

Settlement counsel: a new approach to the resolution of different disputes in commercial litigation

By Michael Schafler

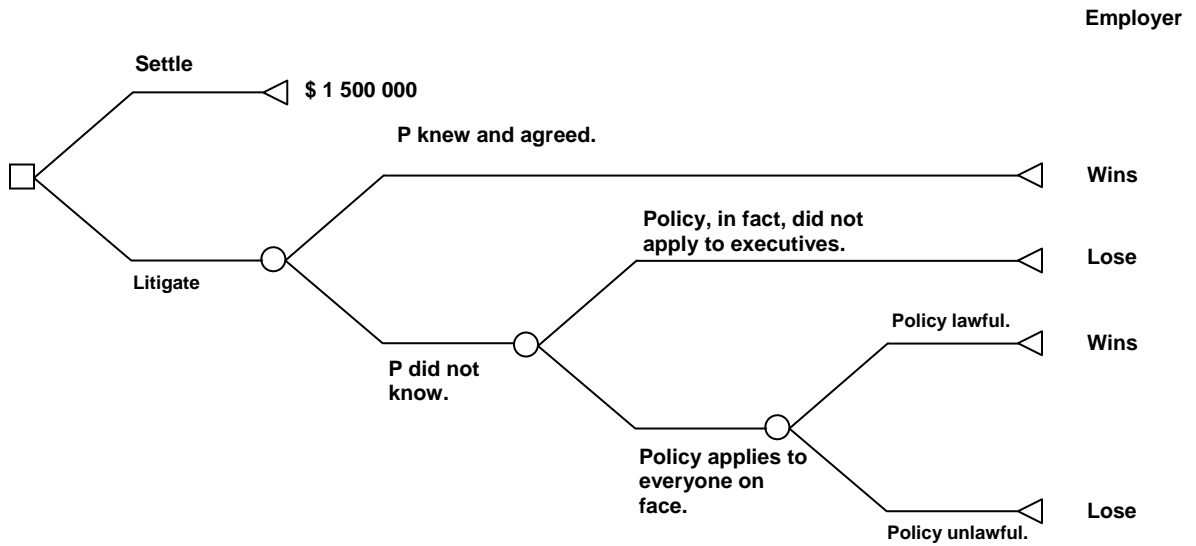
On Jan. 26, 2010, Michael Schafler and Gordon Tarnowsky, both partners in the dispute resolution group of Fraser Milner Casgrain LLP, presented a 90-minute webinar titled "The Emerging Role of Settlement Counsel in Commercial Litigation." The webinar was part of a CBA Professional Development program. Approximately 100 registrants from across Canada participated in the webinar, which included live polling. The two principal topics discussed in the webinar included the role of settlement counsel and facilitating settlement by the use of risk analysis in the context of ADR.

The role of settlement counsel is a growing phenomenon in Canada that emanated from the United States. As the polling showed, many people in the ADR field are aware of the concept. The role of settlement counsel is to assess, develop and implement a settlement strategy for the case. The objective of settlement counsel is to engage in a problem solving approach focused on the interests of the parties, typically through negotiation or mediation. Two different approaches can be applied to the relationship between settlement and litigation counsel (which can include lawyers from the same firm (subject to ethical screens) or lawyers from different law firms). The first approach entails litigation and settlement counsel working side by side, but a more common approach is when there is an open one way flow of information from litigation counsel to settlement counsel. Settlement counsel uses and relies upon litigation counsel's opinions and risk analysis to assist in understanding and weighing the "litigation option" in pursuing and assessing potential alternative resolutions.

Advantages of using settlement counsel include: counsel not being invested in the analysis of the underlying rights, a focus on achieving a fair and durable settlement early in the process, minimizing the escalation of conflict, possibly reducing the need for formal discovery, the opportunity for a significant reduction of overall costs and the development of a risk analysis or decision tree. The perceived disadvantages and responses to the use of settlement counsel include: increased legal costs by having a second set of counsel and increased dedication of client internal resources. A poll revealed that those who had been exposed to settlement counsel in their practice (including as mediators) thought positively of the experience.

