Civil Procedure
Law 225

Winter Term 2024

Lecture Notes No. 16

COSTS AND SETTLEMENT

The ***Courts of Justice Act*** provides the Court's substantive jurisdiction to order costs:

> **131 (1)** Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding **are in the discretion of the court**, and the court may determine by whom and to what extent the costs shall be paid.
>
> (2) In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

It is important to note the **discretionary nature** of costs, which makes anticipating an award of costs really difficult.

Procedurally, two Rules are important: **Rule 49** (dealing with the costs consequences attached to settlement offers) and **Rule 57** (costs generally). **Please read these two rules carefully.**

A Preliminary Decision: Whether to Move for "Security for Costs"

Rule 56.01(1) provides the Court's discretionary jurisdiction to order security for costs.

> 56.01 (1) The court, **on motion by the defendant or respondent** in a proceeding, may make such order for security for costs as is just where it appears that,
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> (a) **the plaintiff or applicant is ordinarily resident outside Ontario**;
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> (b) the plaintiff or applicant has another proceeding for the same relief pending in Ontario or elsewhere;
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> **(c) the defendant or respondent has an order against the plaintiff or applicant for costs in the same or another proceeding that remain**

unpaid in whole or in part;

(d) the plaintiff or applicant is a corporation or a nominal plaintiff or applicant, and there is good reason to believe that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent;

(e) there is good reason to believe that the action or application is frivolous and vexatious and that the plaintiff or applicant has insufficient assets in Ontario to pay the costs of the defendant or respondent; or

(f) a statute entitles the defendant or respondent to security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (1).

(2) Subrule (1) applies with necessary modifications to a party to a garnishment, interpleader or other issue who is an active claimant and would, if a plaintiff, be liable to give security for costs. R.R.O. 1990, Reg. 194, r. 56.01 (2).

The leading case is **Yaiguaje v. Chevron Corporation, 2017 ONCA 827 (Ont. C.A.)**. There, the Court of Appeal held *per curiam*:

[23] The Rules explicitly provide that an order for security for costs should only be made where the justness of the case demands it. Courts must be vigilant to ensure an order that is designed to be protective in nature is not used as a litigation tactic to prevent a case from being heard on its merits, even in circumstances where the other provisions of Rules 56 or 61 have been met.

[24] Courts in Ontario have attempted to articulate the factors to be considered in determining the justness of security for costs orders. They have identified such factors as the merits of the claim, delay in bringing the motion, the impact of actionable conduct by the defendants on the available assets of the plaintiffs, access to justice concerns and the public importance of the litigation...

[25] **While this case law is of some assistance, each case must be considered on its own facts. It is neither helpful nor just to compose a static list of factors to be used in all cases in determining the justness of a security for costs order. There is no utility in imposing rigid criteria on top of the criteria already provided for in the Rules. The correct approach is for the court to consider the justness of the order holistically, examining all the circumstances of the case and guided by the overriding interests of justice to determine whether it is just that the order be made.**

The Significance of an Offer to Settle

Rule 49 provides the Court with the jurisdiction to award higher costs to a plaintiff that makes an offer and does as well or better, or, to award partial-indemnity costs to a defendant that makes an offer and the plaintiff does not do better than the offer – but subject to the Court's over-riding discretion in awarding costs. The Rule does not prevent the Court from considering non-Rule 49 offers.

The Rule provides:

> Where Available
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> 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). R.R.O. 1990, Reg. 194, r. 49.02 (1).
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> (2) Subrule (1) and rules 49.03 to 49.14 also apply to motions, with necessary modifications. O. Reg. 627/98, s. 4.
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> **Time for Making Offer**
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> **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.** R.R.O. 1990, Reg. 194, r. 49.03.
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> Withdrawal or Expiry of Offer
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> Withdrawal
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> 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. R.R.O. 1990, Reg. 194, r. 49.04 (1).
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> (2) The notice of withdrawal of the offer may be in Form 49B. R.R.O. 1990, Reg. 194, r. 49.04 (2).
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> Offer Expiring after Limited Time
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> (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. R.R.O. 1990, Reg. 194, r. 49.04 (3).
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> 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. R.R.O. 1990, Reg. 194, r. 49.04 (4).

