Agreements to Agree: Do They Bind You Or Not? Court Decisions Resting on Specific Provisions

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Do you have a memorandum of understanding, a letter of intent, or some other “agreement to agree” with a supplier, a customer, an adviser, a partner, a potential purchaser, or some other business party?

If you do, then you need to understand when such an agreement binds you legally because the Court is finding that some terms in some agreements to agree are “binding” while others are not.

A common principle in agreements to agree is an “agreement to negotiate in good faith.” This topic was first discussed in *Deal or No Deal: Do you have a Duty to Negotiate in Good Faith?*, as published in the April 2012 issue of *Commercial Litigation Update*.

In the past, based on prior case law, one could ordinarily expect that an agreement to agree would not be enforceable on the basis that there simply was no contract. Recent case law, however, illustrates that Courts are looking carefully at each case to determine if one party is responsible to pay monetary damages to the other when there are agreements to agree.

In the case of *Georgian Windpower Corporation et al v. Stelco Inc.*, the parties were at all times dealing with each other at arm’s length in a commercial context, and were of equal bargaining power for a wind power project. They entered into two agreements to agree -- a memorandum of understanding (MOU) and an Agreement to Establish a Land Lease Easement Agreement (AELLEA). After the signing of both, Stelco (the defendant) sent a letter to Georgian (the plaintiff) terminating both agreements immediately. This led to the litigation.

The Court found that there were binding *and* non-binding terms in the MOU and the AELLEA. It also found that an agreement providing for future agreement can be binding *if* the concept is sufficiently clear and discrete to enable enforcement of the agreement between the parties. This is not always something that can be determined easily after the fact, and in the midst of litigation.

In making this determination, the Court will strive to see what the parties' intent was at the time they made the agreement to agree, as well as look to the specific wording in it.

In *Georgian vs. Stelco*, the plaintiff (Georgian) was entitled to damages of $75,000 in total for the wrongful termination -- $1,000 in respect of the defendant's breach of the MOU and $74,000 for the breach of the AELLEA. In making this finding, the Court also found that there was no contractual duty to negotiate in good faith in the circumstances surrounding this particular case. However, the Court distinguished between a case where there is an existing preliminary agreement between the parties and where one of the parties has agreed to use best efforts to carry out a specific term of the agreement and the case where the parties have merely agreed to use best efforts to carry out future negotiations.

Whether a specific term will be found to be enforceable will likely depend on whether there are sufficient criteria to allow the subject variable (the term in question) to be isolated and to stand on its own unambiguously, so as to constitute a true reality - something that can be performed.

The movement away from the principle that 'if there is no contract, then there is no breach of contract' is also evident in *Molson Canada 2005 v. Miller Brewing Co*. In this case, Molson was seeking injunctive relief to prevent Miller from terminating the licence Miller had with Molson. Pending the trial, scheduled for December 2013, Miller was required to continue its Canadian licensing arrangement with Molson.

In this particular matter, since 2010, Molson had failed to meet the targets set by the licencing agreement, as the volume of some Miller brews sold each year in Canada had declined. Given the changing Canadian beer market, the parties got together to negotiate.

The negotiations centred on a possible amendment to the Industry Standard Bottle Agreement (ISBA), which standardizes production of Canadian bottled beer and requires the dark brown glass bottle. One of the hallmarks of many Miller brews is that they are packaged in clear bottles, and because of the ISBA, the clear bottles must be imported from abroad, which adds costs. The parties hoped that the ISBA would be amended to allow for local production of clear bottles, and a letter of intent was drafted in anticipation of this possibility.

Immediately following the letter of intent, the parties signed an amendment to the licensing agreement providing that if the ISBA did not allow for local production of clear bottles, then the parties would negotiate in good faith, and specifically would negotiate about volume targets, marketing and equitable profit splitting.

A short while later it became clear that the ISBA would not likely be amended to allow local production of clear bottles, and Miller began exploring the option of selling its brand beers in Canada without Molson. Ultimately, Miller attempted to terminate the licensing agreement, which sparked the action and the request for injunctive relief.

In the written reasons for granting Molson's request to prevent Miller from terminating the licencing agreement, Mr. Justice Herman J. Wilton-Siegel of the Ontario Superior Court of Justice stated as follows:

Ultimately, any covenant to negotiate in good faith, as any other contractual obligation, must be interpreted in accordance with the intention of the parties in the context in which the agreement was negotiated and executed. The issue is not whether a court should imply an obligation to negotiate in good faith as a matter of commercial morality, but rather whether the parties themselves understood from the circumstances which an express commitment to negotiate in good faith was given, and intended in those circumstances, that any breach of the specific commitment was to have some legal consequences.

This reasoning is understandable, as it was apparent from wording in the agreement to agree that the parties had committed to work through their issues despite the difficult market.

Parties rely on good faith provisions by revealing proprietary information, investing time and money in projects, and securing or extending credit. In the absence of the enforceability of these provisions, lawyers will have to find other provisions to assure clients who might otherwise be deterred from proceeding with preliminary agreements.

With all of this being said, an important basic lesson with respect to developing and implementing agreements to agree persists -- take care when drafting and before signing any type of negotiation agreement, as you may find yourself bound to something before you are ready or, alternatively, believing you have rights when you do not.