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DECEMBER 2009

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**IS YOUR MASTER SERVICES AGREEMENT A PREVENIENT ARRANGEMENT UNDER THE ALBERTA BUILDERS' LIEN ACT?**

BY E. JANE SIDNELL

It makes sense that businesses would like to develop long term relationships with preferred contractors and suppliers, but do master service agreements and other long term arrangements have an effect on the parties rights and obligations under the *Builders' Lien Act*? The answer is that if an arrangement is a *prevenient arrangement* then:

- the party contracting for the work or service (an owner, general contractor or anyone else) will have a significantly increased exposure for holdback; and
- the party performing the work or providing the service or goods (typically the designer, contractor or supplier or their subcontractors) should not be paid out the holdback until the end of the whole arrangement – which can seriously and negatively affect cash flow.

The *Builders' Lien Act* bases the rights and obligations of the various parties on the contracts between them. This means, for example, that each contract will have its own lien fund for lien claimants. The common law has developed the concept of a prevenient arrangement. A prevenient arrangement arises where a single contract is deemed to cover a series of transactions. This means that the holdback amounts accumulate for the whole prevenient agreement and the period for filing a lien in relation to the first transaction is extended to the end of the applicable statutory period after the last transaction.

A prevenient arrangement was described in *Blue Range Resource Corp. (Re)*<sup>1</sup> by Justice Romaine as follows:

A prevenient arrangement is said to exist where there is a preliminary understanding between parties that they are entering into an ongoing relationship. This preliminary understanding does not have to be a binding contract or contain all the terms upon which materials or services are to be supplied, but it serves to link together what would otherwise appear to be a series of contracts into one continuing contract or open account ...<sup>2</sup>

<sup>1</sup> *Blue Range Resource Corp (Re)* (1999), 254 A.R. 103 (Q.B.)

<sup>2</sup> *Blue Range Resource Corp (Re)* (1999), 254 A.R. 103 (Q.B.) at page 105

It is a question of fact as to whether or not the services or work performed have been provided under separate or linked transactions.<sup>3</sup> Justice Romaine further stated that:

[T]he scope and extent of the work to be done further to the preliminary understanding must be determinable with a sufficient degree of certainty to constitute the "thread" that serves to link the subsequent supply of goods or services together.<sup>4</sup>

In his judgment in *Schlumberger Holdings (Bermuda) Ltd. v. Merit Energy Ltd.*<sup>5</sup>, Lovecchio J. determined that the burden of proof lies with the lien claimant and summarised the factors to be considered in establishing a prevenient arrangement as follows:

- a limited time frame
- a designated area of service
- a guarantee of specific amount of work or sales
- exclusivity between the parties or advance discussions of specific requirements<sup>6</sup>

Many owners and contractors negotiate master contracts or umbrella agreements to manage their relationships. These are over-arching agreements, the purpose of which is to establish a long-term business arrangements between the parties and to set out the terms and conditions that will apply to each transaction between the parties. Once a master contract or an umbrella agreement is negotiated, the owner can issue work orders, releases or authorizations to initiate the performance of specified work without renegotiating the terms and conditions each time.

If a master contract or an umbrella agreement exists, it opens the door to litigation from lien claimants arguing that a prevenient arrangement exists. While not a panacea, language such as the following may assist in establishing that a prevenient arrangement does not exist:

The parties agree that each Work Order will be an independent and separate contract from all other Work Orders, for all purposes, including, but not limited to, the application of the applicable lien legislation. In addition, this Master Contract does not create, nor will be deemed to create a prevenient arrangement or general contract between the Owner and the Contractor. The purpose of this Master Contract is to agree to certain terms that will govern the relationship between the Owner and the Contractor. However, each Work Order will set out the specific terms and conditions relating to the Work and will be a separate contract in relation to the law, including, but not limited to, the applicable lien legislation.

If a prevenient arrangement is found to exist, then it is worthwhile knowing the consequences of the arrangement from a *Builders' Lien Act* point of view. The holdback is typically paid out to the contractor 45 or 90 days<sup>7</sup> after the completion of the project. Where, for example, there are three projects that the contractor works on, there could be the following payments made:

<sup>3</sup> For a recent case in which a prevenient arrangement was found, see *Consun Contracting Ltd. v. Surmont Sand & Gravel Ltd.*, 2006 ABQB 164

<sup>4</sup> *Blue Range Resource Corp (Re)* (1999), 254 A.R. 103 (Q.B.) at page 106

<sup>5</sup> Paraphrased from *Schlumberger Holdings (Bermuda) Ltd. v. Merit Energy Ltd.* 2001 ABQB 34

<sup>6</sup> *Schlumberger Holdings (Bermuda) Ltd. v. Merit Energy Ltd.* 2001 ABQB 34, at para. 39

<sup>7</sup> In 2001, an amendment to the *BLA* increased the period for filing a lien against an "oil and gas well" or "oil and gas well site" to 90 days, although these terms are not defined.

