



**THE FINE PRINT**

## FDH Congratulates its Teams!



*"We congratulate the Hamilton Bulldogs and owner, Mike Andlauer (President of ATS Andlauer Transportation Services), American Hockey League Champions and winners of the Calder Cup."*



*The Mississauga Southwest Girls Midget Fastpitch team, sponsored by Feltmate Delibato Heagle, went undefeated in 6 games to take the gold medal in the recent United States Fastpitch Association qualifying tournament. The team has won a berth to compete in the USFA's tournament to be held in Florida in July 2008.*

## JULY 2007

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**Feltmate Delibato Heagle**

L A W Y E R S

## Lawyer Profile - Christopher Neufeld



After working for five years in New York City as a corporate/commercial and securities litigator, Christopher joined the corporate/commercial group at Feltmate Delibato Heagle in 2005. His work in logistics and transportation has led to Chris' current involvement with various levels of government in the trade and transportation sectors. Chris serves as regional coordinator for business law on the executive board of the Ontario Bar Association's Business Law Section and is actively involved in the leadership of Burlington's Terry Fox Run.

## Letters of Intent: The Backbone of a Successful Commercial Transaction

*By Christopher Neufeld*

A letter of intent is an interim document used in the course of negotiating the terms of a prospective commercial transaction. It serves a number of important functions, including:

- signifying a commitment to the proposed transaction by setting out agreed key terms
- officially declaring that the parties are currently in negotiations
- obligating the parties to maintain confidentiality

Although not intended to bind the parties to a proposed transaction, a letter of intent aims to bind them to negotiate, in good faith, a binding agreement of purchase and sale. The letter of intent can be said to serve as a "roadmap" of the essential terms of the proposed transaction so that the parties can proceed to negotiate and resolve outstanding issues and to settle on the more "standard" terms of the purchase and sale agreement. Furthermore, a letter of intent provides comfort and re-assurance that the parties are serious about the proposed transaction and willing to commit the resources necessary to further investigate and negotiate the proposed transaction.

Where a transaction is not exceedingly complex, a letter of intent fulfills a slightly different role, that of avoiding misunderstandings, maintaining momentum for the transaction and creating a moral obligation, if not a legal one, to proceed. It can also allow a purchaser to bind a target before a competitor enters the bidding or to facilitate obtaining financing for the acquisition.

Despite its potential benefits however, a poorly drafted letter of intent may impose obligations and liabilities which are unintended and unwanted. In certain circumstances, particular aspects of the letter of intent may be unexpectedly

binding and enforceable. Specifying the correct set of responsibilities and objectives is essential. What is important for one commercial transaction can be quite different from the needs of another.

### Where the Problems Arise

Letters of intent should not be taken lightly. In law, the parties either have a contract or they don't. Business people and their lawyers, however, invariably seek to have the best of both worlds and attempt to create the legal equivalent of being "almost pregnant." This arises from the paradox of the parties stating, in a single document, that they agree to something, while concurrently stating that they don't.

A letter of intent generally lacks otherwise essential commercial terms that would be found in a definitive agreement of purchase and sale (such as representations and warranties, limitations on liability, waivers and indemnification). Yet, where a party prevails in its attempt to have the court declare a binding agreement, the parties have the worst possible contractual scenario to resolve: the parties have become bitter adversaries that are now obligated to negotiate minor details in a very contentious atmosphere. Attempting to avoid such a scenario is fraught with danger; since committing to too much detail in a letter of intent greatly increases the risk that a court may conclude that the document contains the essential terms necessary to complete the transaction and is accordingly, a binding contract.

To avoid the perils associated with a letter of intent being construed as binding, it is important to properly consider the following:

- the language of the letter of the intent
- the context of the negotiations

- whether the parties have partially performed their obligations
- whether essential terms remain to be negotiated

The letter of intent should be drafted to incorporate both non-binding and binding terms. Financial terms and related commercial variables are often intended to be non-binding and subject to change based upon due diligence investigations and further negotiations. Conversely, binding terms generally include confidentiality obligations, "no-shop" or "standstill" arrangements and termination provisions. Problems arise when the parties do not effectively distinguish between the binding and non-binding terms.

### Avoiding Unintended Consequences

The following general guidelines will help to avoid unintended consequences when entering into a letter of intent:

- clearly indicate that it is not a binding agreement of purchase and sale
- be brief, informal and use words of futurity
- use tentative or conditional language such as "preliminary" and "proposed transaction", while avoiding the mandatory terms "shall", "will" and "must" that suggest an agreement has been reached
- avoid making a letter of intent "subject to" best efforts or every reasonable effort commitments, as those words could be construed as creating a valid contract with a good faith duty to complete the transaction
- clearly state which terms are binding and which are non-binding

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## Employment Standards - Are you prepared?

By Peter Welsh

It may come as a surprise to many employers that the *Employment Standards Act* (Ontario) ("ESA") contains an anomaly with respect to the normal presumption of innocence until proven guilty. In fact, under the ESA an employer is obligated to disprove allegations made by an employee, frequently with little or no capacity to do so.

