

## WINNING STRATEGIES FOR CASE CONFERENCES AND URGENT MOTIONS

by

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The way in which we litigate appears to be evolving.

The last decade or so – and especially the last 5 years (since Covid – 19) – has seen litigation pick up speed at a frenetic pace. While commercial litigation once meandered through the usual processes of pleadings, affidavit of documents, discovery, mediation and trial, my practice involving debt collection and mortgage remedy litigation has seen a proliferation of urgent motions and urgent case conferences that have changed the litigation landscape. For the better, I hope.

For the better, because urgent motions and case conferences get the matter before a judge a what was once thought to be lightning speed. No need for affidavits of documents or discoveries. Often, no need for pleadings to be closed. And usually before cross examinations. Just preparation of motion records and if time allows, Aide Memoires or Summaries of the Law for the judge’s review.

It is not my intention to list all of the scenarios in which one might find oneself in Court these days, on very short notice. But I have brought and been served with urgent mareva injunctions; urgent injunctions to delay mortgage enforcement; urgent motions to prevent land owners from interfering with mortgage enforcement; urgent motions to stop agreements of purchase and sale of land from closing; urgent motions to lift cautions or other Land Titles registrations that were only registered to interfere with the closing of a purchase and sale transaction. And the list goes on.

And going to court, often with just a couple of hours’ notice or, if lucky, 2 or 3 days’ notice, is, to borrow a phrase from the 1939 movie *The Wizard of Oz*, “a horse of a different colour”. So, without further ado, and certainly, without trying to write a definitive treatise on what I call “Express

Litigation”, here are a few tips, pointers, dos and certainly some don’ts to keep in mind when faced with very short notice of a pending Court hearing, or “Express Litigation” if you will!.

For ease of writing, I will focus on being the applicant or moving party. But these comments are equally applicable to the responding parties as well.

First and foremost, whether or not one finds oneself in the Commercial Court, following the 3 C’s of the Commercial Court is always a good starting point. These 3 C’s are:

- co-operation
- communication and
- common sense

I would add a 4<sup>th</sup> “C”, being courtesy. Being co-operative, having an open line of communication and always being courteous with counsel opposite is always a positive and productive way to handle every dispute. Remember, the clients may be fighting with each other “tooth and nail”. And the clients may be painting the other side as evil reincarnate. But counsel should not personalize the client’s dispute. And counsel should not be angry with each other or bad-mouth each other. It is counterproductive to getting the best result for your client.

And certainly, when in front of the judge, never bicker or argue with counsel opposite. Not just because it is unprofessional and counterproductive. But because judges absolutely hate to hear bickering. And most will shut it down instantaneously. So, save yourself the indignity. And just argue the case without arguing with the other side’s lawyer.

Even when the other side is (in your view) being untruthful, irresponsible or nasty. Take the high road. Don’t get suckered into a battle of egos with the other side. Keep your cool and composure and you will score brownie points with the judge.

Next point of order – we should all take note of Rule 50.13(6) which seems to be coming into its own of late. This Rule gives a case conference judge the power to make a procedural order, give

directions and make an order for interlocutory relief. This is very powerful and can often take the wind right out of the other side's sails, if they are not alive to the possibilities of this Rule.

Have a look at the decision in *Think Research Corp. v. N & M Medical Enterprises Inc.* 2023 ONSC 6910 <https://canlii.ca/t/k1k7w> where Justice Koehnen, at a case conference less than 1 year ago, granted substantive (but interlocutory) relief to the moving party – because it was fair and reasonable for the Court to do so.

Lastly, although this may seem counterproductive to the way most litigators have been trained in the past (especially when engaged in more standard, slow moving, litigation) going for the jugular is very often the wrong approach when engaged in Express Litigation.

Now, don't get me wrong. I like winning as much as everyone else does. But winning in Express litigation is not always about winning every single point that is on the table or before the judge. Express litigation is about getting what your client needs – and your client's needs is often not identical to the exact relief that you asked for.

Put another way, you don't have to win every little skirmish in Express Litigation in order to win the battle or in order to win the war. Allow me to give a few examples where compromise on my part got me what my client substantially needed. Which is a victory in both my eyes and my clients'.

