

RULE 49

OFFERS TO SETTLE

Purpose: The purpose of the rule is to encourage parties to make offers to settle by providing that if the party making the offer achieves a better result at the hearing than under the Offer to Settle, that party will secure a better order as to costs than would otherwise have been the case.

Timing: Offers to settle must be made **seven days** before the commencement of the hearing and may not expire or be withdrawn before the commencement of the hearing

Where a **plaintiff makes an offer** and the judgment is as or more favourable to the plaintiff than the offer to settle, the Plaintiff is entitled to:

- Costs on a partial indemnity basis to the date of the offer; and
- Costs on a substantial indemnity basis thereafter

Where a **defendant makes an offer** and the outcome is as or less favourable for the plaintiff than the terms of the offer:

- Plaintiff entitled to partial indemnity costs to the date the offer was served; and
- Defendant entitled partial indemnity costs from that date forward

Map

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1. General Principles

	Principle	Authority
General Test	Judgment + interest + costs (to date of offer) vs. Offer to Settle	<i>Merrill Lynch Canada Inc. v. Cassina</i> (1992), 15 C.P.C. (3d) 264 (Gen. Div.)
Where Plaintiff does not obtain Judgment	Where the plaintiff is entirely unsuccessful and recovers no judgment, Rule 49 is rendered inoperable and costs are to be determined by application of the factors under Rule 57	<i>S & A Strasser Ltd. v. Town of Richmond Hill et al.</i> (1990), 1 O.R. (3d) 243 (C.A.), per Carthy J.A
	In such circumstances, the defendant may receive costs on a partial indemnity basis up to the date of an offer and on a substantial indemnity basis from the time of the offer to the date of judgment	<i>Dunstan v. Flying J Travel Plaza</i> , [2007] O.J. No. 4089
Necessary Features	Must be in writing [Be careful not to leave written offers open if that is not that intention.]	<i>John Logan Chevrolet Oldsmobile Inc. v. Baldwin</i> , [1994] O.J. No. 1378 (Gen. Div.)
	Use of form 49 is permissive- content over form	<i>Lindsay Paper Box Co. v. Shubert Intl. Manufacturing Inc.</i> (1992), 8 O.R. (3r) 437 (Gen. Div)
	May be communicated in correspondence between counsel	<i>Clark Agri Service Inc. v. 705680 Ontario Ltd.</i> , 1996 CarswellOnt 2889, 2 C.P.C. (4th) 78, 11 O.T.C. 241

2. Terms of Settlement

	Principle	Authority
Certainty of Terms	“Fixed, certain, and understandable offer must be outstanding down to trial”. If there is “perpetual variation” in the Offer, it will not be fixed and determinable.	<i>Yepremian v. Weisz</i> (1993), 16 O.R. (3d) 121
	Note: while the above test remains current, a degree of leniency and “creativity” is to be allowed in Rule 49 offers	<i>Rooney (Litigation Guardian of) v. Graham</i> , [2001] O.J. No. 1055
	The court may refuse to assess the value of an offer where it lacks the “confidence” to do so or where the terms are too ambiguous to translate into a dollar value	<i>Starkman v. Starkman</i> , [1990] O.J. No. 1627 (C.A.)
	Judgment valued as if it included interest and costs up to the date of the offer, not up to the day of trial; offer can only be “more favourable than” judgment if the defendant or plaintiff, on the date of the offer, would have been better off to accept than to go to trial	<i>Whitford v. Agrium Inc.</i> , [2007] A.J. No. 384 (C.A.)
	It is for the party seeking to invoke the Rule to establish the foundation for its application	<i>Starkman v. Starkman</i> , [1990] O.J. No. 1627 (C.A.)
Pre-Judgment Interest	You may make or receive a “lump sum” offer that includes interest. Where the offer is a lump sum, including interest, the court will compare the sum to the damages awarded at trial plus prejudgment interest as of the date of the offer	<i>Mathur v. Commercial Union Assurance Co. of Can.</i> (1988), 24 C.P.C. (2d) 225 (Ont. Div. Ct.) upheld in: <i>Emery v. Royal Oak Mines Inc.</i> (1995), 26 O.R. (3d) 216 (Gen. Div)
	Pre-judgment interest is implied on the principal amount offered and need not be stated. The interest will be pursuant to the <i>Courts of Justice Act</i> .	<i>Orsini v. Sherri</i> , [1987] O.J. No. 2323
	Interest entitlements under the <i>Courts of Justice Act</i> vary according to the type of damages claimed. This does not imply uncertainty in terms if the types of damages in an offer to settle are not outlined in that offer - that would be overly technical	<i>Brady v. Lamb</i> , [2004] O.J. No. 212 (QL) ¹ – applying principles in <i>Rooney, supra</i>
	Only interest owing up to the date of the offer can be included, not interest which accrues after the offer	<i>Alberta Wheat Pool v. Northwest Pile Driving Ltd.</i> (2000), 2 C.P.C. (5th) 12 (BCCA).