Effect of Offer

49.05 An offer to settle shall be deemed to be an offer of compromise made without prejudice. R.R.O. 1990, Reg. 194, r. 49.05; O. Reg. 132/04, s. 11.

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. R.R.O. 1990, Reg. 194, r. 49.06 (1).

(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. R.R.O. 1990, Reg. 194, r. 49.06 (2).

(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. R.R.O. 1990, Reg. 194, r. 49.06 (3).

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. R.R.O. 1990, Reg. 194, r. 49.07 (1).

(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. R.R.O. 1990, Reg. 194, r. 49.07 (2).

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. R.R.O. 1990, Reg. 194, r. 49.07 (3).

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. R.R.O. 1990, Reg. 194, r. 49.07 (4).

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. R.R.O. 1990, Reg. 194, r. 49.07 (5).

Incorporating into Judgment

(6) Where an offer is accepted, the court may incorporate any of its terms into a judgment. R.R.O. 1990, Reg. 194, r. 49.07 (6).

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. R.R.O. 1990, Reg. 194, r. 49.07 (7).

Parties under Disability

49.08 A party under disability may make, withdraw and accept an offer to settle, but if approval of the settlement is required under rule 7.08, 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 until that approval has been given. O. Reg. 281/16, s. 6.

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. R.R.O. 1990, Reg. 194, r. 49.09.

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 to settle was served and substantial indemnity costs from that date, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 49.10 (1); O. Reg. 284/01, s. 11 (1).

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. R.R.O. 1990, Reg. 194, r. 49.10 (2); O. Reg. 284/01, s. 11 (2).

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). O. Reg. 219/91, s. 6.

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. R.R.O. 1990, Reg. 194, r. 49.11.

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. R.R.O. 1990, Reg. 194, r. 49.12 (1); O. Reg. 627/98, s. 5.

(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. R.R.O. 1990, Reg. 194, r. 49.12 (2).

(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. R.R.O. 1990, Reg. 194, r. 49.12 (3).

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. R.R.O. 1990, Reg. 194, r. 49.13.

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. R.R.O. 1990, Reg. 194, r. 49.14.

The Criteria the Court Should Consider in Calculating Costs

See **Rule 57**:

57.01 (1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) **the principle of indemnity**, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) **the amount of costs that an unsuccessful party could reasonably expect to pay** in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) **the conduct of any party** that tended to shorten or to lengthen

unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

Offers to Settle

Clark Agri Service Inc. v. 705680 Ontario Ltd.
(1996), 2 C.P.C. (4th) 78 (Ont. Gen. Div.)

Justice Quinn's opening paragraph is a terrific piece of Denning-like prose:

> This motion is the result of two offers to settle and one tornado. At issue is whether either of two offers to settle served by the plaintiff had been withdrawn before being accepted by the defendants. The defendants move for judgment in the terms of the allegedly accepted offers. The plaintiff hopes for judicial intervention to undo what divine intervention hath wrought.

This case involved a commercial contract. The parties negotiated the sale of a business including land, a grain silo, and various bits of equipment. The plaintiff in the litigation was the purchaser and the defendant the vendor. The plaintiff's position was that there was a binding contract reached; the defendant's position was that the deal was never completed

and that there was no enforceable contract.

The plaintiff made two offers to settle at different stages of the proceedings. Neither offer was accepted; the first did not have an expiry date, the second (more generous to the defendant) did have an expiry date and the offer was not accepted before the offer expired.

Mother Nature then intervened – a tornado caused damage to the buildings. The vendor then indicated that they would accept at least the first offer (but preferred the second and would rather accept that offer). In essence, the vendor sought to shift the tornado damage to the purchaser by accepting the offer made before the tornado caused the damage.

