

binding or non-binding letter of intent

Wallace v. Allen 2009 CarswellOnt 150 (Ont. C.A.) (January 16, 2009)

The issue in this case instance was whether an executed letter of intent providing for the following was binding as between the parties:

IT IS ALSO AGREED BY THE PARTIES THAT THERE WILL BE MUCH LEGAL WORK TO BE DONE UPON ACCEPTANCE BY BOTH SIDES AND THAT THE WORDING OF THIS AGREEMENT MAY ALTER SOMEWHAT

and

THIS LETTER OF INTENT MUST BE REDUCED INTO A BINDING AGREEMENT OF PURCHASE AND SALE BY THE PARTIES WITHIN THE NEXT 40 DAYS

At trial it was determined that the parties did not intend that there be a binding contractual relationship until the final share purchase agreement was signed. The Ontario Court of Appeal disagreed J. MacFarland J.A. concluding:

Both [the above referenced] clauses contemplate that it is the wording of “this” agreement (not some other agreement) that “may alter somewhat” and “must be reduced into a binding agreement of purchase and sale” -- and only the wording, not the substance. I agree with the appellant that the document plainly expressed an intention on the part of the parties to be bound by the terms of the Letter of Intent, which terms were to be incorporated into a more formal document ...

The parties used the language of contract -- they used terms such as “it is agreed” and “upon acceptance” and “this agreement”.

Contrary to the finding of the trial judge, the language of the document itself speaks to an intention to be bound upon the signing of the document.

And with respect to the condition of the final share purchase agreement, J. MacFarland J.A. notes:

Further, the first draft of the Share Purchase Agreement was delivered December 6, 2004. On December 9, 2004 the parties met for the express purpose of addressing any and all outstanding issues.

From September 24 through to December 29 the parties conducted themselves as though they had a deal. Wallace put his solicitor in funds to close. The Allens showed up with the two minority shareholders for what they thought was the December 29 closing, prepared to sign the Share Purchase Agreement.

To suggest that the parties did not consider themselves bound would be contrary to the evidence.

It bears repeating and being an excerpt (authorities deleted) from a soon-to-be-published text book on Canadian oil and gas law authored by Michael A. Thackray, O.C.:

letters of intent

in general

The letter of intent is a standard document used in the oil and gas industry in connection with the purchase and sale of oil and gas assets. This document identifies the principal deal terms including adjustment date, purchase price, closing date and a relatively detailed description of the assets. Letters of intent also usually contemplate that upon acceptance by both vendor and purchaser of the terms and conditions (such as they might be) and as set forth in the letter of intent, a more formal Agreement of Purchase and Sale shall be entered into between the parties, the Agreement of Purchase and Sale to contain such other or expanded terms and conditions as are appropriate to the subject transaction and agreed upon between the parties all in a form satisfactory to each of the parties and their respective counsel (or words to like effect).

binding contract or agreement to agree

As many oil and gas transactions evolve (or attempt to evolve) from interim or letter agreements, the issue is whether a letter of intent is a binding contract or merely an agreement to agree in the future. It appears to be well settled by the authorities that if the letter of intent relied on as constituting a contract contemplates the execution of a further Agreement of Purchase and Sale between the parties, it is a question of construction whether the execution of the Agreement of Purchase and Sale is a condition or term of the bargain or whether it is a mere expression of a desire of the parties as to the manner in which the transaction already agreed to will in fact be

completed. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract.

non-binding

If the parties to the letter of intent have specified that an Agreement of Purchase and Sale will be prepared with terms and conditions to be agreed upon by the vendor and the purchaser, this is likely a circumstance where some further agreement is necessary (i.e., a non-binding letter of intent). It is most often the case in the oil and gas industry that where the parties have stated that the terms and conditions are to be agreed, it cannot be said that the letter of intent is the mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact be closed. Instead such a letter of intent is an agreement to enter into a contract. It “anticipates a further meeting of the minds” and as such is non-binding.

by [Michael A. Thackray, Q.C.](#)

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a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2009.