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BREAKDOWN IN NEGOTIATIONS — THE BINDING EFFECT OF A LETTER OF INTENT

Catherine Rioux
crioux@lavery.ca

Patrice Vaillancourt
pavaillancourt@lavery.ca

You have decided to sell your business or to initiate a business relationship with a partner. You negotiate the main terms and, before going further, you sign a letter of intent. Then, you decide to withdraw from the negotiations. Can you do it? Not necessarily. Are you surprised?

The discussions and negotiations that precede the sale of a business or the beginning of a business relationship may be long and difficult. Before undertaking formal negotiations that may require a substantial investment in professional fees (accountants, lawyers) and energy, an entrepreneur may resort to a letter of intent, which he may consider as being of no real consequence.

Indeed, some entrepreneurs believe that signing a letter of intent does not bind them and only constitutes the expression of the common interest of the parties to pursue negotiations. But what about the obligations arising from a signed letter of intent? Does signing a letter of intent create legal effects between the parties? Can one be held liable for breaking off negotiations?

A letter of intent allows one or more parties to express in writing their intent to enter into negotiations in view to conclude a business transaction and evidences certain points of agreement between the parties before they continue negotiations.

A letter of intent may take many forms and be referred to under different names, such as *letter of intent (LOI), agreement in principle, articles of agreement and memorandum of understanding (MOU)*. Regardless of its name, it is the intent of the parties before and after the signature of a letter of intent that will determine its scope. Therefore, the actions taken and the behaviour of the parties and even what they say will influence its interpretation.

In order not to be bound by a letter of intent, it is important to express this clearly; otherwise the courts may review the circumstances surrounding its signature, the nature of the contract, the interpretation that the parties have already given to it as well as usage to determine the actual and common intent of the parties rather than limiting themselves to the literal meaning of the wording.

Even if a letter of intent is drafted in such a way that it creates no commitment to complete the proposed transaction, it however requires the parties to cooperate and collaborate positively between themselves towards that purpose and a party may withdraw in good faith from the negotiations to the extent that this is not abusive.

Various factual elements may also indicate improper conduct, including trying to obtain confidential information from the other party, leading the other party to believe that the proposed transaction will be finalized (for example, the attitude of the parties with their associates or the integration of the other party in the business), the advanced state of the negotiations and the amount of the costs already incurred.

An aggrieved party may obtain damages including interest from the party who withdrew from negotiations if the letter of intent did not allow such withdrawal or if the aggrieved party can prove that the other party did not act in good faith and that such behaviour was abusive.

Although it may seem simple, drafting a letter of intent must not be taken lightly. Since its main purpose is to frame the negotiations, it is crucial to ensure that the wording used does not create a final agreement of the parties. The use of words such as *offers, accepts, shall, must, promise, agreement, contract,*

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undertaking is to be avoided since they indicate the intent to be bound.

The wording of the letter of intent should never imply that it constitutes a final contract. It must be primarily a tool of reference for the parties. One cannot insist enough on the fact that involving legal counsel at the beginning of the process can avoid regrettable consequences.

A well drafted letter of intent can be a valuable tool to frame the negotiations for the acquisition or sale of a business or initiating a business relationship. However, one must not forget that breaking off negotiations can bring about significant legal consequences according to circumstances.

BEING INVOLVED IN FINDING SOLUTIONS !

Sophie Prégent
spregent@lavery.ca

Your neighbours are watching you? You sense that they are checking and evaluating everything you do? The situation makes you slightly uncomfortable? It may well be that you suffer from neighbourhood disturbances!

During the fall of 2008, the Supreme Court of Canada recognized the existence of a no fault liability in matters of neighbourhood disturbances in the *Ciment du Saint-Laurent inc.* v. *Barrette* case[1]. Since the very beginning of its operations in 1955, the neighbours complained of excessive dust, unpleasant odours and abnormal noises. Over the years, Ciment du Saint-Laurent inc. invested several millions of dollars in environmental protection, particularly by maintaining efficient environmental equipment which complied with the standards in place. Despite these precautions, a motion to be authorized to institute a class action was filed in June 1993. The cement plant ceased its operations in 1997.