Justice Quinn was first required to determine whether a valid offer had been made and accepted:

> An offer to settle made pursuant to Rule 49 ("Rule 49 offer") has the following features:
>
> It must be in writing.
>
> It must be effectively delivered to the opposing party.
>
> It must be a proposal that can be construed as an offer to settle, open for acceptance and binding if accepted.
>
> It may be in Form 49A, but the use of that form is permissive.
>
> It may be communicated in correspondence between counsel.
>
> If these features are present, an offer will be presumed to be a Rule 49 offer unless expressly stated otherwise or unless the offeror can demonstrate that he or she did not intend the offer to be a Rule 49 offer. The point was put this way by Blair J. in McDougall v. McDougall (1992), 7 O.R. (3d) 732 (Gen. Div.) , at p.735:
>
> Rule 49 was a deliberate departure from the practice as it existed under the former rules and from the common law approach to settlement. Its purpose was to promote settlement and to encourage offers in this respect by using the carrot of cost advantages for the successful offerer and the stick of cost disadvantages for the reluctant offeree. If we are to give maximum effect to this change in procedure and policy, parties should know that if an offer complies in substance with the requirements of rule 49.02 it will be treated as a Rule 49 offer unless it is expressly stated not to be such . [Emphasis added]

> In the case at bar, the First Offer clearly was intended to be a Rule 49 offer because Form 49A was utilized. As well, it met the criteria for such an offer. The Second Offer was a "letter offer." However, since it complied with the essential features of a Rule 49 offer, and there being no evidence, express or otherwise, that it was intended to be a common law offer, it must be presumed to be a Rule 49 offer. The distinction is important to this motion because a prior counter-offer or rejection of an offer has the effect of terminating a common law offer, whereas a Rule 49 offer may be accepted notwithstanding a prior counter-offer or rejection.

Quinn J then considered whether the first offer had been implicitly withdrawn by the second offer. Two Court of Appeal cases were relevant. In *Diefenbacher v. Young* (1995), 22 O.R. (3d) 641 (C.A.), Carthy J.A. said that while two offers may remain open under Rule 49 it may also be the case that a first offer may be implicitly withdrawn in the circumstances. Carthy J.A. said:

> I lean to adopting the parlance and normal understanding of a litigant that a decreasing offer by a plaintiff and an increasing offer by a defendant, without reference to the earlier offer, is by implication a withdrawal of the earlier offer. Its reality has disappeared in the ongoing negotiations and dealings between the parties and, prior to the present judicial debate of the issue, it is not sensible to consider that the parties would give thought to the earlier offer, in the context of costs consequences, after the second offer.

In another case, *Mortimer v. Cameron* (1994), 17 O.R. (3d) 1 (C.A.), the plaintiffs made a series of decreasing offers to settle and obtained a judgment at trial that was better than any of the offers. In that case Robins J.A. seemed to hold to the contrary of the first case:

> In some circumstances a subsequent offer may, by necessary implication, constitute the withdrawal of a previous offer. This will occur where, for instance, the subsequent offer requires payment of a greater sum than the sum stipulated in the previous offer. In this case, however, the subsequent offers were more favourable to the defendants than the offer of March 20, 1989. While one would not expect the defendants to accept an earlier offer over a later one which was more beneficial to them, I do not think it can be implied that the earlier offer had been withdrawn.

