers’ attention, and in any event, the defendant responded with its own offer to settle.

<sup>24</sup> [Igbokwe v HB Group Insurance](#), 2001 CarswellOnt 2689 at para 11, 2001 CanLII 3804 (CA).

<sup>25</sup> *Clark Agri Service Inc v 705680 Ontario Ltd*, 1996 CarswellOnt 2889 (Ont Ct J (Gen Div)) citing [McDougall v McDougall](#), 1992 CarswellOnt 433, 1992 CanLII 7568 (SC). See also, [Lindsay Paper Box Co v Shubert International Manufacturing](#), 1992 CarswellOnt 1101, 1992 CanLII 7520 (Gen Div).

binding consequences of such an offer by taking the position that it has been overtaken by subsequent events and has ceased to be operative.<sup>26</sup>

The above presumption is also important because as discussed below, Rule 49 offers and non-Rule 49 or common law offers have different mechanics in terms of withdrawal, counter-offers and rejection of an offer.

**(c) Timing requirements of a Rule 49 offer**

A Rule 49 offer can be made “at any time”, but in order to trigger the cost consequences of rule 49.10, the offer must be served:

- i) after the commencement of the legal proceeding to which the offer relates; but
- ii) not less than 7 days before the commencement of the hearing (rule 49.03).

An offer made before litigation has commenced is not a valid Rule 49 offer.<sup>27</sup> This is consistent with the requirement of rule 49.02 which provides that a *party to a proceeding* may serve a Rule 49 offer.

For the purpose of Rule 49, the “commencement of the hearing”, whether it is a trial or other type of hearing, is on the first day of evidence, not jury selection, opening statements and rulings on objections.<sup>28</sup>

However, courts have shown flexibility in the requirement that the Rule 49 offer be made no less than 7 days before the commencement of the hearing. Rule 49.13 provides: “Despite rules 49.03 [Time for Making Offer], 49.10 [Cost Consequences of Failure to Accept] and 49.11 [Multiple Defendants], the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.”<sup>29</sup> The policy reflected in rule 49.13 is that offers to settle should in some instances be saved if they comply with the spirit of Rule 49, despite being technically non-compliant in one or more ways.<sup>30</sup>

Therefore, even if a Rule 49 offer is made less than 7 days before the hearing, the court may still take the offer into consideration in exercising its discretion on costs under rule 49.13, including whether to grant the benefits of rule 49.10 regardless.<sup>31</sup> In *Kagal v Tessler*,<sup>32</sup> for example, the plaintiffs made an offer only 5 days before the commencement of trial and, at trial, obtained a more favourable judgment than the offer. Despite the offer not complying with the 7-day deadline under rule 49.03, the court exercised its discretion under rule 49.13 to award the plaintiffs its substantial indemnity costs as incurred after the date of the offer – effectively granting the plaintiffs the cost consequences of rule 49.10.

*Williams v Wai-Ping* provides a further example. The court agreed to exercise its discretion where the plaintiff’s Rule 49 offer was served 104 minutes after the seven day cut-off, but within 24 hours of receiving notice that the defendant intended to bring a motion.<sup>33</sup> A party’s failure to serve its offer at least

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<sup>26</sup> [McDougall v McDougall](#), 1992 CarswellOnt 433 at para 14, 1992 CanLII 7568 (SC).

<sup>27</sup> [Buccilli v Pillitteri](#), 2014 ONCA 337 at para 24. See also [Scanlon v Standish](#), 2002 CarswellOnt 128 (CA), 2002 CanLII 20549 at para 22.

<sup>28</sup> [Elbakhiet v Palmer](#), 2014 ONCA 544; [Capela v Rush](#), 2002 CarswellOnt 1162 (SC).

<sup>29</sup> *Rules of Civil Procedure*, r. 49.13..

<sup>30</sup> [Elbakhiet v Palmer](#), 2014 ONCA 544 at para 33, [Lawson v Viersen](#), 2012 ONCA 25 at para 46

<sup>31</sup> [Mora v Mora](#), 2011 ONSC 3479 at para 7.

<sup>32</sup> [Kagal v Tessler](#), 2003 CarswellOnt 312 (SC), 2003 CanLII 7272.

<sup>33</sup> [Williams v Wai-Ping](#), 2005 CarswellOnt 2741 (SC).

7 days before the hearing is therefore not necessarily fatal to the applicability of rule 49.10's cost consequences.

The court may be reluctant to entertain "technical" objections about an offer being made out of time from sophisticated commercial parties who receive an offer to settle less than seven days before the hearing, but who still have, in the court's opinion, a sufficient amount of time to consider it.<sup>34</sup> Ultimately each case will be considered on its own facts in determining whether to exercise discretion under rule 49.13.<sup>35</sup>

Rule 49 applies only to offers made in a proceeding at first instance. It does not apply to offers to settle made pending an appeal.<sup>36</sup>

**(d) Substantive requirements of a Rule 49 offer**

(i) Certainty

Offers to settle should be clear and unequivocal.<sup>37</sup> When determining whether the rule 49.10 cost consequences will apply, the court needs to know the terms of the offer to settle in order to compare it with the judgment and determine any cost consequences. The burden of proving that the judgment is as favourable as, or more or less favourable than the terms of the offer to settle, is on the party claiming the benefit of that rule.<sup>38</sup> Without a "fixed, certain and understandable offer", it would be unfair to apply cost consequences since an offeree would not be certain of the terms of an offer, or whether it even exists.<sup>39</sup>

Uncertain or ambiguous terms may be construed against the interest of the offeror, making it difficult to reap the maximum benefit of those cost consequences.<sup>40</sup> However, as discussed in more detail below, escalating terms, such as a provision for ongoing prejudgment interest and/or ongoing costs will not render an offer to settle too uncertain to meet the requirements of Rule 49.<sup>41</sup>

Even if a settlement offer is found to be too uncertain or ambiguous to qualify under Rule 49, it can still be relevant to an assessment of costs under rule 49.10, because of the court's discretion to consider non-compliant offers under rule 49.13. In addition, non-Rule 49 offers can be taken into consideration by a court when exercising its discretion to award costs generally under rule 57.01(1).<sup>42</sup> Finally, an offer that does not qualify under Rule 49 can still be found to be a binding "without prejudice" or "not without prejudice" offer to settle under the common law.

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<sup>34</sup> [Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc](#), 2013 ONSC 5213 at paras 2-8.

<sup>35</sup> [Thomas \(Committee of\) v Bell Helmets Inc](#), 1999 CarswellOnt 3624, at para 81, 1999 CanLII 9312 (CA).

<sup>36</sup> [Niagara Structural Steel \(St. Catharines\) Ltd. v. W.D. LaFlamme Ltd](#), 1987 CarswellOnt 440 at paras 18-27, 1987 CanLII 4149 (CA).

<sup>37</sup> [Bernstein v Poon](#), 2015 ONSC 2125 at para 47.

<sup>38</sup> *Rules of Civil Procedure*, r. 49.10(3).

<sup>39</sup> [Yepremian v Weisz](#), 1993 CarswellOnt 462 paras 7, 14; 1993 CanLII 5483 (SC).

<sup>40</sup> [Hunt v Anastasoff](#), 1999 CarswellOnt 328 paras 9-10 (Ont Ct J (Gen Div)).

<sup>41</sup> [Rooney \(Litigation Guardian of\) v Graham](#), 2001 CarswellOnt 887 (CA), 2001 CanLII 24064 (CA).

<sup>42</sup> [Bifolchi v Sherar \(Litigation Administrator of\)](#), 1998 CarswellOnt 1463 (CA). See for example, r. 57.01(1)(e), regarding conduct of any party that tended to lengthen unnecessary the duration of the proceeding, r. 57.01(1)(f), regarding whether any step taken was improper, and r. 57.01(1)(i) which is a catch-all for "any other matter relevant to the question of costs".

