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Crafting the "Perfect" Rule 49 Offer to Settle

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Offers to settle can take a wide range of forms and can involve a variety of terms. However, an offer to settle which is intended to be Rule 49 compliant generally includes certain key terms that are intended to engage the costs consequences in rule 49.10 of Ontario's *Rules of Civil Procedure*.

The outcome of a Rule 49 compliant offer depends on the circumstances of the case and the party that made the offer. In short, rule 49.10 operates by mandating a costs award that is favourable to any party who (i) makes a Rule 49 compliant offer; and (ii) achieves a more favourable result at Trial.

Basics of Rule 49 compliant offers

Certain requirements apply to any party seeking to make a Rule 49 compliant offer, including: 1) the offer must be made at least 7 days before the commencement of the hearing; and 2) the offer cannot be withdrawn or expire before the commencement of the hearing.[1] There are additional requirements if the action involves multiple defendants, which are set out in rule 49.11.

[1] See rules 49.03, 49.10(1) and 49.10(2), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. What triggers the "commencement of a hearing" is a complex issue with its own body of case law. But for Rule 49 purposes, a civil Trial commences when evidence has been heard. See *Elbakhiet v. Palmer*, 2014 ONCA 544, at paras 16 and 20, leave to appeal refused ([2014] S.C.C.A. No. 427) [*Elbakhiet*].

Litigants may be incentivized to make an offer because they hope that it will be accepted and the Trial will be avoided entirely. However, most parties are motivated to serve a Rule 49 compliant offer in an effort to engage the following cost consequences.

If a plaintiff "beats" their Rule 49 compliant offer at Trial, they are entitled to partial indemnity costs up to the date of the offer, and substantial indemnity costs thereafter. Conversely, if a defendant "beats" their Rule 49 compliant offer at Trial, the plaintiff is still entitled to their partial indemnity costs up to the date of the defendant's offer, but the defendant is entitled to their own partial indemnity costs thereafter.

Determining whether a party "beat" their offer at Trial

In some cases, it will be patently obvious that a party's Rule 49 offer "beat" the result obtained at Trial, but in many cases, parties will dispute whether an offer was in fact more or less favourable than the result.

Ontario Courts apply a high standard when assessing whether a Rule 49 offer is better or worse than the result a Trial. For a settlement offer to engage the cost consequences of rule 49.10, some Courts have stated that the offer must be "crystal clear", and "[u]ncertainty or lack of clarity in any aspect of an offer may prevent a party from showing that the judgment obtained was "as favourable as the terms of the offer to settle, or more or less favourable", as the case may be".[2] The party looking to rely on rule 49.10 has the burden of proving that the result obtained at Trial was more or less favourable than their Rule 49 offer(s).[3]

That being said, uncertainty alone will not make a settlement offer non-compliant with Rule 49. Rather, uncertainty or lack of clarity impacts whether a party can meet their burden of proving that the judgment at Trial is more or less favourable than their offer.[4]

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[2] *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622, at para 111 [*Mayer*], citing *inter alia*, *Rooney (Litigation Guardian of) v. Graham* (2001), 53 O.R. (3d) 685 (Ont. C.A.) at para 44 [*Rooney*].

[3] See rule 49.10(3), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and *Elbakhiet*, *supra* note 1 at para 28.

[4] *Rooney supra* note 2, cited with approval by the Court of Appeal in *Elbakhiet*, *supra* note 1 at para 25.

In other words, if a party beats their Rule 49 offer by a very high margin, it should not matter if the offer gave rise to some minor uncertainty when it was made.

For example, in the leading case of *Elbakhiet v. Palmer*, the defendant's offer ($145,000 plus interest and costs), barely exceeded the damages awarded ($144,013.07). The offer did not specify what rate of pre-judgment interest would apply, and how much interest was awarded would determine if the offer was better than the result. Due to the small margin, the Court of Appeal held that "only by making some arbitrary distribution of interest could the [defendant] establish that their offer exceeded the Judgment".[5]

Consequently, the offer in *Elbakhiet* did not engage Rule 49. This was not because of the uncertainty in and of itself, but because the defendant failed to prove that the offer was more favourable. If the margin between their offer and the damages award had been higher, the defendant might have been able to do so, notwithstanding the uncertainty.

In a jury Trial, the Rule 49 offer is not compared to the quantum of damages awarded by the jury; instead, the offer is measured against the damages awarded by the judge plus pre-judgment interest, and after any applicable reductions.[6] Reductions such as statutory deductibles, *past* collateral benefits and equitable setoff will generally be applied before determining whether an offer beat the verdict at Trial.[7] That is unless a statutory provision requires a reduction to be ignored for the purpose of fixing costs (as was the case until recently for the statutory deductible applied to motor vehicle claims).

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[5] *Elbakhiet supra* note 1 at para 28.

[6] *Wilson v. Cranley*, 2014 ONCA 844, at para 17.

