SETTLEMENT CONFERENCES IN THE ONTARIO SMALL CLAIMS COURT

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Introduction

"The greatest victory is that which requires no battle."

– Sun Tzu, *The Art of War* (5th century BC)

This practical article is about the salient aspects of settlement conferences in the Ontario Small Claims Court.[1] It is directed principally at litigation lawyers who represent or will represent clients in our court. Our expressed views, observations and tips emanate from our many collective years of experience as deputy judges of the Ontario Small Claims Court-Toronto Region,[2] lawyers and mediators.[3]

As examined further below, settlement conferences are primarily governed by rule 13 of the Rules of the Small Claims Court (the "Rules").[4] You and your client would be well served by your having a complete knowledge of this rule's ten sections.[5]

The Ontario Small Claims Court has jurisdiction in any action for the payment of money up to $25,000 and in any action to recover possession of personal property valued up to $25,000.[6] The caseload

1. The Small Claims Court was continued as a branch of the Superior Court of Justice by s. 22(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This Act is available online at https://www.ontario.ca/laws/statute/90c43.
2. Toronto is one of eight Regions in the province. The others are: Central East; Central South; Central West; East; North East; North West; South West.
3. We are articulating our own personal insights and are not speaking for the court.
4. O. Reg. 258/98, under the *Courts of Justice Act*. The Rules of the Small Claims Court are available online at https://www.ontario.ca/laws/regulation/980258. Small Claims Court forms are available online at http://ontariocourtforms.on.ca/en/rules-of-the-small-claims-court-forms.
5. The headings for the ten sections and their subsections are as follows:
   - 13.01 (1) Settlement Conference Required in Defended Action (2) Duty of Clerk (3) Timing (4) Exception
   - 13.02 (1) Attendance (2) Authority to Settle (3) (4) Additional Settlement Conferences (5) (6) Failure to Attend (7) Inadequate Preparation, Failure to File Material
   - 13.03 (1) Purposes of Settlement Conference (2) Disclosure (3) Further Disclosure Restricted
   - 13.04 Recommendations to Parties
   - 13.05 (1) (2) Orders at Settlement Conference (3) Recommendations to Judge (4) Consent to Final Judgment (5) Service of Order
   - 13.06 Memorandum
   - 13.07 Notice of Trial
   - 13.08 Judge Not To Preside At Trial
   - 13.09 Withdrawal of Claim
   - 13.10 Costs

is massive. The Small Claims Court is the busiest civil court in the province and perhaps in Canada.[7]

In a Small Claims Court action, the three basic procedural steps are: (1) pleadings; (2) settlement conference; and (3) trial. The settlement conference must be held within 90 days after the first defence is filed: rule 13.01(3). The trial cannot be requested until after 30 days from the completion of the settlement conference: rule 13.07.

1. What is a settlement conference?

A settlement conference in the Small Claims Court is a mandatory,[8] informal, private, confidential[9] meeting between the parties in a conference room in the presence of a judge. This imperative meeting is often the first time the parties have sat at the table across from each other since the claim was filed. The parties or their representatives must openly and frankly discuss the issues involved in the action: rule 13.03(3). This discussion can lead to resolution and therefore closure.

2. Purposes of the settlement conference

You and your client should understand why you are there. Rule 13.03(1) sets out the multiple purposes of a settlement conference. They are:

(a) to resolve or narrow the issues in the action;
(b) to expedite the disposition of the action;
(c) to encourage settlement of the action;

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6. *Courts of Justice Act*, s. 23(1). The prescribed monetary limit of $25,000 has been in effect since January 1, 2010 (O. Reg. 439/08, amending O. Reg. 626/00 (Small Claims Court Jurisdiction and Appeal Limit), s. 1, under the *Courts of Justice Act*), up from the previous $10,000. Many people predict that a further increase is inevitable. Provinces and territories currently with a higher monetary limit are Alberta ($50,000) and the Northwest Territories ($35,000).
7. Despite this fact, little appears to have been written about Settlement Conferences in our court. While the Ministry of the Attorney General's "Guide to Getting ready for Court – Small Claims Court" (Queen's Printer for Ontario, 2016) at https://www.attorneygeneral.jus.gov.on.ca/english/courts/guides/Guide_to_Getting_Ready_for_Court_EN.html is helpful, it is directed at laypersons who are representing themselves, not at lawyers.
8. Rule 13.01(1) reads: "A settlement conference shall be held in every defended action."
9. Rule 13.03(4) reads: "Except as otherwise provided or with the consent of the parties (Form 13B), the matters discussed at the settlement conference shall not be disclosed to others until after the action has been disposed of."

(d) to assist the parties in effective preparation for trial; and
(e) to provide full disclosure between the parties of the relevant facts and evidence.

Broadly, settlement conferences in the Small Claims Court serve some of the same purposes as examinations for discovery.

