Common Disputes Arising from Preliminary Business Negotiations (and How to Avoid Them)

Litigation & Dispute Resolution | Mergers & Acquisitions

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Agenda

1. Introduction
2. Colourful Cautionary Tales from M&A
3. Key Practical Takeaways

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Introduction

- Preliminary deal documents and negotiations can sometimes give rise to disputes.
- A key reason is that even if a deal document is marked "non-binding", other factors can lead the court in a different direction.
- BC courts have also occasionally flagged the risk that oral negotiations can give rise to binding obligations:
  - *Langley Lo-Cost Builders Ltd. v. 474835 Ltd.*, 2000 BCCA 365 at para. 38.
  - *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1990 at para. 333, *aff'd* 2022 BCCA 16:
    - "It is… clear that [BC] courts are more likely than the courts of other provinces to give legal effect to agreements reached through negotiation and discussion".

Introduction (cont'd)

- Only three basic prerequisites for a binding contract:
  - agreement on all essential terms;
  - sufficient certainty of those terms; and
  - objectively demonstrated intention to enter legal relations.
  - See *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at paras. 46-48.
- The court may consider the parties' actions – beware of conduct that may suggest a binding contract.
- Questions of witness credibility and "commercial reality" may weigh heavily – these are inherently difficult to predict.
- <u>End result</u>: While typically a remote risk, to avoid unpleasant surprises, ensure businesspeople appreciate preliminary deal discussions and documents are not inherently benign!

Colourful Cautionary Tales from M&A

Essential, but not necessarily numerous

- Essential terms in M&A can be as few as number of shares, price, and (sometimes) closing date:
  - *Oswald v. Start Up SRL,* 2021 BCCA 352.
  - *UBS Securities v. Sands Brothers*, 2009 ONCA 328: Purchase of $5 million stake in a private company agreed by phone call.
- Or more terms may be required, e.g. (1) payment schedule, (2) security for payment, (3) retention of key employee, and (4) post-closing adjustments:
  - *Ruparell v. J.H. Cochrane Investments*, 2021 ONCA 880: Offer to buy car dealership accepted by voicemail left from noisy car wash.

When the parties' conduct complicates things

- Even if a deal document is expressly marked as non-binding, the parties' conduct may indicate otherwise.
  - *Hoban Construction Ltd. v. Alexander*, 2012 BCCA 75: Back of the envelope in the bottom of a gravel pit.
  - *Wallace v. Allen*, 2009 ONCA 36: What could go wrong by sending some Christmas cards?

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Can "Subject to Definitive Agreement" not mean what it says?

- In England, a "subject to contract" disclaimer is essentially ironclad.
- In Canada, while it carries great weight, it is also a "question of construction" and the disclaimer will not necessarily stop the court from considering the parties' conduct and broader context.
  - *Calvan Consolidated Oil & Gas Co. v. Manning*, [1959] SCR 253.
  - *Langley Lo-Cost Builders v. 474835 Ltd.*, 2000 BCCA 365:
    - "I conclude that the 'subject to' clause in this case established Mr. Oliver in the role of a scrivener. His approval was to be not of the agreement itself, but rather of the formal written documents that the parties might prepare to carry out the objectives of their agreement. The fact that Langley later declined to participate in the preparation of such a formal agreement does not affect the terms or validity of any bargain the parties may have reached."

When one part is binding even if the other part is not

- Several courts have upheld a joint share or asset purchase absent agreement regarding the parties' co-ownership afterwards:
  - *Zynik Capital Corporation v. Faris*, 2007 BCSC 527: Joint purchase of shipyard.
  - *Langley Lo-Cost Builders Ltd. v. 474835 Ltd*, 2000 BCCA 365: Joint development of real-estate project.
  - *Matic et al. v. Waldner*, 2016 MBCA: Joint purchase of company on a 70% and 30% basis.
  - *Concord Pacific Acquisitions Inc. v. Oei*, 2019 BCSC 1990, *aff'd* 2022 BCCA 16: Share purchase and JV for large commercial development project.

