INTRODUCING ADR INTO SETTLEMENT CONFERENCES

Introduction

I am pleased to speak to you today about settlement conferences. One of the interesting things to note in reading Rule 13 of the Small Claims Court rules is that the rules delineate our duties and powers as deputy judges. While rule 13 answers the *what* question, it doesn't answer the 'how' question. In other words it doesn't tell us *how* we are supposed to approach the issue of settlement with parties and their representatives. One of the central purposes of today's discussion is guiding parties toward settlement. When I reach that particular issue in a while, I intend to shift the discussion from law to ADR, or alternative dispute resolution.

As many of you already know, Alternative Dispute Resolution or ADR as a modern discipline dates back to 1975 when Roger Fisher and William Ury co-operating in authoring a soft cover entitled 'Getting to Yes'. The first edition in the US was published in 1983. Roger Fisher had practised as a litigator and later joined the law faculty at Harvard Law School. William Ury's backround was in labour relations and he also joined the law faculty at Harvard where both of them have taught negotiation as members of the Harvard Negotiation project. Their book Getting to Yes is the accepted bible for negotiators. Any ADR course that you attend will include a copy of this book. The softcover is available at any large book store for about $20.00.

The subject matter of ADR not surprisingly is divided into several major branches, negotiation, mediation, training and coaching. The common denominator for

all of these branches is a conceptual approach based on discussion of the parties needs or interests. Whether you register in a quick ADR course or take a longer certificate programme or decide to enroll in a two year degree programme such as Osgoode Halls executive LLM in ADR, you will be introduced to the concept of needs or interests.

More importantly, as lawyers, you will be directed way from a discussion of legal rights. One of the underlying reasons is that debates over legal rights is essentially circular. Each party asserts that on his or her understanding of the facts, he or she is correct and the other party is incorrect. The problem that arises from a right and wrong analysis is that only a neutral third party can make the determination such as a judge or an arbitrator. Discussion of right and wrong is essentially circular since each party asserts that he or she is right. If no one yields any ground, the dispute either proceeds to trial or is arbitrated provided that the parties have agree to arbitrate.

Even if you are not inclined to enroll in an ADR course, I can tell you having done introductory and advanced ADR courses and Osgoode Hall's Masters degree programme that reading Getting to Yes is 190 pages and will take you no more than a weekend to read. It is written conversationally and is filled with anecdotes which are based on some very high powered negotiations. It is an incredible book and it will help you as a deputy judge in settlement conferences.

I can promise you that today's discussion on ADR will provide you with a fresh approach to negotiation that will be useful to you not only in settlement conferences but also in your law practices.

Let's Get Started

When we sit as deputy judges in settlement conferences, we have three basic functions to perform. The first is to briefly review any procedural issues. The second is to encourage and guide the parties toward settlement by making the parties and their representatives mindful of the costs and risks of litigation especially at the small claims court level. As just mentioned part of this discussion will incorporate the proposition that to help parties settle we need to change the channel from a discussion of 'rights' to a discussion of 'interests'. The third function is to offer an opinion as to the likely outcome at trial. The last two functions are arguably the most important. My last point will deal with Rule 12.

Reviewing the Basic Purposes of Settlement Conferences

Before asking the parties to speak, I review the basic purposes of settlement conferences. Whether the litigants are represented by lawyers or para-legals, or are self-represented, I find it helpful to do a quick review. It's surprising how often parties attend settlement conferences without any clear expectations or understanding of the process.

Firstly, I generally canvass issues such as the need for document production orders and delivery of witness lists as required under Rule 13. In the vast majority of cases the parties don't squabble about the need to deliver their productions and witness lists. In most cases where the parties are represented they are familiar with their obligation to produce documents and witness lists. Where the parties are self

represented it's important to draw Rule 13 to their attention in case they are unfamiliar with it.

Occasionally, production of one document or another may be resisted possibly because of an issue of document destruction, or lack of access, or privilege, or perhaps because of a confidentiality provision in an agreement to which a party may be privy. Of course, it takes more time to work out a resolution of those disagreements.

Because Rule 13.03(2) provides us as deputy judges with a handy road map, I generally devote as much of the 45 minute session allotted in Central East Region where I sit to working with the parties and their representatives in an attempt to reach settlement.