You and your client should also have read the one-page document titled "Important Information About Your Settlement Conference".[10] This is sent to all parties from the court office. It can also be found at www.ontariocourts.ca/scj/small-claims-court/conference.

3. A forum for problem solving

Settlement conferences provide a forum for parties to promptly resolve their dispute and find closure and for their lawyers to exercise and hone their problem-solving and advocacy skills.

Your client has retained you to solve his or her problem, not necessarily to litigate. Be a problem-solver and you will accomplish much. Your client will thank you for attaining an early satisfactory resolution and avoiding trial. Your ability to achieve a fast, favourable outcome will enhance your professional reputation. Further, it might well be rewarded with more business from that client plus business from new clients who hear about your stellar reputation as an effective early problem-solver.

4. Your attitude and approach

Coming to the settlement conference with a positive attitude will more likely allow you to reap its benefits. Some lawyers do not take seriously this important opportunity. We have heard some counsel say that our settlement conferences are a waste of time because, in their experience, nothing is achieved.

These lawyers bring to mind the folk story of the traveller who approaches the village elder sitting on a rock at the edge of town and asked if the people in the village were friendly. The wise old man responds by asking the traveller how the people are in his home town. The traveller replies that the people in his town are welcoming, friendly and helpful. The old man assured him that the people of the village were the same. Sometime later, another traveller approaches and asks the same question. The old man, as before, asks him about the people in his town, to which the man replies: "The people in my

10. Superior Court of Justice, Office of the Chief Justice, Osgoode Hall (June 21, 2012).

village are selfish and unfriendly." The old man tells the second traveller: "You will find the people of our village to be the same."

How does this story apply to the settlement conference? If you come with the attitude that nothing will be accomplished, you will probably be right. If you come with the attitude that important work will be done, then you will also probably be right.

5. Talk with the other side

Before your settlement conference, you are encouraged to talk to the other side to try to resolve all or part of your dispute, agree on any facts or narrow the issues. Do not be shy about approaching the other side in the waiting area (some of us call it "the settlement lounge") outside the conference room. Do not squander this opportunity to get the ball rolling. If respectful dialogue has already begun, you are that much further ahead once the conference actually begins. At that point you might just need an experienced impartial judge to help you overcome any gridlock.[11]

If you do not settle at the settlement conference, keep talking to the other side so that you can use the information gleaned from the conference to help you settle the dispute on your own or possibly at another scheduled settlement conference.

6. Prepare your case

Know the facts, issues and law in your case. Be organized. The better prepared you are for your settlement conference, the more you will get out of it. You must "put all the cards on the table". Serve and file your documents and witness lists at least 14 days before the settlement conference as required by rule 13.03(2). This means you will have to get acquainted with the client and the file well in advance of the scheduled conference. This is an advantage for you and your client, not a disadvantage. Know your file and do your best to know what you can about the other side's case.

You might prepare a succinct chronological summary of your case, with supporting evidence. If necessary, you should be able to summarize your case for the judge at the settlement conference and dissect your case into its component parts. Prudent counsel prepare a worksheet in appropriate cases. An example is a Scott's Schedule in

11. The Settlement Conference can be an opportunity to overcome any intransigence. 2016 Nobel Prize-winning singer-songwriter Bob Dylan tersely describes such a situation thus: "You're right from your side, and I'm right from mine." ("One Too Many Mornings" (1964)).

defective construction cases. Some counsel find it useful to prepare and file a Settlement Conference Brief, although this is not required.

Caution about costs

If you are not prepared or do not file the requisite documents in time and consequently, the settlement conference cannot be properly conducted, it could cost your client money. The judge could order your client to pay the other party's expenses for having to attend the aborted settlement conference. Everyone will have to come back.

Under the Rules, if a person attending the conference is "so inadequately prepared as to frustrate the purposes of the conference", then the judge may award costs against that person: rule 13.02(7)(a).

If a person attending the conference does not file at least 14 days before the date of the settlement conference (i) the documents to be relied on at trial, and (ii) the list of proposed witnesses and others having knowledge of the dispute (Form 13A)[12] (as required by rule 13.03(2)), then the judge may award costs against that person: rule 13.02(7)(b).

The costs of a settlement conference (not including disbursements) shall not exceed $100 unless there are special circumstances: rule 13.10.

7. Prepare your client

Prepare your client for the settlement conference. Explain the risks of going to trial. Be sure that neither you nor your client are too certain about your chances of success at trial. Discuss whether a negotiated solution is better or worse that not settling the case.

Inform your client about the transaction costs of going to trial.[13] They might include your fee, court fees[14] and other disbursements, the possible cost award to the other side, experts' reports, and witnesses' fees and allowances. Estimating the total cost of going to trial as a percentage of the amount claimed can help determine if going to trial is economically justified. Your client must also weigh the important emotional cost of preparing and waiting for the trial and then going through with it. This process can be an emotional powder keg.