[7] Only *past* collateral benefits are noted above, as the interplay between future collateral benefits and Rule 49 offers, in particular in motor vehicle cases, is particularly complex and beyond the scope of this article. For a detailed discussion of this issue, see "*The Interplay Between Tort and Accident Benefits - The Law and Practical Issues at Trial*", at page 22, by my colleagues, Stephen Ross and Meryl Rodrigues, and the Court of Appeal's recent decisions: *Cobb v. Long Estate*, 2017 ONCA 717 and *El-Khodr v. Lackie*, 2017 ONCA 716.

Key terms to consider when drafting a Rule 49 compliant offer

As a result of the high threshold described above, every case will turn on its particular facts, namely the terms of the Rule 49 offer and the result at Trial. A term that is found ambiguous or uncertain in one case might be "crystal clear" in another case.

Thus, when crafting the "perfect" Rule 49 compliant offer, certain terms should be avoided or included, depending on the circumstances of the case. The following is a non-exhaustive list of terms that can impact whether an offer will be Rule 49 compliant:

- If an action involves multiple plaintiffs, the offer should be explicitly severable as between the plaintiffs.[8] Logic dictates that a properly severable offer must also specify any amount(s) to be paid to each plaintiff, if accepted by any one of them. However, recently in *Cobb v. Long Estate*, the defendant offered to settle the claims of all plaintiffs, without a breakdown among the main plaintiff and the *Family Law Act* plaintiffs. The Court of Appeal held that the offer was Rule 49 compliant, although it did not specifically address the issue of one offer being made to multiple plaintiffs.[9]
- There is no freestanding requirement for a Rule 49 compliant offer to be broken down by heads of damage. However, where an offer covers multiple heads of damage, a lump sum can create uncertainty (and thus render the party who made the offer unable to prove that it "beat" the offer at Trial), especially if different interest rates apply.[10]
- Similarly, there is conflicting case law on whether pre-judgment interest can be included in a lump sum offer, or must be provided for separately. Depending on

[8] *Mayer supra* note 2 at para 115: non-severable offers are non-compliant with Rule 49 "because they raise the danger of defendants encouraging plaintiffs to "play off their claims against each other"".
[9] *Cobb v. Long Estate*, 2017 ONCA 717 at paras 143 and 147 [*Cobb*].
[10] *Elbakhiet supra* note 1 at paras 26 and 28.

the facts of the case, an amount inclusive of pre-judgment interest might create sufficient uncertainty to render the offer non-compliant.[11]

- The costs and disbursements component of an offer should be broken out from any payment to be made towards damages. However, in at least one case, an offer to pay a fixed amount for damages and costs, plus interest, was held to be Rule 49 compliant.[12]
- In *Cobb v. Long Estate*, the Court of Appeal also held that the defendant's offer was Rule 49 compliant, even though it required the plaintiffs to pay the defendant's costs from the second day after the offer was served, unless the offer was accepted within 30 days.[13]
- If a party makes a subsequent Rule 49 offer, that party's earlier Rule 49 offer(s) are deemed withdrawn, unless the latter offer explicitly states the contrary intention.[14] If a party intends to make a subsequent Rule 49 compliant offer, the offer should explicitly state whether earlier offers are withdrawn or are available concurrently.
- Although an offer that requires a Full and Final Release could be Rule 49 compliant,[15] it is submitted that this practice should be avoided. A plaintiff who obtains judgment after Trial does not sign a Full and Final Release, and an at-

[11] Mayer at para 113, citing *Mathur v. Commercial Union Assurance Co. of Canada*, [1988] O.J. No. 144 (Ont. Div. Ct.). In *Mayer*, Justice Leach found that the "all inclusive" offer lacked the clarity required by rule 49, because pre-judgment interest increases over time, with a corresponding decrease in the damages paid.

[12] See *Hydrastone Inc. v. Clearway Construction Inc.*, 2015 ONSC 6358, where the defendant offered to settle for $75,000 for damages and costs, plus interest. Master Albert awarded the plaintiff damages and costs totaling only $72,084.94 (i.e. around $3,000 less than the defendant's offer), but refused to apply Rule 49. This finding was overturned on an appeal to Justice Mew, who found that the defendant's offer was not vague, and that "[a]n offer which is inclusive of costs can readily be valued once the costs have been assessed or fixed by the court". Justice Mew applied the cost consequences of Rule 49. Notwithstanding this case, it is submitted that an offer inclusive of costs will only rarely be found to be Rule 49 compliant.

[13] *Cobb supra* note 9 at paras 143 and 147. In making this finding, the panel in *Cobb* relied upon the Court of Appeal's earlier decision in *Rooney supra* note 2, where the plaintiffs' offer had contained a similar term for the ongoing payment of costs, but was still found to be Rule 49 compliant. Although such terms are "in some measure" uncertain, they do not invalidate an offer that is otherwise Rule 49 compliant.

[14] See *Stradiotto v. BMO Nesbitt Burns Inc.*, 2015 ONSC 1760 at para 17, and *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641 (Ont. C.A.) at paras 20 and 21.

[15] See *Evoke Solutions Inc. v. Chive Inc.*, 2017 ONSC 1684, at paras 9 to 12 and 32.

fault defendant is not entitled to insist upon a Confidentiality Agreement. Including these devices as terms in an offer will make it difficult, if not impossible, to prove that the offer was "beaten" at Trial.