The Supreme Court ruled that even though it appears to be absolute, the right of ownership has limits: owners cannot force their neighbours to suffer abnormal or excessive annoyances. This limit is objective. It relates not to the owner's conduct, but to the consequences of the owner's use of his property. Even in the absence of malicious intent or wrongful conduct, owners must indemnify their neighbours for abnormal or excessive annoyances.

This recognition of no fault liability in neighbourhood disturbance matters has a major impact for businesses located near residential zones. Even though this promotes the achievement of environmental protection objectives, it is no longer enough to ensure compliance with the laws and regulations or the conditions of their certificates of authorization. Businesses must now assess the inconveniences caused to the neighbourhood and try to prevent those that may be deemed abnormal or excessive.

HOW HAVE THE COURTS REACTED SINCE THIS CASE?

The Court of Appeal of Quebec ruled on neighbourhood disturbances last February in the *Entreprises Auberge du parc ltée* v. *Site historique du Banc-de-pêche de Paspébiac* case[2]. The operator of a high-end health centre was seeking a permanent injunction against his neighbour, a non profit organization which was organizing musical shows outdoors on Sunday afternoons during the summer. The municipal corporation had expressly authorized these festivities.

The Court thought it necessary to inquire if this was a normal inconvenience. What is a normal inconvenience? It must not be treated as an abstract concept. One must take into account the environment in which an abuse of property right is alleged.

Previous uses will form an integral part of this contextual review. The Court of Appeal noted that one does not benefit from an acquired right to the neighbourhood situation based on the fact that the establishment was there first. By accepting to live near a known source of inconvenience, one accepts, to a certain extent, the normal inconvenience of this environment. However, one who creates a new source of inconvenience may be held liable for deteriorating the quality of the environment. The [translation] "land use capability and actual use of the land, the environment in which it is located and local usage"[3] will then have to be examined.

In the case of *Sirois* v. *Rosario Poirier inc.*.[4], the Court of Québec emphasized the necessity of proving that the inconvenience is abnormal or excessive. According to the judge, [translation] "[...] to satisfy the preponderance of probabilities criterion, the evidence must always be clear and convincing."[5]

In the case of *Talbot* v. *Martinez*[6], the Court reminds us that one has to prove two things: the facts and actions which are the subject of the complaints and that these facts and actions constitute abnormal or excessive inconvenience.

These decisions show us that, although not having to prove a fault is advantageous to the plaintiffs, they still must deal with the burden of proof of

1. *Ciment du Saint-Laurent inc.* v. *Barrette*, 2008 CSC 64
2. *Entreprises Auberge du parc ltée* v. *Site historique du Banc-de-pêche de Paspébiac*, J.E. 2009 346 (C.A.)
3. *Id.*, page 5, par. 22
4. *Sirois* v. *Rosario Poirier Inc.*, J.E. 2009-566 (C.Q.)
5. *Id.*, page 33, par. 190
6. *Talbot* v. *Martinez*, 2009 QCCS 549 (C.S.)

the existence of abnormal or excessive inconvenience.

A growing number of businesses are obviously threatened with possible lawsuits based on article 976 of the *Civil Code of Québec* as their neighbours come to think that the activities of these businesses cause them to suffer abnormal or excessive inconveniences. These activities have often been conducted for years, sometimes even prior to the arrival of the neighbours.

WHAT CAN YOU DO TO PROTECT YOUR BUSINESS AGAINST POSSIBLE LAWSUITS?

Businesses are well-advised to be attentive and imaginative to ensure good relationships with their neighbours. They must implement measures that promote dialogue and constructive exchanges thus preventing situations of confrontation. An open mind is essential to avoid instituting endless and costly judicial proceedings.

It is imperative that your business be informed of the consequences of its activities. You must be aware of all the effects of the operations of your business on its neighbourhood, particularly with respect to its hours of operation, the noise it causes, the dust it generates, the odours it spreads into the neighbourhood and the effect of light pollution. Once you are aware of these inconveniences, ask yourself whether they could be considered as abnormal or excessive. In the affirmative, it is time to think about solutions to reduce or better control such inconveniences.