(ii) Compromise

Rule 49 offers to settle are deemed to be offers of compromise made without prejudice.<sup>43</sup> Does an offer need to contain an element of compromise to qualify? Generally speaking, offers to settle in respect of unliquidated claims need not be for an amount less than that claimed in the pleading, although they may be in practice.<sup>44</sup> Where a party has made a *bona fide* attempt to settle the case, and there is some, even modest element of compromise, that offer will generally engage Rule 49.<sup>45</sup> Compromise in a Rule 49 offer can be reflected in a number of different and creative ways that may serve the dual purpose of being more palatable to a client who is reluctant to settle for less than the full amount of its claim, while satisfying the compromise criterion in order to benefit from the Rule 49 costs regime. An example of such compromise would might include giving up a claim of prejudgment interest, which can be substantial, particularly in large commercial cases.

However, in cases involving liquidated claims and where a defendant is relying on a defence of substance that puts his/her liability into question, compromise may be a reasonable thing to expect from a plaintiff.<sup>46</sup> For example, in *Walker v York-Finch General Hospital*, the parties had agreed to an amount for damages before trial.<sup>47</sup> The plaintiffs offered to settle for that amount, less \$100.00, and were successful at trial. The Court of Appeal held that the plaintiff's "compromise" was for less than 1/8000<sup>th</sup> of the value of the liquidated claim, and therefore fell far short of the necessary element of compromise. The Court declined to apply the cost consequences in rule 49.10.

Overall, since the objective of Rule 49 is to promote settlement, offers that are not genuine offers to settle and are invitations to capitulate, with the effect of setting the parties further apart rather than encouraging settlement, will be discouraged by the courts and are unlikely to be treated as legitimate Rule 49 offers.<sup>48</sup>

**(e) Disclosure of an offer to the court**

The fact that an offer to settle has been made cannot be disclosed to a court by way of pleading.<sup>49</sup> If an offer to settle is not accepted, no communication can be made to the court about the offer and its terms, and the offer cannot be filed until all questions of liability, relief and costs have been determined.<sup>50</sup> The

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<sup>43</sup> *Rules of Civil Procedure*, r. 49.05. According to at least one case, there is no need to mark a Rule 49 offer "without prejudice" and doing so may actually raise ambiguity about whether the party making the offer intends to be bound by it: [Ludington v Parisi](#) 2011 ONSC 5709 (Ontario Master).

<sup>44</sup> [Data General \(Canada\) Ltd v Molnar Systems Group Inc](#), 1991 CarswellOnt 402, 1991 CanLII 7326 (CA).

<sup>45</sup> [Stoneleigh Motors Ltd v General Motors of Canada](#), 2012 ONSC 3045 (SC), [Beswick Properties Yonge Street Inc. v. Royal Bank of Canada](#), 2013 ONSC 394, [Rankin Construction Inc. v. Her Majesty The Queen In Right Of Ontario](#), 2013 ONSC 1625.

<sup>46</sup> [Data General \(Canada\) Ltd v Molnar Systems Group Inc](#), 1991 CarswellOnt 402 at paras 37-38, 1991 CanLII 7326 (CA).

<sup>47</sup> [Walker v York-Finch General Hospital](#), 1999 CarswellOnt 667, 1999 CanLII 2158 (CA).

<sup>48</sup> [Argyropolous v Toronto Transit Commission](#), 2014 ONSC 3261 (SC), [Shannon Gohm v. Larry York, Corey MacDougall, Lisa Frew](#), 2014 ONSC 4459.

<sup>49</sup> *Rules of Civil Procedure*, 49.06(1).

<sup>50</sup> *Rules of Civil Procedure*, 49.06(2) and (3).



purpose of this prohibition is to ensure that the parties are not prejudiced and that the court can effectively resolve the issues before it.<sup>51</sup>

In general, courts have enforced the prohibition on disclosure of Rule 49 offers.<sup>52</sup> While recognizing that a strict reading of rule 49.06 precludes any mention of offers to settle, courts have allowed parties to make reference to Rule 49 offers in certain instances where equitable defences such as *laches* or estoppel were raised, provided specific details were deleted.<sup>53</sup> In one case, the court allowed a plaintiff seeking a declaration of debt owed to him to reference an offer to settle as evidence of a debt, because in the court's view, once the offer to settle had been accepted, the purpose of rule 49.06 (encouraging settlement) was no longer relevant and would not prejudice the debtor in the way rule 49.06 sought to prevent.<sup>54</sup>

Aside from the specific prohibition in rule 49.06 against disclosure of Rule 49 offers, settlement offers of any kind may be subject to privilege and should be treated accordingly.

#### 4. **Strategic Considerations**

##### **(a) *When to make a Rule 49 offer***

Between the commencement of litigation and 7 days before the commencement of the hearing, the decision of when to make a Rule 49 offer is usually guided by strategic considerations. In general, the following are opportune times to make a Rule 49 offer:<sup>55</sup>

- i) *Right after litigation is commenced:* Parties may often be reluctant to make an offer early in the litigation for fear of being seen as weak. However, for plaintiffs, an early Rule 49 offer may trigger an early entitlement to substantial indemnity costs if they are able to obtain an equal or better result at the hearing; hence an early offer may allow plaintiffs to recoup a much greater share of their legal costs. For defendants, an early low-ball offer, even if not accepted, may help enhance the defendant's argument for costs at the end of the proceeding if the plaintiff's case is dismissed. There is generally little risk in making a Rule 49 offer early in the proceeding, as the offer can always be withdrawn and replaced with a new offer as the litigation unfolds.
- ii) *Before commencing work on a major step in the litigation:* Since a Rule 49 offer only impacts an award of costs that are incurred *subsequent* to the offer, a party should consider making a Rule 49 offer before embarking on a procedural step that is time-consuming and expensive. For example, a party should consider making a Rule 49 offer before documentary discovery, before examinations for discovery, or before a summary judgment motion. A Rule 49 offer served at such junctures may also persuade the offeree to think twice before spending further resources on the litigation.

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<sup>51</sup> [Kular v Ecosol](#), 2012 ONSC 6410 (SC). The court suggested that correspondence exchanged between parties to resolve issues should not be put before the court until the court has resolved that issue, and then only if one of the parties intends to seek costs (see para 40); [Montague v Bank of Nova Scotia](#), 2004 CarswellOnt 11, 2004 CanLII 27211 (CA); [Ventura v Domingos](#), 1993 CarswellOnt 4374 (Ont Ct J (Gen Div)).

<sup>52</sup> See, e.g., Holmsted & Watson, *Ontario Civil Procedure*, p. 49-44.

<sup>53</sup> [Ventura v Domingos](#), 1993 CarswellOnt 4374 (Ont Ct J (Gen Div)).

<sup>54</sup> [Fung v Cheung](#), 2010 ONSC 4198.

<sup>55</sup> See also Jeffrey Leon and Giovanna Toscano Roccamo, "Strategic Uses of a Favoured Rule: Rule 49 Offers to Settle" (2006-2007) 32 *Advoc Q* 259.

- iii) *After discoveries or when the case's merits have changed:* A Rule 49 offer is only advantageous if there is a prospect of the offeror achieving an equal or better result at the hearing. Therefore, following discoveries or any re-evaluation of the strengths and weaknesses of the case, a party should consider making a Rule 49 offer that reasonably reflects the merits of its position. If a party already has a Rule 49 offer open for acceptance, the party should consider whether the offer needs to be revised by either withdrawing it and replacing it with a new offer, or alternatively by making a second offer to settle that is expressly stated to be in addition to and not in replacement of the earlier offer to settle which remains outstanding (these alternatives are discussed below).
- iv) *After mediation:* If a party makes an offer in a mediation that is rebuffed, the party should nonetheless consider formalizing its offer after mediation as a Rule 49 offer to trigger the cost consequences of rule 49.10 if the party is prepared to leave that offer on the table with the addition of an ongoing prejudgment interest and costs provision.

