

RULE 49
OFFER TO SETTLE

DEFINITIONS

49.01 In Rules 49.02 to 49.14,

- (a) "defendant" includes a respondent;
- (b) "plaintiff" includes an applicant.

WHERE AVAILABLE

- 49.02** (1) A party to a proceeding may serve on any other party an offer to settle any one or more of the claims in the proceeding on the terms specified in the offer to settle (Form 49A).
- (2) Subrule (1) and Rules 49.03 to 49.14 also apply to motions, with necessary modifications.

TIME FOR MAKING OFFER

49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in Rule 49.10 do not apply.

WITHDRAWAL OR EXPIRY OF OFFER

Withdrawal

- 49.04** (1) An offer to settle may be withdrawn at any time before it is accepted by serving written notice of withdrawal of the offer on the party to whom the offer was made.
- (2) The notice of withdrawal of the offer may be in Form 49B.

Offer Expiring after Limited Time

- (3) Where an offer to settle specifies a time within which it may be accepted and it is not accepted or withdrawn within that time, it shall be deemed to have been withdrawn when the time expires.

Offer Expires when Court Disposes of Claim

- (4) An offer may not be accepted after the court disposes of the claim in respect of which the offer is made.

EFFECT OF OFFER

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice.

DISCLOSURE OF OFFER TO COURT

- 49.06** (1) No statement of the fact that an offer to settle has been made shall be contained in any pleading.
- (2) Where an offer to settle is not accepted, no communication respecting the offer shall be made to the court at the hearing of the proceeding until all questions of liability and the relief to be granted, other than costs, have been determined.
- (3) An offer to settle shall not be filed until all questions of liability and the relief to be granted in the proceeding, other than costs, have been determined.

ACCEPTANCE OF OFFER

Generally

- 49.07** (1) An offer to settle may be accepted by serving an acceptance of offer (Form 49C) on the party who made the offer, at any time before it is withdrawn or the court disposes of the claim in respect of which it is made.
- (2) Where a party to whom an offer to settle is made rejects the offer or responds with a counter offer that is not accepted, the party may thereafter accept the original offer to settle, unless it has been withdrawn or the court has disposed of the claim in respect of which it was made.

Payment into Court or to Trustee as Term of Offer

- (3) An offer by a plaintiff to settle a claim in return for the payment of money by a defendant may include a term that the defendant pay the money into court or to a trustee and the defendant may accept the offer only by paying the money in accordance with the offer and notifying the plaintiff of the payment.

Payment into Court or to Trustee as a Condition of Acceptance

- (4) Where a defendant offers to pay money to the plaintiff in settlement of a claim, the plaintiff may accept the offer with the condition that the defendant pay the money into court or to a trustee and, where the offer is so accepted and the defendant fails to pay the money in accordance with the acceptance, the plaintiff may proceed as provided in Rule 49.09 for failure to comply with the terms of an accepted offer.

Costs

- (5) Where an accepted offer to settle does not provide for the disposition of costs, the plaintiff is entitled,

- (a) where the offer was made by the defendant, to the plaintiff's costs assessed to the date the plaintiff was served with the offer; or
- (b) where the offer was made by the plaintiff, to the plaintiff's costs assessed to the date that the notice of acceptance was served.

Incorporation into Judgment

- (6) Where an offer is accepted, the court may incorporate any of its terms into a judgment.

Payment out of Court

- (7) Where money is paid into court under subrule (3) or (4), it may be paid out on consent or by order.

PARTIES UNDER DISABILITY

49.08 A party under disability may make, withdraw and accept an offer to settle, but no acceptance of an offer made by the party and no acceptance by the party of an offer made by another party is binding on the party under disability until the settlement has been approved as provided in Rule 7.08.

FAILURE TO COMPLY WITH ACCEPTED OFFER

- 49.09** Where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may,
- (a) make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly; or
 - (b) continue the proceeding as if there had been no accepted offer to settle.

COSTS CONSEQUENCES OF FAILURE TO ACCEPT

Plaintiff 's Offer

- 49.10** (1) Where an offer to settle,
- (a) is made by a plaintiff at least seven days before the commencement of the hearing;
 - (b) is not withdrawn and does not expire before the commencement of the hearing; and
 - (c) is not accepted by the defendant,
- and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is

entitled to partial indemnity costs to the date the offer was served and substantial indemnity costs from that date, unless the court orders otherwise.

Defendant's Offer

- (2) Where an offer to settle,
 - (a) is made by a defendant at least seven days before the commencement of the hearing;
 - (b) is not withdrawn and does not expire before the commencement of the hearing; and
 - (c) is not accepted by the plaintiff,and the plaintiff obtains a judgment as favourable as or less favourable than the terms of the offer to settle, 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, unless the court orders otherwise.