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With a binding contract may come implied terms

- Once a binding deal is struck, the potential arises for implied terms, including on the basis of "commercial reality".
  - *Energy Fundamentals Group Inc. v. Veresen Inc.*, 2015 ONCA 514: A binding option to acquire a 20% interest in an LNG project comes with implied access to confidential information.
  - *Kaban Resources Inc.*, 2020 BCSC 1307, 2020 BCSC: A binding right to purchase a partial interest in a mine carries implied restrictions on the terms of the buyer's financing.

Duties of confidence can arise absent an NDA

- Duties of confidence can arise under common law and without an NDA, Confidentiality Agreement, or other binding contract.
  - Breach of confidence consists of three elements:
    - (1) confidential information
    - (2) communicated in confidence, and
    - (3) misuse of the information by the person to whom it was communicated.
  - *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574: A prospective JV partner in a mining project acts on confidential information regarding the mine gained during JV negotiations to acquire an adjoining property. Results in a constructive trust whereby the property is held for the benefit of the disclosing party.

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Practical Takeaways

"*Dos*" and "*Don'ts*"

Do ensure basic precautions are taken to mitigate the risk of any misunderstanding or dispute.

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If commercial terms are intended to be non-binding:

Do

- Always include a robust "Subject to Definitive Agreements" clause.
- Consider including basic binding legal terms (i.e., governing law and attornment).
- Clearly separate and identify non-binding commercial terms and basic binding legal terms.
- In the event of a compound transaction, ensure the "Subject to Definitive Agreement" clause refers to the entire deal.

Don't

- Do not mix non-binding commercial terms with clauses of a *prima facie* legal nature in a document that is either:
  - silent regarding its binding or non-binding nature; or
  - that simply says it is not intended to be binding.
- Do not act in any manner that could reasonably be interpreted as indicating that the preliminary terms discussed are intended to be binding.

Do, if intended to be binding

- Ensure the inclusion of all essential terms.
- Include a robust entire agreement / no other representations clause to guard against implied terms and/or potential misrepresentation claims.

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Do understand your objectives

- Term sheets can be used for various purposes.
- The level of negotiation and detail/certainty of terms at the non-binding documentary stage will vary based on the circumstances.

Don’t ignore non-binding terms

- Even if non-binding, preliminary documents set expectations for the subsequent definitive agreement.
- Make sure either all the deal terms in the term sheet are acceptable or make it clear those terms will be negotiated as part of the definitive agreement.

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Do consider including certain binding terms

- Consider if the term sheet should include certain binding terms.
- For example, depending on the circumstances, it may be appropriate or prudent to address: (1) exclusivity, (2) confidentiality, and/or (3) non-solicitation.

Any more questions?

Interested in learning more? See FASKEN's *Private M&A in Canada: Transactions & Litigation* (LexisNexis, 2024).

Disclaimer

- The information in this presentation is intended to provide general comments on legal issues. The information in this presentation is not intended to provide legal advice. Participants should seek out legal advice on issues specific to them before acting on any information provided in this presentation. We would be pleased to provide additional information on request.

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Andrew Nathanson, KC focuses on complex commercial litigation and white collar crime. He is Co-Chair of Fasken's Commercial Litigation Group in BC and Co-Leader of the firm's national White Collar Defence and Investigations group. Andrew is a Fellow of the American College of Trial Lawyers and has been ranked as a leading litigator in diverse areas including corporate and commercial litigation, directors and officers liability, securities litigation, public law and criminal defence. In 2022, Benchmark Litigation named Andrew British Columbia Litigator of the Year. In 2023, *Best Lawyers in Canada* named Andrew Lawyer of the Year in BC for director and officer liability practice and criminal defence. Commentators consistently highlight Andrew's meticulous preparation and problem-solving skills.