Depending on the circumstances, it might be appropriate to make an offer non-severable as between multiple plaintiffs, to include a term requiring the plaintiff to sign a Confidentiality Agreement, or to include any of the other terms discussed above. Defence counsel and insurance adjusters should appreciate that these terms might make the offer non-compliant with Rule 49, and weigh the risks of doing so accordingly.

"Close" does not count – but it will be taken into consideration

The Ontario Court of Appeal has specifically held that there is no "near miss" principle, which had previously allowed the consequences of Rule 49 to be invoked where the amount of an offer came very close to beating the result at Trial.[16] Similarly, there is no such thing as a "near miss" when it comes to the 7-day time requirement of Rule 49.[17]

However, under rule 49.13, the Court may consider any written offer to settle in fixing costs, and it appears that "near miss" offers will be given particularly strong consideration, even if the strict consequences of 49.10 do not apply.

As a prime example, in *Cadieux (Litigation guardian of) v. Cloutier*, the plaintiffs obtained a total judgement of $500,827, compared to the defendant's offer of $500,000 plus costs. When fixing costs, Justice Hackland referred to this as a "near miss" case and awarded the plaintiffs only $100,000 in costs (plus HST and disbursements of $98,798). It is fair to say that this costs award was low, given that he also found the plaintiffs' request for costs of $494,039 was "appropriate and reasonable" for the complex 7-week jury Trial.[18]

Where an offer comes close to meeting the requirements of Rule 49, but is found to be non-compliant as a result of technical deficiencies that could have been resolved by

[16] *Elbakhiet supra* note 1 at para 31. See also *McLeish v. Daines*, 2017 ONSC 3117 at paras 13 to 15.
[17] *König v. Hobza,* 2015 ONCA 885, at para 33.
[18] Cadieux (Litigation guardian of) v. Cloutier, *2016 ONSC 7604*, at paras 58 to 68.

counsel, significant weight may still be given to the offer when fixing costs.[19] This is because “rule 49.13 is not concerned with technical compliance with the requirements of rule 49.10”, but instead calls for a “holistic approach” to assessing settlement offers.[20]

Discretion of the Court to “order otherwise”

Judges and Masters in Ontario generally have a significant amount of discretion when it comes to awarding costs after a Trial or motion. However, the presumptive costs consequences of Rule 49 are one of the few areas where the Court’s discretion to award costs is narrowly prescribed.

When faced with a Rule 49 compliant offer that has clearly beaten the result at Trial, the Court may exercise its residual discretion to depart from the cost consequences mandated by rule 49.10, but “only in exceptional circumstances, where 'the interests of justice require a departure'".[21] This narrow interpretation encourages the settlement of cases by providing predictability in cost awards.

In rare cases, the interests of justice can extend to awarding costs against a successful party. In *Oliveira v. Zareh,* Justice Donohue dismissed the plaintiffs’ action on the basis that it was improperly pled and a proper party was not named as a defendant. Thus the defendant beat their Rule 49 offer (which was to pay $25,000 all-inclusive). However, the defendant’s conduct (including theft and lying about it on his discovery) was such that if the action had been properly pled, punitive damages would have been granted. In the result, the unsuccessful plaintiffs were awarded $40,000 in costs.[22]

Conclusion

A cynical defence counsel or insurance adjuster might think that the hurdles imposed by the Courts in assessing whether a Rule 49 offer “beat” the result at Trial are used to

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[19] See *Mayer supra* note 2, where Justice Leach awarded no costs to either party – although the defendants’ offers were technically non-compliant with Rule 49, they were also generous in light of the jury’s verdict.
[20] *Elbakhiet supra* note 1 at para 33.
[21] *Ibid* at paras 30 to 31.
[22] *Oliveira v. Zareh,* 2015 ONSC 515.

protect individual plaintiffs from well-deserved adverse cost awards. However, it is submitted that a very high threshold is appropriate before engaging the costs consequences of Rule 49, because those consequences can be quite harsh, even draconian. Plaintiffs are not immune to the costs consequences of Rule 49.

Take for example the recent case of *Bosnali v. Michaud*.[23] After a long jury Trial, the plaintiffs were awarded a total of $130,791.21 for damages and interest. The defendants had served an initial offer of $310,000 inclusive of interest, and a subsequent offer of $550,000 for all damages claimed. As a result of Rule 49, the defendants were awarded costs of more than $300,000, which wiped out all amounts awarded to the plaintiffs. The end result was the plaintiffs owed the defendants just over $2,000 (not to mention any obligation the plaintiffs' may have had for their own lawyers' costs and disbursements).

The key takeaway about drafting a Rule 49 compliant offer is to make it as clear and certain as possible, in the circumstances of the case. It is also advisable to make a reasonable offer as early as possible in the litigation, so that if the offer is not accepted, the opposing party may be subject to more severe cost consequences.

[23] *Bosnali v. Michaud*, 2017 ONSC 3943.