Burden of Proof

- (3) The burden of proving that the judgment is as favourable as the terms of the offer to settle, or more or less favourable, as the case may be, is on the party who claims the benefit of subrule (1) or (2).

MULTIPLE DEFENDANTS

49.11 Where there are two or more defendants, the plaintiff may offer to settle with any defendant and any defendant may offer to settle with the plaintiff, but where the defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim and rights of contribution or indemnity may exist between the defendants, the costs consequences prescribed by Rule 49.10 do not apply to an offer to settle unless,

- (a) in the case of an offer made by the plaintiff, the offer is made to all the defendants, and is an offer to settle the claim against all the defendants; or
- (b) in the case of an offer made to the plaintiff,
 - (i) the offer is an offer to settle the plaintiff's claim against all the defendants and to pay the costs of any defendant who does not join in making the offer; or
 - (ii) the offer is made by all the defendants and is an offer to settle the claim against all the defendants, and, by the terms of the offer, they are made jointly and

severally liable to the plaintiff for the whole amount of the offer.

OFFER TO CONTRIBUTE

- 49.12** (1) Where two or more defendants are alleged to be jointly or jointly and severally liable to the plaintiff in respect of a claim, any defendant may serve on any other defendant an offer to contribute (Form 49D) toward a settlement of the claim.
- (2) The court may take an offer to contribute into account in determining whether another defendant should be ordered,
- (a) to pay the costs of the defendant who made the offer; or
 - (b) to indemnify the defendant who made the offer for any costs that defendant is liable to pay to the plaintiff,
- or to do both.
- (3) Rules 49.04, 49.05, 49.06 and 49.13 apply to an offer to contribute as if it were an offer to settle.

DISCRETION OF COURT

49.13 Despite Rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

49.14 Rules 49.01 to 49.13 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Fraser v. Runighan, 2020 PECA 5

Communications made with the intent to settle a matter are privileged and inadmissible unless the party making the communication states their intent that the admission is not to be held in confidence.

Fraser v. Runighan, 2019 PESC 21

The plaintiffs were found to have obtained a judgment as favourable, as or more favourable than, the plaintiffs' offers to settle. Rule 49.10 was triggered, with the *prima facie* effect to award the plaintiffs' substantial indemnity costs. However, the court considered numerous other factors in determining costs and awarded an amount greater than partial indemnity but less than substantial indemnity costs.

Koughan v. Dow, 2014 PESC 15

The Court awarded substantial indemnity costs because, had the Offer to Settle been accepted when made, it would have exceeded the amount of the award.

The Court confirmed there is no costs reward for making an offer which is “nearly as good” or “almost as good” for the opposing party as to what the opposing party receives.

Shepard v. Sanderson, 2012 PESC 20

The trial judge held that the plaintiff’s offer to the defendant to settle the liability part of the claim by admitting 100% liability is not a Rule 49 offer. The plaintiff’s offer was one to settle a “component of the claim” but not an offer to settle a “claim” as contemplated by Rule 49.02. An element of compromise is not an essential element of an offer to settle but the absence of an element of compromise may be taken into account in assessing whether it is an offer within the meaning of Rule 49.02.

Mutch v. Huestis & Century 21, 2011 PESC 13

The plaintiff made two offers to settle. While the second offer qualified for consideration under the provisions of Rule 49, the trial judge found that the plaintiff did not meet the burden of establishing that the offer was more favourable than the judgment (Rule 49.10(3)). The claim for costs was excessive. The trial judge denied the plaintiff substantial indemnity costs within the applicable time period.

D. A. Browning & Associates Inc. v. Tweedy, 2010 PESC 8

Offers made by the successful plaintiff did not qualify as offers under Rule 49.10; however, when the offers were made they were for less than the amount of damages awarded to the plaintiff. Considering the offers and other relevant factors in Rule 57.01, the plaintiff was awarded 65% of its legal fees throughout and 100% of its disbursements, with one exception.

Guptill v. Noble, 2006 PESCTD 29

A second offer, by implication, had the effect of withdrawing the first offer and thus was an offer for purposes of Rule 49.10.

Paynter v. Paynter, 2005 PESCTD 65

A motion under Rule 49.09 to enforce the terms of a settlement agreement entered into between the petitioner and the respondent was denied.

Roberts v. Clough, 2002 PESCTD 55

The defendant’s offer did not fall within the Rule because of the combined operation of Rules 49.03 and 3.02(1)(a). The offer was not made within 7 days before the commencement of the hearing.