Project 1 Completion March 1, 2009		Project 2 Completion June 1, 2009		Project 3 Completion September 1, 2009	
Contract Price	Holdback Paid on April 16, 2009	Contract Price	Holdback Paid on July 17, 2009	Contract Price	Holdback to be Paid on October 17, 2009
\$900,000	\$90,000	\$2,000,000	\$200,000	\$130,000	\$13,000

If the contractor becomes insolvent on October 1, 2009, then, if these projects are considered to be separate contracts, the holdback has been paid out on the first two projects and there are no issues with respect to those holdbacks. In relation to the third project, the owner has a \$13,000 holdback and that holdback, plus any amount owing under the contract, will form the lien fund and the lien claimants are entitled to the lien fund on a *pro rata* basis. The owner's liability is capped at the amount of the lien fund.<sup>8</sup>

If, however, a prevenient arrangement is established, then all of the work would be deemed to be under one contract and the holdback would be the sum of \$90,000 + \$200,000 + \$13,000, for a total of \$303,000. This would be the exposure of the owner to the lien claimants, plus the amount unpaid under any contract, notwithstanding that \$290,000 of the \$303,000 has already been paid out to the insolvent contractor.

When entering into long term relationships, contracting parties should be aware of the effect of the *Builders' Lien Act* on their arrangements and, where possible, should be proactively making their intent regarding those relations known before the contract is tested.

<sup>8</sup> See section 25 of the *Builders' Lien Act*:

**Liability of owner**

25 An owner is not liable under this Act for more than

- (a) the total of the major lien fund and the minor lien fund, or
- (b) the major lien fund, where a minor lien fund does not arise under section 23.

## WHAT MAKES STANDARD TERMS AND CONDITIONS ENFORCEABLE?

BY CHRISTOPHER KNIGHT

The enforcement of Standard Terms and Conditions is important, especially when involving “limitation” and “exclusion” clauses that mitigate the risks of doing business. A volume-based equipment vendor, for example, will rarely be in a position to sell at competitive rates unless its liability is contractually limited. It is often Standard Terms and Conditions that accomplish this goal, but even given their importance, Standard Terms and Conditions can often be overlooked by contracting parties as mere “boilerplate” or “legalese”. Likewise, when multiple parties to a contract come to the table with competing Standard Terms and Conditions, it can often be unclear as to whose terms and conditions are actually included in the final contracts. With these difficulties in mind it is useful to consider how the courts view the enforcement of Standard Terms and Conditions.

At the most basic level, an enforceable contract requires (i) a “meeting of the minds” laying out the agreement between parties, and (ii) the exchange of “valuable consideration” between parties to secure the bargain that has been struck. Absent these elements, courts are generally unable to enforce an agreement. When it comes to Standard Terms and Conditions, however, do the courts require that a “meeting of the minds” involve a detailed review of each and every provision printed as small text at the bottom and reverse of standard forms? What view do the courts take when a party does not actually read Standard Terms and Conditions?

The short answer is that – generally speaking – two elements are required by the courts before they will enforce Standard Terms and Conditions: **Notice** and **Incorporation**. A contracting party must, first, have notice of Standard Terms and Conditions before the contract is entered into and, second, Standard Terms and Conditions must be properly incorporated into the contract itself. This newsletter explores the court’s view of the first of these two elements.

### Part 1: Notice

It would prove to be too cumbersome if, in the course of everyday business, each and every Standard Term and Condition had to be individually reviewed by all parties to a contract before a “meeting of the minds” could be said to have occurred. It would simply be too onerous, for example, if each and every sale of a standard piece of equipment involved a detailed discussion of all of the Standard Terms and Conditions between vendor and purchaser. On the other hand, because Standard Terms and Conditions often contain “limitation” and “exclusion” provisions that may prove to be particularly onerous for a contracting party, it would be unjust for the courts to enforce Standard Terms and Conditions automatically and without exception. As a result, the courts have taken a pragmatic approach to enforcement. Rather than requiring that contracting parties must actually turn their minds to each and every term in a contract, the courts have taken the view that a contract can be enforced so long as a party has **prior notice** of the Standard Terms and Conditions incorporated therein. As Professor G.H.L. Fridman<sup>1</sup> warns, however:

Unless a party has taken reasonable steps to draw the other party’s attention to the contents, or some particular contents, of the proposed contract, the consent of the offeree to the offer will not be taken to extend as far as the term or terms of which the offeree is ignorant. The test is whether the offeree knew the proposed term or terms or had reasonable means of knowledge of the term or terms as a result of the offeror’s actions.

