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“Making Settlements Stick”

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Introduction

- *lawsuits can be:*
  - *expensive*
  - *disruptive*
  - *slow*
  - *Uncertain*
- Settlements can be a solution these problems, if they are done properly

Overview

1. Preparing for Settlement
2. Making the Offer
3. Drafting the Settlement Documents
4. Enforcing the Settlement Agreement

1. Preparing for Settlement

(a) Understand legal/business relationship between the parties

(b) Confirm no other claims, proceedings or discussions between the parties elsewhere

(c) Have all claims and issues been identified?

(d) Are the right parties involved?

(e) Have the insurers been notified?

(f) Have all potential limitation periods been addressed?

2. Making the Offer – The Problem

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough.

-Abraham Lincoln

Abraham Lincoln (1809–1865), U.S. president. Fragment, notes for a law lecture, July 1, 1850. Collected Works of Abraham Lincoln, vol. 2, p. 81, Rutgers University Press (1953, 1990).

2. Making the Offer – What is an Offer to Settle?

- In its simplest form an offer to settle is “an admission of limited liability and an offer to pay a certain amount, or a denial of liability and an offer to pay something to end the dispute”.

  The Dictionary of Canadian Law, 4th ed., *sub verdo* ‘offer to settle’.

2. Making the Offer – Two Settlement Regimes

- There are two forms of offers to settle: the statutory and the common law offer to settle.
- When an offer to settle is made outside a statutory rules regime, it is subject to the common law rules of contract law.
- The courts have ruled that the two settlement regimes under the common law and civil procedure rules can co-exist and serve two different functions.

2. Making the Offer – Two Settlement Regimes

- ***Caution**:* Confusion can arise however due to these coexisting settlement regimes.
- The form of a common law offer to settle and a Rule 49 offer have in practice become blurred.
- The courts have allowed letter offers, that do not use Form 49A, to qualify under Rule 49, so long as the offer is otherwise consistent with Rule 49 requirements.

2. Making the Offer – The Origin of Rule 49

- In February 1984 a special sub-committee of the rules committee in Ontario produced a report explaining the draft rules.
- The report describes Rule 49 as: “an important innovation in the rules relating to the encouragement and facilitation of settlements…[containing numerous] innovative features”.

2. Making the Offer – The Purpose of Rule 49

- ***The Purpose***: To encourage parties to make reasonable offers to settle or contribute to facilitate the early resolution of litigation short of trial.
- ***The Incentive****:* Rule 49.10 imposes cost consequences upon offerees who do not reasonably assess the actual value of the case in advance of trial.
    - Should an offer to settle comply with Rule 49 and should the final judgment obtained be as "as favorable as" or "more favorable than" that offer, significant additional costs benefits may, at the court's discretion, be awarded to the offeror.

2. Making the Offer – Availability of Rule 49

- ***The Form:*** Form 49A. This form provides the basic structure for a plaintiff's and a defendant's offer to settle.

- The courts have found that if an offer to settle complies in substance with Rule 49.02 that offer will be treated presumptively as a Rule 49 offer to settle unless it is expressly stated not to be such an offer.

  - *McDougall v McDougall* (1992), 7 OR (3d) 732, [1992] OJ No 295 at p. 734 (Ct J (Gen Div)); *Scanlon v Standish*, [2001] OJ No 1822, 17 RFL (5th) 136 at para. 42 (Sup Ct).

2. Making the Offer – Availability of Rule 49

Other Qualifications:

- only the offeror can cancel, withdraw or replace a Rule 49 offer to settle. The offeree can only accept or not accept the offer to settle;
- a Rule 49 offer to settle is only effective if it is made after an action or application has been commenced;
- a Rule 49 offer must be served in writing on the opposing lawyer, if any is retained, and cannot be oral in its form;
- Although a Rule 49 offer must be exact in its terms, with no uncertainty, conditions, variations or complex formulas, it need not settle all issues raised in the proceeding to be valid.

2. Making the Offer – Availability of Rule 49

- Rule 49.02 contains express language that states that it applies to applications and motions in addition to actions.

- By contrast, Rule 49 does not expressly apply to appeals.

2. Making the Offer – Timing of the Offer

- On a straightforward reading of Rule 49.03 a Rule 49 offer to settle may be made at any time.
- ***But*** Rule 49.03 clarifies that if the offer to settle is served less than seven days before the hearing Rule 49.10 does not apply.
- The case law has enforced the strict time constraints set out in Rule 49.03 with limited exceptions.

2. Making the Offer – Timing of the Offer

- In calculating the time limitations under Rule 49.03 it is important to be clear on when exactly a hearing is deemed to have commenced.
- ***Jury trials***: the preponderance of the case law supports the view that a hearing commences when the trier of fact, the jury, first hears evidence.
- ***Non-Jury Proceedings***: a hearing commences upon: "the hearing of preliminary questions before evidence is tendered".

