THE FINE PRINT

Brian Heagle with Jim Commerford, CEO of the YMCA Hamilton/Burlington, at the BECD Signature Event Dinner

For the second year in a row, the Mississauga Southwest Girls Midget Fastpitch team, sponsored by Feltmate Delibato Heagle, went undefeated to win the gold medal in the recent United States Fastpitch Association qualifying tournament and to secure a berth to compete in the USFA's World Series tournament to be held in Panama City Beach, Florida.

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Feltmate Delibato Heagle
LAWYERS

What Judges and Lawyers Can Do About Rising Legal Fees

By Tibor Sarai

It comes as a surprise to some of my clients when I say that few lawyers could afford their own services, should they be sued or want to sue in the present climate of the legal system. As a litigator, I am faced with the question on a daily basis whether the cost of going through the Court process justifies the amount in dispute. More often than not, compromises are made on an economic basis rather than on the merits of the case.

In my recent paper, *Is the tail wagging the dog? – A Look at Recent Cost Awards and How the Courts Appear to Moderate Them to Enable Access to Justice*, there are three areas in which I perceive the Judges to have taken the prevailing legislated rules and regulations and costs awards in civil cases: (i) in assessment of costs as between litigants; (ii) as between solicitor and his own client; and (iii) in the Simplified Rules context. I put forward the theory that the Courts moderate costs with the general intent and effect of reducing the steadily upward trend in legal fees, arguably attempting to preserve access to justice.

Yes, legal costs are a justice issue. There is a commonly held belief that there is a lack of equality between the wealthy and the under-resourced litigant. The cost of litigation, coupled with the difficulty of forecasting the outcome of any lawsuit, induces fear and confusion in many and represents the growing challenge to both the Bench and the Bar. Indeed, there have been a number of reports attempting to address the issue. One of them is under the Civil Justice Reform Project on which Mr. Justice Osborne reported on a wide range of issues challenging the legal profession, including the rising costs of legal services. His conclusion respecting costs of litigation, in a nutshell, is that the system and the procedures ought to be revamped under the rubric of a concept called "proportionality". This approach would simply try to reflect the time and expense devoted to a proceeding in proportion to what is at stake. How exactly that would be achieved would have to be worked out in detail and will take time. What to do in the meantime? I argue in my paper that the Judges are doing their best in a subtle way to curb and influence the cost awards. What about what lawyers can do about rising legal costs?

Lawyers face pressure from at least two sides. Our business model as a law firm and the client have differing views about the billable hour. One way to resolve costly litigation, at least in part, is to go against the very meaning of the word "litigate", derived from the Latin term for "conducting lawsuits". One must remember that whether it is through suing or negotiation and mediation, the object in a lawsuit is to always try to resolve the dispute. It has been my self-made task and ambition to explore ever new ways of introducing the dispute resolution aspect and introduce it early in any litigation so that any 'scorched earth policy' inherent in litigation is avoided.

This approach is neither new or unique, but I believe that it is underutilized. One aspect of this approach is that rather than looking for causes and bases of disagreement, one should try to assist the other side in solving their problem, which in turn will solve your problem. Sure, you may say, "this sounds easy in principle, but what if there is a difficult and uncooperative counterpart?" Both the lawyers and their clients may not buy into cooperative solicitors. I am not proposing that this will always be a successful approach or strategy. However, the very mindset often finds a resonating note, even in those on the other side who are more inclined to be adversarial.

Attempts to resolve disputes quickly and inexpensively by negotiation instead of litigation is not driven by altruism, although that certainly can be a part of it. The reality is that a positive results-oriented cooperative approach is worth pursuing simply because it is practical and saves substantial fees over the long term.

Of course, if the clients still wish to engage in the more expensive, adversarial warfare, that it is still an option. If, however, their concern is an early resolution at a low cost, then we do have the appropriate arsenal of mediation, meetings and suggesting solutions and resolutions, some of which "assist" both sides. In final analysis, there is no loss of face, posture or credibility in doing so. It is simply smart business.

Securing Financed Sales in the United States and Canada

By Chris Neufeld

Companies selling or distributing their products in the United States and Canada must recognize the importance of taking security to increase the prospect of financial recovery when the purchaser is unwilling or unable to honour its payment obligations. Both the United States and Canada have developed extensive rules and legal precedents regarding securitization, and it is the application of these rules that is critical to securing your priority position for payment.

Both countries operate on the legal principle that a secured creditor ranks in priority to unsecured creditors, even if the unsecured creditor's indebtedness is more substantive and can be traced back to an earlier transaction. This is achieved through Section 9 of the *Uniform Commercial Code* or "UCC" in the United States and the *Personal Property Security Act* or "PPSA" in most provinces in Canada. In this article, the UCC and the PPSA will be referred to together as "Securities Legislation".

Securities Legislation provides a "security interest" in the goods being sold. Even though a purchaser / distributor may be in possession of the goods being sold, the seller's interest in the goods is secured by allowing them to act as security, or collateral, for payment. In the case of payment default by the purchaser / distributor, a secured creditor has the ability to repossess and resell the goods. Where the purchaser / distributor files for bankruptcy protection, the Securities Legislation grants the secured creditor a priority claim in these goods over all unsecured creditors and other secured creditors.

