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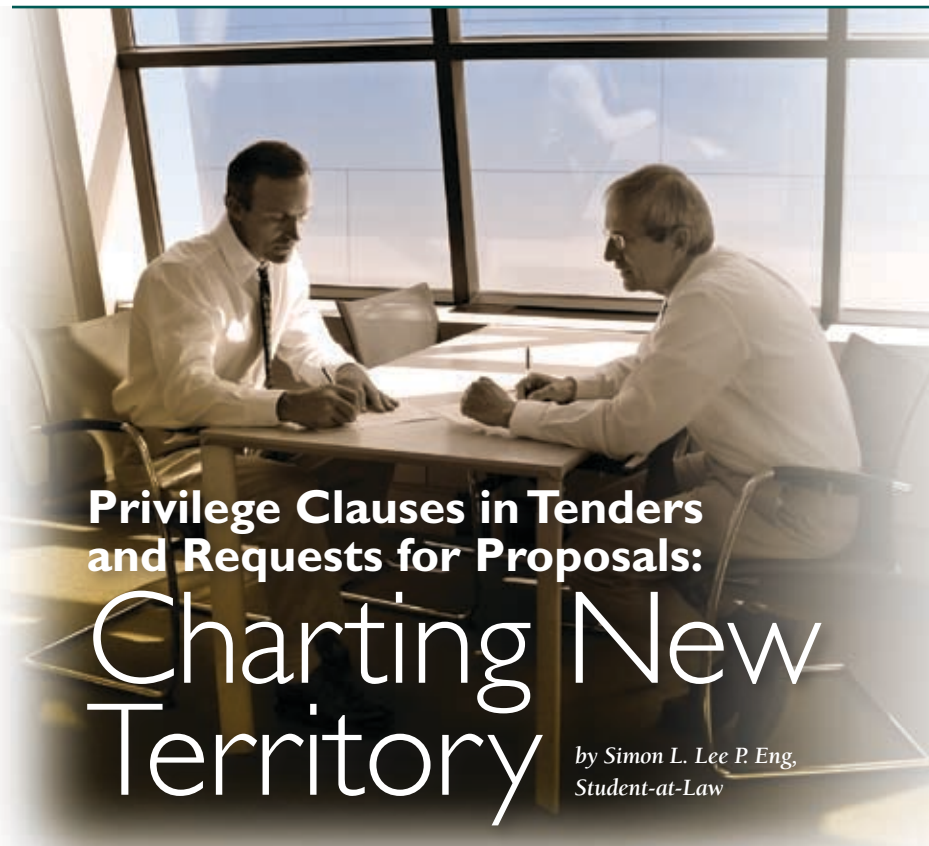
# FROM THE GROUND UP

DECEMBER 2006

## BACKGROUND

Prior to the landmark 1981 case of *R. v. Ron Engineering and Construction (Eastern) Ltd.*,<sup>1</sup> (“**Ron Engineering**”) it was thought that there was no contractual relationship between an Owner and a Bidder during a tendering process. Consequently Owners had a great deal of freedom in the way they assessed tenders and awarded contracts. In *Ron Engineering*, the Supreme Court of Canada changed this and found that an Owner is subject to contractual duties that arise when a contractor submits a bid, regardless of whether that contractor is subsequently retained to perform the work. Later cases have shown that, *without further qualification by the owner*, an owner can only accept the lowest bid and must reject non-compliant or qualified bids. Additionally, an owner owes a duty to treat all parties equally and fairly, and cannot use undisclosed criteria to assess bids, or consider late bids or negotiate with one contractor prior to entering into the construction contract.

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## Privilege Clauses in Tenders and Requests for Proposals: Charting New Territory

by Simon L. Lee P. Eng,  
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In reaction to *Ron Engineering* and later cases, owners have attempted, with great success, to restrict these obligations as much as possible by using ‘privilege clauses’. These are clauses in the tender documents that remove the Owner’s duties mentioned above and grant the Owner as much freedom as possible to select tenders. For instance, one typical privilege clause may read:

The Owner reserves the right to reject any and all tenders, and the lowest or any tender will not necessarily be accepted.<sup>2</sup>

The Supreme Court of Canada (“SCC”) addressed privilege clauses in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*<sup>3</sup>. Here, the tender call required that bidders submit one unconditional lump-sum price for the work. The tender documents also included a privilege clause stating that the lowest or any tender would not necessarily be accepted. The Owner subsequently awarded the work to a bid that was qualified by stating that some of the costs may be increased if certain conditions were encountered at the job site. The second lowest tender brought an action for breach of contract claiming that the qualification made the winning bid non-compliant and the Owner could not accept it. The SCC agreed, finding that the privilege clause was valid and allowing the owner to award other than to the lowest bidder. However, the SCC did not override the Owner’s obligation to accept only compliant bids. In other words, the SCC acknowledged that privilege clauses are legally valid if worded correctly, but effectively cautioned that the privilege clauses will be construed narrowly.

## SUBSEQUENT DEVELOPMENTS

Other cases have both extended and filled in details of how owners can use privilege clauses to manage their risk in the tendering process.

In *Martel Building Ltd. v. R.*<sup>4</sup> the SCC found that all other things being equal, the Owner owed a duty of fairness to all bidders entering into the tendering process. This was described as “a duty to treat all bidders fairly and equally, but still with due regard to the contractual terms indicated in the tender call”. However, the SCC also indicated that an appropriately worded privilege clause can exclude even this duty; the SCC stating that

the tender documents “...must be examined closely to determine the full extent of the obligation of fair and equal treatment... such a duty [of fairness] must be defined with due consideration to the express contractual terms of the tender”. Therefore, there is an argument to be made that even this duty can be explicitly negated with a suitably worded privilege clause. Similarly, courts have upheld privilege clauses stating that the Owner can accept the tender that was “most favourable to the interests of the [Owner]” and award the work to “the tender that will give the greatest value based on quality, service and price”<sup>5</sup>. In this case, however, the Court emphasised the owner still needs to use “relevant and reasonable criteria” and assess the bids in good faith.