Thus the question became whether the two cases could be reconciled; Justice Quinn held that each was contained to its own facts. In the end the Quinn J. held for the plaintiff:

> [after referring to the Diefenbacher case]... I have before me a plaintiff who made an offer that is less favourable to that plaintiff than its earlier offer. Should I, therefore, lean to adopting the normal understanding of a litigant

> that the earlier offer is "a piece of history"? I answer that question in the affirmative. In the circumstances of this case, I see it as neither sensible nor fair to conclude that, when the Second Offer was made, the parties regarded the First Offer as still open for acceptance. Furthermore, the conduct of the parties (up until the date that the tornado struck) is consistent with this view:
>
> When the solicitors for the plaintiff stated, in their letter offer of May 3, 1996, that they would "not be making any further offers", I consider it to have been understood by all that this was not just the last offer but, as well, the only offer.
>
> When, in their letter of June 17, 1996, the solicitors for the defendants purported to accept the Second Offer, the solicitors for the plaintiff, before seeking instructions from their client, wanted to know whether the damage caused by the tornado had been repaired. This tells us two things: firstly, the Second Offer, at least in the minds of the plaintiff and its solicitors, was not on the table - other-wise, it would not have been necessary for instructions to be obtained; secondly, the information in respect of the tornado damage was a sine qua non to the plaintiff even considering placing the Second Offer back on the table.

Thus there was no settlement offer that was still open to the defendants to accept. If there was, Quinn J held that he would not enforce it as it would be unfair:

> Should I be in error in my views as to the absence of any offer eligible for acceptance by the defendants, I exercise the overriding discretion of the Court not to enforce the settlement sought by the defendants on the grounds that, to do so, would be unfair. As to the existence of such a discretion see, for example, D & R Equipment Repairs Ltd. v. Mardave Construction Ltd. (1989), 35 C.P.C. (2d) 266 (Ont. H.C.) , at p. 271.
>
> V Conclusion
>
> In the result, the motion by the defendants for judgment in the terms of either the First Offer or the Second Offer is dismissed. If the parties are unable to agree on the matter of costs, arrangements may be made with the trial co-ordinator at St. Catharines for an appointment to make submissions in that regard. Because I am inclined to view the actions of the defendants as an outrageous and unseemly attempt to visit upon the plaintiff the disastrous effects of the tornado (after all, what, other than the tornado, occurred between May 13, 1996, the date when the defendants purported to reject the Second Offer, and June 17, 1996, the date when the defendants purported to accept the Second Offer) I invite submissions as to the appropriateness of solicitor and client costs fixed and payable forthwith.

Thus, we can take the case as illustrating a number of propositions:

- **An offer to settle is assumed to be a Rule 49 offer unless stated to the contrary.**
- **An offer to settle may be withdrawn explicitly or implicitly.**
- **A Court may not enforce the settlement if it would be unfair to do so. This is rather more controversial and I would suggest that this proposition is not well established in the jurisprudence.**

Settlement Approval

A settlement in favour of a party under a disability must be approved by the Court.

Wu Estate v. Zurich Insurance Co.
(2006), 268 D.L.R. (4th) 670 (Ont. C.A.)

Is a settlement enforceable by the estate of a party under a disability where the settlement had been made but not yet approved by the Court when the party died? Yes. For our purposes the import of the case is in respect of the nature of the Court's jurisdiction in approving settlements rather than its survival post-mortem (but both propositions are significant).

Per Curiam:

> The starting point for analyzing the legal status of the settlement agreement is to consider the situation that existed immediately before Rebecca Wu's unexpected death. In Smallman v. Smallman, [1971] 3 All E.R. 717 (Eng. C.A.), at 720, Denning M.R. provided the following helpful statement of the legal status of a settlement agreement that is subject to court approval:
>
> > In my opinion, if the parties have reached an agreement on all essential matters, then the clause 'subject to the approval of the court' does not mean there is no agreement at all. There is an agreement, but the operation of it is suspended until the court approves it. It is the duty of one party or the other to bring the agreement before the court for approval. If the court approves, it is binding on the parties. If the court does not approve, it is not binding. But, pending the application to the court, it remains a binding agreement which neither party can disavow.
>
> The requirement for court approval of settlements made on behalf of parties under disability is derived from the court's parens patriae jurisdiction. The

parens patriae jurisdiction is of ancient origin and is "founded on necessity, namely the need to act for the protection of those who cannot care for themselves...to be exercised in the 'best interest' of the protected person...for his or her 'benefit' or 'welfare'.... The jurisdiction is "essentially protective" and "neither creates substantive rights nor changes the means by which claims are determined"...The duty of the court is to examine the settlement and ensure that it is in the best interests of the party under disability... The purpose of court approval is plainly to protect the party under disability and to ensure that his or her legal rights are not compromised or surrendered without proper compensation.