12. Form 13A: List of Proposed Witnesses can be found at http://ontariocourtforms.on.ca/static/media/uploads/courtforms/scc/13a/rscc-13a-e.pdf.
13. As Sun Tzu advised: "who wishes to fight must first count the cost" (*The Art of War*, 5th century BC).
14. See O. Reg. 332/16 (Small Claims Court - Fees and Allowances) under the *Administration of Justice Act* (effective November 6, 2016).

Remind your client to approach settlement opportunities with a practical and business-like frame of mind without a lot of emotion. Provide your client (and yourself) an objective assessment of your case and your chances at trial. If your client is motivated to settle, identify for how much; define upper/lower limits. Explain to your client that settling does not mean he is admitting liability. Settling is a sign of strength, not weakness. From our experience, parties typically want one thing more than anything else: closure. Settling brings closure.

8. Be punctual

Be on time. Plan ahead. Take into account heavy traffic and your possible need to find parking. Leave early. The court usually allows only 45 minutes for the settlement conference. If you are very late and then need time to prepare your client, you have probably significantly diminished any chance of a successful meeting. Moreover, as mentioned, in this situation, your client just might be ordered to pay costs for the wasted meeting: rule 13.02(7)(a).

9. Attendance is mandatory

The rules require that the parties attend: rule 13.02. Some judges will not conduct the settlement conference at all if the clients are not present.[15] Parties may attend with or without their representative: rule 13.02(1).

If you or your client cannot attend on the date set for the settlement conference, you may request the court to adjourn the settlement conference and reschedule it on another date. We recommend that you first contact the other side and then provide the court with mutually agreeable dates in writing. If the judge allows the request and makes an order, the court office will notify the parties of the new settlement conference date.

Lawyers who send a client unrepresented to the settlement conference assuming that it is a waste of time are undermining the process at their peril.

If a representative shows up without her client, the court could grant an adjournment. Attending without one's client defeats the purpose of a settlement conference. In addition to the risk of incurring a costs award, as provided for in rule 13.02(5)(a), lawyers who do this are seriously harming their reputation with the court.

15. To be clear, this includes such clients as insurance adjusters or a municipal representative where the municipality is a party.

What are the consequences of not attending? If a *plaintiff* does not attend a scheduled settlement conference, a second settlement conference may be scheduled: rules 13.02(5)(b), 13.05(2)(a)(viii). There may be costs or other sanctions (rule 13.02(5)(a)) and consequences for not complying with these sanctions. If the plaintiff does not attend again, the judge can order that the claim be struck out.[16]

If a *defendant* does not attend a scheduled settlement conference, a second settlement conference may be scheduled: rules 13.02(5)(b), 13.05(2)(a)(viii). There may be costs or other sanctions (rule 13.02(5)(a)) and consequences for not complying with these sanctions. If the defendant does not attend again, the defence might be struck out and any defendant's claim dismissed and the plaintiff might then be able to pursue a default judgment: rule 13.02(6).

To be clear, your client, but *not* witnesses, must attend the settlement conference. Witnesses should not attend.

10. Attendance by telephone

The Rules allow for attendance by a party and the party's representative by telephone.[17] Remote attendance is within the court's discretion and convincing reasons must accompany your request for telephone attendance. A form entitled Request for Telephone or Video Conference (Form 1B) must be completed including the reasons for the request. Make the request as soon as you know this arrangement is needed. State clearly who wants to attend by telephone.

Rules 1.07(1)-(3) and 13.02(1)(b) deal specifically with attendance by telephone. Rule 1.07(3) states the basis for the order. The judge must consider the balance of convenience between the party that wants the telephone conference and any party that opposes it, and any other relevant matter. Generally, the judge might be more likely to grant the requested order where counsel, or the party, live out of town.

If the judge grants the request, the court office will make the necessary arrangements and notify the parties.

Some people believe that attending by telephone can greatly reduce the benefits of the conference.

16. Pursuant to the general powers of the presiding judge under rules 13.05(1) ("may make any order relating to the conduct of the action ...") and 13.02(5)(a) ("may impose appropriate sanctions").
17. Video conference attendance is also permitted by the rules, but the facilities must available at the specific regional court. Currently the Toronto court does not have video conference facilities in its conference rooms.

11. Authority to settle

The judge will likely determine at the outset that the attending people (i) know the facts underlying the dispute, and (ii) have full authority to settle. If these crucial requirements are not met, the conference could be adjourned and a costs order made against the party that has delayed the process and thereby inconvenienced the other attending party.

If a party needs another person's approval before agreeing to a settlement, that party must, before the settlement conference, arrange to have ready telephone access to the other person throughout the conference: rule 13.02(2).