When serving a Rule 49 offer, it is good practice for counsel to immediately prepare an affidavit of service to include in their files. In the event that the litigation takes years to resolve and the opposing side later disputes whether the offer was ever served, the offeror may rely on the affidavit of service. It is also good practice to keep track of all settlement offers as they are served and received (both Rule 49 and common law) by including them on an ongoing basis in your pleadings brief or in a separate settlement offer brief.

***(b) Making a common law offer as a strategic alternative to a Rule 49 offer***

As an alternative to a Rule 49 offer, or in addition to a Rule 49 offer, a party should consider whether to serve a common law offer.

A common law offer is typically a time-limited offer. Unlike a Rule 49 offer, it is not left open until the commencement of the hearing of the proceeding. Also unlike a Rule 49 offer, which is governed by the *Rules of Civil Procedure*, a common law offer is governed by the usual contractual principles of offer and acceptance. Therefore:

- i) a common law offer may be made and withdrawn orally or in writing; and
- ii) if an offeree rejects a common law offer or responds to it with a counter-offer, the common law offer is spent and is no longer available for acceptance.

A common law offer does not attract the predetermined presumptive costs consequences of rule 49.10. It may, however, have the benefit of creating more immediate settlement pressure on the recipient than a Rule 49 offer because of its time-limited nature. A common law offer's limited window for acceptance can force the opposing party to immediately focus on settlement and make a settlement decision. By contrast, a Rule 49 offer must remain open until the commencement of the hearing of the proceeding, which eliminates any need for the opposing party to respond in a timely manner.

Making a common law offer may be particularly advantageous at the juncture of a major step in the litigation, such as before or immediately following discoveries, or at or immediately following mediation. At these junctures, all parties and counsel are already focused on the litigation and its merits, and may be in a good position to make settlement decisions in short order. Parties may also be more willing to offer or accept a settlement at these junctures rather than move forward with costly next steps. A common law offer puts settlement pressure on the opposing party by giving them a time-limited chance to resolve the case before incurring the legal expense of the next step.

Because a rejection or counter-offer will extinguish a common law offer, the recipient faces a downside risk if it tries to negotiate the offer. This may be contrasted with a Rule 49 offer, where even if the offeree rejects a Rule 49 offer or makes a counter-offer, the Rule 49 offer still remains open for acceptance until the commencement of the hearing (unless it is withdrawn).

In an all-or-nothing case where the only issue is liability and not the amount claimed (e.g. a debt claim on a cheque), the asymmetrical costs consequences under rule 49.10 offer little, if any, costs upside to a defendant. If the defendant wins and the case is dismissed, the defendant will generally obtain an award of costs on a partial indemnity scale and will obtain no more than that under the Rule 49.10 costs consequence.<sup>56</sup> In such a case, a defendant will likely prefer to make a time limited common law offer, which may be more effective at forcing the other side to focus on settlement and respond promptly.

**(c) Making common law offers concurrently with Rule 49 offers**

Making a time-limited common law offer does not withdraw any Rule 49 offer a party may already have open for acceptance.<sup>57</sup> Parties can therefore use both Rule 49 offers and common law offers concurrently to their advantage. For example, a party may have served a reasonable Rule 49 offer early in the proceeding (for example, at the close of pleadings). The party may then want to make a more attractive common law offer prior to discoveries. The party's Rule 49 offer still remains open for acceptance and serves to provide the party with costs protections under rule 49.10, while the party's time-limited common law offer may better incent the opposing side to accept a settlement before discovery.

*McDougall v McDougall*<sup>58</sup> presents a cautionary tale of how rejections and counter-offers are treated differently by the two types of offers: the respondent made what she believed to be a common law offer, but in fact no expiry was stated and the offer met all the requirements of Rule 49. The applicant made a counter-offer, which the respondent believed had the effect of extinguishing the original offer she had made. Instead, the applicant later accepted her original offer and brought a motion to enforce the settlement. The court allowed the motion and held that because the respondent's offer met all the requirements of Rule 49, it was presumptively a Rule 49 offer.

To avoid what occurred in *McDougall*, parties would be wise to always formally withdraw an offer they no longer want open for acceptance (regardless of whether the offer was purportedly a Rule 49 offer or common law offer), even if the offeree has already rejected the offer or presented a counter-offer.

**(d) Selling your settlement offer to the offeree**

Making a settlement offer is a part of advocacy, and counsel should therefore *advocate their client's offer*. In other words, when making an offer, counsel should explain to the offeree why the offer is reasonable and why the offeree should accept the offer in lieu of continuing with litigation. Explaining and selling an offer is particularly important if the basis and reasonableness of the settlement amount offered might not be self-evident to the recipient.

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<sup>56</sup> As discussed below, courts have held where a defendant has made a Rule 49 offer that was not accepted by the plaintiff, and the plaintiff does not obtain a judgment of any value at trial, the court may exercise its discretion under rule 57.01(4)(c) to award substantial indemnity costs to the defendant as incurred from the date of the Rule 49 offer onwards, but this is not a presumptive costs consequence.

<sup>57</sup> [\*York North Condominium Corp No 5 v Van Horne Clipper Properties Ltd\*](#), 1989 CarswellOnt 463 (CA), 1989 CanLII 4375 (ON CA) at para 10; *Boer v Cairns*, 2003 CarswellOnt 5455 (SC) at para 44.

<sup>58</sup> *McDougall v McDougall*, 1992 CarswellOnt 433 (Gen Div).

In making an offer, counsel may want to include a cover letter that includes such information as:

- i) an explanation for how the amount of the offer was calculated or arrived at ( e.g. 50% of the amount in issue after crediting an undisputed set off amount, or an undisputed mitigation amount). Alternatively, the calculation may be included in the body or a schedule to the settlement offer;
- ii) all the elements of compromise in the settlement offer (e.g. amount of claim, timing of payment, rate and duration of prejudgment interest, costs);
- iii) reference to key evidence (including discovery admissions), facts or case law that support the reasonableness of the offer;
- iv) an explanation of the rationale for terms of the offer that might not be self-evident; and
- v) reasons why the offeror believes the offer will ultimately compare favourably to any judgment to be rendered by the court (this is particularly important if the offer is a Rule 49 offer);

Explaining your Rule 49 offer or common law offer in a cover letter will be advantageous even if your advocacy does not result in a settlement and the case proceeds to judgment, as it will serve as a reminder (at a time when memories may have faded or counsel may have changed) of why the offer was considered reasonable when it was made and will serve as *de facto* submissions on this point.

## **5. Cost Consequences: Determining if the Court's Judgment is as or more Favourable to the Offeror than its Unaccepted Rule 49 Offer**

### ***(a) Comparability***

The cost consequences of rule 49.10 apply only if the offeror makes a Rule 49 offer that is not accepted, and the offeror then obtains judgment that is as or more favourable to the offeror than the terms of its offer. This is colloquially referred to as "beating your offer".

Favourability should be relatively simple to assess in an action for damages or a debt claim where a party has made a monetary Rule 49 offer. The court can readily compare the amount of the judgment with the amount of the offer. For the purposes of Rule 49, "judgment" includes both the amount awarded and prejudgment interest.<sup>59</sup> Further, as discussed below, the totality of the monetary elements of the offer and judgment are taken into account in the comparison.

However, in cases where either the Rule 49 offer or the relief sought in the litigation is non-monetary in nature, it may be difficult to determine whether the court's judgment is, in fact, as or more "favourable" to the offeror than its Rule 49 offer.

In *Hunger Project v Council on Mind Abuse (COMA)*,<sup>60</sup> for example, the plaintiff won a libel suit against the defendant and was awarded \$25,000 plus interest. Prior to trial, the plaintiff had made a Rule 49 offer to discontinue the action in return for a written apology and retraction of the libellous statement, which the defendant did not accept. Was the judgment of \$25,000 to the plaintiff as favourable as, or more

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<sup>59</sup> *Pilon v Janveaux*, 2006 CarswellOnt 1211 (CA), 2006 CanLII 6190 at para 16, *Wilson v. Cranley*, 2014 ONCA 844.