The requirement for court approval of settlements involving parties under disability is codified in Ontario in rule 7.08(1):

No settlement of a claim made by or against a person under disability, whether or not a proceeding has been commenced in respect of the claim, is binding on the person without the approval of a judge.

As explained by Garry D. Watson & Craig Perkins, Holmested and Watson: Ontario Civil Procedure, looseleaf (Toronto: Carswell, 1984) vol. 2 at 7-33

> Rule 7.08... merely codifies a rule established by case law that a party under disability is bound only by a settlement that is for his or her benefit....it is designed to protect the party under disability from mistakes of the litigation guardian. The settlement of a claim by or against a party under disability, whether or not a proceeding has been commenced, is not binding on the party under disability without the approval of a judge.
>
> The wording of rule 7.08(1) may be contrasted with the language of the English "compromise rule" that provides that no settlement involving a party under disability shall "be valid without the approval of the court." This wording was considered by the House of Lords in Dietz v. Lennig Chemicals Ltd. (1967), [1969] 1 A.C. 170 to deprive a settlement that is subject to court approval of any legal effect and to allow either party to repudiate it unless and until it was approved by the court. The situation in Ontario is different: see Richard v. Worth (2004), 73 O.R. (3d) 154 (Ont. S.C.J.), holding that an insurer could not repudiate an infant settlement, yet to be approved by the court, on the ground that the law relating the insurer's liability had been changed by a subsequent Court of Appeal decision. The effect of rule 7.08(1) coincides with Smallman v. Smallman, supra, to this extent: the party under disability has an agreement from which

> the opposite party cannot resile and that will become fully operational once approved by the court.

We conclude from this analysis that immediately prior to Rebecca Wu's death there was in law an agreement, which the respondents could not disavow, to settle her claim on the terms recorded in the minutes of settlement, but that the operation of that agreement was suspended pending "necessary" court approval.

Enforceability of a Settlement

Centorame v. Centorame
2012 ONSC 6405 (Ont. S.C.J.)

A married couple separated. They owned and operated a business together but could not come to terms on who would buy who out. One party accepted the offer and then the circumstances changed (the business lost its principal client). Enforceable?

Per Herman J.

> On Tuesday, February 7, 2012, Sandy provided the offer to settle that is the subject matter of this motion.
>
> In the offer, Sandy offered to pay Mary $425,000 in full satisfaction of any claim Mary may have in Whitecourt. Immediately upon the acceptance of the offer, Mary's association with Whitecourt would cease and she would not longer attend at Whitecourt offices. Sandy would pay monthly child support of $2,804. There would be no equalization paid by either party. The civil proceeding would be dismissed on consent and the family proceeding would be settled by way of Minutes of Settlement, incorporating the terms in the offer and containing comprehensive releases from each party.
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> The offer was open for acceptance until noon on February 9, 2012.
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> At 4:45 p.m. on Wednesday, February 8, 2012, Corey Hancock of Linamar Corporation, a major customer of Whitecourt, sent an e-mail to Mary, with a copy to Sandy. In the e-mail, Mr. Hancock advised that "due to supply instability for your organization, and a large concern on behalf of our facilities receiving (or not receiving) your product, we are left with no choice but to put you on a 90-day Notice of Termination of our Partnership Agreement". In the meantime, Linamar would be trying out a competing vendor and would have a final decision for Whitecourt by the end of May 2012.
>
> Mary's counsel faxed Mary's acceptance of Sandy's offer at 7:58 p.m. on

February 8.

Sandy then tried to argue that there was no agreement or that it was unenforceable as a matter of general equity. The argument was rejected by the Judge:

Should the settlement be enforced?