12. Be civil and professional

Civility and professionalism[18] are expected. Further, you have a professional duty to act honourably and with integrity.[19]

At the heart of civility is respect. Civility begins with you. Do not intimidate or harass the other side, including and especially unrepresented parties. Besides being improper and unprofessional, it is counterproductive and will likely not be tolerated by the judge. Be businesslike and helpful in your search for common ground. Do not confuse boorishness and aggression with good advocacy.

Former Associate Chief Justice John Morden explained:

> Civility is not just a nice, desirable, adornment, to accompany the way lawyers conduct themselves, but, is a duty which is integral to the way lawyers are to do their work. In the field of litigation, civility is the glue that holds the adversary system together, that keeps it from imploding.[20]

18. This topic is addressed in the rules governing lawyers, as well as in cases, the legal literature, speeches and CPD programs, for instance. Begin with a thorough understanding of the Law Society of Upper Canada's *Rules of Professional Conduct* (November 1, 2000, as amended October 1, 2014), at www.lsuc.on.ca/lawyer-conduct-rules. See also, *e.g.*, The Advocates' Society's *Principles of Civility for Advocates* and *Principles of Professionalism for Advocates* (2009), at www.advocates.ca/assets/files/pdf/publications/principles-of-civility.pdf; Wendy Matheson, "Civility: Ten Litigators to watch out for" (2005), 25:1 The Advocates' Soc. J. 17-18, available at www.lsuc.on.ca/media/ninth_colloquium_ten_litigators.pdf.
19. Law Society of Upper Canada's *Rules of Professional Conduct*, Chapter 2: Integrity.
20. In a "Call to the Bar Address" delivered in February 2001, quoted in *R. v. Felderhof* (2003), 235 D.L.R. (4th) 131, 68 O.R. (3d) 481, 2003 CarswellOnt 4943 (C.A.) at para. 83; *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at para. 417, application/notice of appeal 2016 CarswellOnt 14118 (S.C.C.); *Law Society of Upper Canada v. Groia*, 2012 ONLSHP 94 (L.S.U.C. Hearing Panel) at paras. 60 and 72, reversed in part 2013

The Law Society's *Rules of Professional Conduct*,[21] Section 5.1: The Lawyer as Advocate, is pertinent. Section 5.1-1 reads:

> When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

As an advocate, your duty of professionalism encompasses both the duty of zealous advocacy and the duty of courtesy and civility. Lord Reid's following renowned statement in *Rondel v. Worsley*[22] applies equally to settlement conferences in our court:

> Every counsel has a duty to his client fearlessly to raise every issue, advance every argument and ask every question, however distasteful, which he thinks will help his client's case. But, as an officer of the Court concerned in the administration of justice, he has an overriding duty to the Court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the Court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession.[23]

ONLSAP 41 (L.S.U.C. Appeal Panel), additional reasons 2014 ONLSTA 11, affirmed 2015 ONSC 686 (Div. Ct.), additional reasons 2015 ONSC 1680, affirmed 2016 ONCA 471 (entire quotation). The last case, by the Law Society Hearing Panel, concerns professional misconduct and compendiously examines civility, pursuant to the previous *Rules of Professional Conduct* and the *Professional Conduct Handbook, 1999,* under the heading "Law Society's Role in Regulating Civility" at paras. 49-80.

21. Law Society of Upper Canada's *Rules of Professional Conduct*.
22. (1967), [1969] 1 A.C. 191, [1967] 3 All E.R. 993 (U.K. H.L.).
23. *Ibid.* at pp. 227-28. See Law Society of Upper Canada's *Rules of Professional Conduct*, Section 5.1: The Lawyer as Advocate (quoted in text above), including Commentary 1 and 2 below.

    Commentary

    [1] *Role in Adversarial Proceedings* - In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected.

    [2] This rule applies to the lawyer as advocate, and therefore extends not only to court proceedings but also to appearances and proceedings before boards, administrative tribunals, arbitrators, mediators and others who

These obligations are owed by all advocates and due to all participants in the justice system. Your duties are owed not only to your client, but also to the public and, hence, to the justice system itself and all its participants.[24]

Justice Felix Frankfurter's eloquent description is pertinent:

> It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield", to quote Devlin J., in defense of right and to ward off wrong. From a profession charged with such responsibilities, there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character".[25]

At the settlement conference, be unfailingly courteous and respectful.[26] Do not interrupt the judge or other counsel. Be patient. You will have your opportunity to speak.

Being respectful includes turning off your mobile phone and any other distracting devices.

13. Be creative

Settlement conferences can be a canvas for creativity. At trial your client wins or loses and damages are restricted to money damages or the return of property. At the settlement conference, the parties can agree to whatever they want and file a settlement document to that effect (though they might not be able to get a judicial order adopting the terms). Various solutions are available to the litigants in a negotiated settlement that are not available to a trial judge in rendering judgment. Be innovative. Be concrete but flexible. Understand that there may be more than one solution to your client's problem. Conceive options that target the parties' articulated interests.[27]

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resolve disputes, regardless of their function or the informality of their procedures.

