The Canadian Case for Settlement Counsel

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Blame it on William F. Coyne, Jr. In his seminal 1999 article, *The Case for Settlement Counsel*[1] , Coyne introduced a role that is now widely accepted in the United States and is gaining growing acceptance in Canada. In short, it entails retaining a lawyer dedicated to negotiating settlement, in a role independent from but complementary to that of trial counsel.

The Role of Settlement Counsel

By retaining settlement counsel, parties to commercial litigation can reconcile two fundamental yet contradictory goals. The first is to allow the dispute to progress towards trial in a manner that communicates confidence, determination and commitment. The second is to demonstrate the flexibility, openness to discussion and willingness to compromise that is necessary to achieve a negotiated resolution and, in many cases, preserve a valuable business relationship.

In most commercial litigation, counsel are able to reconcile these opposing goals, as is in fact their professional obligation[2]. In such cases the appointment of settlement counsel may in fact be counterproductive, by adding unnecessary expense and creating inefficiency and delay.

This gives rise to a threshold principle -- the appointment of should be limited to significant commercial litigation. This includes "bet the company" lawsuits and other litigation that, by reason of size, scope or profile, may have a material adverse effect if unsuccessfully prosecuted or defended. In those cases, the appointment of settlement counsel is not only appropriate but is arguably necessary as a matter of due diligence in risk management. To put it another way, the appointment of settlement counsel establishes beyond argument that all possible efforts have been made to achieve a negotiated resolution and avoid the risks of trial.

The benefits of appointing settlement counsel are quite compelling.

To begin with, the appointment, properly managed, actually assists trial counsel by permitting them to focus exclusively on trial preparation.

This is of no small consequence: requiring trial counsel in significant commercial litigation to also be involved in the ebb and flow of settlement discussions not only affects their efficiency and effectiveness but may also send a mixed message as to the party's resolve. By contrast, there can be no mixed message where settlement counsel are retained and trial preparation continues unabated.

Furthermore, the appointment of settlement counsel may avoid the brinkmanship that is often the result of the adversarial nature of litigation. As the litigation advances and costs increase, positions harden and the parties become more and more entrenched, until it appears that the only options are capitulation or trial. As the trial date looms and the stakes increase, management and other stakeholders may require more and more extensive analysis and briefings, may insist on second opinions or even consider retaining new counsel, all on an ad hoc basis. By contrast, the timely appointment of settlement counsel allows intensive trial preparation and

[1] 14 Ohio St. J. on Disp. Resol. 367 (1998-1999)

[2] See, for example, Rules 2.02(2) and 2.02(3) of the Law Society of Upper Canada *Rules of Professional Conduct*.

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intensive settlement discussions to proceed in concert. If necessary, those settlement discussions can continue through trial and appeal.

Lastly, and perhaps most importantly, the appointment of settlement counsel opens a separate communication portal that removes the adversity and sometimes animosity that can be a by-product of the ligation process. The business decision makers can negotiate effectively through lawyers whose roles are not adversarial.

The Appointment of Settlement Counsel

Unlike the United States, Canada does not yet have firms or practitioners who dedicate themselves exclusively to acting as settlement counsel. That, however, is not of itself an impediment. The role of settlement counsel can be undertaken by an experienced commercial litigation lawyer who is also a proponent and practitioner of alternate dispute resolution. This can even include another lawyer at the firm that acts as trial counsel, if an appropriate protective screen is in place and the existence of that screen is communicated to the opposing party.

Once the appropriate candidate for settlement counsel has been identified, terms of the retainer can be crafted to suit the circumstances. For example, the retainer can provide for an hourly fee, a flat fee, a success fee or some combination. If considered appropriate, the retainer can be limited to a period of time that is considered sufficient to allow settlement counsel to be briefed, make contact with the opposing party and engage in meaningful negotiations.

After the retainer is in place, settlement counsel should be briefed by trial counsel and provided free access to trial counsel's file. As part of the briefing, settlement counsel should be provided with trial counsel's assessment on the merits. As a general rule, settlement counsel will defer to that analysis, rather than undertake a second opinion. However, settlement counsel should be free to question or challenge trial counsel on matters that settlement counsel considers relevant to achieving a negotiated resolution.

Settlement counsel should also meet with the client to ensure a complete understanding of the client's interests, as well as to provide recommendations on the proposed negotiations and receive instructions.

Negotiations

Before negotiations begin, the party that has appointed settlement counsel must advise the opposing party of that retainer. Much depends on this initial communication, since the effectiveness of the settlement counsel role is largely dependent on its reciprocity. One approach is to have settlement counsel write directly to opposing trial counsel, with a request that the letter be forwarded to the opposing party. The letter can describe settlement counsel's retainer and the instructing client's interest in a negotiated settlement, while also referencing to the continuation of trial preparation and the client's resolve to proceed to trial, if necessary. The letter can also invite the opposing party to retain its own settlement counsel for the purpose of facilitating without prejudice settlement discussions.

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If the other side declines, the party making the proposal may allow the matter to proceed to trial, with the knowledge that it has done everything possible to achieve a negotiated settlement.

If the other side agrees, negotiations between settlement counsel will ensue. In the course of those negotiations, settlement counsel report to and obtain instructions directly from their respective clients.

The form of the negotiations is itself open to discussion. One effective method is to have the parties, with their respective settlement counsel, attend mediation. Aided by an effective mediator, the parties and their counsel can explore all possible means of achieving a negotiated settlement. Discussions can continue while trial preparations continue and, if necessary, during the trial and any appeal.

If the negotiations between settlement counsel are successful, the parties will have achieved their primary goal of avoiding the risks of trial as well as, in appropriate cases, preserving important business relationships. If the negotiations are unsuccessful, the parties can again demonstrate that all possible steps were taken to achieve a negotiated settlement.

Settlement counsel will have an increasingly important role in significant commercial litigation in Canada. As that role develops, questions will increasingly be raised not as to those businesses that choose to appoint settlement counsel, but rather, those businesses that do not.

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