

## CREATIVE OFFERS TO SETTLE

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For most personal injury lawyers, the title of this paper is an oxymoron. Generally, very little thought, and even less creativity, is put into the drafting an offer to settle pursuant to Rule 49. This is not due to the overall lack of creativity in the personal injury bar. Instead, this mundane approach to Rule 49 offers stems from a judicial reluctance to consider anything even vaguely creative to be an effective offer to settle that triggers the cost consequences of the Rule. Fortunately, the tide is turning.

This paper should be read in conjunction with, or as a supplement to, the papers delivered on this topic by Dermot Nolan (OTLA Fall Conference 1999) and Brian Barrie (OTLA Spring Conference 2001). An attempt will be made to update the case law in this area and to provide the reader with some practical advice about using creative offers. I will use the term “formal offer” to describe an offer made pursuant to Rule 49.

### When does Rule 49 apply (whether you like it or not)?

On occasion, lawyers have attempted to make formal offers only to have a court declare that Rule 49 did not apply. On other occasions, lawyers have attempted to make an “informal” offer only to have a court declare that the offer was subject to Rule 49.

The following cases will help to clarify when Rule 49 will apply to an offer.

In *Bodenhamer v. Bodenhamer* (1991), 2 O.R. (3d) 767 (Gen. Div.) Herold J. concluded that an offer made before the commencement of the litigation is not a Rule 49

offer. In that case, an offer had been made and rejected before a divorce petition was filed. During the subsequent litigation, the parties made formal offers and counter-offers. One of the parties then attempted to accept the pre-litigation offer. Under the common law, an offer is deemed to be withdrawn if it is rejected or if a counter-offer is made. On the other hand, a Rule 49 offer is not necessarily withdrawn under either of those circumstances. Herold J. found that Rule 49 only applied to offers made during the course of litigation, and therefore the pre-litigation offer was deemed to have been withdrawn at the time that it was rejected.

Even where the parties attempt to explicitly import the consequences of Rule 49 into a pre-litigation offer, the court has held that such efforts will fail. In *Scanlon v. Standish*, [2002] O.J. No. 194 (C.A.), the lawyer for the plaintiff made an offer, before the commencement of the litigation, including the following term: “You may treat this as an offer to settle pursuant to the provisions of Rule 49 of the Rules of Civil Procedure even though no litigation has been commenced.” The defendant made a counter-offer, and later attempted to accept the plaintiff’s original offer. Despite the plaintiff’s reference to Rule 49, the Court of Appeal held that the offer was not a Rule 49 offer. Specifically, the Court held that, based on the common law, the original offer was withdrawn when the counter-offer was made, and that Rule 49.07(2) (which stipulates that the offer is open notwithstanding a counter-offer) did not apply.

While creativity can be useful in crafting formal offers, it appears that even the most creative lawyers will not be able to make pre-litigation offers subject to Rule 49. On the other hand, lawyers must be careful in making any “informal” offers after the

commencement of the litigation, as a court may deem the offer to be a formal offer whether you like it or not.

*Igbokwe v. HB Group* (2001), 55 O.R. (3d) 313 (C.A.) involved a claim for certain accident benefits that had been refused by the insurer. Counsel for the plaintiff made what he thought was an “informal” offer to settle all of Mr. Igbokwe’s past and future claims for accident benefits for “\$45,000.00, plus party and party costs”. Mr. Igbokwe’s entitlement to future benefits was not, strictly speaking, at issue in the litigation. Further, the offer was sent to the insurance company, not to the lawyer handling the litigation. Apparently, the plaintiff’s intention was that the quantum of costs would have to be agreed upon if the insurer wished to accept the offer. Notwithstanding these facts, the Court of Appeal held that the plaintiff had made a formal offer in the litigation and that the defendant was therefore entitled to accept the offer and force the plaintiff to assess his costs.

In short, Rule 49 does not apply before litigation, and it almost always applies once litigation is commenced. If you want to make an offer and avoid the consequences of Rule 49 during the litigation, then you must say so clearly and unequivocally. For example, you may have a perfectly good formal offer on the table. Your client then gives you instructions to settle for something less, but only if the defendant will pay “generous costs” and agree to a structure. You want to ensure that the defendant cannot simply accept a further offer without agreeing upon all of the terms (costs, structure, etc.), and you also want keep your formal offer on the table despite serving a “lower” offer (this problem is discussed below). You must make it clear that the offer is NOT made pursuant to Rule 49, that it does not replace the formal offer and that the quantum of costs

and all of the structure details must be agreed upon between the parties before the case is considered settled.

