Opportunities for Settlement and the Litigation Timeline

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There is no question that nearly all cases settle before trial. When and how counsel make offers to settle, and the all-important cost consequences of those offers, are questions that attract much discussion. This paper will explore issues surrounding offers to settle at different points in the litigation process, from pre-litigation to during trial.

We will first discuss pre-litigation offers and the interaction between settlement discussions and pleadings. We will then explore the complete costs regime of Rule 49 of the *Rules of Civil Procedure*, including permissible escalating offers, the interplay of multiple offers and what constitutes a more favourable offer. We then discuss offers that fall outside the Rule 49 regime. Finally, we will review the strategic considerations in making offers at various points in time.

1. Pre-Litigation Offers

In many cases, attempts are made to settle a matter before litigation is commenced.

It is always recommended that counsel consider whether an early resolution can be achieved in any particular action. It is in the best interest of the client to obtain a resolution quickly and expeditiously, provided damages can be accurately assessed at an early stage. Resolution is really all the clients ever ask for, as quickly and cheaply as possible as a general rule. In order to attempt to resolve matters, however, it is important that you be able to accurately quantify the client's damages. You first have to assess what the damages likely are and what the maximum damage award might be. Then you can discuss with the client what an appropriate and acceptable recommendation would be with a view to an early settlement. Cases can only settle based upon client instructions and the client will want an opinion and recommendation before deciding whether they are comfortable with early resolution.

The appropriate timing of settlement is not always clear and will depend upon the nature of the case and known factors at any given point in time. You never want to be in a position of recommending a settlement to a client when you have no idea what the damages are, for example. In some cases, it may even be that litigation has to be commenced before an offer can be made as the damages are not yet known and limitation periods have to be complied with. However, in the vast majority of cases involving commercial litigation, breach of contract, and certainly in employment matters, pre-litigation offers are common and should be considered if they are in the client's best interest.

Rule 49, explored in detail below, does not apply to offers to settle made before litigation begins. Rule 49 is triggered by a "party to a proceeding" serving an offer to settle "any one or more of the claims in the proceeding". If there is no proceeding, defined as an action or application, there can be no Rule 49 offer.[1]

However, a court still has discretion under Rule 49.13 to consider offers that do not fall within the confines of Rule 49 in awarding costs. In *McBride Metal Fabricating Corp. v. H & W Sales Company Inc*., the Court of Appeal appears to indicate that this discretion can include consideration of pre-litigation offers, although it reversed a lower court's decision to award substantial indemnity costs against the defendant for the entirety of that action on the basis of Rule 49.13.[2]

Notwithstanding there not being any certain Rule 49 cost consequences, engaging in settlement negotiations at the first available opportunity is usually advisable. A party is also free to formalize a pre-litigation offer after an action is commenced in a form compliant with Rule 49 to reap the cost benefits of the rule.

You may consider service of an offer to settle together with a draft Statement of Claim as opposed to a demand letter. This is unlikely to harm, but may be equally unlikely to help your client. If the facts of the case are known to the other side, it seems to be a waste of effort, time and expense to the client to be drafting pleadings unnecessarily

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[1] *Scanlon v. Standish*, 2002 CarswellOnt 128 (ONCA) at para 8
[2] *McBride Metal Fabricating Corp. v. H & W Sales Company Inc*., 2002 CanLII 41899 (ON CA) at paras 35-38.

when the claim may never have to be issued. Prospective defendants are rarely intimidated into settlement by a draft claim. When it becomes clear that negotiations are not going to result in settlement, that is when the Statement of Claim must be prepared.

If your client has a settlement position which you wish to preserve with a Rule 49 offer, you can serve a Rule 49 offer together with your claim. However, you should consider that, to be most effective, a Rule 49 offer should represent damages that are below what your client expects to achieve at trial. It is really their final settlement position. At the outset of litigation and moving into a mediation, you may not wish to have your client's final and lowest settlement position on the table as it would set the ground floor for negotiation going forward.

Often, a pre-litigation mediation is worth considering if the intervention of a third party would be helpful. This can be particularly effective where one party's counsel signals that their client requires a "little push" by a third party to bring home the reality of their prospects. It is possible for counsel to agree that the pre-litigation mediation can be substituted for the mandatory mediation. If the mediation fails and a proceeding is commenced, the mediator may file the Certificate, allowing you to move the matter towards settlement far more quickly than in the normal course where mediation often follows discovery.

In employment cases in particular, mediation has a very high statistical resolution rate and it makes good sense to consider early mediation, whether that be before proceedings are commenced or in advance of discovery. Reaching such an agreement with opposing counsel requires open communication between the lawyers and a certain degree of realism in terms of where your client is likely to land relative to the expectations of the other party. Otherwise, it may be in the interest of all parties to defer mediation until such point as they can more accurately assess the case of the other and be in the mind-set to engage in a fruitful settlement discussion.