Tannereye v. Hansen, 2002 PESCTD 37

The plaintiff’s offer to settle did not meet the requirements of this Rule because it was not fixed or certain. Furthermore, on a proper consideration of the award at trial against one of the defendants, it did not exceed the offer.

Bus. Dev. Bank v. ABN Amro, 2002 PESCTD 32

The applicant and the respondent had contested priority under the provisions of the *Personal Property Security Act*, S.P.E.I. 1997 1997, c.33. The respondent was successful and obtained an order that it had priority. The trial judge awarded the respondent costs on a party and party basis. The respondent had made an offer to the applicant to settle the dispute over priority on payment of a certain sum of money in exchange for the applicant's withdrawal of the application for priority. Accordingly, the respondent argued because it was totally successful on the application, the offer it made attracted the costs consequences of Rule 49.10 and the applicant should be ordered to pay the respondent costs on a solicitor-client basis. The trial judge held that Rule 49.10(2) did not apply because the respondent did not "obtain a judgment" as contemplated by the rule.

Davis and Loignon v. Kelly and Fortin-Kelly, 2002 PESCTD 9

The plaintiffs and the defendants exchanged offers prior to the commencement of trial. The plaintiffs' claim was dismissed. The defendant asserted that it should be entitled to costs in accordance with Rule 49.10(2) as the plaintiff failed to recover at least the amount of the defendants' offer. The court found that Rule 49.10(2) did not apply as the plaintiffs did not 'obtain a judgment' as the Rule requires.

Wawanesa v. Mann & Ors., 2001 PESCTD 59

The provisions of this Rule are not available unless, at the time the purported settlement is concluded, a proceeding has been commenced.

Kenny v. The City of Summerside, 2000 PESCTD 31

The plaintiff was awarded damages which were substantially lower than the amount offered by the defendant in an offer which did not comply with Rule 49.10 because it was not made within seven days of the commencement of the trial. Nevertheless, the court decided that in exercising its discretion to award costs pursuant to Rule 57, it may consider any offers of settlement even if they were not made in compliance with Rule 49.10.

Martin v. East Coast Limber and Maibec Industries Inc. (1998), 166 Nfld. & P.E.I.R. 295 (P.E.I.S.C.-T.D.)

See cases noted under Rule 74 where Rule 49.10 was considered in a small claims proceeding.

Reeves v. Arsenault; Reeves v. Gauthier (1998), 155 Nfld. & P.E.I.R. 328 (P.E.I.S.C.-T.D.)

For purposes related to the application of Rule 49, a civil non-jury trial commences when the action is called for trial by the trial judge. It is not necessary that evidence be called before the hearing or trial actually commences.

An offer which expires one minute after the time set for the commencement of the hearing is treated as an offer which is fixed and certain. If not withdrawn prior to that time, the offer is an offer as contemplated by Rule 49.10(2)(b).

Noye Enterprises Inc. v. Grady et al., [1998] P.E.I.J. No. 9 (Q.L.) (P.E.I.S.C.-T.D.)

The consequences of the strict application of Rule 49.10(1) can be significant for a litigant and for that reason, the Rule should not be imposed lightly. A written offer expiring two weeks after service did not come within the Rule. A verbal repetition of that offer on the eve of the trial did not bring it within the narrow confines of Rule 49.10(1).

Island Opry Inc. et al. v. Tweedy Ross (1996), 138 Nfld. & P.E.I.R. 36. (P.E.I.S.C.-T.D.)

Granting leave to amend the statement of defence did not in the circumstances result in any prejudice to the plaintiffs in relation to Rule 49. See: paras. 17-19.

Terris v. Crossman, [1995] 2 P.E.I.R. 227 (P.E.I.S.C.T.D.)

Rule 49 was held to apply because the defendants made an offer to settle at least 7 days before the commencement of the trial which was not withdrawn and the plaintiff obtained a judgment less favourable than the amount offered. The plaintiff was awarded her party and party costs to the date of the offer and the defendants were awarded their party and party costs from the date of the offer. The amount of the party and party costs to which the plaintiff was entitled was reduced by the trial judge in accordance with the discretion exercised pursuant to Rule 57. See cases annotated under that Rule. Confirmed on appeal. See: [1996] 1 P.E.I.R. 106 (P.E.I.S.C.A.D.)

Lewis v. P.E.I. (1994), 123 Nfld. & P.E.I.R. 36 (P.E.I.S.C.-A.D.)

Rule 49 does not apply to offers at the appeal stage.