#### Increasing and decreasing offers

Notwithstanding the provisions of Rule 49.04 (offer withdrawn by written notice of withdrawal), courts have routinely held that the making of a subsequent offer can implicitly withdraw a previous offer. It is submitted that this interpretation of the Rule is not in keeping with either the letter or the spirit of Rule 49. However, since the case law has been around for some time, one must live by the motto “offeror beware”.

From the perspective of the plaintiff, one can understand the implicit withdrawal of a formal offer if the subsequent offer is higher (see *Kocsis c. Chippewas of Mnjikaning First Nation* (1999), 35 C.P.C. (4<sup>th</sup>) 378, *Mills v. Raymond* (1997), 36 O.R. (3d) 62). Presumably, the plaintiff is no longer prepared to accept the lower figure, or there would be no real purpose in making a higher offer. There are still tactical reasons for making an increasing formal offer (i.e. to force a case to settle early), but this will only have the intended effect if the lower offer is left open for a limited period of time. The formal offer can then be explicitly withdrawn or implicitly withdrawn by serving a higher offer.

The considerations are not the same when the plaintiff makes subsequent lower offers. The plaintiff would still be willing to accept the earlier, higher offer and the plaintiff would like to keep the earlier offer open to maintain the exposure of the defendant to costs on a substantial indemnity basis for a longer period of time. Two competing lines of cases have evolved under those circumstances. Arguably the better line of cases follows the Court of Appeal decision in *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1, in which it was held that a second, lower offer made by the plaintiff did not

implicitly withdraw the first offer. On the other hand, the Court of Appeal came to the opposite conclusion in *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641, wherein it was held that a second, lower offer withdraws the first by implication. For whatever reason, the Court in *Diefenbacher* was not aware of the contrary opinion in *Mortimer*.

Recently, the Court of Appeal has, arguably, come down in favour of the approach in *Mortimer*. In the case of *Thomas v. Bell Helmets*, [1999] O.J. No. 4293, the Court commented that,

“It is regrettable that the court in *Diefenbacher* was not aware of the contrary judgment in *Mortimer* on the issue of withdrawal by implication, but this aspect of the decision does not detract from the force of its holding in so far as it relates to an expressly withdrawn earlier offer.”

This comment seems to have the effect of favouring the position that a subsequent lower offer from a plaintiff does not automatically withdraw the earlier offers, unless explicitly stated. In any event, it would be prudent to make it very clear when a subsequent lower offer is served that the offer does not replace the earlier formal offer and that the earlier offer remains open to the defendant to accept.

Even where the previous offers are withdrawn, one should not assume that those offers will have no effect on a court's decision to award costs. In the *Thomas* case, the plaintiff had made three formal offers for (chronologically) \$850,000.00, \$450,000.00 and \$800,000.00. The last offer included the term, “any previous written or oral offers are hereby withdrawn”. The plaintiff obtained a judgment at trial in excess of all three offers.

The trial judge found that the first offer had remained open at the commencement of the trial and therefore awarded solicitor-and-client costs from the date of the first offer. The Court of Appeal disagreed, holding that the last offer clearly and explicitly withdrew all previous offers. However, the Court justified the trial judge's award of costs based on Rule 49.13, which permits a court to consider any offer to settle in exercising its discretion with respect to costs. Since the plaintiff in *Thomas* always had a formal offer on the table from the date of the first offer, and since the judgment was substantially in excess of all three offers, the Court determined that this was a proper case for solicitor-and-client costs from the date of the first formal offer. In doing so, the Court commented that,

“We do not wish to be taken to have concluded that in all cases where rule 49.10(1) does not apply, sequential offers to settle, if less than the judgment in the case of plaintiffs offers, or more than the judgment in the case of defence offers, will automatically lead to an award of solicitor and client costs from the date of the first offer. Each case will have to be considered having regard to its relevant features and the provisions of rule 49.13, assuming, of course, that rule 49.10(1) does not apply.”

Based on the reasoning of the Court, when you revoke a formal offer, you should simultaneously replace it with another formal offer if possible. This will leave it open for a court, based on *Thomas*, to award costs on a substantial indemnity basis from the date of the first formal offer, notwithstanding that it had been withdrawn long before the trial.

### Creativity and uncertainty

Arguably the largest barrier to crafting creative formal offers has been the judicial tendency to punish uncertainty and instability. In the past, the court has been reluctant to make an award of costs on a substantial indemnity basis where the offer varies over time and is difficult to calculate with precision on any given day. For example, in *Yepremian v. Weisz* (1993), 16 O.R. (3d) 121, the defendant made a formal offer to pay \$17,500.00, less the defendant's party and party costs from the date of the offer. Macdonald J. held that, since the offer was continuously variable, it could not attract the cost consequences of Rule 49. Most cases have followed this line of reasoning, taking away the ability of counsel to inject a degree of creativity in their formal offers that would result in some uncertainty in the final calculations.