2. The Rule 49 Regime

To understand the strategy behind making offers at different points along the litigation timeline, an understanding of Rule 49 is necessary. Rule 49 provides a complete self-contained scheme for offers to settle made during the course of litigation.[3] It is intended to create "an incentive for parties to settle disputes without the need of a trial by imposing significant cost consequences".[4] Rule 49 offers are available in actions, applications,[5] counterclaims, crossclaims, third-party claims,[6] and on motions.[7]

(a) Requirements of Rule 49 Offers

The following features are necessary in order for a settlement offer to fall within the ambit of Rule 49:

1. It must be in writing;
2. It must be effectively delivered to the opposing party;
3. It must be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted; and,
4. It must be made at least seven days before commencement of the hearing and must not be withdrawn or expire before the commencement of the hearing.[8]

The offer may be in Form 49A but need not be, and may be communicated in correspondence between counsel.

The rule that an offer must stay open until after the commencement of trial was at issue in the recent Court of Appeal decision of *Fonseca v. Hansen*. The defendant in a motor vehicle accident case served an offer on the plaintiff for $1 million that was open until one minute after the commencement of trial. The trial began and the plaintiff did not accept the offer. A mistrial was declared after several days of evidence. At the second trial, the plaintiff recovered less than half a million dollars. In determining costs, the trial

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[3] *363066 Ontario Ltd. v Gullo*, 2007 ONCA 785 at para 9.
[4] *Novacrete Construction Ltd. v. Profile Building Supplies Inc.,* 2000 CarswellOnt 1174 at para 14.
[5] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 49.02(1)
[6] Rule 49.14
[7] Rule 49.01
[8] *Clark Agri Service Inc. v. 705680 Ontario Ltd.*, (1997) 2 CPC (4th) 78 at para 4; Rule 49.10(1)(a) and 49.10(2)(a) govern when an offer must be made; Rules 49.10(1)(b) and 49.10(2)(b) govern how long an offer must stay open.

judge declined to consider the defendant's offer because it did not remain open until the commencement of the second trial from which the less favourable judgment resulted. The Court of Appeal upheld the trial judge's decision that "the fact that what was a trial when it started turned out to be no trial at all, does not revitalize or extend the offer because the circumstances intended for the duration of its availability had passed".[9]

Although this interpretation technically complies with Rule 49, it does seem somewhat unfair to the defendant, as the Court does not suggest what the defendant could have done to avoid this result. They could not have known at the time the offer expired that a mistrial was to result. The lesson appears to be that Rule 49 may work an injustice in circumstances outside the normal progression of an action.

(b) Cost consequences of Rule 49 offers

The crux of Rule 49 lies in the cost consequences contained in Rule 49.10. Rule 49 offers have the potential to be more advantageous, in terms of cost consequences, for the plaintiff than the defendant. If the plaintiff makes an offer that is rejected and obtains judgment that is as favourable or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs up to the date of the offer and substantial indemnity costs after the date of the offer.[10] Absent an offer (or a clear finding of reprehensible conduct by the defendant), a successful plaintiff would expect partial indemnity costs throughout.[11]

In contrast, if the defendant makes an offer to settle that is rejected and the plaintiff obtains judgment that is 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.[12] Absent these precise circumstances, there are no cost consequences to a defendant's offer to settle.

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[9] *Fonseca v. Hansen*, 2016 ONCA 299 at paras 90-92.
[10] Rule 49.10(1)
[11] *Davies v. Clarington (Municipality)*, 2009 OJ No 4236 (ONCA) at para 40.
[12] Rule 49.10(2)

To stand the best chance of triggering the rule effectively, the Plaintiff must put forward its lowest possible settlement position, and make it less (more than trivially less) than it will likely receive at trial.

Escalating offers and ambiguity

In considering when to make an offer during the course of litigation, it is necessary to understand the effect of escalating offers, the value of which may change as time progresses. An example of an escalating offer is an offer that includes an escalating amount of costs or pre-judgment interest. Escalating offers can offer a valuable tactical advantage.[13] They can create an incentive to accept the offer sooner rather than later and provide an increased value to the offering party if the other party is slow to accept.

The law on this point has evolved from a strict requirement of certainty towards the current principle that some amount of uncertainty inherent in an escalating offer is acceptable under Rule 49. A shift occurred in *Rooney (Litigation Guardian of) v. Graham*, where the plaintiff offered to settle for a payment of $800,000 plus pre-judgment interest at 10% on the sum of $225,000 from the date of the offer to the date of acceptance.[14] The offer also included payment of partial indemnity costs by the defendant to the date of the offer and substantial indemnity costs thereafter. The interest and the substantial indemnity costs increased with every day the offer remained unaccepted. It was not a “clean” offer of a fixed amount. The Court of Appeal concluded that the uncertainty of escalating costs or interest should not invalidate Rule 49 offers, but that it was important for counsel to maintain ongoing communication about the quantum of costs.

