

Enforcement of minors' contracts in British Columbia

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Since the late 1700s, the legal status of minors' contracts has been confused by "two competing, if not irreconcilable, policies":¹ in the marketplace, minors should be protected from both others and themselves, but where market access is necessary or desirable, minors should not be barred from contracting. Stated differently, "an infant is disabled from binding himself, except when it is for his benefit, for want of judgment and capacity".² Because of these conflicting principles, the law of the capacity of minors in many jurisdictions has been uncertain, and often unwieldy.

To eliminate much of this confusion, British Columbia has taken a legislative approach to minors' contracts. The British Columbia *Infants Act*³ provides reasonably clear guidelines within which to determine the contractual capacity (or general lack thereof) of minors (*i.e.*, those under the age of 19):

When infants' contract enforceable

19. (1) Subject to this Part, a contract made by a person who was an infant at the time the contract was made is unenforceable against him or her unless it is

- (a) a contract specified under another enactment to be enforceable against an infant,
- (b) affirmed by the infant on his or her reaching the age of majority,
- (c) performed or partially performed by the infant within one year after his or her attaining the age of majority, or
- (d) not repudiated by the infant within one year after his or her reaching the age of majority.

(2) A contract that is unenforceable against an infant under subsection (1) is enforceable by an infant against an adult party to the contract to the same extent as if the infant were an adult at the time the contract was made.

Because of the general lack of enforceability of minors' contracts, as laid out above, court approval of a minor's contract can be important to any person contracting with children. However, in film and television production, the consequences of the minor's traditional ability to repudiate a performer's contract can be particularly disastrous: "the potential losses to a producer who is unable to bind a child performer could be enormous: the entire production may be rendered unexploitable if, for example, the minor played

a leading role".⁴ The importance of court approval is underscored by the fact that parental guarantees, permitted and enforceable under the *Infants Act*, may be of little value: "even if a parent can be held financially liable for the failure of the infant to perform the contract, it is not clear that the producer's goal of obtaining the necessary rights to exploit the production can be realized via this mechanism."⁵ Accordingly, court approval of a child performer's contract should arguably be pursued as a matter of course.

Under the *Infants Act*, parties to a contract with a minor can apply to either the British Columbia Supreme Court or the Public Guardian and Trustee (although practically, a grant of capacity will typically involve both)⁶ for an order that the minor in question be granted a limited capacity for a particular contract.

Generally speaking, the court will not make an order granting capacity (limited or otherwise) unless it is convinced that the contract in question is, overall, to the benefit of the minor.⁷ Unfortunately however, what is to the benefit of a minor is not always clear; there is a dearth of case law in this area, and particularly in British Columbia. This being said, the courts are likely to consider "a constellation of concerns",⁸ including, for example: the remuneration to the minor; other benefits such as access to an otherwise closed-off profession or career; whether any of the obligations on the minor are particularly onerous; and whether the sanctions for breach by the minor are unduly harsh. No one factor is determinative, and each case will turn on its own facts.

To this end, and to promote a view that a particular contract is for the benefit of a minor, there are some factors that a party might rely on in support of an order for capacity.

First, as alluded to above, review and endorsement by the Public Guardian and Trustee of the applicable contract prior to a petition to the Supreme Court is likely to give a court some comfort when considering an order of capacity. The Public Guardian and Trustee will usually engage in a rigorous analysis of a minor's contract prior to making any recommendations, and may seek out additional information from the party proposing the application or embark on its own investigation into the circumstances of the contract. Therefore a positive recommendation from the Trustee is likely to carry significant weight with the court.