Guiding the Parties Toward Settlement

One of the things I quickly discovered as a newbie in my first year judging in 2014 was that some of the disputes that find their way into small claims courts are just as complex as many of the cases before the Superior Court of Justice. While the $25,000.00 monetary jurisdiction imposes the same degree of responsibility and diligence on us as deputy judges as is the case with Superior Court judges, nowhere is the question of economics dealt with when parties fight complex cases over relatively small amounts of money or property.

In one of my first settlement conferences, I had a three inch file in front of me which I couldn't possibly read in the half hour before conferences begin. In the Richmond Hill court we read files between 9:00 am and 9:30 am and then go into conference every 45 minutes.

This file involved a fire at a car dealership which destroyed the dealership. The Plaintiff dealership had settled its claim on its insurance policy. The Plaintiff assigned its claim so that the Plaintiff's lawyer was its insurer's lawyer. The five defendants were a combination of building architect, consulting engineer, electrical engineer, electrical contractor and an electrical sub-contractor. We barely had enough room at the conference table and sufficient chairs to seat everyone.

One of the critical reports was an engineering report written in technical language. I don't know about you, but in my generation most lawyers arrived at law school with a BA degree. Engineers were the guys who ran the trains. Thank God, one of the lawyers had a Bachelor's degree in engineering. He translated the technical language and made the technical facts intelligible. The BA's in the room, like me, would have been lost without him.

By the time six parties, six lawyers and I had a grip on the facts roughly 40 of the allotted 45 minutes had passed. I knew from the tone of our discussion that everyone really wanted to settle. The problem was that they didn't know had to get where they wanted to go. In any case, we were down to the last 5 minutes.

I reviewed Rule 13 and in particular Rule 13.02(3) and Rule 13.05(2)(viii) which permit additional settlement conferences. Rule 13 does not limit the number of additional settlement conferences. More importantly, it doesn't prohibit at Deputy Judge from seising himself or herself from overseeing an additional conference or conferences.

Since the rule is not prohibitive, it is permissive. So I asked all of the counsel whether or not they were comfortable with my doing the follow up conference. The idea was that if I presided, I would be able to hit the road running the next time. A new judge would likely need another 40 minutes to get up to speed. That made no practical or financial sense with lawyers billing about $400.00 per hour. Nor was it an effective use of taxpayers money which as we all know the Ministry of the Attorney General doesn't have. I got everyone's agreement and endorsed the settlement conference order accordingly.

We met several months later and at the second conference we were able to narrow down causation to the two electrical contractors and they agreed to share liability 50/50. The Plaintiff agreed to accept $17,000.00 to get the action settled.

There are two side bars that are worth noting. The first is that having come this far, the parties could smell settlement. They were very determined. My job was to keep them focused on the goal line, and to try to prevent back sliding. Lawyers being lawyers, we love to argue. Cooler heads prevailed and we got the job done.

The second side bar was a bolt out of the blue. About a week after the court file was returned to the Richmond Hill clerk, I received a fax from her questioning why I had seised myself in that case and in 5 previous cases where I had handled settlement conferences.

Aware that the clerks schedule our court days and that we do not want to annoy them, I advised her that there was a pattern to my orders seising myself of a second conference. Where the actions were so complex that 45 minutes was insufficient to get

to settlement and/or where there were multiple parties that made the 45 minute time frame unworkable, I seised myself.

I pointed out to the clerk that the added delay in getting the parties back before me was less costly to them and to MAG then the alternative. After that, I never received a similar query. This is a segue to my second point.

Changing the Channel

One of the biggest difficulties that parties face to varying degrees is their degree of commitment to their cause. Often, each side is invested in the justice of his or her cause and believes that the other side just doesn't get it. Compounding the problem are representatives who likely earn larger fees the longer the action continues.

The question for us as deputy judges is how to help parties identify their real needs by comparing the costs of litigation with the possible benefits. I say possible benefits because each party needs to be reminded that not everyone can win. In an adversarial system if one wins hands down the other loses. Each litigant takes it for granted that he or she will be a winner. They need to be reminded that this will not be the case in a win-lose system.

I suspect that many if not all litigants get so invested in their cases that somewhat like people bidding at an auction, they forget when to put their bidders card down. If I sense that this what is happening, I ask the parties and their representatives to stop any discussion of facts, evidence, and of questions of legal right or wrong. Debating facts, evidence and right and wrong is circular by nature. This kind of

discussion reminds me of the endless arguments children engage in when one says “I know what you are but what am I”.

Once the parties and their representatives understand this point, it’s time to suggest that we change the channel and look at the costs of litigation and its possible benefits. Before sharing some of my own experiences, I thought that it might be helpful to look at some ADR basics before looking at specific court cases.