(c) The effect of multiple offers

As litigation progresses and more facts reveal themselves, it may be necessary to make additional offers to settle. Multiple offers are allowed under Rule 49 but where multiple

[13] Jeffrey Leon & Justice Giovanna Toscano Roccamo, “Strategic Uses of a Favoured Rule: Rule 49 Offers to Settle” 32 *Advoc Q* 259 (2006-2007) at p. 264 [Leon & Roccamo].
[14] *Rooney (Litigation Guardian of) v. Graham*, 2001 CarswellOnt 887 (ONCA); See also *Elbakhiet v. Palmer*, 2014 ONCA 544.

offers are made, it is crucial for counsel to understand the effect of later offers, especially on the key issue of costs.

Rule 49.07(2) reverses the common-law position by providing that a party may accept an original offer to settle although he or she has made a counter-offer, unless the original offer has been withdrawn or the court has disposed of the claim.[15]

Sometimes, an unaccepted offer is impliedly withdrawn by subsequent offers. Whether a subsequent offer has the effect of withdrawing an earlier offer depends on whether the subsequent offer was more or less favourable to the opposing party. In *Love v. Acuity,* a second offer of $920,000 made by the respondent employer to a former employee in a wrongful dismissal action was less favourable than the first offer of $1.1 million. Both offers were more favourable than the award at trial. As the Court of Appeal pointed out, “unless the second offer was intended to revoke the first, there was no point in the respondent making it.” The effective date for the cost consequences under Rule 49.10(2) was thus the date of the second offer.[16]

Where judgment ultimately obtained is *better than the second offer, but not the first*, cost consequences will only attach from the time of the second offer since this is the only offer that is more favourable to the offeree than the judgment. For example, if the plaintiff first offers $20,000, makes a second offer of $10,000 and receives judgment for $15,000, cost consequences apply only from the date of the second offer.

Conversely, where judgment obtained is *better than the first offer but not the second*, cost consequences arise from the time of the first offer. For example, a plaintiff makes a first offer of $10,000 and a second offer of $20,000 and then obtains judgment for $15,000, cost consequences apply from the first offer assuming the second offer did not explicitly withdraw the first.[17]

The default under Rule 49.04(1) is that an offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer. This default is

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[15] *Scanlon v. Standish*, *supra* at para 7.

[16] *Love v. Acuity Investment Management Inc*., 2011 ONCA 130 at para 30-31.

[17] Leon & Roccamo, *supra* at p. 270 citing *Boer v. Cairns*, 2003 CarswellOnt 2524

not altered even by express language in the offer indicating it is irrevocable, as the Court of Appeal clarified in *363066 Ontario Ltd. v. Gullo*.

In *Gullo*, a 2004 offer indicated that it was to "remain *irrevocable* until one minute after the commencement of the trial of this action". In 2006, the defendant made inquiries about the 2004 offer but did not accept it. Shortly thereafter, the plaintiffs revoked the 2004 offer and made a new, less favourable, offer to settle. The 2006 offer expressly revoked the 2004 offer. The Court of Appeal found that Rule 49 was a self-contained code and it was not necessary to draw on Rule 1.04 to liberally construe Rule 49 to make it subject to an irrevocability provision in an offer. The plaintiff was entitled to revoke the 2004 offer under Rule 49 despite the express language of the offer.[18]

(d) The meaning of a more favourable offer

The party seeking the benefit of an offer has the burden of establishing the criteria for entitlement have been satisfied.[19] This includes establishing that the offer was more favourable than the result obtained. The Court of Appeal has stated there is no "near miss policy" in offers to settle such that, "a party that comes close to meeting the judgment is not thereby entitled to an award of costs as if they did provide a successful offer."[20] Even a "serious attempt to resolve issues" which is not as favourable or more favourable than the result obtained by the opposing party will not attract the costs consequences of Rule 49 automatically, as to do so would introduce serious uncertainty in how offers are treated.[21]

Rule 49 offers should contain an element of compromise. Although nominal offers made only to gain a cost advantage, as opposed to settling the action, can be sufficient to trigger Rule 49, they are not encourage by the courts and should be used with caution and with a reasonable expectation that they will not attract cost consequences.

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[18] *Gullo, supra* at paras 6-9.
[19] Rule 49.10(3)
[20] *Elbakhiet v. Palmer*, 2014 ONCA 544 at para 31.
[21] *Kilitzoglou et al v. Cure et al*, 2016 ONSC 3468 at para 31.