The following will illustrate what employers may face under the ESA. Bill, a salaried or hourly employee, abruptly resigns his employment without notice. The absence of notice or apparent reason for the resignation is irrelevant. A few weeks later, Bill's employer receives a letter from the Ministry of Labour advising that Bill has filed a claim under the ESA claiming that he was not paid, or underpaid, for overtime work, vacation pay and holiday pay. The employer is not provided with a copy of the claim, being advised merely that the claim has been filed. The employer is required to respond in an attempt to disprove Bill's allegations yet the employer is without the benefit of having the allegations before him. The Ministry argues that privacy legislation prohibits it from providing the employer with a copy of the claim.

Without knowing the substance of the claim, the employer can rely only upon its own records. A meeting with Bill, his former employer and an Employment Standards Officer ("ESO") follows. The meeting is not under oath or recorded and the employee is at liberty to produce, as evidence, any documentation it chooses, including unsworn letters from other employees to support Bill's claim for overtime, vacation and holiday pay. The ESO is then entitled to issue his Order, which is binding on both employer and employee. At no time is Bill subject to any

examination or questions under oath about the truthfulness of his claim. The employer's only recourse is to a Tribunal of the Ministry of Labour. By this time, the employer has expended considerable resources, both financial and human, representing itself at the meeting and in gathering and reviewing materials to respond to Bill's claim.

This reverse onus provision of the ESA appears to be in contravention of the common law presumption of innocence until proven guilty as well as the right of a defendant to know the case being made out against it. Nonetheless, the ESA grants to the employee the right to make a claim to which the employer must respond without the benefit of being provided with a copy of the allegations or without the safeguard of the trial system, including testimony under oath that is subject to cross-examination. Furthermore, there is no financial cost to the employee. The Government of Ontario underwrites entirely the employee's potential costs to argue his case. Even if Bill's claim is ultimately disproved, only the employer must bear the costs to defend itself; Bill has no exposure whatsoever (although, in return for the Ministry's assistance, the employee must limit its claim to \$10,000 and waive the right to bring a civil lawsuit against the employer).

Few, if any, small businesses maintain a punch clock for their employees. Even fewer keep written records of their employees' hours of work, leaving themselves completely exposed to a claim by a former employee.

That, unfortunately is not the end. In the process of investigating Bill's claim, the Ministry of Labour will be reviewing the employer's records to determine if the provisions of the ESA have been fully complied with. This includes maintenance of payroll

records, hours of employment, days in the week worked by each employee, exact overtime hours worked by the employees and a host of other statistics that few employers actually maintain, particularly in smaller businesses.

Employers must be aware of the exposure and, in the event of an ESA investigation, must fully expect that its record keeping will be open for examination. Even if the employer is successful against an employee claim, the employer could, nevertheless, become subject to an Order under the ESA relating to its record keeping. The process itself becomes a Pandora's Box.

There is, logically, a limit on how much an employer can document without being overburdened with paperwork. However, given the reverse onus obligation under the ESA, there is an absolute necessity to fully comply with the ESA, including accurately recording in writing all employee work hour activity.

While your employees may well be your most treasured resource, a former employee can also be your most painful and expensive liability.

*Peter Welsh is counsel to Feltmate Delibato Heagle*

**FEEDBACK:** We are always interested in hearing what you think about our Newsletter. If you have any comments or suggestions, or a topic that you would like to see covered in an article, please contact our Editor, Debi Sutin at 905-639-8881.

## FDH News & Legal Tidbits

- **Feltmate Delibato Heagle** is now a platinum sponsor of the Burlington Teen Tour Band, Canada's largest and oldest youth band. The Burlington Teen Tour Band is recognized around the world and competes regularly in Canada, the United States and Europe.
- **Henry Krupa** spoke on April 13, 2007 to the Ontario Ground Water Association on the impact of Regulation 903, the proposed new amending regulation to the *Ontario Water Resources Act*.
- On June 7, 2007, **Debi Sutin** and **Lori Brown** attended the 5th Annual Charity of Hope Fashion Show Fundraiser. The Charity of Hope is a non-profit organization whose mission is "to create hope in the lives of children and provide a source of light for their future which distributes funds to children in need in the Hamilton, Halton and Niagara areas.
- **Ron Weston** attended the 4th Annual Invitational Joseph Brant golf tournament at Legends of Niagara Golf Course on May 25th and 26th, 2007. The event raised \$150,000 for diagnostic equipment for men's health care.
- **Debi Sutin** has been invited to speak at the Ontario Bar Association's 7th Annual Franchise Law Conference to be held on November 15, 2007. She will be speaking on "Alternative Expansion Models to the Unit Franchise Agreement."

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- specify a deadline at which negotiations will end if a definitive agreement is not reached

Depending upon the complexity of a proposed transaction, a number of issues can arise in negotiating a letter of intent. This article touches upon just a few of the matters to be aware of. The more complex the deal, the more careful one has to be. In those cases, it is prudent to involve experienced legal counsel to assist in the preparation of a letter of intent which accurately reflects the intentions of the parties.



*Members of the firm help Fulvio celebrate his 50th Birthday.*

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