In order to take advantage of the rights granted under Securities Legislation, precise steps must be taken, failure of which could result in your claim for priority payment being rejected.

The securitization process begins with a determination and assessment of existing security interests. By assessing the competing security interests, the appropriate strategy can be undertaken to achieve a top priority position. This enables you to strengthen your priority position should the purchaser / distributor go into default.

Securing your interests under Securities Legislation involves two key events: attachment and perfection.

Attachment creates the security interest in the goods being secured, and occurs when an enforceable agreement setting out your rights in the goods (a security agreement) is signed by the seller (or "secured party") and the purchaser (or "debtor"). The Security Agreement defines default, outlines creditor remedies and specifies costs that the debtor must bear when default occurs.

The three principal requirements for attachment are:

1. The secured party must extend value for the security interest;
2. The debtor must acquire rights in the collateral; and
3. There must be a written security agreement signed by the secured party and the debtor, in which the secured property is sufficiently identified.

Attachment, however, is only the first step, as it does not protect your interest in the property against claims to the same property by third parties.

Perfection establishes the secured party's priority in relation to the debtor's other creditors. Perfection occurs when a financing statement is filed or registered with the appropriate governmental body. Although there are other ways of perfecting a security interest in certain types of property, filing is the most common means of perfection for goods and equipment.

It is imperative that perfection occur as soon as possible, either prior to, or immediately following the entering into of the security agreement. When two or more creditors claim a perfected interest in the same property, the priority between the various creditor claims is generally determined by who perfected their interest first.

Purchase-Money Security Interests

Securities Legislation also provides special priority rules for what are called "purchase-money security interests" ("PMSI"). A PMSI is the interest taken in goods to secure payment of all or part of the purchase price for those goods. A PMSI enables a seller of goods to extend credit to an upstart company, a financially unstable business or heavily secured debtor who has already pledged its assets.

A PMSI that complies with the requirements of Securities Legislation gives the PMSI-secured party priority in the specified goods over any other person who claims an interest in the debtor's assets. The PMSI rule exists in order to ensure that a debtor wishing to make additional purchases of property will be able to obtain credit from the seller without the consent of existing secured parties and without the risk that the goods will not form the collateral for another of the purchaser's secured creditors. Recognition is given to the fact it is only by extending credit that the debtor's pool of assets increases, and you are able to look to the goods sold to the debtor to satisfy your claim for payment before other creditors can claim an interest in those goods.

Conclusion

Both the UCC and PPSA provide a straightforward and reliable system whereby sellers and suppliers can secure the payment obligations of their US and Canadian purchasers / distributors, and extend credit to facilitate increased business. By securing these sales, greater confidence in your business in the United States and Canada can be realized.

This article is based upon an article by Chris Neufeld that was published in Enterprises with Foreign Investment and China Business Law – Legal Resources.

FDH News & Legal Tidbits

- **Brian Heagle** has been appointed a member of the new Inclusivity Advisory Committee for the City of Burlington which was established as part of the federally-funded "Inclusive Cities Canada" initiative. The committee will monitor and evaluate the state of social inclusion in Burlington and advocate for policies and practices to reduce inequality and address concerns for those who are vulnerable for reasons of poverty, racism or fear of difference, age or mental or physical disabilities.
- **Ron Weston** was elected to the Board of Directors of Burlington Economic Development Corporation (BEDC). BEDC works to enhance and promote Burlington's economic advantage and works closely with new and existing business to help them grow and prosper. The Board of Directors provides strategic direction to the organization that focuses on innovation, creativity and talent.
- **Debi Sutin** has been named Program Coordinator of the Ontario Bar Association Joint Sub-Committee on Franchising for 2008-2009.
- **Ron Weston** participated in the Joseph Brant 2-Day Invitational Golf Tournament on May 22nd and 23rd which raised $180,000 for the purchase of medical diagnostic equipment.
- **Paul Lawson** worked with GenNext, a division of United Way Hamilton/Burlington, to raise more than $5000 through a fundraising breakfast.
- On May 27, 2008 **Ron Weston** spoke to the Hamilton Law Association on the topic of "The Other Alternative", the use of freezes, trusts, shareholders' agreements and other corporate devices for the division between spouses of family-owned businesses.
- On June 13, 2008 **Brian Heagle**, **Paul Lewis**, **Paul Lawson** and **Chris Neufeld** attended The 4th Annual Charger Foundation Golf Tournament hosted by HS & Partners LLP. Proceeds from the event will be used to benefit under-privileged children.
- **Miles Feltmate**, **Ron Weston**, **Brian Heagle**, **Fulvio Delibato**, **Lori Brown** and **Paul Lawson** attended BEDC's 2008 Signature Event on June 12, 2008. The event recognized the induction of Michael DeGroote Sr. as Burlington's Entrepreneur of the Year.

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, please contact our Editor, Debi Sutin at 905-631-3643.

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