In *Walker Estate v. York-Finch General Hospital,* the parties agreed on the quantum of damages and went to trial on the issue of liability.[22] Prior to trial, the plaintiffs made an offer for the amount of the agreed-upon damages, less $100. The plaintiffs were successful at trial on liability. The Court of Appeal reversed the lower Court's decision to award the plaintiffs substantial indemnity costs after the offer. In doing so, the Court held that the nominal offer was contrary to the spirit of compromise Rule 49 is intended to encourage, and that the absence of compromise can be taken into account when the application of the discretionary exception in Rule 49.10(1) ("unless the court orders otherwise") is considered.[23]

3. Non-Rule 49 Offers

Offers that do not meet the requirements of Rule 49 also have their uses, and may even attract cost consequences under the catch-all Rule 49.13 which provides the court discretion to "take into account any offer to settle made in writing" even outside the confines of the Rule 49 regime and "calls on the judge to take a more holistic approach".[24]

Moreover, non-Rule 49 offers are not bound by the requirement to stay open until after the commencement of the hearing – they can be time limited. Time-limited offers convey the message that such a favourable offer will not be open again.[25] Non-Rule 49 offers can serve many purposes and are often in the client's best interest. Time limited offers in particular can be a driving force in getting a settlement done in a timeframe which impresses a client and avoids unnecessary trial preparation costs and stress for the client.

An offer to settle is often perceived as more fair by the parties and can include more creative solutions without concern for whether those solutions will be too ambiguous to be considered under Rule 49. There are many things which clients may wish to include as a term of settlement which cannot ordered by a court. Apologies, letters, acts of non-

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[22] *Walker Estate v. York-Finch General Hospital,* (1999) 43 OR (3d) 461 (ONCA), aff'd 2001 SCC 23.
[23] *Ibid* at p.480.
[24] *Elbakhiet v. Palmer* at paras 32-33.
[25] Leon & Roccamo at p. 271.

parties to the litigation and the like can be very important to the client. This is also one of the key reasons why mediation is so successful in bringing about resolution.

4. When to make an offer during litigation

Outside of the requirement that offers be made at least seven days before the hearing and be kept open until after the commencement of the hearing to comply with Rule 49, the question of when an offer should be made is one of strategy.

There is little disadvantage to making an early offer to settle. Opposing counsel are unlikely to see it as a sign of weakness, it can be withdrawn until such time as it is accepted, and it can be replaced with a new offer, ideally explicitly withdrawing a previous offer.

An early offer to settle does set expectations for parties entering into mediation. For this reason, you certainly do not want to make a Rule 49 offer which represents your client's bottom line position. However, setting the framework for the issues to be discussed at mediation through exchange of offers in advance can start the mediation on a more productive path. For example, offers can create a framework for various heads of damages, what the client's out-of-pocket expenses are, and any non-monetary issues which should be put on the table. Framing the issues in advance of mediation can ensure that the other parties in attendance are prepared to engage in a discussion about all relevant issues. It serves little purpose to blindside the other parties at mediation with new issues and concerns which they have not had the opportunity to consider in advance.

In general, it is also advisable to consider an offer before any stage of the litigation where a significant amount of time and costs will be expended. This would include the few months preceding trial. Offers delivered before discovery can be advantageous in terms of cost consequences, considering the substantial time often associated with the discovery process. An offer made before discovery may also be useful in testing the opposing side’s confidence in their case before you have a chance to learn about it through discovery. Counsel may be tempted to wait until after discovery to make an offer because they have not yet learned the merits of their own case prior to discovery.

A better strategy is to take the time to address the strengths and weaknesses of your case before discovery and tailor an offer according to your estimate of success. After discovery, it may be appropriate to make a new offer having re-evaluated the merits.[26]

Rule 49 offers cannot be made during trial, but settlement discussions during trial may still be advisable.

Conclusion

There is no perfect time to settle any case. There are vast array of opportunities, both in advance of and during the litigation process, to engage in settlement discussions with opposing counsel. Never once has a client advised that their goal is to engage in protracted and costly litigation. Good counsel continuously explores opportunities for a reasonable settlement which is in their client's best interest both pre-litigation and during litigation. We are all aware of the statistic that the vast majority of cases will settle in advance of trial. The earlier that resolution can be achieved, presuming the resolution was the same at day 1 as it is on day 750, the better the client's interests are served.

We can never be overzealous about achieving a settlement at any cost. The settlement must be reasonable considering the client's prospects of success and reasonable range of outcomes, and be acceptable to the client. Counsel must continuously engage in discussion with their client throughout the course of any retainer. The opportunity for settlement discussions abound. Take the opportunities which make sense for your clients when opportunity strikes.

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[26] Leon & Roccamo at p. 266-268.