Client and market commentary

Clients and commentators praise Andrew as "a fantastic lawyer...a very intelligent, strategic thinker" and "a great communicator. I feel like I have a real advantage with him leading the way". They note Andrew's "diverse basket of cutting edge work" and call him a "star seeing his profile surge inexorably". Andrew is "known for … his professionalism in and out of the courtroom". Courts have called his advocacy, including in achieving settlements in difficult cases, "exceptional" and as exhibiting "counsel work at the highest level".

Complex commercial litigation

Andrew is sought after by corporations, directors and shareholders for his expertise in shareholders' disputes, oppression claims, proxy contests, and commercial disputes.

Andrew has particular experience in disputes involving the mining, entertainment and hospitality industries. Andrew's mining cases have included disputes over the interpretation of joint venture and earn-in agreements; contested mergers and acquisitions; the interpretation of royalty agreements; the acquisition of mineral interests; tax and other commercial disputes; and environmental and regulatory enforcement actions. Andrew has acted for majors and for junior exploration companies. In addition to court proceedings, Andrew has been counsel in both domestic and international commercial arbitrations.

Many of Andrew's commercial cases involve multi-jurisdictional disputes.

Some of the significant commercial cases in which Andrew has been involved include:

- Andrew was co-counsel for Lions Gate Entertainment, successfully defeating the Icahn Group's oppression claim and proxy contest seeking control of Lions Gate (*Icahn Partners LP v. Lions Gate Entertainment Corp*., 2010 BCSC 1547, appeal dismissed 2011 BCCA 228). The case featured parallel proceedings before the BC Supreme Court, BC Securities Commission and federal and state courts in New York. The case affirmed that where there is a hostile bid for control, a corporation's directors may, consistent with their fiduciary duties, take measures to resist the bidder where they reasonably conclude that it is in the best interests of the corporation to do so. This had long been a controversial question in Canadian corporate law;
- From 2014 to 2020, Andrew was lead defence counsel for Nevsun Resources, defending complex mass tort claims brought by Eritrean refugees who alleged they were subjected to forced labour and torture in the construction of the Bisha Mine in Eritrea. The plaintiffs narrowly won what commentators called a "landmark" 5-4 Supreme Court of Canada decision, permitting them to advance claims for damages for breach of customary international law norms, automatically incorporated into Canadian law (*Nevsun Resources Ltd. v. Araya*, 2020 SCC 5). Despite this, the Nevsun defence team defeated the plaintiffs' attempt to pursue a common law class action on behalf of up to 2,000 claimants (*Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856); obtained an order that the plaintiffs waived privilege over communications with their counsel, affirmed on appeal (*Araya v. Nevsun Resources Ltd*., 2019 BCCA 205); and twice successfully resisted the plaintiffs' application for bellwether

trials and a stay of discovery (*Araya v. Nevsun Resources Inc.*, 2020 BCSC 294). After worldwide discoveries of just half of the claimants, which resulted in the dismissal or discontinuance of 40% of all claims, the litigation was settled at mediation in 2020. The litigation resulted in over 20 reported judgments, some on novel procedural issues. Lexpert Magazine named the Supreme Court of Canada decision one of its Top 10 Cases of 2019-2020;