24. *R. v. Lyttle*, 2004 SCC 5 at para. 66, quoting the above passage from *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 at para. 68, cited in *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 at para. 134, application/notice of appeal 2016 CarswellOnt 14118 (S.C.C.).
25. *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957) at p. 247 (Frankfurter J., concurring).
26. See, *e.g.*, Law Society of Upper Canada's *Rules of Professional Conduct*, Section 5.1-1 (quoted in text above) and Section 7.2-1: "A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice."
27. Much has been written about parties' identifying interests to develop a win-win solution. An instructive example is the famous story of two sisters quarreling over an orange. The sisters finally agree to cut the orange in half.

Here are a few examples. Would your supplier or contractor client like to fix the problem instead of paying damages? This would be cheaper and just might make everyone happy. Would a full refund, a gift certificate, a store credit or tickets for things like travel, concerts and sporting events mollify your client's disgruntled customer? Would your terminated employee client benefit from a favourable letter of recommendation from her former employer? Would a sincere apology from the other side make your irate client feel better? Would a donation to one's favorite charity bring peace? These are just a few illustrations of what creativity can accomplish.

You are unlikely to accomplish anything like this if you view the conference as a battlefield and are overly aggressive. Instead, explore important aspects like interests, goals, concerns, wants, needs, motives, perceptions, feelings, personalities and settlement impediments of both your client and the other side. Then search for a solution that addresses them. A mutually acceptable solution lets the parties respect each other. Both win.

14. Control your client

The dynamics of a settlement conference can be complicated and triggering. Keep your client under control. The dispute might arouse in your client a bundle of emotions. Your client might arrive at the conference loaded for bear. A client eruption can easily derail a settlement conference. To avert this, know your client and how she is feeling. Manage her and her expectations. While the process can be cathartic, help your client to constructively channel any negative emotions. Keep her focussed on the goal of resolution. Remind her to be respectful and use civil language. Tell her to avoid personal attacks and belligerent behaviour. The conference room is not a battlefield.

While keeping your client in check, also remember that she must be there. Indeed, your client is why you are there. You are there for your client; you are not there for you. So your client should not be

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The first sister takes her half, eats the fruit and throws away the peel. The other sister throws away the fruit and uses the peel for baking. If their interests had been articulated, they both could have obtained all of what they wanted, rather than just half. The first sister would have had the whole fruit and the second sister would have had the whole peel. Missed was the opportunity to invent options for mutual gain based on the fact that the sisters wanted different things. See Roger Fisher, William Ury and Bruce Patton, *Getting To Yes: Negotiating Agreement Without Giving In* (New York, N.Y.: Penguin Group, 2011), pp. 58-59, 75, the acclaimed bestseller.

discouraged from meaningfully engaging in the process and responding to the judge's questions and comments when appropriate.

15. Likelihood of success at trial

One objective of the settlement conference is for the parties to get a realistic idea of their likelihood of success at trial. If this is not forthcoming from the judge hearing the settlement conference, you may ask the judge for his opinion about the merits of your case. This is often helpful when you are trying to get settlement instructions from your client. That particular judge's opinion will be based on their personal experience as a judge and lawyer. Of course you have the right to ignore that opinion. But you should carefully consider it because it is based on much experience, including in Small Claims Court, a forum with which you might be unaccustomed.

If the judge says something like "the law is against you on that point" or "you don't have the evidence needed to prove that", ensure your client is listening. Pay attention if the judge tells you how he might approach and resolve an important disputed fact or a credibility issue as a trial judge. For example, has the judge identified apparent inconsistent statements or the absence of corroborating documentation?

16. Likelihood of enforcing a judgment

You will also want to discuss with your client the likelihood of successfully executing a favorable judgment in the circumstances of your case. Even if your client wins at trial, he or she must be realistic about the ability to promptly enforce any judgment.[28] While a judgment is good for life,[28a] depending on the judgment debtor's financial circumstances, the winning party or judgment creditor might have a hard time *quickly* collecting any monetary award. Then their win, in the short term at least, is Pyrrhic. In this situation, the client might have been better off settling early, before spending the money and time on a trial that resulted in a hollow victory, at least in the short term.[29]

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28. See rule 20.

28a. *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 16(1)(b) prescibes no limitation regarding a proceeding to enforce a court order.

29. The following oft-quoted advice of President Abraham Lincoln is apposite:
> Discourage litigation. Persuade your neighbours 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.