ADR Basics: Interests, Common interests, issues, and workable options

a) Interests

The core of ADR is straight forward. People have interests. And those interests don’t necessary have anything to do with litigation. For example, if you’re looking at booking a trip to Greece and the Greek islands, and review the various tour brochures, you’ll probably find that many of the holidays are 15 or 16 days long. Most of these tours provide the same land itinerary. Where they differ is in the number of islands they include. One tour may include two islands and another five. When you examine the details you quickly find that the five island tours have you quickly in and out of port.

If you’re interested in hopping and skipping that’s fine. But if you want to relax and get a better feel for each island, the larger number of tours may not ‘interest’ you. In other words, you may prefer quality over quantity. This is a ‘need’ or ‘interest’.

Interests may be material and relate to money or property which is the menu of small claims courts. Or they may be psychological. For example, your next door neighbour is loud, obnoxious and throws his garbage out on your lawn. You try to speak

with him as tactfully as possible and get either a grunt or an expletive and decide not to deal with him. Then he hires construction trades to work along his foundation who remove enough clay to compromise your own foundation and dump construction debris on your side yard. You see your lawyer and ask for legal advice.

Your lawyer tells you that this activity is illegal even if a building permit has been issued. The next thing you're told is that if the neighbor refuses to stop construction after being given a written warning, you will need to sue and seek an injunction. And the costs of this kind of action might reach $50,000.00 depending upon the stubbornness of the neighbour, money you may not have. You leave your lawyer's office to consider your options. One option is to sue and spend an unaffordable bundle on legal fees. A second, illegal option is revenge. You deliberately do damage to his property. Depending upon your response the next time the door bell rings it may be the police who come calling or a process server with a Statement of Claim. Not a great strategy!

Your third option might be to let him finish, hire your own contractor to do the necessary backfill and clean up and list the property for sale. In other words, if you can't live next to this neighbor, then move. Each of these unappetizing options is a possible solution to the problem. The option you actually choose will reflect your 'interest'. In this situation the need to reduce expense, and buy peace of mind reflect the party's needs.

If you actually enjoy fighting and want to teach this neighbour a lesson he'll never forget, the preferred option may be litigation. If financial considerations and the need for peace of mind are paramount, escape may be the best option. Your interests once you figure them out will help you determine your preferred option.

b) **Common interests**

In a private, non-judicial negotiation with a neural mediator guiding the disputants, the latter will quickly look at all of the parties interests and calculate the number of interests that they share in common. The more common interests they share the easier to work toward an acceptable simply because like interests mean that they have something in common. People with common interests are more easily persuaded to compromise. Private mediation sessions generally run a minimum of one-half day.

c) Issues

Once we have some sense of the issues that both sides share, the next step is to frame the issues which as lawyers we do all the time. An easy way of explaining this to the parties is by reference to journalism's W5 and 'how'. W5 is who, what, when, where, and why.

d) Workable options

Once the issues are listed, the workable solutions are the next task. And that is a practical exercise which allows the parties to make an agreement that resolves the dispute. ADR theory proposes that the mediator ask a lot of questions so as to encourage the parties to eventually propose their own solutions. The fundamental reason for this is that parties take ownership of their disputes when they propose the solutions. The biggest obstacle in doing all of this in a small claims court settlement conference is time. We have only 45 minutes. My suggestion then is that we as deputy judges cut the process short by taking control which we are empowered to do as judges and quickly delineate the obvious interests, common interests, the issues and the range

of workable options. By listening and then taking control we have an opportunity to make ADR work even if we have to operate in ‘fast forward mode’. ADR purists will likely not be happy. But we’re operating with time constraints and need to do what we need to do. What I am saying is that in a constrained time frame theory needs to bend to fact.

Back to the Settlement Conference Room

In the example I shared with you about the fire at the auto dealership, I took a quick look at the faces of the six lawyers. Two of the six seemed to be in their mid thirties and the other four in their fifties or sixties. I asked them to project the amounts of their bills to their clients. The dollar figure across the table, all in, was $65,000.00. $65,000 of billings on a $25,000 case, at best. Counsel for the Plaintiff assumed that judgment would be for $25,000.00, a dangerous assumption.