- Andrew was counsel for Al Jazeera Media Network in a highly publicized $100 million claim brought by Mohamed Fahmy. Fahmy was one of three Al Jazeera English journalists arrested in December 2013 and imprisoned in Egypt for more than a year. After Al Jazeera brought a jurisdictional application, which included a constitutional challenge to the forum of necessity provision in s. 6 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, the action was dismissed by consent;
- Andrew successfully prosecuted an oppression claim against a national accounting firm in the leading oppression case under the *Canada Cooperatives Act*, S.C. 1998, c. 1 (*Collins Barrow Vancouver v. Collins Barrow National Cooperative Incorporated*, 2015 BCSC 510, appeal dismissed 2016 BCCA 60);
- As co-counsel for Talisman Energy, Andrew defended a claim for a $10 million finder's fee in connection with a Sudanese oil concession. The action was dismissed against Talisman (*Malik (18A application of Talisman Energy Inc.)*, 2007 BCSC 739), with judgment against a subsidiary reduced on appeal from $1 million to $385,000 (*Malik (Estate of) v. State Petroleum Corporation*, 2009 BCCA 505);
- After a 40 day trial, Andrew succeeded in obtaining specific performance of an agreement with a large group of offshore owners from Singapore and Malaysia in what the court described as "a long and hard-fought battle" that produced a "vortex" of litigation over control of the management and operation of an award-winning boutique hotel (*Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303, appeal dismissed on procedural grounds following an order to post security, *Le Soleil Hotel & Suites Ltd. v. Alianto*, 2009 BCCA 616).

White collar crime and public law expertise

In the area of white-collar crime, Andrew has acted for both the Crown and defence. He has particular experience assisting corporations and

individuals in responding to criminal and regulatory investigations, in some cases avoiding charges altogether.

Andrew was counsel for Teck Coal Limited in a complex prosecution that would have resulted in the largest environmental trial in Canadian history (*R. v. Teck Coal Limited,* 2021 BCPC 118). The Federal Crown approved charges under the *Fisheries Act*, alleging that Teck Coal had deposited or permitted the deposit of a deleterious substance, coal mine waste rock leachate, from two of its mines over a ten year period. Part of the period was subject to mandatory minimum sentences. Teck Coal successfully resolved the charges with the Crown, pleading guilty to two counts of breach of s. 36(3) of the Act covering the time period January 1, 2012 to December 31, 2012. The court accepted a joint submission and sentenced Teck Coal to penalties totalling $60 million. As part of the joint submission, the Crown agreed not to proceed with the balance of the charges. The court called the counsel work “exceptional”.

In 2013, Andrew was counsel for an employer in a catastrophic industrial accident in which two workers died and 19 were injured. The case was described as one of the most complex occupational health and safety investigations in WorkSafe BC’s history. No charges were laid. In an aggravated sexual assault investigation, Andrew successfully resisted a production order, obtaining what is believed to be the first-ever recognition in Canada of a common law privilege for HIV-related health records. Andrew was retained to conduct an anti-bribery and corruption investigation for a private corporation, involving the law of four jurisdictions. He has advised Canadian companies on sanctions-related matters, including under the *Special Economic Measures Act*, S.C. 1992, c. 17.

In January 2022, as counsel for the B.C. Liberal Party, Andrew successfully defeated a short notice, high profile injunction application seeking to prevent the party from announcing the results of its leadership election (*Bajwa v. BC Liberal Party*, 2022 BCSC 194). The court accepted Andrew’s arguments and rejected the injunction as “a substantial interference with the democratic processes of a major political party”, holding that “[t]he public’s faith in the Party’s process, and democracy generally, is protected by post-election challenges brought in Court and by the public presentation of evidence of irregularities. … To accept that an injunction is required here would be to accept that election processes can be arrested on the fears of any Member or interested party. This would result in a far more serious threat to the democratic process”.

Andrew served as associate commission counsel in the second phase of the Davies Commission of Inquiry into the death of Frank Paul, which examined the Crown's decisions not to charge police in the death of an Indigenous man who died of hypothermia after being left by police in an alley. The Davies Commission report, together with the report of the Braidwood Commission, led to the creation of the BC Independent Investigations Office to conduct criminal investigations where police are suspected of involvement in incidents resulting in death or serious harm. Andrew has been involved in other public inquiries. He was co-counsel for a former cabinet minister at the Commission of Inquiry into Money Laundering in British Columbia (the Cullen Commission) and was co-counsel for a sitting judge who was a witness at the Missing Women Commission of Inquiry headed by Wallace Oppal, KC.

Andrew is experienced regulatory defence counsel, having defended charges brought under federal and provincial environmental legislation.