The Court of Appeal has recently taken a different approach, and the lower courts appear to be following the lead. In *Rooney v. Graham* (2001), 53 O.R. (3d) 685, the Court of Appeal was forced to deal with the following term in the plaintiff's formal offer:

“reasonable party-and-party costs, as assessed by an assessment officer or agreed upon, up to the date of the offer, and afterwards reasonable solicitor-and-client costs as assessed or agreed upon.”

While this term is not difficult to understand, it did inject a level of uncertainty into the calculations following the trial. Without considering the cost provision, the judgment was approximately \$200,000.00 more than the formal offer. Therefore, if the difference between the plaintiff's solicitor-and-client costs (as per the offer) and the reasonable party-and-party costs (awarded to a successful plaintiff in any event) was less than \$200,000.00, the plaintiff would have technically “beat” the formal offer. In the past, the

term regarding the payment of solicitor-and-client costs would likely have been used by a court to deny a successful plaintiff his or her costs on a substantial indemnity basis. However, a majority of the Court of Appeal (Carthy J. A. dissenting on this point) held that this term does not preclude an award of costs based on Rule 49.10, and that such terms simply make it more difficult for the plaintiff to prove that the judgment is more favourable than the offer. The Court stated that,

“A provision for ongoing solicitor-and-client costs is, in some measure, uncertain. But so too is a provision for ongoing party-and-party costs. This "uncertainty" should not invalidate Rule 49 offers. I recognize that some courts have taken the opposite view. It seems to me, however, that in evaluating a Rule 49 offer any "uncertainty" that arises from a provision for costs should only be relevant in deciding whether the party relying on the offer has met its burden of proof under rule 49.10(3).”

Laskin J.A. went on to say,

“I do not think the court should interpret Rule 49 in a way that limits the creativity of the bar in fashioning offers to settle. A party wishing to make its offer more, or less, attractive by including a provision for ongoing solicitor-and-client costs should be free to do so.”

Even though the plaintiff did not lead any evidence of the solicitor-and-client costs from the date of the offer, Laskin J.A. found it “inconceivable” that those costs would exceed the reasonable party-and-party costs by \$200,000.00. As a result, the Court awarded solicitor-and-client costs from the date of the offer.

Based on *Rooney*, the bar should no longer hesitate to serve creative formal offers. The Court of Appeal has made it clear that, as long as the plaintiff can meet the burden of proving that a judgment is more favourable than a formal offer, the cost consequences will flow. When drafting a creative formal offer, look forward to the end of the trial and attempt to do the math assuming a favourable result. If the figures that you have to use in the calculations are open to a lot of disagreement or interpretation (for example, the present value of a future stream of accident benefits), you likely won't be able to meet the burden of proof.

For example, some lawyers use a "standard" formal offer for a Bill 59 tort claim, which is essentially an offer to accept \$X for claims, plus interest, plus costs. Assuming that the claim for accident benefits is still open, following a successful result at trial the plaintiff will have to hold the future benefits in trust for the defendant or provide an assignment. How does one compare the "standard" offer to the result at the end of such a trial? Even where the judgment clearly exceeds of the amount set out in the offer, the plaintiff will have to prove that the value of the future benefits is not more than the amount of the excess. Given the uncertainty involved, the plaintiff will likely not receive the benefit of the doubt.

This example raises a common problem in Bill 59 cases. The defendant rarely wants an assignment of future benefits, and the plaintiff rarely wants to give up the right to claim future benefits. Both parties would prefer to make a "clean break", whereby the defendant pays money and the plaintiff retains the right to claim benefits. On the other hand, a "clean break" offer will make it much more difficult for a plaintiff to receive costs on a substantial indemnity basis following a trial. As a result, our office has been

using a “dual” formal offer. Part one is a “clean break” offer that permits the plaintiff to maintain the claim for accident benefits. This part of the offer is most likely to be accepted by the defendant, or to at least form the basis for ongoing negotiations. Part two, offered in the alternative, is a formal offer to settle for a higher (usually substantially higher) amount, with a term that the plaintiff will hold future benefits in trust, or provide an assignment, in accordance with section 267.8 of the *Insurance Act*. This dual offer has the effect of leaving open an offer that the defendant may be forced to accept as the trial approaches (the “clean break” offer) while at the same time leaving open an offer that puts the defendant at risk to pay costs on a substantial indemnity basis.

As a result of *Rooney*, the bar is no longer constrained by the judiciary from making creative formal offers. In fact, creativity has been explicitly endorsed by the Court of Appeal. The limits are now only in the minds, and calculators, of the bar.

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