17. Why settle?

While there is no obligation to settle, some good reasons why parties should try to settle their dispute before going to trial are listed below.[30]

a) It saves time.
b) It saves money and avoids exposure to costs consequences.
c) It avoids the stress, formality, uncertainty, publicness, and possible publicity of a trial.
d) It gives the parties the power to resolve their dispute on their own, rather than have a stranger resolve it for them.
e) The parties are more likely to respect their solution since they created it and therefore own it.
f) It can allow the parties to generate a solution in which both benefit and win, rather than have a trial judge impose a solution in which one wins and the other loses.
g) It can be purgative by letting the parties articulate freely their feelings about their dispute in an informal, confidential setting.
h) It can allow the parties to preserve a relationship that their dispute might have otherwise demolished.
i) It provides the parties with an end result, with much-desired closure.

Small Claims Court is meant to be an accessible forum for the expedient, low-cost resolution of monetary disputes up to $25,000. The goal is "to secure the just, most expeditious and least expensive determination of every proceeding on its merits" (rule 1.03) and "hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience" (*Courts of Justice Act*, s. 25).[31] Since the monetary jurisdiction was raised to $25,000 in 2010, trials in Small Claims Court have become more complex in many cases and are increasingly multi-day. Indeed, the word "small" may no longer be an accurate descriptor.

A party might adamantly insist on having their "day in court". While they are entitled to this, they must also be realistic. Pursuing one's "day in court" can take a financial and emotional toll. Long-haul litigation can be expensive and stressful. One approach is to

30. See "Important Information About Your Settlement Conference", *supra*, footnote 10, para. 7.

31. See, *e.g.*, the recent cases of: *Stamm Investments Ltd. v. Ryan*, 2016 ONSC 6293 (Div. Ct.) at para. 11, M. Dambrot J.; *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014 (Div. Ct.) at para. 9; *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847 (Div. Ct.) at para. 9, L.A. Pattillo J.

view the private settlement conference as if it were one's "day in court". In appropriate cases this perspective can satiate the desire for justice in a recognised forum in the presence of a judge, a neutral, fair-minded third party, while avoiding a prolonged public trial and its concomitant costs and uncertain outcome.[32]

From our experience, upon settlement, the parties often appear relieved. Reaching a resolution can be cathartic. No longer locked in litigation, the parties are grateful and can go on with their lives. They have closure. They can breathe again.

18. Settlement document

Be familiar with the terms that are typically addressed in a settlement document. Be ready to complete it in anticipation of the case being resolved. A settlement document can take various forms, but has the same basic terms. [33] The document often used in the Toronto Region is "Minutes of Settlement", reproduced as an example below.

MINUTES OF SETTLEMENT

Claim No. _____

The above parties have agreed to settle this action on the following terms:

1. The Defendant shall pay to the Plaintiff the sum of $_____ as follows:

_____

as full settlement of all claims, including interest and costs.

2. This Claim (and Defendant's Claim, if any) is dismissed.

3. If the Defendant defaults, the Plaintiff may ask the Clerk of the Court to sign judgment, without notice, for $_____, plus interest and costs, less any payments made.

32. At that early stage, the outcome of your case is undetermined, unknown and unknowable. Your client should understand that, while in common law jurisdictions, judicial precedent or *stare decisis* is an important doctrine, there is always uncertainty about any pending decision of a court, regardless of its level. In this sense, Alfred, Lord Tennyson's view of law as "[t]hat wilderness of single instances" (*Aylmer's Field* (1793)) might resonate.

33. See also Form 14D: Terms of Settlement. It can be found online at http://ontariocourtforms.on.ca/static/media/uploads/courtforms/scc/14d/rscc-14d-e.pdf.

4. Provided that the terms of settlement are complied with, the above parties fully and finally release one another from all claims related to the facts and issues raised in this action.

Dated at _____, this _____ day of _____, 20xx.

Plaintiff: _____ Witness: _____

Defendant: _____ Witness: _____

Ensure that the settlement document is completed clearly and accurately to avoid confusion and the possible resulting need to bring a motion to try to resolve it.

What are some examples of details to consider? In Paragraph 1 above include the exact names of the payor and payee where there are multiple parties, the form of payment (*e.g.* cash, cheque, certified cheque, bank draft, e-transfer, post-dated cheques), the deadline for payment(s) (to avoid confusion, put a fixed date, *e.g.* "by May 1, 2017", not a time period, *e.g.* "within 30 days"), the specific dates and amounts if paying by installments, the means of transfer (*e.g.* ordinary mail, registered mail, courier, electronic transfer to specified bank account) and any other special arrangements. Put all additional details in writing.

The monetary amount to insert in Paragraph 3 is subject to negotiation. The purpose of this term is to ensure compliance. If one party does not comply with the Minutes of Settlement, the other party can ask the court clerk for judgment for this amount plus interest and costs, less any payments made.

On the signature line, be sure to print under the signature the name in block letters and identify if someone is signing on behalf of someone else. Any confusion could result in the need for a motion to try to clarify it.

