



Fleury, Comery LLP  
Barristers & Solicitors

## OFFERS TO SETTLE

The rules of our Ontario courts make provision for formal Offers to Settle in the context of litigation. These Offers have financial consequences and we have accordingly prepared this memorandum which will, we hope, answer any questions you have in regard to these Offers to Settle. Of course if you have any further questions we would like you to call us.

### PARTIAL AND SUBSTANTIAL INDEMNITY COSTS

Before proceeding it is important to understand the distinction made in the courts between "partial indemnity" costs as opposed to "substantial indemnity" costs. It is a policy of the Ontario courts to discourage litigation. Thus in the vast majority of cases even the successful party is only going to receive from the unsuccessful party his partial indemnity costs, which are based on a court tariff which provides payment only for certain parts of the solicitor's services to you, and at low rates. Usually, partial indemnity costs come to somewhere below 50% of your lawyer's actual charges.

In certain exceptional circumstances the court will find it appropriate to award higher "substantial indemnity" costs. Again, this is not total reimbursement but very close to that. The court's tariff of items that are covered is a wider one, and the rate at which payment is made for those services is higher.

### PLAINTIFF'S OFFER TO SETTLE

If you are the plaintiff and you make a formal Offer to Settle in the course of litigation which is not accepted by the defendant, and then if you recover an amount equal to or greater than the Offer to Settle at trial, you are generally entitled to partial indemnity costs to the date that the Offer was served on the other party, and substantial indemnity costs from that point onward. This encourages a plaintiff to make a serious Offer to Settle at as early a point as possible during a litigation matter. Similarly it forces a defendant to consider seriously that Offer to Settle.

If the plaintiff's Offer to Settle is accepted at any time, then the plaintiff is entitled to partial indemnity costs to the date of the Offer and substantial indemnity costs to the date of acceptance.

### DEFENDANT'S OFFER TO SETTLE

The consequences of an Offer to Settle by the defendant are slightly different and not quite as favourable. If the defendant's Offer to Settle does not provide for any disposition of costs then the plaintiff is actually entitled to his partial indemnity costs to the date of the Offer. (Obviously, most defendant's Offers to Settle will make some provision for costs). In any case, if the defendant's Offer is not accepted and the matter proceeds to trial, then the defendant is entitled to his partial indemnity costs from the date of the Offer to Settle onward if the defendant does better than the Offer after a trial.

Note that at no point under the Rules does the defendant recover its partial indemnity costs prior to the date of its Offer to Settle, and this part of the Rules makes no provision for substantial indemnity costs.

### DISCRETION OF THE JUDGE

All of these provisions for costs are subject to the discretion of the Trial Judge. There are also certain formalities respecting Offers to Settle which I would not propose to set out here. There must be exceptional circumstances, however, for the court to ignore these very clear provisions of the Rules.

### CONTEXT OF THIS MEMORANDUM

This memorandum is provided to you in the context of urging that we consider or serve an Offer to Settle. In personal injury cases we do not generally propose that a plaintiff serve an Offer to Settle until we have had a very clear idea of the damages we seek - it does not make a good impression with the defendants to have Offers to Settle served, withdrawn, changed etc. In commercial litigation we are more likely to be asking you to make an Offer to Settle at an early point.

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