<sup>60</sup> *Hunger Project v Council on Mind Abuse (COMA)*, 1995 CarswellOnt 343 (Gen Div), 1995 CanLII 7390.

favourable than, the offer the plaintiff made for the defendant to apologize in return for discontinuing the claim? The court found that, for the plaintiff, the judgment was in fact more favourable than the offer. The plaintiff's offer to accept an apology from the defendant would have vindicated the plaintiff's reputation, but the judgment gave the plaintiff both judicial vindication and a monetary award.

The court held that in order to engage the cost consequences of rule 49.10, "the concept of favourability requires only comparability between the offer and the judgment, not equivalence and not correspondence"<sup>61</sup> with what judicial relief may be awarded. Parties are therefore free to come up with innovative Rule 49 offers, and as long as the offer settles the action in full, "the concept of direct comparability with a judgment under rule 49.10 is met."<sup>62</sup>

In cases where it is not readily apparent whether the offer or judgment is more favourable, however, "evidence may be necessary to determine favourability depending upon the degree of divergence between the offer to settle and the familiar currency of judicial remedies."<sup>63</sup> The onus to prove that the court's judgment is as or more favourable to the offering party than its unaccepted Rule 49 offer, lies with the party seeking the benefit of rule 49.10's cost consequences. The determination of favourability will depend on the particular circumstances of each case.<sup>64</sup>

To avoid the potential need to call further evidence to establish whether an offer is more favourable than a court judgment, a party making the Rule 49 offer should try, if possible, to draft the offer on terms reflecting the relief being sought by the claimant or that are easily comparable to a court judgment.

**(b) Escalating terms: offers with an ongoing costs or prejudgment interest component**

It is now common for Rule 49 offers to include an "ongoing costs" component which gives the offeror protection in the event that the opposing party accepts the Rule 49 offer late in the proceeding after the offeror has continued to incur significant legal expense in the litigation.

In a Rule 49 offer with an ongoing costs component, the offer still remains open for acceptance until after the commencement of the hearing, as required by rule 49.10. However, if the offer is accepted after a prescribed date, then the offer will require the acceptor to also pay the offeror's costs on a partial indemnity scale as incurred between the prescribed date and the date the offer was accepted.

A plaintiff making a Rule 49 offer may also include an "ongoing prejudgment interest" component where, if the defendant accepts the offer after a prescribed date, the defendant must pay the prejudgment interest on the offer amount as accrued between the prescribed date and the date the defendant accepts the offer.

The leading authority on offers with an ongoing costs component is the Court of Appeal for Ontario's decision in *Rooney (Litigation Guardian) v Graham*.<sup>65</sup> The court considered the question of whether an ongoing costs component ran afoul of the requirement that a Rule 49 offer's terms be certain and unambiguous.

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<sup>61</sup> *Ibid* at para 25.

<sup>62</sup> *Ibid* at para 25.

<sup>63</sup> *Ibid* at para 27.

<sup>64</sup> *Ibid* at para 27. See also [Homewood v. 2010999 Ontario Inc](#), 2013 ONSC 5337.

<sup>65</sup> [Rooney \(Litigation Guardian of\) v Graham](#), 2001 CarswellOnt 887 (CA), 2001 CanLII 24064.

Carthy J.A., in dissent, held that an offer with an ongoing costs component was inconsistent with Rule 49 because the amount under the offer would continuously change as the litigation advances, making the value of the offer too uncertain for acceptance.

Writing for the majority, however, Laskin J.A. held that the purposes of Rule 49 – to encourage parties to make reasonable settlement offers and to facilitate early settlement – would be undermined if the rule did not permit inclusion of ongoing costs. Otherwise, parties would have less incentive to make reasonable offers because the opposite party could depreciate the real value of the offer by not accepting it until late in the proceeding.

Hence a settlement offer that has an ongoing costs or prejudgment interest component will be a valid Rule 49 offer that will trigger the cost consequences of Rule 49.10, so long as the total value of the court's disposition is as or more favourable to the party making the offer as the ultimate total value of its offer computed as at the date of the court's disposition (including the ongoing costs provision and ongoing prejudgment interest provision).

In *Rooney*, the plaintiff, who was successful at trial, had made a Rule 49 offer that asked the defendants to pay her partial indemnity costs as incurred up to the date of the offer, and her substantial indemnity costs as incurred after the date of the offer. Laskin J.A. held that the offer's provision of ongoing costs on a substantial indemnity scale made the offer difficult to compare to the court's judgment, since substantial indemnity costs are ordinarily not available outside of satisfying rule 49.10. The plaintiff's ongoing costs provision assumed an entitlement to substantial indemnity costs that had not yet been determined.

Laskin J.A. held that for the purpose of the comparability exercise under rule 49.10, the court must compare the ongoing costs provision in the offer with the trial judge's usual award of partial indemnity costs to the successful litigant. Laskin J.A. nonetheless granted the plaintiff the substantial indemnity costs she incurred after the date of her Rule 49 offer, on the basis that the quantum of the judgment itself greatly exceeded the plaintiff's offer regardless of what the plaintiff's substantial indemnity costs would have been after the date of the offer.

Subsequent court decisions in Ontario have adopted Laskin J.A.'s majority reasons in *Rooney* and have recognized offers with an ongoing costs component as valid Rule 49 offers.<sup>66</sup> However, where the offer requires payment of costs on the higher substantial indemnity scale after the date of the offer, that costs feature may disentitle the offeror to the costs consequences of Rule 49.<sup>67</sup>

A party can therefore render their Rule 49 offer ineffective to attract the costs benefits of rule 49.10 if the offer requires payment of substantial indemnity costs for all or part of the litigation, rather than partial indemnity costs throughout.<sup>68</sup> For example, in *Daniels v Crosfield (Canada) Inc.*<sup>69</sup> (a decision that predates *Rooney* but is nonetheless illustrative), the plaintiff made a Rule 49 offer to settle the action at \$43,000 plus his substantial indemnity costs up to the date of acceptance. The plaintiff was awarded

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<sup>66</sup> See e.g. [Hayden v Stevenson et al](#), 2010 ONSC 633 at paras 27-29; [Schindler Elevator Corp v 1147335 Ontario Inc](#), 2012 ONSC 505 (Master) at para 22, [König v. Hobza](#), 2013 ONSC 5531.

<sup>67</sup> See e.g. [1709451 Ontario Inc v 1718541 Ontario Inc](#), 2012 ONSC 7025 at para 9; [Oates v Alexanian](#), 2010 ONSC 6879 at para 8.

<sup>68</sup> The exception is if there is a basis for claiming a higher scale of costs independent of the cost consequences of Rule 49, e.g. if there is a contractual costs provision that requires the offeree to pay full or substantial indemnity costs to the offeror such as in a mortgage claim, or the rare case where the conduct of a litigant justifies a higher scale of costs.

<sup>69</sup> [Daniels v Crosfield \(Canada\) Inc](#), 1994 CarswellOnt 530 (Gen Div), 1994 CanLII 7288.

judgment of \$47,040, but Borins J. (as he then was) denied the plaintiff any entitlement to substantial indemnity costs precisely because his Rule 49 offer had assumed he could get substantial indemnity costs from the court, when in fact a favourable judgment normally attracts only partial indemnity costs, and substantial indemnity is generally awarded *only after* the plaintiff is able to establish that the judgment beat his offer. By including a costs component in his Rule 49 offer that was on a substantial indemnity scale, the plaintiff had in essence put the cart before the horse and out-smarted himself. Borins J. wrote:

It would seem, therefore, that by making the offer which he did the plaintiff appears to have out-smarted himself. ... Although the plaintiff obtained a monetary judgment, excluding pre-judgment interest, which exceeded by about \$2,000 the amount for which he would have settled his claim, he would not be entitled to the costs of his claim on a solicitor-and-client scale. ...