Knowing that the real parties through subrogation were insurance companies, I suggested that their principals would probably be happier to see this action settled as inexpensively as possible. We all understood basic business and knew that legal expenses decrease the bottom line and don’t do much to enhance their clients’ Revenue and Expense statements. Apart from anything else, that bit of financial encouragement, as obvious as it is, I believe helped them to reach the goal line. Not every case is as complex or multi-partied as this one. But I generally find that an appeal to financial logic is helpful. Because of the limits on cost awards under the Courts of Justice Act and the application of Rule 14.05, where parties are represented by counsel, less so with paralegals, the party who wins often does so at a disproportionate cost and

the party who loses, really loses. And that doesn't even begin to take into account a party's lost opportunity costs. Where I encounter a party who is motivated either by principle, or spite, I ask them to consider the probable expense they may be exposing themselves to. For example, what salary are they giving up if they are employed. If the party is self employed, what new business might he have done that day had he been able to attend to business and not be stuck in a courtroom. An additional inquiry would relate to the cost of transportation to and from court. If a party arrives at court and lives out of town or out of province, what is he spending on airfare or train fare. Should a trial likely need two or three days or more, what is the cost of hotels, and taxis if need be back and forth to the court. If the case involves experts, what are the costs of expert reports and attendance at trial to testify not to forget their transportation and hotel costs. I find that the more we appeal to each party's financial self-interest, by encouraging them to do the arithmetic, the more likely protracted litigation loses its appeal and settlement begins to look more attractive.

If we look at the typical conflict cycle, often the parties do not even agree on the same facts. Each side ascribes fault to the other and sees himself or herself as the other's innocent victim. Because conflict is a cycle in which one party identifies the other as the bad guy and blames him for whatever has gone wrong, there is no escape. An added problem is that with the passage of time, memory fades. Sometimes parties offer new facts that fill in memory gaps without conscious awareness that that's what they're doing. It is usually at trials when parties testify that we're able to pick up strands of evidence that simply don't fit their own narrative.

Last year I tried a case involving a commercial trucker and a repair shop where the owner of the truck alleged that the shop mechanic had damaged it.. The Plaintiff insisted that the mechanic had admitted to doing unspecified damage. He didn't pick up the truck at the time and never had another shop examine it and report back. He had no expert witness at trial The Plaintiff admitted that the truck was so old that it wasn't worth repairing and bought a used replacement truck after verbally approving repairs. Almost seven months later he had the truck towed to a scrap yard from the shop. The Defendant denied doing any damage. The Plaintiff's position made absolutely no sense. But that didn't matter. He was determined that he was right.

Common sense dictated that if the Plaintiff's version was true, at the very least he would have picked up his truck and brought it to another repair shop for a second opinion. What was noteworthy was the Plaintiff's tendency to blame and to be very certain that the Defendant had damaged his truck. He had a decent knowledge of truck mechanics but could not answer any questions about the damage he alleged. The point is that the very nature of the conflict cycle often involves a lack of objectivity as to one's own role in bringing about and in escalating the conflict. This lack of objectivity feeds the conflict and makes it run in a circle. Since the time limitation on settlement conferences is 45 minutes, we don't have the time to do an in depth analysis of the causes and development of the conflict.

So the critical question is what can we do to help the parties break that cycle. The answer as I suggested earlier is to encourage the parties to change the channel by doing a cost-benefit analysis. If the cost, meaning the financial pain of litigation assuming victory exceeds the gain, it's time to settle. If the cost, meaning the financial

pain of litigation assuming a loss or a divided result is even greater, all the more reason the parties should settle.

What I am suggesting is that we change the channel from one of fault to one of arithmetic as the logical path to settlement. The one and only opportunity to do this is in settlement conference. Once an action proceeds to trial, all that matters are evidence, fact finding, and findings of law. Generally someone one wins. Someone loses. And both sides especially if counsel are involved get to pay a bundle.

The channel changing I am proposing can easily reach beyond the approach I just outlined. Last year I tried a home owner construction case. The homeowner owned a home in an older part of Richmond Hill that was constructed well before by laws were passed to regulate below frost line construction. Her basement and garage lay above the frost line. Whenever there was heavy frost the frost lifted the basement and garage and forced cracks in both and caused cracks in the walls above the foundation and garage.