In other words, for Standard Terms and Conditions to be enforceable, steps must be taken to ensure that the other party has “reasonable means of knowledge” of the terms and conditions during the time leading up to the execution of the contract. This has implications when Standard Terms and Conditions are sent and received in the typical course of day-to-day operations, and particularly when printed in small type at the bottom or reverse side of a form. Such a situation was considered by the courts in *Finning v. BHP*

<sup>1</sup> G.H.L. Fridman, *The Law Of Contract*, 4th ed. (Toronto: Carswell, 1999) at 610.

*Diamonds Inc.*<sup>2</sup> In this case, important terms and conditions (including a limitation clause) were found on the reverse side of a series of “Daily Field Service Activity Reports” issued in relation to work completed under an overarching retainer agreement. As Justice Schuler stated:

[Finning] argues that the Activity Report was like an offer made by Finning which BHP accepted without objection and the contents of which therefore bind BHP. The difficulty with this argument is that the evidence indicates that the Activity Reports were not tendered to BHP until after the work was done. Whether the limitation clause is effective surely must depend (at least in part) on whether BHP had notice of its existence prior to the work done by [Finning]. ... In this case, it would appear that the work done by [Finning] was done under the main retainer agreement and the Activity Report submitted only after its completion.

As a result, Justice Schuler found that the parties did not have a “meeting of the minds” with respect to the limitation clause found on the reverse of the Activity Reports; the terms and conditions were **not** found to form a part of the contract between the parties. By the same token, however, Justice Schuler of the NWT Supreme Court said that:

[T]his case bears more similarity to the ticket cases than it does, for example, to *Eagle Dancer Enterprises Ltd. v. Southam Printing Ltd.*<sup>3</sup> In *Eagle Dancer*, the limitation clause was contained in the original purchase order or quotation which the plaintiff had accepted and the clause was therefore found to form part of the contract between the parties.

Accordingly, Justice Schuler’s decision in *Finning* endorses the view that knowledge of terms and conditions on the back of a document, where the document was submitted **prior** to the formation of a contract, is sufficient to establish that those terms and conditions form a part of an overall contract. In the *Eagle Dancer* case, Justice MacDonnell of the B.C. Supreme Court found that an experienced businessman familiar with an industry practice of including terms and conditions on the reverse side of quotation forms was bound by those terms and conditions even though he may not have explicitly read them. In this sense, the courts deem knowledge of terms and conditions to exist on a very low threshold. In other words, the courts will accept that notice of Standard Terms and Conditions has been given, even if the notice is not explicit or dramatic.

Care should be taken, however, when dealing with consumers, as the courts are inclined to take a more restricted view when non-commercial parties are involved. In consumer contracts, courts are more likely to look beyond express words to interpret a contract to the favour of the consumer. Such was the case in the leading decision in *Tilden Rent-A-Car Co. v. Clendenning*.<sup>4</sup> In that case, a consumer who signed a car rental agreement in a hurry was not bound by an onerous standard term excluding insurance coverage. There, because the term was not explicitly brought to the attention of the consumer, it did not apply.

When dealing with contracts between commercial parties, however, the words of a contract are normally given effect by the courts on the presumption that the parties have agreed to the actual words that appear in the contract documents. For example, in *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*,<sup>5</sup> even though the facts were similar to the *Tilden* case, the outcome was opposite. As Justice Robins of the Ontario Court of Appeal stated:

This is an ordinary commercial contract between business people ... In this commercial setting, in the absence of fraud or other improper conduct inducing the plaintiff to enter the contract, the onus must rest upon the plaintiff to review the document and satisfy itself of its advantages and disadvantages before signing it. There is no justification for shifting the plaintiff’s responsibility to act with elementary prudence onto the defendant.

<sup>2</sup> (1999), 46 C.L.R. (2d) 101 (N.T. S.C.)

<sup>3</sup> (1992), 6 B.L.R. (2d) 45 (B.C. S.C.)

<sup>4</sup> (1978), 83 D.L.R. (3d) 400 (Ont. C.A.)

<sup>5</sup> [1997] 148 D.L.R. (4th) 496 (Ont. C.A.)

In other words, in an ordinary commercial contract it is the responsibility of the business people making the agreement to review any Standard Terms and Conditions that they have been given notice of. The courts will take a dim view of such parties to a contract who thereafter claim ignorance of the terms, and will generally enforce a contract against such a party. Accordingly, in order for Standard Terms and Conditions to be enforceable, notice of those terms and conditions must be given by way of a “reasonable means of knowledge” for the contracting parties. This notice must be provided prior to the formation of the contract if the courts are to enforce an agreement. Care should be taken when dealing with consumer contracts, especially where particularly onerous terms are not brought to the explicit attention of a consumer. According to the courts, in an ordinary commercial context Standard Terms and Conditions are generally enforceable on the presumption that contracting parties have agreed to the actual words that appear in the contract documents.

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