2. Making the Offer – Withdrawn/Expired Offers

- Under the common law offers to settle can be withdrawn by the passage of time, by counter-offers or by an oral rejection.

- A Rule 49 offer to settle can only be withdrawn pursuant to Rule 49.04, which requires written notice of withdrawal, the expiration of the time for which it is open for acceptance or by disposition of the claim by the court.

    - *Mortimer v Cameron*, [1992] OJ No 3744, 35 ACWS (3d) 554 at para. 40 (Ct J (Gen Div))

2. Making the Offer – Withdrawn/Expired Offers

- As a starting point the courts have found that a withdrawal of an offer to settle under Rule 49.04(1) must be “clear and unequivocal”.

- Oral discussions and purported verbal withdrawals cannot displace written offers to settle under Rule 49.

  - See for example: *Smith v Robinson* (1992), 7 OR (3d) 550, 87 DLR (4th) 360 at paras. 9-10 (Ct J (Gen Div)).

2. Making the Offer – Withdrawn/Expired Offers

- An offer to settle under Rule 49 cannot be withdrawn except through the mechanism of withdrawal provided for by subrules 49.04(1) and (2) or by the making of a subsequent offer under Rule 49 that is incompatible with its terms.

2. Making the Offer – Withdrawn/Expired Offers

- Limited case law on subrule 49.04(3) (expiry)
- The courts will take a common sense approach in determining whether or not an offer was accepted or withdrawn within the required timeline and before the offer expired by operation of the Rules.

2. Making the Offer – Effect of the Offer

- Rule 49.05 confirms that a proper Rule 49 offer to settle, by operation of statute, is an offer of compromise and shall not in its service prejudice the position otherwise taken by the offeror in the proceeding.

- ***Caution***: Rule 49 offers to settle that contain the disclaimer “without prejudice” may not be admissible under Rule 49 for assessment of cost consequences.

2. Making the Offer – Acceptance of the Offer

- Form 49C Notice of Acceptance of Offer. The acceptance of an offer to settle must be unconditional, unqualified and unequivocal.

- If an offer to settle is properly drafted it can be accepted by one or more offerees. Rule 49.11 allows a plaintiff to offer to settle with any of multiple defendants, and any of the multiple defendants to offer to settle with the plaintiff.

- Certain complications can arise when an offeror is not clear in the offer to settle as to which of the multiple opposing parties may accept the offer.

2. Making the Offer – Acceptance of the Offer

- Subrule 49.07(2) confirms that a Rule 49 offer to settle may be accepted after the offeree rejects the offer or responds with a counter-offer, so long as the initial offers has not been withdrawn in the interim and so long as the court has not disposed of the claim.

- As such, any available offer to settle under Rule 49 carries with it the “risk” of acceptance and must be monitored closely by legal counsel.

2. Making the Offer – Cost Consequences of Offer

Generally:

- Rule 49.10 is the device that dictates exactly how the Rule 49 incentive system works.
- It is a tool available to the offeror, whether plaintiff or defendant.
- In its operation it creates a presumptive entitlement that manufactures the risk that motivates the offeree to undergo that careful assessment of the merits and in doing so functions as the engine that drives the Rule 49 machine.

2. Making the Offer – Cost Consequences of Offer

- 49.10(1) (for the plaintiff) and (2) (for the defendant) provides limited circumstances under which the default cost rules do not apply and greater costs award become available to offerors.

- Rule 49.10 requires that the offer: is made at least seven days before the commencement of the hearing; is not withdrawn and does not expire before the commencement of the hearing; and is not accepted by the offeree.

2. Making the Offer – Cost Consequences of Offer

- Under subrule 49.10(3) the burden of proving that the judgment is as favorable as the terms of the offer to settle, or more or less favorable, rests with the offeror.

- A settlement can only be contemplated and accomplished if there is something fixed and determinable to consider and accept. And, if a lack of certainty in the offer strips the offeree of its ability to precisely understand and evaluate the offer, the entire rationale for attaching cost consequences to Rule 49 offers to settle is lost

2. Making the Offer – Cost Consequences of Offer

- For an offer to attract Rule 49.10 cost consequences the plaintiff would have to prove that the offer to settle, including its costs provision, was as favorable or more favorable than the judgment *with an award of partial indemnity costs.*

2. Making the Offer – Cost Consequences of Offer

- ***The implication***: a party that elects to provide for ongoing costs in an offer to settle must balance two competing interests imbedded in the offer to settle:

  - the desire to protect that offeror's higher rate of costs, should the offer be accepted, by providing for ongoing substantial indemnity costs (***the cost protection interest***); *AND*
  - the desire to maximize the likelihood of attracting Rule 49.10 cost consequences by providing for ongoing partial indemnity costs (***the cost maximization interest***).

