

**Settlement Conferencing Presentation to
IATJ 2nd Assembly, Paris, France
September 9 and 10, 2011**

1. Under the Tax Court of Canada rules of Court, there is specific reference to settlement offers under the rules on cost, under Rule 147(3)(d). Basically, costs, in the Tax Court of Canada, are totally in the discretion of the trial judge who can award the costs after considering a variety of factors, one of which includes any offers of settlement. This particular factor has become more important to the Tax Court of Canada because the Tax Court of Canada judges are now awarding costs on a more frequent basis, in higher amounts, and as a result parties are focusing more and more on written offers of settlement before trials, which result in earlier settlements and which promotes settlement conferencing.

2. Also, recently, the Tax Court of Canada, through Chief Justice Rip, issued Practice Note 17 which deals with litigation conferences. One of the litigation conferences is a settlement conference and this particular practice note, which will eventually be a rule of the Court, specifically provides for the holding of settlement conferences.

3. The Tax Court of Canada has several types of conferences and hearings with counsel before trial, they are:

- a) Status Hearings;
- b) Case Management Conferences;
- c) Trial Management Conferences; and
- d) Settlement Conferences.

4. Status Hearings are, really, any hearings where the parties come up before the Court to discuss the status of a case and can occur at any time during the course of the litigation up to trial.

5. Case Management is a conference with a particular judge who has been assigned to manage the case with the parties. This judge is the single judge who governs this litigation throughout the entire litigation process, until trial, including dealing with all motions, scheduling or any matters which has to be dealt with between the parties.

6. A Trial Management Conference is a conference held by a trial judge who has been specifically assigned a specific appeal. This usually only occurs a few months before the trial and is for the purpose of the trial judge making sure that the parties are organized for trial and so the trial proceeds in a logical fashion and in a proper manner in terms of documents, witnesses and issues.

7. A Settlement Conference is a conference held between the parties, presided over by a judge assigned by the Chief Justice or the Associate Chief Justice, the goal of which is to conclude a settlement with the parties.

8. Settlement conferences have been ongoing for years in other courts, all across Canada, for all types of litigation, except criminal, but including family, civil litigation, commercial litigation, labor litigation, administrative litigation, really any type of litigation before our courts have been subject to, and sometimes mandatory settlement conferencing. Some courts have mandatory settlement conferencing for specific types of litigation, most importantly in matters dealing with family matters, so why have not have settlement conferences in tax litigation?

9. Almost 50% of the cases scheduled for trial before the Tax Court of Canada are settled in less than 30 days prior to the trial. Nothing can be done about this simply because it is part of the litigation process but it is very costly to the justice system in terms of facilities, staffing, down time, travel costs, preparation, etc.

10. I have participated in hundreds of settlement conferences as a private practitioner and I never attended one where I did not learn something of significance about the opposing side's case that I was not aware of before — this usually will only come out in an environment where there is a free flow and exchange of information between the parties spoken on a non-prejudice basis.

11. Settlement conferences also has the effect of having the parties better prepared for the litigation and eventually for the trial. It has a tendency to force them to focus on the issue(s), it has a tendency for them to focus on the costs and to force the parties to focus on what is really in dispute and how far they are willing to go to have the matter resolved.

12. Until a few years ago, settlement conferences in the Tax Court of Canada were really on a hit and miss basis somewhat haphazardly. But in the past few

years the Tax Court of Canada is now focused on doing settlement conferences for a variety of reasons:

- a) In many cases that come before the Court, the parties have had absolutely no communication on settlement or exchanged or presented the other party with an offer of settlement prior to trial. As a result, the parties are really not focused on what they want out of the trial and what they can hopefully achieve at the least possible expense for their client.
- b) The conference allows the parties to really see what the hard points are of their opposing party's case. That is, what is the real issue without the posturing; what are the strengths and weaknesses of the other party's case and how does that relate to or affect your case?
- c) The conference allows the Court to see who is really calling the shots in the litigation, is it the client, is it one part of the client, is it the legal counsel, or is it a combination of the two and what is their interest in the litigation?

- d) The conference will show to the parties, to some extent, the strengths and weaknesses of their own position — it forces them to because that is what the opposing party will focus on — sometimes counsel can't see the problem they have until sometimes it is shown to them either by opposing counsel or the judge.
- e) The conference will force the parties to confront the issues before them in each other's presence, without the intermediary of legal counsel filtering the information from the Court to the client.
- f) It forces the parties to focus on their chance of success or failure — every counsel for every client in all litigation should regularly assess their chances of success/failure and discuss this with the client. This all too often does not happen, especially with CRA. Many times they will go ahead notwithstanding their prospect of success is poor simply due to lack of accountability.

- g) It forces the parties to focus on the cost of the litigation and their exposure to their clients — talk about settlement offer Rule.