Some of the significant criminal and constitutional cases in which Andrew has been involved are:

- Free speech during elections (*R. v. Bryan,* 2007 SCC 12);
- The right of persons suffering from addiction to access harm-reduction based health services (*Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44);
- The obligation of witness police officers to complete their duty notes in civilian police oversight investigations without the participation of counsel (*Schaeffer v. Wood,* 2013 SCC 71);
- Jury secrecy and when jury verdicts may be set aside for reasonable apprehension of bias (*R. v. Budai,* 2001 BCCA 349, application for leave to appeal dismissed);
- Refugee protection and human smuggling (*R. v. Appulonappa*, 2015 SCC 59 and *B010 v. Canada* (Citizenship and Immigration), 2015 SCC 58);
- The constitutionality of mandatory minimum sentences for drug trafficking (*R. v. Lloyd*, 2016 SCC 13 (factum only)); and
- The right to financial assistance to make full answer and defence (*R. v. Ho*, 2003 BCCA 663, application for leave to appeal dismissed).

In white collar crime and related civil proceedings, Andrew frequently collaborates with counsel in Canada, the U.S. and other jurisdictions.

Andrew contributes substantial time to pro bono work and teaching civil litigation, advocacy and legal ethics. Teaching with Mr. Justice Crerar, he was an adjunct professor of civil litigation at The University of British Columbia from 2003 to 2016. He is an honorary member of the UK's Commercial Bar Association, the co-chair (with Madam Justice Catherine Murray) of CLE BC's Winning Advocacy Skills Workshop, former President of the Advocates' Club, a Supreme Court Advocacy Institute practice advisor and a regular CLE contributor. He has represented the Canadian Civil Liberties Association, the BC Civil Liberties Association, Pivot Legal Society/the Union of BC Indian Chiefs on appeals in pro bono matters.

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Samuel Li is a member of the firm's Mergers & Acquisitions, Corporate Finance, and Information Technology groups in Vancouver, with a focus on securities and M&A in the mining and technology sectors.

Samuel Li is a part of the firm's Securities and Technologies Practice Group. Samuel advises public and private clients on a variety of securities and corporate transactions, including public and private financings, including Canadian and cross-border public offerings, mergers and acquisitions, takeover bids and reorganizations. He also assists listed companies with the various reporting, continuous disclosure and compliance obligations required by applicable securities regulators and stock exchanges and general corporate matters.

Samuel received his Juris Doctor from the University of Toronto, and graduated with honours in Accounting from the Sauder School of Business at the University of British Columbia. Samuel is a regular contributor to the firm's *Timely Disclosure* **blog** on the topics of M&A, corporate finance and securities.

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Paul's practice is focused on mergers and acquisitions, private equity and corporate governance. He is a thought leader in these fields and advises clients regarding both transactional and litigation matters.

Paul is the Editor-in-Chief of ***Private M&A in Canada: Transactions and Litigation***, the country's first (and only) comprehensive book on private M&A, published by LexisNexis Canada. By lawyers and for lawyers, the book is a practice-focused guide through the complexities of Canadian private M&A deals and disputes.

Paul also regularly publishes regarding M&A, private equity and corporate governance with *The M&A Lawyer*, the ABA's M&A Deal Points, *Lexpert* and *The Globe and Mail*. He is also the author of 15 law journal and law review articles, including with the McGill Law Journal, the Alberta Law Review, the Banking & Finance Law Review, the Journal of International Arbitration and the Virginia Law & Business Review.

Prior to joining Fasken, Paul was an M&A Partner at another premier national law firm in Calgary. He is called to the bar in Alberta (2011), New York State (2009, non-practicing) and New South Wales (2007, non-practicing), and has worked in England, South Africa, Japan and Australia.

Fasken is a leading law firm with more than 950 lawyers and 10 offices on three continents. Clients rely on us for practical and innovative legal services.

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