As we can never stress enough the importance of communication with your neighbours, we would suggest that you establish a residents committee. This committee can point out any inconvenience that you may have been underestimating. In addition, such a committee provides residents with the opportunity to be heard and creates the possibility for a joint search for solutions to reduce environmental impacts. Why not think about organizing an "open door" event, which will allow you to enlighten residents about the operations of your business?

Even after taking these actions, you receive complaints from residents? It is imperative not to leave them unanswered. Follow-up with the complainant, document the complaints you received, the actions taken in response and keep all files, which could prove very useful in the event proceedings are instituted against your business.

Everything revolves around perceptions. A business which gets involved in its neighbourhood and is perceived as a partner in its community is less likely to be challenged than one who only seems to care about its own interests.

BID-RIGGING - A LESSER KNOWN OFFENCE IN COMPETITION LAW

Jean-Philippe Lincourt
jplincourt@lavery.ca

COMPETITION ACT

The *Competition Act*[1] (the "Act") is a federal statute whose primary purpose is to prevent anti-competitive practices in the Canadian market. More specifically, the Act's provisions are intended to promote the efficiency and adaptability of the Canadian economy, expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, and finally, provide consumers with competitive prices and product choices.

The Act regulates the conduct of most Canadian businesses, and the construction industry is no exception.

In addition to specifically setting out the deceptive market practices and restrictive trade practices that are prohibited, the Act also provides for a series of criminal offences. As in the *Criminal Code*, persons accused of committing an offence under the Act will be found guilty if it is proven that they have committed the act (*actus reus*) and that they had the necessary intent (*mens rea*). All the elements of the offence must be proven beyond a reasonable doubt.

One of the criminal offences provided for in the Act is bid-rigging, which affects the construction market in particular, since competitive tendering and bidding is often used in this industry.

THE OFFENCE OF BID-RIGGING

The definition of bid-rigging is set out in section 47(1) of the Act and consists of one of the following two types of agreement between various parties:

1) an agreement or arrangement whereby one of the parties undertakes not to submit a bid in response to a call or request for bids or tenders; or

2) the submission of bids or tenders that are arrived at by agreement or arrangement among the various bidders or tenderers.

However, note that these agreements are not considered illegal if it is shown that they were made known to the person or business calling for the bids or tenders.

It is also important to note that the mere act of participating in such an agreement or arrangement is an offence in itself without the need for evidence, as is the case for other offences, that it would likely have unduly lessened competition or resulted in injury to a third party.

1. *R.S., 1985, c. C-34*

Thus, evidence alone of the accused's intention to conclude and participate in an illegal agreement is sufficient to establish his or her guilt without regard to the reasons the accused may have had in doing so.

Finally, where a person is found guilty of bid-rigging, under the Act, he or she is liable to a fine in the discretion of the court or to imprisonment for a term not exceeding 5 years, or to both.

FORMS OF BID-RIGGING

In practice, the offence of bid-rigging often takes one of the following four forms:

1) an agreement among bidders to submit false bids which are in most cases overpriced;

2) an agreement among bidders for one or more of them to refrain from submitting, or to withdraw, a bid;

3) an agreement among bidders for one supplier, chosen in advance, to systematically or alternately submit the lowest bid;

4) an agreement among bidders to not compete against each other in a given region or with respect to certain clients.

CONSEQUENCES OF BID-RIGGING

Obviously, firms engage in bid-rigging in order to obtain contracts at non-competitive prices, which generally increases the costs of projects for businesses granting contracts to a much higher level than when the contract price is determined freely through the competitive process.

The Competition Bureau has exposed several cases of bid-rigging, particularly in the construction industry. Fines totaling more than $3 million were paid by offenders, notably in the context of important construction projects such as those at Pearson Airport and the Skydome Hotel in Toronto[2].

It is therefore crucial that businesses whose activities lead them to participate in the bid process, either as client or bidder, are made aware of the existence of this offence.

2. http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/02646.html

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CONTACTS

MONTREAL - 1 Place Ville Marie
514 871-1522

QUEBEC CITY - 925 Grande Allée Ouest
418 688-5000

LAVAL - 3080 boul. Le Carrefour
450 978-8100

OTTAWA - 360 Albert Street
613 594-4936

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Pour recevoir notre bulletin en français, veuillez envoyer un courriel à info@lavery.ca.