Once completed and signed, the original Minutes are put in the court file along with the judge's endorsement. It generally says simply that the matter has settled according to the Minutes filed. The court office then closes the file.

19. Consent to final judgment for claims under $2,500

There is a special rule (rule 13.05(4)) for claims for an amount under the appealable limit, *i.e.* $2,500.[34] This rule in effect contemplates a voluntary mediation-adjudication. Before the settlement

34. O. Reg. 626/00 under the *Courts of Justice Act*.

conference, the parties may file a consent[35] signed by all parties stating that they wish to have final judgment at the settlement conference if a mediated settlement is not reached. If the parties do not settle, the judge can then make a final judgment at the settlement conference. This immediate resolution brings an end to the action. There will be no trial fee and there is no right to appeal.

What happens if you do not settle?

Below are some important considerations if you do not settle at the conference. Remember that you can settle at any time before trial or even after the trial has started and before judgment. At that late juncture, much time and money has been spent. This fact might be an incentive to seriously consider an early resolution to avoid protracted litigation.

20. Court orders

If you do not settle at the conference, remember that judges have broad discretion to make various orders at a settlement conference. The appellate case law about the court's jurisdiction can be instructive. The conference also serves a housekeeping function. Examples of orders are: add or delete parties, consolidate actions, stay or dismiss an action, amend or strike out a claim or defence, direct production of documents, change the place of trial, direct an additional settlement conference (also under rule 13.02(3)), and order costs: rule 13.05(1)-(2). Caselaw confirms the mandatory nature of an order made at the settlement conference.[36]

Pleadings issues may be determined at settlement conferences: rule 13.05(2)(a)(iv), referencing rule 12.02(1).

21. Document production

As mentioned, rule 13.03(2) says that, at a settlement conference, every party must provide a copy of any document to be relied on at the trial, including an expert report, and that every party must also provide a list of witnesses. Recent caselaw describes this rule as "a form of discovery."[37]

35. Form 13B: Consent can be found online at http://ontariocourtforms.on.ca/static/media/uploads/courtforms/scc/13b/rscc-13b-e.pdf.
36. *Bilusack v. Faith*, 2015 ONSC 678 at paras. 14-18, Ellies J.
37. *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014 (Div. Ct.) at para. 11. Nordheimer J repeated: "the Small Claims Court Rules do provide for a very limited form of discovery" (para. 11) and "Discovery does exist in the Small Claims Court, but only to an extremely limited degree" (para. 12). There he

Among the most useful court orders concerns document production under rule 13.05(2)(a)(vi). A typical order might say:

> Each party shall serve on every other party and file with the court a copy of all documents to be relied on at the trial, including any expert reports, at least 30 days before trial.[38]

Thus, you can get some additional information about the case you have to meet as a result of the settlement conference. Some of these documents might already have been attached to the pleadings and served on the defendant. You can assist by bringing to the conference a list of what you believe is in the other parties' possession, control or power and has not been attached to the pleadings. For instance, in a personal injury or medical negligence action, medical evidence,[39] such as expert reports or a chronology of visits to health care providers and their assessments and notes, might be sought to verify the nature and extent of the claimed injury. In a "renovations gone bad" case, the defendant contractor might ask for such things as any photos, inspection and expert reports, and quotes, invoices and proof of payment for remedial work.

Recent caselaw states that the judge at a settlement conference cannot issue a *third party* order for production.[40]

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upheld an order for pre-trial inspection of property (iPhone 5) but also said such orders were rare.

38. See, *e.g.*, *Bent Glass Design Inc. v. Tersigni*, 2015 ONSC 6725 (Div. Ct.) at para. 10, D.L. Corbett J.; *Cash X v. Carvalho* (2010), 185 A.C.W.S. (3d) 922, 2010 CarswellOnt 1356 (Div. Ct.) at para. 3, K. Swinton J.
39. As in *Hervieux v. Huronia Optical*, 2016 ONCA 294 at paras. 3 and 9, L.B. Roberts J.A.; and *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847 (Div. Ct.) at para. 13, L.A. Pattillo J.
40. *Elguindy v. St. Joseph's Health Care London*, 2016 ONSC 2847 (Div. Ct.) at para. 23. There L.A. Pattillo J. explained:

    > In the absence of discovery in the Small Claims Court, there is no gap in the SCC Rules which would permit incorporation of rule 30.10 of the *Rules of Civil Procedure*. Nor is there any provision in the SCC Rules for third party production orders, either on a motion or at a settlement conference. As noted, the only provision in the SCC Rules permitting an order for production of documents is SCC Rule 13.05(2)(a)(vi) which, in the context of a settlement conference, only permits an order for production by a party to the action as part of the settlement conference.