Facilitating settlement by the use of risk analysis in the context of ADR involves the application of a "decision tree analysis", which is a method of systematically quantifying the risks and uncertainties inherent in the litigation process. A decision tree analysis involves a 5- step process which includes the following: (1) identify uncertainties, (2) define outcomes, (3) assign probabilities, (4) do the math and (5) interpret the results. An example of a decision tree is illustrated below courtesy of the Honourable George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Limited, 2003). In the hypothetical case referred to by Adams, the plaintiff has sued the employer for wrongful dismissal, seeking damages of \$4 million. The plaintiff has offered to settle for \$1.5 million and the defendant wishes to evaluate its reasonableness. The initial decision tree (Figure 1) refers to the legal issues engaged by litigation, namely, whether the plaintiff knew about an alleged mandatory retirement policy, if so, whether it applied to the employee and, if it applied, whether it was lawful. Once the various scenarios and outcomes are identified the employer can assess whether they "win" or "lose".

Figure 1- Assessment of Legal/Factual Issues



The next step is to assign probabilities to these outcomes and then to do the same analysis as to damages (the plaintiff's salary was \$1 million and a notice period of 24 months is in issue; in addition \$2 million in damages with respect to stock options are in issue). The resulting trees look like this:

Figure 2- Probabilities (Liability)

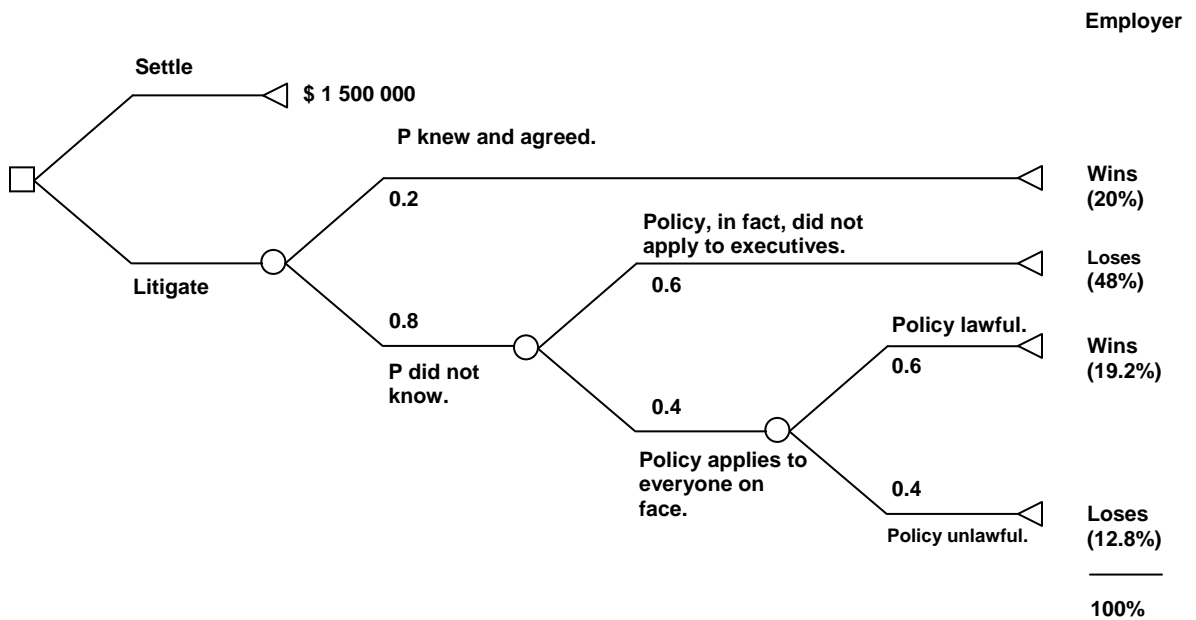
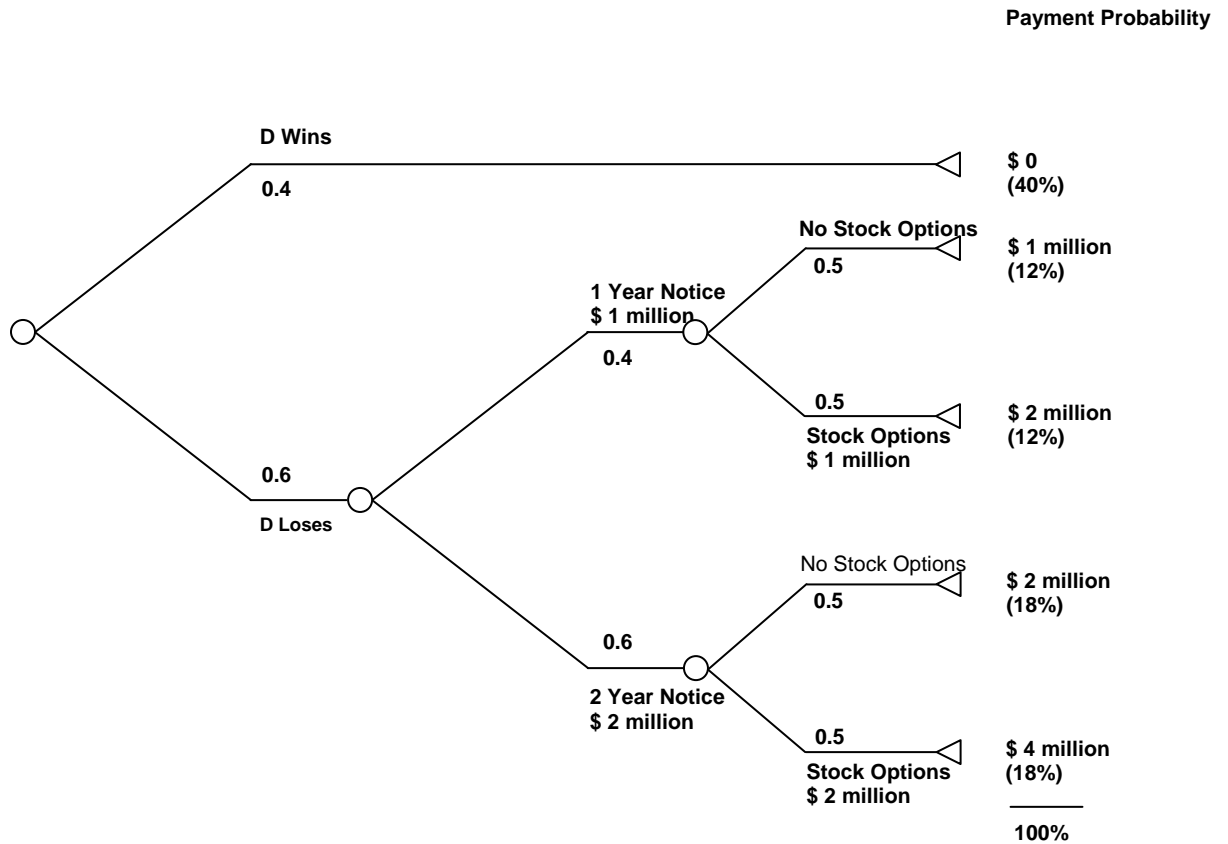