¹ NOTE: Case overruled on appeal but not with respect to issues of offers to settle and costs

3. Cost Considerations

	Principle	Authority
<p>Costs</p> <p>Where costs are unspecified in an offer to settle, and that offer is accepted, pursuant to Rule 49.07(5), costs will follow for the plaintiff as an implied term of the offer, whether or not expressly stated</p>	<p>Offers that include a fixed amount for costs (best to state “an amount to be agreed upon or assessed”) are to be discouraged—the court should not have to perform an <i>ad hoc</i> assessment of costs as to the date of the offer</p>	<p><i>Noyes v. Attfield</i> (1994), 19 O.R. (3d) 319 (affirmed on appeal)</p>
	<p>Following trial, where an offer was made for costs on a substantial indemnity basis, that offer was denied the costs benefit of Rule 49—substantial indemnity costs are rarely awarded and their award should follow the guidelines in Rule 57</p>	<p><i>Daniels v. Crosfield (Canada) Inc.</i> (1994), 19 O.R. (3d) 430</p>
<p>Escalating Offers</p> <p>An escalating offer is one where the costs amount escalates as the offer continues to remain in existence, prior to the commencement of trial. The reason behind such offers is to enable the party making the offer to recover its costs of litigating a matter as those costs continue to increase.</p>	<p>Escalating offers, where carefully worded, will not contravene the <i>certainty of terms</i> rule</p> <p>Note: a majority the Court of Appeal held that the recovery of costs of ongoing litigation should be recoverable. Interestingly, the escalating costs in this case were on a substantial indemnity basis</p>	<p><i>Rooney v. State Farm, supra</i></p>