The plaintiff's difficulty lies in the offer's reference to solicitor-and-client costs. In my view, an offeror must bring himself or herself within the rule in order to obtain the higher scale of costs. Here, by including solicitor-and-client costs as one of the terms of the offer without, perhaps, recognizing that solicitor-and-client costs are awarded exceedingly rarely to a successful plaintiff, the plaintiff made it very difficult, if not impossible, to obtain the benefit of solicitor-and-client costs provided by r. 49.10(1) following a successful trial or motion for summary judgment.<sup>70</sup>

Hence, in making a Rule 49 offer with an ongoing costs provision, unless a party has a solid entitlement independent of Rule 49 to costs on a higher scale (e.g. a contractual provision for full indemnity costs) a party should ensure that the costs provision is on a partial indemnity scale throughout, so that the court can compare the offer to the judgment before the costs impact of rule 49.10 is factored in.

In this regard, it should also be noted that the costs incentive regime of rule 49.10 is asymmetrical and does not provide for a defendant to receive costs on any scale higher than partial indemnity. That said, courts have held where a defendant has made a Rule 49 offer that was not accepted by the plaintiff, and the plaintiff does not obtain a judgment of any value at trial, the court may exercise its discretion under rule 57.01(4)(c) to award substantial indemnity costs to the defendant as incurred from the date of the Rule 49 offer onwards.<sup>71</sup>

***(c) Avoid Making a Rule 49 Offer that is an “All-Inclusive Sum”***

When drafting a Rule 49 offer, an offeror should be wary of specifying a settlement amount in terms of an “all-inclusive sum” that includes the claim, prejudgment interest and costs. This has the risk of complicating the favourability comparison under rule 49.10. Because the court must compare the Rule 49 offer to the judgment *before* it awards and quantifies costs, a Rule 49 offer that merges judgment, prejudgment interest and costs into all-inclusive sum does not provide an easy basis of comparison with the judgment.

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<sup>70</sup> Ibid at paras. 7-8.

<sup>71</sup> *S & A Strasser Ltd. v. Richmond Hill (Town)*, 1990 CarswellOnt 435 (CA), 1990 CanLII 6856 at para 11; *Dunstan v Flying J Travel Plaza*, 2007 CarswellOnt 6806 (SC), 2007 CanLII 44819 at paras 10-13; and *Hervé Pomerleau Ontario Inc v Ottawa (City)*, 2014 ONSC 1496 at para 7.

The offeror may find itself in the possibly difficult position of satisfying the court that the judgment along with prejudgment interest and an award of partial indemnity costs once quantified would be as favourable to the offeror as the “all-inclusive sum” offer that was made.<sup>72</sup>

Instead, to provide the court with an easy basis of comparison, a party crafting a Rule 49 offer should separate out: (i) the amount of the settlement offer itself, (ii) the rate of prejudgment interest to be applied on the offer amount and the period over which prejudgment interest is to be calculated, and (iii) costs on a partial indemnity scale, in an amount to be fixed or assessed by the court failing agreement, for all or a specified part or time period of the litigation.

## **6. Expiry of a Rule 49 Offer**

For the cost consequences of Rule 49.10 to apply, a Rule 49 offer must remain open for acceptance until the commencement of the hearing. After the hearing commences, however, the offer may be withdrawn or may expire as per the terms of the offer. It is therefore common for counsel to include a term in their Rule 49 offer that provides that the offer expires “one minute after commencement of the hearing,” to ensure the offer complies with Rule 49 but cannot be accepted shortly after the hearing begins.

In drafting a Rule 49 offer, the offeror should ensure that the offer expires after “the commencement of the *hearing*”, as opposed to after the “commencement of *trial*.” Not only does this track the language of rule 49.10, but it also protects the offeror in the event that all or some of the issues in the litigation are disposed of earlier than trial, such as at a summary judgment motion. If the bulk of the litigation is determined at the summary judgment motion but minor issues still proceed to trial, conceivably the offeree can still accept an open Rule 49 offer that expires after the “commencement of trial”. And there appears to be a material risk that a Rule 49 offer that expires after the “commencement of trial” remains open for acceptance throughout the hearing of the summary judgment motion and while the summary judgment decision is under reserve.<sup>73</sup>

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<sup>72</sup> Supra *Homewood* note 64.

<sup>73</sup> Rule 49.04(4) provides: “An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.” See also [Grass v. Women's College Hospital](#), 2004 CanLII 19636 (ON SC) where there was a trial, an appeal, and then a re-trial of the matter, and see [1019330 Ontario Limited \(Direct Diamond Promotions\) v. Bach-Vu \(Dorothy Jewellery\)](#), 2008 CanLII 41819 (ON SC) where Justice Brown considered two of the plaintiff’s offers to settle in a case where there was a summary judgment motion that did not dispose of the case so the case proceeded to trial. The first offer the plaintiff made was to settle the summary judgment motion. Justice Brown concluded that this was not a Rule 49 offer as it was expressly stated to expire on commencement of the summary judgment motion and therefore was not open until the commencement of the trial. Justice Brown noted that the second offer, which was held open until just after the commencement of trial, constituted an offer to settle within the meaning of Rule 49.



## 7. Withdrawal of a Rule 49 Offer

Unlike a common law settlement offer, a Rule 49 offer can only be withdrawn in writing.<sup>74</sup> Pursuant to Rule 49.04, the offer may be withdrawn at any time by serving a notice of withdrawal on the party to whom the offer was made.

Because a Rule 49 offer may be withdrawn “at any time”, the Court of Appeal for Ontario has held that even Rule 49 offers that purport to be “irrevocable” can, in fact, be withdrawn in writing by the offeror or can expire if the terms of the offer provide for an expiry.<sup>75</sup>

If an offeror makes another Rule 49 offer without having withdrawn its first Rule 49 offer, does the second offer constitute an implied withdrawal of the first offer? The case law is conflicted on this point. However, in *Boer v Cairns*,<sup>76</sup> Molloy J. conducted a fulsome analysis of the jurisprudence and proposed the following guidelines:

- (a) If an offeror makes a second Rule 49 offer that is *less* favourable to the opposing side than the offeror’s first Rule 49 offer, then the second offer is, by necessary implication, a withdrawal of the first offer. This was confirmed by the Court of Appeal for Ontario in *Love v Acuity Investment Management Inc.*,<sup>77</sup> where it held that “unless the second offer was intended to revoke the first, there was no point in the respondent making it.”<sup>78</sup>
- (b) If an offeror makes a second Rule 49 offer that is *more* favourable to the opposing side than the offeror’s first Rule 49 offer, then there has been no effective withdrawal, and the first Rule 49 offer is still open for acceptance.<sup>79</sup> However, Molloy J. noted that the case law on this front was inconsistent. In *Mortimer v Cameron*,<sup>80</sup> for example, the Court of Appeal for Ontario held that a second Rule 49 offer that was more favourable to the offeree than the first offer did not revoke the first, while a year later, in *Diefenbacher v Young*,<sup>81</sup> a different panel of the Court of Appeal for Ontario reached the opposite conclusion. This conflicting jurisprudence was also observed, but not resolved, as late as 2015 in *Marshall Estate v Legge & Legge*.<sup>82</sup>

Whether or not a second Rule 49 offer constitutes a withdrawal of the first Rule 49 offer may impact the offeror’s entitlement to costs under rule 49.10. If neither of the offeror’s Rule 49 offers is accepted and the offeror obtains a judgment that beats both its first and subsequent offers to settle, then the cost consequences of rule 49.10 are calculated based on the date of the first offer if that offer was not impliedly withdrawn by the subsequent offer. If the second offer impliedly withdrew the first offer, however, then the offeror loses the Rule 49 benefits of having made the first offer.

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<sup>74</sup> Benjamin M Bathgate and D Brent McPherson, eds, *The Essential Guide to Settlement in Canada* (Toronto: LexisNexis, 2013) at 25-27; [York North Condominium Corp No 5 v Van Horne Clipper Properties Ltd](#), 1989 CarswellOnt 463 (CA), 1989 CanLII 4375; and [Marshall Estate v Legge & Legge](#), 2015 ONSC 3028 at para 10.