She contracted a firm with many years of experience in this field. The Plaintiff claimed $25,000.00 in damages for repairs within one year of completion of this work. The Defendant did not issue a Defendant's claim for its warranty follow up work after she made a complaint to it. The Plaintiff testified on her own behalf and had no other witnesses. The principal of the Defendant was one of two witnesses each with extensive training and experience in the field. Both parties agreed that the formal written contract they signed governed their rights and obligations.At the very bottom of the front page of this contract in large, bold print was a warning to the homeowner that she had to immediately insulate this home by replacing her garage door and replace her mud room

door from the garage to her laundry room. This warning clause which was written in the clearest language warned of the risk of frost causing further heaving if these two preventive steps were not taken within a specified period. The Plaintiff admitted signing the contract and reading this warning.

On cross examination she acknowledged not taking these steps because she didn't have the funds. Not surprisingly, her claim was dismissed with costs to the Defendant. The more interesting part of this case was that the Defendant had orally proposed returning to effect a limited amount of corrective work to reduce the risk of more major heaving. He was sympathetic to the Plaintiff who lived alone on a fixed income. In any event, she didn't take up this oral offer and nothing came of it. I mention this because as I was listening to the trial evidence I thought to myself that these parties had lost a good opportunity at settlement conference to negotiate a deal that might have been a 'win-win'. Corrective work to the home to help the Plaintiff deal with her problem and a fresh contract producing more income for the Defendant. Had the parties been willing, the approach to repair might have developed as follows. In exchange for the required corrective work to be completed by an agreed date, the Plaintiff would provide the contractor with some deposit that reflected her means. Because the contractor felt sorry for her the odds favoured his agreement to a smaller deposit. The corrective work could have been done according to a defined schedule, with a reasonable series of payments over time by way of post-dated cheques.

As we know, the details of a settlement conference under Rule 13 are privileged and are not to be disclosed or discussed at trial. I obviously couldn't comment on what may or may not have transpired at the settlement conference and silently wished that I

had been the settlement conference judge, and not the trial judge. This action was truly a lost opportunity. I felt badly for the Plaintiff. However, in an adversarial system of 'rights' she didn't have any. So she lost.

Offering an opinion as to the likely outcome at trial

Rule 13 is curiously silent with respect to a deputy judge offering an opinion as to the likely outcome at trial. Following the practice in the Superior Court of Justice, it's my practice to offer an opinion only if there is absolutely no prospect of settlement provided that the facts are so crystal clear as to make the outcome obvious. If on the other hand, the facts are muddy, or confusing, and if credibility appears important, I remain silent. I haven't keep any statistics. But based upon recall, most of the time, I lean one way or the other by the end of a conference. Why Rule 13 is silent on this issue, I do not know. I would have thought that the persuasive effect of offering a judge's opinion would assist parties in attempting to reach a fair settlement so as to avoid committing their resources to a win-lose roll of the dice at trial.

Applying Rule 12

There is one last unrelated point I would like to make**.** At the small claims court level we sometimes see files that make you want to scratch your head. What I am about to say I know will be controversial. Some of you may not agree and I respect your right to do so. The prevailing view is that every party should have their day in court. I may be in the minority. But I have difficulty with the unqualified nature of this principle.

Rule 12 allows us as deputy judges to dismiss a claim where it appears on its face to be inflammatory, a waste of time, a nuisance, or an abuse of the Court's process

on motion. However, this Rule goes further and also empowers us to make an order ‘on our own initiative’ in appropriate circumstances. This is a power that Superior Court justices have under Rule 2.1. Rule 13 in dealing with settlement conferences permits us to make any order which we may otherwise make thereby putting Rule 12 in play. I often find that parties with patently nonsensical claims or defences have a tendency not to attend settlement conferences, sometimes more than once. Where circumstances warrant it, I make a Rule 12 order whether on motion or on my own initiative.

If the offending party does attend, I proceed in the manner I have already described. If that party insists on proceeding to trial despite the legal impossibility of his or her claim or defence, I read rule 12, discuss my concerns and before applying it ask whether that party is prepared to reconsider and consent to the order. If I get a consent so much the better. If I do not, I make the order anyway.

We all know that with power comes responsibility. Of course we have to be careful not to act rashly. However, in clearly appropriate cases we shouldn’t fear applying this rule bearing in mind the costs to innocent parties and to the taxpayer. If cabinet had not wanted us to apply this part of Rule 12 in appropriate circumstances, it could have amended it at any time by order in council. It has not done so. Apart from the cost to other parties of responding to patently nonsensical claims, the scarcity of resources available to the Ministry of the Attorney General do not need to be further stretched simply to please individuals who believe that that have an unqualified right to their day in court. As I see it, our duty is to judge, not to please everybody.

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