4. Expiry/Revocation of Offer

	Principle	Authority
Jury and Non-Jury Trials	Offers must remain open until the hearing of a matter – as such, offers that contain provisions stating that the offer is open until “one minute before the start of trial” or before the hearing of the matter do not comply with the Rule, but wording such as “until the trial of this action” does conform to the Rule	<i>Denison v. M. Loeb Ltd.</i> (1993), 16 O.R. (3d) 130 (Gen. Div.)
	<i>Non-jury trials</i> : trial commences when the action is called for trial, not when evidence is adduced	<i>Bontje v. Campbell, Roy & Brown Insurance Brokers Inc.</i> (1994), 21 O.R. (3d) 545 (Gen Div.)
	<i>Jury Trials</i> : hearing commences when evidence is called before the jury (not when the jury has been selected)	<i>Capela v. Rush</i> (2002), 20 C.P.C. (5 th) 245, 2002 CarswellOnt 1162
Multiple Offers	General Rule: common sense should prevail; a subsequent lower offer by a plaintiff and a subsequent higher offer by a defendant will imply that the previous offer has been withdrawn	<i>Diefenbacher v. Young</i> (1995), 123 D.L.R. (4th) 641 (Ont. C.A.)
	A subsequent higher offer by a plaintiff will also cause the previous offer to be withdrawn	<i>Mills v. Raymond</i> , [1997] O.R. (3d) 62 (leave to appeal refused)
	BUT where a plaintiff explicitly indicates that a second and higher offer is “included and not superseded by” the first offer in the terms of his or her offer, the first offer is not automatically withdrawn.	<i>Cyanamid of Canada Ltd. v. Bigelow Liptak of Canada Ltd</i> (1990), 43 C.P.C. (2d) 1 (Ont. H.C.J)
	<i>Costs consequences of multiple offers</i> : where a judgment is obtained that is more favourable to an offeror than the most recent Rule 49 offer made by that party, the costs consequences of Rule 49 should apply from the date of that offer and going back to any previous Rule 49 offer which was also more favourable to the offeror than the judgment	<i>Boer v. Cairns</i> , [2003] O.J. No. 5466 (S.C.J.)
Withdrawal of Offer Offers must be withdrawn in writing by the party that made the offer, unless followed by a subsequent offer, as per above (see Form 49B – Withdrawal of Offer).	A letter between counsel that explicitly withdraws an offer is also acceptable, following the content over form rule. In certain circumstances, courts have allowed an oral withdrawal of a Rule 49 Offer.	<i>D & R Equipment Repairs Ltd. v. Mardave Construction Ltd.</i> (1989), 69 O.R. (2d) 48
	BUT, the withdrawal in such cases must be clear and unequivocal	<i>He Estate v. ING Insurance Co. of Canada</i> , [2007] O.J. No. 3993
	Counter-offers : Rule 49.07 extends the common law so that where a plaintiff or a defendant responds to the other’s offer with a counter- offer that is not accepted, the original offer is still open for acceptance, unless subsequently withdrawn by the party that made it	<i>D & R Equipment v. Mardave Construction, supra</i>

5. Important Considerations

	Principle	Authority
Non-Monetary Terms	Injunctions: Where consent to an injunction is stated as a term in an offer to settle, receiving an award of damages in excess of damages sought in an offer to settle is still not enough to trigger the application of Rule 49.10 – the injunction sought must also be obtained	<i>Ray Plastics Ltd. v. Dustbane Products Ltd.</i> , [1990] O.J. No. 3122 principle upheld in <i>Rueter v. Fraser Estate</i> , [2000] O.J. No. 3819
	<i>Apologies</i> : In considering a non-monetary term in an offer, the Court must balance the need for certainty (test in <i>Yepremian, supra</i>) with the important policy objective of promoting early settlement BUT, note: Ontario now has an <i>Apology Act</i> that enables parties to litigation to make an apology under the legislation that will not be admissible in court during a proceeding.	<i>Hogson v. Canadian Newspapers Co.</i> (2003), 37 C.P.C. (5th) 165 (S.C.J.)
Motions and Appeals <i>Motions</i> : Pursuant to Rule 49.02 a “proposal for settlement” may be made. The Court is given significant discretion under Rule 49.13 and may consider whether an offer to settle was made when determining costs under Rule 57.	<i>Appeals</i> : Rule 49.10 <i>does not</i> apply to appeals	<i>Bader v. Rennie</i> , [2008] O.J. No. 521 (S.C.J.)
	If an offer to settle has been made, it may be considered when determining costs on appeal	<i>Douglas Hamilton Design Inc. v. Mark</i> , [1993] O.J. No. 1856 (C.A.)
Accident Benefits and Deductibles	Defendants must be cautious when making offers to settle in claims involving the payment of accident benefits by an insurer. Consideration must be given to whether the Defendant will take an assignment of those rights. The relevant date is the value of the offer as at the date of the offer.	<i>Moore v. Cote</i> , [2008] O.J. No. 1998 (S.C.J)
	The statutory deductible (currently \$30,000 under the <i>Insurance Act</i>) <i>does not apply</i> when considering the costs consequences of offers to settle	<i>Rider v. Dydyk</i> , [2007] O.J. No. 3837 (C.A.)