<sup>75</sup> [363066 Ontario Ltd v Gullo](#), 2007 ONCA 785.

<sup>76</sup> For a fulsome analysis of the case law on this point, including inconsistencies, see *Boer v Cairns*, 2003 CarswellOnt 5455 (SC).

<sup>77</sup> [Love v Acuity Investment Management Inc.](#), 2011 ONCA 130.

<sup>78</sup> *Ibid* at para 30.

<sup>79</sup> *Boer v Cairns*, 2003 CarswellOnt 5455 (SC) at paras 48-52.

<sup>80</sup> [Mortimer v Cameron](#), 1994 CarswellOnt 601 (CA), 1994 CanLII 10580.

<sup>81</sup> [Diefenbacher v Young](#), 1995 CarswellOnt 503 (CA), 1995 CanLII 2481.

<sup>82</sup> [Marshall Estate v Legge & Legge](#), 2015 ONSC 3028 at paras 11-12.

Given the inconsistency in the case law as to whether a new Rule 49 offer constitutes an implied withdrawal of any earlier Rule 49 offer, to avoid any uncertainty, a party making a further Rule 49 offer should include a term that expressly indicates whether or not the offeror, in making the new offer, is withdrawing any previous Rule 49 offers.

## **8. Acceptance of a Rule 49 Offer**

Significantly, rule 49.07(2) provides that if a party to whom a Rule 49 offer is made rejects the offer or makes a counter-offer that is not accepted, the party may still accept the original Rule 49 offer. This is distinguishable from the common law; where an offer is rejected or responded to by a counter-offer, the original offer is no longer open for acceptance.

Rule 49.07(1) provides that an offer may be accepted by serving an acceptance of offer in the form of Form 49C to the offeror at any time before the offer is withdrawn or the court disposes of the claim. However, courts have held that the acceptance of a Rule 49 offer need not be in Form 49C,<sup>83</sup> and need not even be in writing to be valid.<sup>84</sup> However, whether the acceptance is in writing or verbal, it must be an unqualified and unconditional acceptance of all the terms of the Rule 49 offer.<sup>85</sup>

What constitutes an “agreement” depends on the facts and context. Where written correspondence is available, as will likely be the case in a Rule 49 scenario, a court will not look to the subjective intentions of the parties in determining whether a settlement was reached.<sup>86</sup> The court will consider the history and context of any correspondence relating to settlement and interpret it objectively to determine whether an agreement was reached, looking for evidence of mutual intention to create a legally binding agreement, and actual agreement on all essential terms of the settlement.<sup>87</sup>

### **(a) Costs on Acceptance**

If a Rule 49 offer is silent on costs, then rule 49.07(5) is the default provision for dealing with costs if the offer is accepted. It provides that where the plaintiff makes a Rule 49 offer that is accepted by the defendant, then the plaintiff is entitled to its costs up to the date of the defendant’s acceptance. If the defendant makes the Rule 49 offer which is accepted by the plaintiff, the plaintiff is entitled to its costs up to the date the offer was served. However, if an offer does not explicitly deal with costs but offers an amount “in full and complete satisfaction of the plaintiff’s claim”, then it might be construed as settling the entire action, including costs.<sup>88</sup>

Generally, it is advisable, particularly for a defendant, to ensure that any Rule 49 offer always expressly deals with costs. This is to prevent a rude surprise to a defendant who must pay costs pursuant to the default costs provision of rule 49.07(5) if the offer is silent about costs.

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<sup>83</sup> [Schindler Elevator Corp v 1147335 Ontario Inc](#), 2012 ONSC 505 at para 13.

<sup>84</sup> [Bruce v DPCE Computer Systems Inc](#), 1992 CarswellOnt 909 (Gen Div), 1992 CanLII 7736 at para 11.

<sup>85</sup> [Desanto v Cretzman](#), 1986 CarswellOnt 567 (Dist Ct), 1986 CanLII 2663; Benjamin M Bathgate and D Brent McPherson, eds, *The Essential Guide to Settlement in Canada* (Toronto: LexisNexis, 2013) at 35-36.

<sup>86</sup> [Olivieri v Sherman](#), 2007 ONCA 491 at paras 44-45.

<sup>87</sup> [Bank of Montreal v Ismail](#), 2012 ONCA 129 at paras 7-20; [Olivieri v Sherman](#), 2007 ONCA 491 at para 41.

<sup>88</sup> [Puri Consulting Limited v. Kim Orr Barristers PC](#), 2015 ONSC 577.

**(b) Requiring a release as a term of the Rule 49 Offer**

A settlement offer typically includes a term for the offeree or both parties to provide a release. Including a release as a term of a Rule 49 offer raises an interesting question because a release is never given as part of a judgment (although the judgment does attract *res judicata vis-à-vis* the issues in the litigation). Theoretically, then, it may complicate the comparison under rule 49.10 in establishing whether the Rule 49 offer, which requires a release, is as favourable or less favourable than the judgment which does not provide for a release.

There appears to be no case law that has addressed the issue of whether, and how, the requirement of a release in a Rule 49 offer impacts the favourability comparison under Rule 49.10 if the offer is not accepted and judgment is rendered. The requirement of a release in a Rule 49 offer appears to have no bearing on the court's analysis of whether the offer is as favourable or less favourable than the judgment.<sup>89</sup> This may be because, as articulated recently in *OZ Optics Ltd v Timbercon Inc*, "the case law is clear that where a settlement is reached, it is normally implied that an executed final release will be provided."<sup>90</sup> Therefore having an express provision for a release in a Rule 49 offer provides no additional consideration for either party.

Most of the case law around releases and Rule 49 offers is instead directed at the issue of whether, once the Rule 49 offer that requires a release is accepted, a settlement agreement has actually been reached if counsel cannot afterwards agree on the terms of the release. The court held in *Cellular Rental Systems Inc v Bell Mobility Cellular Inc*:<sup>91</sup> "It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, no party is bound to execute a complex or unusual form of release: although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice."<sup>92</sup> As the court further held in *Sivakolunthu v. Royal Bank*,<sup>93</sup> "[O]nce the parties are *ad idem*, one of them cannot wriggle out of a settlement agreement by quibbling over the documentation."<sup>94</sup>

In order not to jeopardize a settlement being reached if a Rule 49 offer is accepted, the Rule 49 offer's term requiring a release should be generally worded and include only as much detail as the offeror absolutely requires in the release as a term of settlement. The boilerplate language with which most parties are content is a term requiring provision of a release or mutual release that is "satisfactory to counsel for the parties acting reasonably."

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<sup>89</sup> See e.g. *Shah v Mohr*, 1998 CarswellOnt 3735 (Gen Div) at paras 2-3, where the court mentioned in passing that the defendant's two Rule 49 offers each had term requiring a mutual release, but the court did not factor this into its favourability analysis.

<sup>90</sup> [OZ Optics Ltd v Timbercon Inc](#), 2013 ONSC 6439 at para 8.

<sup>91</sup> [Cellular Rental Systems Inc v Bell Mobility Cellular Inc](#), 1995 CarswellOnt 4182 (Gen Div), 1995 CanLII 10638.

<sup>92</sup> *Ibid* at para 24.

<sup>93</sup> *Sivakolunthu v Royal Bank*, 2001 CarswellOnt 110 (SC).

<sup>94</sup> *Ibid* at para 13.