13. A settlement can occur at any stage of the litigation but there are usually key times when they are most effective:

- a) at closing of pleadings;
- b) at the exchange of documents;
- c) post-discovery;
- d) at trial preparation, particularly when it comes to retention and instruction of experts; and
- e) just prior to trial.

14. The closer to trial, the more pressure there is for the parties to reach an agreement that they know they can live with versus one which would be imposed on them by the Court. They know the trial judge, they know they are spending money, they know the costs are escalating the closer to the trial and they know

they are exposing themselves to costs, not only their own counsel, but also the other counsel.

15. In the Tax Court there are two processes, there is the Informal, which are claims where the tax amount in dispute is less than \$12,000 per year, or the General process where the amount in dispute is greater than \$12,000 in any one year. As a general rule, there are not settlement conferences for Informals because it is simply too costly and too time consuming, although some are very successful because you are dealing with lay litigants and they really need some guidance in their dispute.

When do the Settlement Conference occurs in the Tax Court of Canada?

16. In General trials that are less than two days, there are no settlement conferences without the approval of the Chief Justice or the Associate Chief Justice. We will look at the file that will be brought to our attention if the parties request a settlement conference or in some other instances, it will be brought to our attention by the Hearings Coordinator, and we will look at the file and if we think a settlement conference might lead to enhance the litigation, we will authorize a settlement conference.

17. If both parties request a settlement conference, then we will schedule one, most of them for one half day, sometimes longer and sometimes it will continue at a later time.

18. Sometimes, the Chief Justice or the Associate Chief Justice will look at a file and say, "Okay, get the parties into a room and we will schedule a settlement conference and appoint a settlement conference judge.

19. Sometimes a judge, when they come upon a file at any stage, they might be of the view that a settlement conference would be of assistance and they will request that a settlement conference judge be assigned or they will take it upon themselves to conduct a settlement conference.

20. Just because a party does not want a settlement conference does not really mean that we will not necessarily hold a settlement conference, because sometimes, when a party refuses a settlement conferences, it simply shows that they have been intransigent and not really focused on what should be focused on in terms of litigation.

Preparation for the settlement conferencing

21. The Court insists that the parties exchange one offer of settlement, before the settlement conference.

22. The parties must file a settlement conference brief, 14 days before the settlement conference, not just their pleadings, but force them in their brief to focus on the real issue, the law, the facts, their position, the offer of the settlement that has been exchanged.

23. The judge will review the file in detail, including the settlement conference brief, and prepare his own plan of attack in approaching the settlement conference itself.

The Settlement Conference

24. There are a variety of methods in settlement conferencing. Some judges involve caucusing, some involve non-caucusing, but all the judge is really trying to do is:

- a) to find the real issue;
- b) to find what the parties have in common;

- c) look at alternative ways to put an agreement together;
- d) get the parties talking and keep them talking;
- e) talk to the parties about the worst case and best case scenario should they go to trial;
- f) talk to the parties about the cost of the litigation;
- g) just try to keep the lines of communication open; and
- h) try to determine where the log jams might be and how this might be breached.

25. Settlement conferences can continue at a later date, sometimes they go on for several days with the settlement conference judge, never the trial judge.

Who does the Settlement Conferencing

26. Settlement conferences are not for everyone. All judges are different and all judges have different skill sets with different styles. Some judges do not want to do them while others do. It is up to the Chief Justice or the Associate Chief Justice to do the match on the assignments.

Different approaches to settlement conferencing

27. It depends upon the parties and their level of sophistication in litigation. It also depends upon the issues, that is, some issues are more conducive to settlement and ADR than others. It also depends on the judge. Not all judges are comfortable doing this function, either due to their personality, their experience or lack thereof, their level of comfort in conducting settlement conference and communication skills.

What problems have the Tax Court of Canada experienced?

29. The government authority always takes the position that they can and will only settle on a point of principle but they will compromise those principles if there is enough money on the table.

30. The Department of Justice is the government authority who represents the Canada Revenue Agency and has the authority to settle under the *Department of Justice Act* but will not do so on their own without specific directions from the Canada Revenue Agency, unlike the system in the United States where the Department of Justice can act without authorization from the Internal Revenue Service.

31. Fashioning a settlement conference can be a problem that requires some innovative skills.

32. In tax litigation in Canada, there are three issues, that is: tax; penalties and interest are specifically outside the jurisdiction of the Tax Court of Canada so therefore this is a specific problem in trying to fashion a settlement which everyone is comfortable with but the Court has the authority to deal with the issue of costs. Sometimes we can use one of these to offset the others, i.e. costs to offset interest.

33. All the judges of the Tax Court of Canada have received specialized training in settlement conferencing and are assigned settlement conferences as and when required.