    In *Riddell v. Apple Canada Inc.*, 2016 ONSC 6014 (Div. Ct.) at para. 23, Nordheimer J. discussed the "essential balance between ensuring expeditious, low cost proceedings and making pre-trial orders that are necessary to ensure that the trial judge can reach a just result." He clarified (at para. 24):

    > This balance will generally tip in favour of not making pre-trial orders for discovery type relief. This is especially true when those orders seek information from third parties of the type that was addressed by this court in *Elguindy*. Indeed, the granting of any such form of pre-trial order, even

22. Judge's recommendations

As an impartial facilitator, the judge will not pressure or force you to settle. But she may make recommendations to the parties on any matter relating to the conduct of the action: rule 13.04. Examples are: (a) clarifying and simplifying issues in the action; (b) eliminating claims or defences that appear to be unsupported; and (c) admission of facts or documents without further proof: rule 13.04.

Ensure your client listens to these recommendations. Be open to admitting facts on issues not in dispute and making concessions about issues where appropriate.

23. Proceeding to trial

The rules effectively invoke a post-conference period in which the parties have the opportunity to continue their settlement discussions. The goal is to encourage the parties to keep talking.

If, *after* 30 days from your settlement conference, the matter is not resolved, one of the parties (typically the plaintiff) may request a trial date from the court office: rule 13.07.

To set the action down for trial, the requesting party must pay the prescribed fee (rule 13.07), currently $145 for an infrequent claimant.[41]

If the action is not set down for trial, the court clerk will eventually make an order dismissing the claim for delay: rule 11.1: Dismissal by Clerk. Recent changes to the Rules[42] impose a two-year timeline and transitional provisions about which you should be aware.

If your matter settles before the scheduled trial date, notify the court office as soon as possible.

To be well prepared for trial, you must know the case you have to meet. So you should seek full disclosure from the other side well in advance of the trial. Full disclosure encourages a fair resolution. As mentioned, the judge at a settlement conference has a limited power to order production of documents.

If some issues are obviously not contentious, you can seek admissions, so proof will not be needed at trial. This might reduce the

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when it only involves the parties to the proceeding, should be done sparingly and only in situations where it is clearly demonstrated that, without the requested pre-trial relief, justice cannot possibly be done between the parties given the nature of the claim at issue.

41. O. Reg. 332/16 under the *Administration of Justice Act* (effective November 6, 2016), s. 1(2)6.
42. O. Reg. 194/15, s. 3 under the *Courts of Justice Act*; O. Reg. 38/16, s. 6 under the *Courts of Justice Act*.

number of witnesses. Admissions will save time and allow your trial preparation and the actual trial to focus only on the points in issue. To save trial time, suggest compiling an agreed statement of facts by an agreed date.

Consider making a formal offer to settle under rule 14. If it does not lead to resolution, the offer might nonetheless be significant when it comes time for the trial judge to determine costs after he or she has granted judgment.

24. Keep settlement offers confidential

Any offers made at the conference or after should not be disclosed to the trial judge during the trial. Also, as mentioned, except as otherwise provided or with the parties' consent, the matters discussed at the conference must not be disclosed to others until after the action has been disposed of: rule 13.03(4). This guarantee of confidentiality lets the parties speak freely without fear that their statements will be used against them at trial.

The judge at your settlement conference cannot and will not be the judge at your trial: rule 13.08. The trial judge will not know the nature of resolution discussions or the settlement conference judge's opinion on the merits of the case.

Conclusion

As the province's most active civil court, the Ontario Small Claims Court is intended to provide an expedient, inexpensive resolution of monetary disputes. Settlement conferences are mandatory, informal, private and confidential. They provide an enormous opportunity to reach an early resolution for your client, thereby sparing him the time, costs, stress, formality, uncertainty, publicness and possible publicity of a trial. To best serve your client, be adept at innovative problem-solving.

Have a thorough understanding of rule 13 and related provisions and up-to-date caselaw. Ensure you and your client comply with the rules, including those about attendance, preparation, disclosure and authority to settle, or else risk an unfavourable costs award.

View the process with a positive attitude. Be punctual, civil and professional. Know and control your client. Manage his expectations. Explain the many purposes of the conference and the numerous advantages of settling. Ensure you and your client listen carefully if and when the judge gives his opinion about the likelihood of success at trial and makes recommendations. Before the

settlement conference, talk with the other side. Try to identify their interests, resolve all or part of the dispute, agree on any facts and narrow the issues. Be ready to negotiate and complete a settlement document.

Where appropriate, consider taking advantage of the judge's discretion to make various orders at a settlement conference. Take the opportunity to seek full disclosure of the relevant facts and evidence from the opposing party.

Take the conference seriously. Make it meaningful. Then it might well be the flight path to a successful timely resolution of your client's dispute. He will finally have closure. Your client will probably be relieved and appreciative. And you might develop a reputation as an effective problem-solver, someone who gets the job done, a "resolutionary".