Second, in British Columbia, most performers will be members of the Union of B.C. Performers, or even if not, it's most likely that a performer's contract will still be subject to the terms of the B.C. Master Production Agreement — the Collective Agreement binding the Union and pro-

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ducers in the province — regardless of Union membership. Among other things governing the terms of employment generally, the Master Production Agreement specifically incorporates the terms of the *Regulations* of the British Columbia *Employment Standards Act*⁹ as it relates to the hiring of children in the entertainment industry. These *Regulations* were developed by the provincial government to specifically address the concerns surrounding the employment of child performers, and set out the conditions of employment including hours of work, breaks, tutorials and chaperones. In addition, the *Regulations* impose a requirement that 25% of any earnings of a minor exceeding \$2,000 be remitted to the Public Guardian and Trustee to be held in trust until the child reaches the age of majority. Assuming that a minor's contract is subject to the provisions of the Master Production Agreement (and noting that the *Regulations* will apply in any event), a court is likely to be assured that as far as the conditions of employment go, the minor is appropriately protected.

Finally, whether the minor has sought independent legal and/or business advice may also militate in favour of an order of capacity.

All this said, parties seeking court-ordered capacity must be cognizant of both the court's and the Public Guardian and Trustee's roles in such applications. Arguably, these roles extend beyond that of adjudicating a matter between parties, and into the realm of the public interest. As mentioned earlier, minors, as a matter of public policy, require protection from both others and themselves. Accordingly, the courts, and the Public Guardian and Trustee, are likely to scrutinize any apparent deficiencies or particularly onerous terms in any minor's contract presented to them.

Therefore, parties to a minor's contract should give some consideration to what exactly they're asking a child performer to agree to, and whether the terms of the contract would be considered reasonable when viewed objectively. In addition, parties should ensure that the applicable employment contracts are drafted and executed in accordance with the law, and with ultimate judicial scrutiny in mind. Particularly, parties should refer to one of the basic tenets of employment law: the contract should be negotiated and executed *before* the minor commences work on a project. Furthermore, to fit within the framework of the *Infants Act*, the contract should be signed by the minor themselves. Parental or Talent Agent signature alone or alongside the child's on a performer's contract in no way

makes it binding on a child performer, and in fact, could make it more difficult to obtain an order of capacity for the minor under the *Infants Act*.¹⁰

Finally, the provisions of the *Infants Act* contemplate an order of capacity prior to the commencement of employment. Accordingly, court approval should be sought before the minor begins work. However, the court approval process can take anywhere from two to five months, depending on Trustee workload and administrative efficiencies. Accordingly, a pre-employment order may not be possible in every circumstance.

In summary, both the courts and the Public Guardian and Trustee in British Columbia take their respective roles as protector of the minor's interests seriously, and are unlikely to look favourably on contracts that do not adhere to at least the principles discussed above. Parties to a minor's contract in British Columbia should therefore take care to ensure, from the outset, that child performer contracts are prepared, executed, and administered with this ultimate scrutiny in mind.

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¹ British Columbia, Law Reform Commission, *Report on Minor's Contracts* (Vancouver: Law Reform Commission of British Columbia, 1976) ("Report").

² *Ibid.*

³ R.S.B.C. 1996, c. 233.

⁴ Bob Tarantino, "A Minor Conundrum: Contracting with Minors in Canada For Film and Television Producers" (2006), 29 *Hastings Com. & Ent. L.J.* 45.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ See, e.g., *Collins (Re)* (1991), 30 A.C.W.S. (3d) 185 (B.C.S.C.); *Hann-Byrd (Re)* (1992), 75 B.C.L.R. (2d) 65, 37 A.C.W.S. (3d) 200 (S.C.).

⁸ See Tarantino, *op. cit.*, footnote 4.

⁹ R.S.B.C. 1996, c. 113, and *Employment Standards Regulation*, B.C. Reg. 396/95.

¹⁰ Note that under s. 40 of the *Infants Act* a guardian can bind a minor to a contract, but only with approval of either of the Public Guardian and Trustee or the Court, depending on the sum of money involved. However, this section of the statute has not been typically used for employment contracts and its utility in this regard is therefore untested. In any event, the signature of the parent, guardian, or talent agent on the contract in no way dispenses with the need for judicial or trustee scrutiny under ss. 21 and 22.

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