I was acting for a mortgagee of 3 homes under construction here in Toronto. The mortgage was in default and the mortgagee hired a property manager to take possession of the 3 properties. The property manager attended one evening after the construction workers had left the property. They managed to change the locks and take possession of one of the homes, but not all three. The owner/mortgagor had installed cameras and as soon as she saw what the mortgagee was doing, the owner/mortgagor rushed to the scene and made quite the fuss, threatened violence and called the police, who attended and managed to de-escalated the situation. But our need for an urgent motion was created by the owner/mortgagor's aggressive behavior.

We were in court the very next day with a short but punchy Motion Record, including a notice of motion, an affidavit, a short factum asking the Court to enjoin the owner/mortgagor from interfering with the mortgage enforcement – and to give the mortgagee possession of the 3 properties. These materials were filed with a letter of urgency explaining that a hearing was needed on an urgent basis in order to avoid the owner/mortgagor from breaching the peace and putting the mortgagee's property manager in a dangerously precarious position.

Needless to say, the judge was very concerned with the commotion caused by the owner/mortgagor. But on the other hand, the judge was not convinced that the mortgagee was acting strictly within its rights. But the main thrust of the owner/mortgagor's response was that she needed time to prepare her own materials and time to cross examine the mortgagee and then exchange facts, in order for a fair adjudication of this dispute to be heard by the Court.

And so, on that cue, when an adjournment appeared to be a real possibility – which could have defeated our urgent motion entirely, I backed off of my usual 'all or nothing' approach, and advised the judge that my client would happily consent to an adjournment – to allow both sides to prepare and cross examine, etc, but suggested that a fair compromise would be for the Court to grant an order maintaining the status quo until the motion could be heard. And the status quo, I suggested, was that the mortgagee keep possession of the one house that it had taken possession of – while the owner/mortgagor retained possession of the other two houses. And – most importantly, that neither party would interfere with the other's possession.

Counsel opposite argued strenuously against this compromise. And the more counsel opposite fought the judge – and the more counsel opposite refused to consent to this compromise, the more enamored the judge became with the idea of settling the matter as I suggested.

Ultimately, the judge granted the Order giving the mortgagee possession of one property and enjoining the owner/mortgagor from interfering with my client's possession. This was a huge victory for the mortgagee, whose mortgage debt was repaid within days of the judge's Order.

Another example of this kind of compromised victory occurred recently when I was retained on very short notice to respond to a wife's urgent motion to stop a mortgagee's power of sale of her husband's property from closing a couple of days' hence. I was retained by the buyer.

The main thrust of the wife's position was that the husband mortgagor was in cahoots with the mortgagee and my client, and all were conspiring to sell the property and remove it from the assets that she was trying to acquire in their messy divorce.

My client maintained his innocence and arm's length status – and just wanted to close the purchase.

When it appeared that the judge was giving some traction to the possibility of the husband's fraud being real – and was clearly thinking about helping the wife out in the interim, by giving the wife some time to investigate the alleged fraud, I suggested a compromise.

I suggested that the judge allow the sale to close. This is what my client needed!

But to placate the wife, I suggested that she be given 30 days to bring a motion to register a certificate of pending litigation against title to the land. And in those 30 days, my client, the buyer, would not sell the property and would not increase the mortgage debt that the buyer was putting on the property on closing.

Of course, as buyer, my client has no intention of refinancing or selling within the next 30 days. But this compromise gave the wife a short period in which she could investigate whether her allegations of fraud could be maintained and proven by affidavit. Needless to say, the wife didn't have the funds or the stomach for prolonged litigation and never bothered to file any materials with respect to this property. The 30 days came and went and my client was free to do what he wanted with the property.

These are but 2 examples of how focusing on what one needs, rather than aiming to get everything that one wants, is often the best strategy at these urgent hearings and case conferences. One must remember that judges are human, too. While their job is to make rulings and issue judgments,

many prefer to encourage settlement based on compromise.. And if you come across as the reasonable party – who suggests a fair compromise – human nature dictates that you will often win favour with the judge and walk away with your compromise – giving your client what it needs!

And that is a victory!!

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