2. Making the Offer – Discretion under Rule 49

- Two Sources Within Rule 49:
  - The discretion provided for in Rule 49.10 (“unless the court orders otherwise”) constitutes the court’s authority for departing from giving effect to the presumptive entitlement otherwise available under subrules 49.10(1) and (2); AND
  - The discretion under Rule 49.13 functions differently. It allows the court to take written offers into consideration in deciding costs when they do not otherwise comply with Rules 49.10 or 49.11. (a more “holistic approach” to its costs determination)

3. Drafting the Settlement Documents

(a) Always record settlement in writing

(b) Drafting Minutes of Settlement

- *(i) recitals – frame the dispute*
- *(ii) payments terms*
- *(iii) tax treatment*
- *(iv) return/delivery of goods*
- *(v) release, or agreement to provide release*
- *(vi) confidentiality or terms of disclosure*
- *(vii) mechanics for implementing settlement*

Releases

- *Recitals*

e.g. "WHEREAS Company A and Company B entered into a supply contract dated May 15, 2013 whereby Company A agreed to supply 200 widgets to Company B

AND WHEREAS Company B has asserted a claim (the "Claim") that 100 of the widgets were defective and has demanded a refund in respect of its payment for these widgets"

AND WHEREAS the parties have agreed to resolve the Claim in its entirety

Releases (cont'd)

"The general words in a release are limited always to that thing or those things which were specifically in the contemplation of the parties at the time the release was given".

Directors of London & South Western R. Co. v. Blackmore (1870) L.R. 4 4.c. 610

Releases (cont'd)

e.g. White v. Central Trust Co. (1984) (N.B.C.A.)

- *release in favour of an executor of an estate which released him from "… any and all claims and demands whatsoever pertaining to the estate of Doris B. Smith"*
- *notwithstanding broad language in release, Justice LaForest found that in the context of the dispute and introductory words of the release, the release was only intended to pertain to the removal of certain furniture*

Releases

- *Recitals*
- *Specify claims to be released*

Releases

- *Recitals*
- *Specific claims to be released*
- *Specify any claims or matters that should be expressly excluded (eg. warranty claims)*

Releases

- *Recitals*
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- *Third party beneficiaries*

Releases

- *Recitals*
- *Specific claims to be released*
- *Specify any claims or matters that should be expressly excluded (e.g. warranty claims)*
- *Third party beneficiaries*
- *Prohibition of claims against third parties*

4. Enforcing the Settlement (Rule 49.09)

- Rule 49.09 provides two specific tactical options to a litigant seeking to enforce a settlement against a defaulting party:
  - Should the non-defaulting party wish to enforce the Rule 49 settlement it can bring a motion within the existing proceeding and seek a judgment based on the terms of the accepted offer;
  - If the non-defaulting party has tactical reasons not to enforce the settlement agreement, it may elect to continue the proceeding as if the settlement agreement had not been entered into.
- Recourse to Rule 49.09 is limited to those offers to settle and notices of acceptance to which Rule 49 applies

4. Enforcing the Settlement (Rule 49.09)

- The ordinary contract law principles as to offer and acceptance and certainty, in addition to the overriding intent of the parties, are considered by the court in order to determine whether:
    - (a) the parties were in agreement on all the essential terms of the contract; and
    - (b) the contract was completed.
- ***Decline to Enforce***: If uncertainty or ambiguity exists with respect to the essential terms of the settlement agreement, that goes to the parties' understanding of the agreement itself.
- ***Enforce the Agreement***: If uncertainty only exists with respect to non-essential terms, the court will usually interpret those terms based on evidence of what the parties intended them to mean.

4. Enforcing the Settlement (Rule 49.09)

- In determining whether to enforce a settle under Rule 49.09 all of the relevant factors disclosed by the evidence must be taken into account, without over-emphasizing one factor over the others.

- In particular, the most important factors to consider include:
  - (a) whether the parties' pre-settlement positions remain intact as of the date of the motion;
  - (b) whether apart from losing the benefit of the impugned settlement, the party relying upon the settlement will not be prejudiced if the settlement is not enforced;
  - (c) the degree to which the party trying to avoid the settlement would be prejudiced if judgment is granted, in comparison to the prejudice that the other party would suffer if the settlement is not enforced; and
  - (d) whether third parties would be affected if the settlement is not enforced.

4. Enforcing the Settlement (Rule 49.09)

- There are numerous possible defences that can be raised by a defaulting party under Rule 49.09.

- These consist of commonly used contract defences that operate the same with respect to Rule 49.09 as under contract law.

- These cases usually involve circumstances such as the following:
  - (a) miscommunication of a client's instructions to its legal counsel, or genuine mistake as to the terms of the settlement agreement (mistake cases);
  - (b) misstatements or misunderstandings between the parties with respect to certain fundamental facts upon which the settlement agreement is based (misrepresentation cases);
  - (c) questions as to the competence and independence of the party entering into the settlement agreement (duress/undue influence/unconscionability cases); and
  - (d) an agreement that is prohibited by law (illegality).

Questions?

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