### **(c) Consequences of failing to comply**

Even if an offer to settle is purportedly accepted, one or more parties may fail to or decide not to comply with its terms for reasons such as mistake, perceiving the terms to be unfair, and questions about whether counsel had the authority to make or accept a settlement on behalf of the client.<sup>95</sup>

Pursuant to rule 49.09, if a party to an accepted offer to settle fails to comply with its terms, the other party can (a) bring a motion to a judge for judgment in the terms of the accepted offer, or (b) continue the proceeding as if there had been no accepted offer to settle.<sup>96</sup> The purpose of bringing a motion under rule 49.09 is to get a quick judgment where there has been a clear offer, acceptance, and failure to comply.<sup>97</sup>

The court will undertake a two-step analysis under rule 49.04. The first step is to determine whether a settlement agreement has been reached on the basis of an accepted offer to settle.<sup>98</sup> On this first step, the court will treat the motion like a rule 20 motion for summary judgment.<sup>99</sup> If the agreement is in writing, the court will read it objectively, and will consider in context any supporting documentation to determine if there was an agreement on essential terms.<sup>100</sup> The court will not grant judgment if there are material issues of fact or credibility that relate to whether the parties intended to create a binding settlement and the terms of the settlement.<sup>101</sup>

If an agreement is found to exist, the second step is to decide whether to enforce it, taking into account all of relevant factors disclosed by the evidence.<sup>102</sup> This step involves discretion, although courts have stated that Rule 49 settlements should be enforced unless to do so would create a real risk of clear injustice.<sup>103</sup>

## **9. Conclusion and Practice Points**

When advising the client about whether to make, accept or reject a Rule 49 offer to settle, lawyers need to balance the interest in getting a settlement, and achieving or avoiding cost consequences if the matter proceeds to trial.<sup>104</sup> Keep the practice points below in mind to achieve the best results for your client<sup>105</sup>. Regardless of the route you take, be sure to discuss the option of settlement with your client as early on as possible, and at various stages throughout the matter.

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<sup>95</sup> Holmsted & Watson, *Ontario Civil Procedure*, p 49-50 to 49-62.

<sup>96</sup> *Rules of Civil Procedure*, r. 49.09.

<sup>97</sup> [BOT International Ltd v CS Capital Ltd](#), 2013 ONSC 5329, leave to appeal to Div Ct refused, 2014 ONSC 1461.

<sup>98</sup> [Exponents Canada Inc. v Sharma](#), 2015 ONSC 2940 at para 9.

<sup>99</sup> [Capital Gains Income Streams Corp v Merrill Lynch Canada Inc](#), 2007 CarswellOnt 6003 at para 9, 2007 CanLII 39604 (Ont SC Div Ct).

<sup>100</sup> [BOT International Ltd v CS Capital Ltd](#), 2013 ONSC 5329; [Bank of Montreal v Ismail](#), 2012 ONCA 129.

<sup>101</sup> [Capital Gains Income Streams Corp v Merrill Lynch Canada Inc](#), 2007 CarswellOnt 6003 at para 9, 2007 CanLII 39604 (Ont SC Div Ct).

<sup>102</sup> [Milios v Zagas](#), 1998 CarswellOnt 810, 1998 CanLII 7119 (CA); [Capital Gains Income Streams Corp v Merrill Lynch Canada Inc](#), 2007 CarswellOnt 6003 at para 9, 2007 CanLII 39604 (Ont SC Div Ct).

<sup>103</sup> [Brzowski v O'Leary](#), 2004 CanLII 4805 at para 44, [Catford v. Catford](#), 2013 ONSC 7147.

<sup>104</sup> Gavin J Tighe, "Rule 49 – Offers to Settle" (2000) 22 Adv Q 500 at 500.

<sup>105</sup> Adapted in part from Tighe at 519 and Jeffrey Leon & Giovanna Toscana Roccamo, "Strategic Uses of a Favoured Rule: Rule 49 Offers to Settle" (2007) 32 Adv Q 259 at 273-276.

## Settlement Offers

### **Rule 49 Offers**

Put it in writing: oral offers don't qualify under Rule 49, so always make the offer in writing, and specify that the offer is made pursuant to Rule 49.

Be strategic: Make your offer during a juncture before a major step in the litigation, or any other time where the opposing side would have more incentive to settle.

Deal with costs: Consider including an ongoing costs provision and/or an ongoing prejudgment interest provision in your Rule 49 offer to protect your client's interests in the event the offer is accepted late in the litigation. However, the costs provision in a Rule 49 offer should generally be on a partial indemnity basis throughout, to ensure that costs under the offer are not more favourable to the offeror than costs awarded by the court before the impact of Rule 49.10 is factored in. Also be aware that if the Rule 49 offer is silent on costs, then the default costs provisions of Rule 49.07(5) will apply.

Make it easy for the court: ensure the terms are sufficiently certain, clear and comparable to a potential court judgment, so that a court can easily do the favourability comparison. Avoid structuring your offer as an "all-inclusive sum".

Sell your offer to the offeree: When serving an offer, provide an explanation to the offeree of the computation and rationale to point out the elements of compromise and explain why the offer is reasonable and should be accepted. Your Offer to Settle and likely any accompanying cover letter will be forwarded by opposing counsel to its client, so regard the letter as an advocacy piece pitched at opposing counsel and the opposing party.

Prepare an affidavit of service: It is good practice to prepare an affidavit of service each time you serve a Rule 49 offer, in the event you may have to later prove that you made the offer and when.

Keep track of what's open for acceptance: Remember that a Rule 49 offer remains open even if the other side rejects it or makes a counter-offer. Therefore, if your client is no longer willing to settle on the terms of its Rule 49 offer, ensure that you withdraw it in writing in clear and

### **Common Law Offers**

Be explicit: clearly state that the offer is time-limited, and indicate when the offer expires. Include all essential business terms.

Be strategic, part 1: think about why you want to make a common law offer as opposed to a Rule 49 offer. Rule 49 offers trigger potential cost consequences under the Rules, while common law offers do not (although they make be taken into consideration to influence a costs award). However, common law offers can put the other side "under the gun" more than a Rule 49 offer.

Be strategic, part 2: Make your common law offer during a juncture before or after a major step in the litigation, or any other time where the opposing side would have more incentive to settle. A common law offer can be used effectively at certain junctures in addition to the pre-existing Rule 49 offer to settle to drive a settlement.

Sell your offer to the offeree: When making a settlement offer, provide an explanation to the offeree of the computation and rationale to point out the elements of compromise and explain why the offer is reasonable and should be accepted. Your letter containing the proposed settlement terms will likely be forwarded by opposing counsel to its client, so regard the letter as an advocacy piece pitched at opposing counsel and the opposing party.

Make your offer expressly "Without Prejudice":

As a common law offer does *not* have the benefit of Rule 49.06 which deems Rule 49 Offers to Settle "to be an offer of compromise made without prejudice", it is important to include a "without prejudice" banner in a common law offer.

### **Rule 49 Offers**

unequivocal terms. This is particularly important in protracted litigation to avoid being taken by surprise when an “open” Rule 49 offer is accepted. If you are making a subsequent Rule 49 offer, clarify whether previous Rule 49 offers are still open for acceptance.

Explain Rule 49 to clients: It is good practice to have a pre-prepared memo that explains to clients, in clear and simple terms, the system of costs incentives and penalties in Rule 49 designed to encourage litigants to make and accept reasonable settlement offers. This memo may then be readily sent to clients at the outset of litigation and again any time you seek instructions to make a settlement offer and any time they have received a Rule 49 offer.