Figure 3- Damages



The liability analysis (Figure 2) shows that the employer is more likely to lose (60%) than win (40%). As to damages (Figure 3), this means there is a 40% chance that the employer will have to pay nothing, and a 60% chance that the employer will have to pay at least \$1 million. When all of the information is aggregated, the risk analysis suggests that the expected value on liability and damages is \$1,440,000 or roughly equal to the offer to settle:

$$(\$0 \times 40\%) + (\$1M \times 12\%) + (\$2M \times 12\%) + (\$2M \times 18\%) + (\$4M \times 18\%) = \$1,440,000.00$$

A decision tree is a risk assessment tool which enables parties to think carefully about where the points of disagreement lie. Thus, risk analysis of this nature can be a useful tool for counsel on both sides. And, it may also assist the mediator in framing a principled approach to the negotiation. Advantages of risk analysis include: enhancing counsel's professional judgment, enabling strategic settlement offers by taking advantage of Rule 49.10 of Ontario's *Civil Rules of Procedure*¹ (or equivalent Rules) and

¹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

better equipping counsel and clients to objectively see and understand the issues in the case by arriving at an informed settlement position.

During this section of the webinar, a poll was conducted with the registrants asking them if they use litigation risk analysis tools in their practice. The majority of registrants responded that they did use these tools in practice and for those that did not, most of them stated that they would begin to use this tool in their practice.

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