The court retains a jurisdiction to decline to enforce a settlement where to do so would be unfair, unjust or unconscionable.

Having concluded that the parties reached an agreement, I must now consider whether, given all the evidence, the agreement should be enforced.

Sandy points to several circumstances that, in his submission, would make it unfair, unjust or unconscionable to enforce the settlement.

Firstly, Sandy maintains that, as a result of losing Linamar's business, what Sandy paid for is no longer what he agreed to pay for, that is, a successful business.

Mary disagrees. According to her, the business was in trouble and at risk of losing Linamar as a customer when Sandy made the offer. Furthermore, in her submission, there is no unfairness to Sandy because he was well aware of the situation when he made his offer.

Secondly, Sandy submits that Mary acted in bad faith. He maintains that Mary had a duty to disclose the Notice of Termination to him. She took advantage of Sandy, faxing in her acceptance late in the evening, instead of waiting until the next morning. Furthermore, Mary refused to accept Sandy's withdrawal of the offer, in the face of the Notice of Termination.

Mary denies any bad faith. She said she had decided to accept the offer on the day she received it, that is, the day before she received the Notice of Termination. There was an agreement to proceed with the appointment of a receiver the following week. Mary said she was concerned that proceeding with a receiver would be expensive and would likely result in losing most or all of the value of the business. In her submission, she had no duty to inform Sandy of the Notice of Termination because it was sent to him at the same time it was sent to her.

In Milios v. Zagas, [1998] O.J. No. 812 (C.A.) at para. 21, the Court of Appeal considered the following factors when it decided that the acceptance of the offer should not be enforced:

no order giving effect to the settlement had been taken out, so that the parties' pre-settlement positions remained intact;

apart from losing the benefit of the impugned settlement, the defendant would not be prejudiced if the settlement was not enforced;

the degree to which the plaintiff would be prejudiced if the settlement was not enforced;

no third parties were, or would be, affected if the settlement was not enforced.

Sandy contends that the enforcement of the settlement would result in prejudice to him. According to him, the Linamar Notice of Termination effectively destroyed the business. If the settlement is enforced, he will be forced to pay Mary a significant sum of money for an interest in a business that he says is worthless.

Sandy also contends that Mary would not be prejudiced if she lost the benefit of the settlement. However, if the settlement is enforced, Mary will be unjustly enriched by $425,000.

I do not agree that there would be no prejudice to Mary if the settlement is not enforced. Sandy excluded Mary from the business. As a result, Mary was denied: the appointment of a receiver, which the parties agreed would occur in the absence of an agreement; a salary for working in the business, to which she would ordinarily have been entitled; and an opportunity to try and turn the business around and keep Linamar as a customer. She has not had access to the bulk of the proceeds of sale of the matrimonial home, which have remained in trust, and has therefore been unable to proceed with her plans to start a business.

There is no way to know what would have happened if the receiver had been appointed or if Mary had continued to work in the business. According to Mary, the failure of the business after her departure confirmed her fears that Sandy would be unable to manage on his own.

The parties' agreement cannot be unraveled. Sandy affirmed the agreement through his conduct and has made it impossible for the parties to return to the pre-settlement situation. When Sandy excluded Mary from the business, he did so with the knowledge of the Notice of Termination. At that point, he assumed the risk of business losses.

If a party wishes to assert the position that an agreement is unfair, unjust and unconscionable and should therefore not be enforced, he or she cannot "sit on the fence" and wait to see how things turn out. Sandy made a choice

> to proceed with the agreement and to try to retain Linamar as a customer. Even assuming Sandy's version of events, that is, Mary acted in bad faith and there was a substantial change in the value of the business either between the time of the offer and the time of its acceptance or since the time of the acceptance, I cannot conclude that it would be unfair, unjust or unconscionable to enforce the settlement given the circumstances.

What can we take from the case? Absent fraud, courts are reluctant to undo any kind of contract including acceptance of a settlement offer.