### **Common Law Offers**

**Annotated Sample of Rule 49 Offer to Settle**

Court File No. XXXXXXXXX

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

B E T W E N:

**ABC CORP.**

Plaintiff

and

**XYZ INC.**

Defendant

**RULE 49 OFFER TO SETTLE**

THE PLAINTIFF offers to settle this proceeding on the following terms:

1. The Defendant shall pay to the Plaintiff by bank draft, certified cheque or electronic fund transfer within 30 days of acceptance of this Offer to Settle:

- (a) \$1,000,000 (the “**Settlement Amount**”); [*Consider whether HST will be payable by the payee on the Settlement Amount and if so whether the settlement figure is to be inclusive of HST or “plus applicable HST”*]
- (b) Prejudgment interest on the Settlement Amount at the rate of X% being the applicable prejudgment rate provided by the *Courts of Justice Act*, R.S.O, c. C.43, ss. 127-128 from the date of this Offer to Settle to the date of payment; and
- (c) The costs incurred by the Plaintiff [from the date this Offer to Settle is served on the Defendant] to the date of acceptance, on a partial indemnity scale in an amount to be agreed upon or, failing agreement, to be assessed or fixed by the

Court, which amount shall be paid within 30 days of being quantified. *[This is the “ongoing costs” provision, and should always be on a partial indemnity basis throughout unless the party making the offer has some right to elevated costs independent of the operation of Rule 49 e.g. a contractual right to full indemnity costs. The start date for ongoing costs can be delayed to give the offeree an incentive to accept within a prompt window of time after service of the offer where there will be no costs.]*

2. The parties shall execute a full and final mutual release in a form satisfactory to their counsel, acting reasonably, releasing all claims between them relating in any way to the matters and events in issue in this proceeding *[In cases where the parties’ interactions are limited to the events giving rise to the litigation and are not ongoing, it may be appropriate to define the scope of the release more broadly e.g. releasing all claims between them to the date of the Release.]*

3. Upon payment of the amounts set out in paragraph 1 and the execution and delivery of the full and final mutual release, this proceeding shall be dismissed on consent. *[If the settlement offer is made in a multi-party action involving several liability claims (e.g. claims against guarantors under several liability guarantees) and no crossclaims, the offer terms must indicate that the offer may be accepted by any of the opposite parties and the action will be dismissed on consent as against each accepting party and the mutual release will be limited to releasing claims as between the offering and accepting parties.]*

4. *[Add any other material business terms of settlement including confidentiality of the settlement terms if that is essential, non-disparagement, etc.]*



5. This Offer to Settle expires one (1) minute after the commencement of the hearing of this proceeding unless it is withdrawn in writing earlier. [*This satisfies the requirement under Rule 49.10(2)(b) that the offer does not expire before the commencement of the hearing.*]

6. This Offer to Settle does not constitute a withdrawal of any earlier Rule 49 offers made by the Plaintiff. Such earlier Rule 49 offers remain open for acceptance until one (1) minute after the commencement of the hearing of this proceeding unless expressly withdrawn in writing. [*If the Plaintiff has made a previous Rule 49 offer for a higher amount (or in the case of a Defendant's offer, for a lower amount) this provision confirms that the previous offer remains open and may still attract the cost consequences of Rule 49.10 if the party making this Rule 49 offer beats their previous offer. If there is only one earlier Rule 49 offer, specify it by date for certainty and ease of comparison.*]

Date: September 28, 2015

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RCP-E 49A (July 1, 2007)

ABC CORP.  
Plaintiff

- and -

XYZ INC.  
Defendant

***ONTARIO***

**SUPERIOR COURT OF JUSTICE**

**PROCEEDING COMMENCED AT TORONTO**

**RULE 49 OFFER TO SETTLE**

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## **Rules of Civil Procedure – Rule 49 Offer to Settle**

### **DEFINITIONS**

49.01 In rules 49.02 to 49.14,

“defendant” includes a respondent; (“défendeur”)

“plaintiff” includes an applicant. (“demandeur”) R.R.O. 1990, Reg. 194, r. 49.01.

### **WHERE AVAILABLE**

49.02 (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A). R.R.O. 1990, Reg. 194, r. 49.02 (1).

(2) Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications. O. Reg. 627/98, s. 4.

### **TIME FOR MAKING OFFER**

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply. R.R.O. 1990, Reg. 194, r. 49.03.

### **WITHDRAWAL OR EXPIRY OF OFFER**

#### *Withdrawal*

49.04 (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the offer was made. R.R.O. 1990, Reg. 194, r. 49.04 (1).

(2) The notice of withdrawal of the offer may be in Form 49B. R.R.O. 1990, Reg. 194, r. 49.04 (2).

#### *Offer Expiring after Limited Time*

(3) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires. R.R.O. 1990, Reg. 194, r. 49.04 (3).

#### *Offer Expires when Court Disposes of Claim*

(4) An offer may not be accepted after the court disposes of the claim in respect of which the offer is made. R.R.O. 1990, Reg. 194, r. 49.04 (4).

### **EFFECT OF OFFER**

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice. R.R.O. 1990, Reg. 194, r. 49.05; O. Reg. 132/04, s. 11.

### **DISCLOSURE OF OFFER TO COURT**

49.06 (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading. R.R.O. 1990, Reg. 194, r. 49.06 (1).

(2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined. R.R.O. 1990, Reg. 194, r. 49.06 (2).

(3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined. R.R.O. 1990, Reg. 194, r. 49.06 (3).

## **ACCEPTANCE OF OFFER**

### *Generally*

49.07 (1) An offer to settle may be accepted by serving an acceptance of offer (Form 49C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made. R.R.O. 1990, Reg. 194, r. 49.07 (1).

(2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter-offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made. R.R.O. 1990, Reg. 194, r. 49.07 (2).

### *Payment into Court or to Trustee as Term of Offer*

(3) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court or to a trustee and the defendant may accept the offer only by paying the money in accordance with the offer and notifying the plaintiff of the payment. R.R.O. 1990, Reg. 194, r. 49.07 (3).

### *Payment into Court or to Trustee as a Condition of Acceptance*

(4) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court or to a trustee and, where the offer is so accepted and the defendant fails to pay the money in accordance with the acceptance, the plaintiff may proceed as provided in rule 49.09 for failure to comply with the terms of an accepted offer. R.R.O. 1990, Reg. 194, r. 49.07 (4).

### *Costs*

(5) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,

(a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or

(b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served. R.R.O. 1990, Reg. 194, r. 49.07 (5).

### *Incorporating into Judgment*

(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment. R.R.O. 1990, Reg. 194, r. 49.07 (6).

### *Payment out of Court*

(7) Where money is paid into court under subrule (3) or (4), it may be paid out on consent or by order. R.R.O. 1990, Reg. 194, r. 49.07 (7).

## **PARTIES UNDER DISABILITY**

49.08 A party under disability may make, withdraw and accept an offer to settle, but no acceptance of an offer made by the party and no acceptance by the party of an offer made by another party is binding on the party until the settlement has been approved as provided in rule 7.08. R.R.O. 1990, Reg. 194, r. 49.08.

## **FAILURE TO COMPLY WITH ACCEPTED OFFER**

49.09 Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,

(a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or

(b) continue the proceeding as if there had been no accepted offer to settle. R.R.O. 1990, Reg. 194, r. 49.09.

**COSTS CONSEQUENCES OF FAILURE TO ACCEPT**

*Plaintiff's Offer*

49.10 (1) Where an offer to settle,

- (a) is made by a plaintiff at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the defendant,

and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1).

*Defendant's Offer*

(2) Where an offer to settle,

- (a) is made by a defendant at least seven days before the commencement of the hearing;
- (b) is not withdrawn and does not expire before the commencement of the hearing; and
- (c) is not accepted by the plaintiff,

and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer was served and the defendant is entitled to partial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (2); O. Reg. 284/01, s. 11 (2).

*Burden of Proof*

(3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2). O. Reg. 219/91, s. 6.

**MULTIPLE DEFENDANTS**

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by rule 49.10 do not apply to an offer to settle unless,

(a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or

(b) in the case of an offer made to the plaintiff,

(i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer, or

(ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and severally liable to the plaintiff for the whole amount of the offer. R.R.O. 1990, Reg. 194, r. 49.11.

**OFFER TO CONTRIBUTE**

49.12 (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49D) toward a settlement of the claim. R.R.O. 1990, Reg. 194, r. 49.12 (1); O. Reg. 627/98, s. 5.

(2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,

(a) to pay the costs of the defendant who made the offer; or

(b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff,

or to do both. R.R.O. 1990, Reg. 194, r. 49.12 (2).

(3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle. R.R.O. 1990, Reg. 194, r. 49.12 (3).

**DISCRETION OF COURT**

49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer. R.R.O. 1990, Reg. 194, r. 49.13.

**APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS**

49.14 Rules 49.01 to 49.13 apply, with necessary modifications, to counterclaims, crossclaims and third party claims. R.R.O. 1990, Reg. 194, r. 49.14.