Similarly, in the recent case of *NAC Constructors Ltd. v. Alberta Capital Region Wastewater Commission*<sup>6</sup>, the Alberta Court of Appeal (“ACA”) upheld an Owner’s right to accept a materially non-compliant bid by using a privilege clause that stated that the Owner could accept a ‘non compliant or conditional’ tender. The ACA stated that there is no inviolable law that prohibits the parties from agreeing an owner can accept a non-compliant bid as the parties are free to contract on any terms they wish. However, it was still required that any clause be interpreted narrowly and that any clause make it ‘abundantly clear’ that non-compliant bids will be accepted. Also, the decision to accept a non-compliant bid must be made objectively and be based on the strict wording of the privilege clause.

A problematic use of a privilege clause arises in circumstances where an owner attempts to reserve the right to negotiate with a tenderer after submission of the bid but prior to entering into the construction contract. This was considered in *Midwest Management (1987) Ltd. v. B.C. Gas Utility Ltd.*<sup>7</sup>, where the tender documents contained the following privilege clause:

Should the OWNER not receive any tender satisfactory to the OWNER in its sole and absolute discretion, the OWNER reserves the right to re-tender the Project, or negotiate a contract for the whole or any part of the Project with any one or more persons whatsoever, including one or more of the Tenderers [emphasis added]

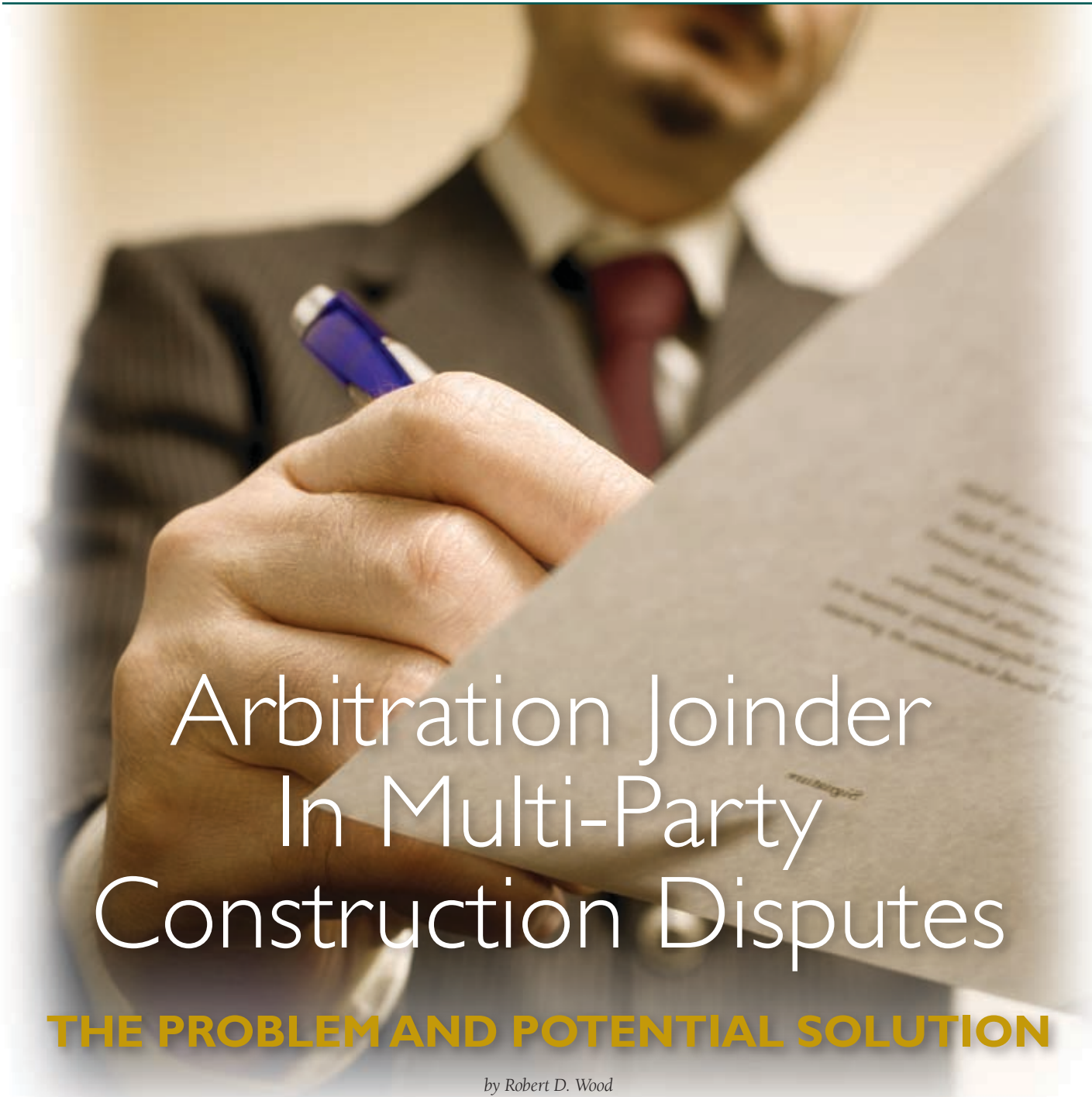
The British Columbia Court of Appeal (“BCCA”) does not directly consider this privilege clause, but appears to implicitly accept it as valid. However, this appears problematic. If it is mutually acknowledged on submission of a bid that the terms of the bid and the construction contract may subsequently be negotiated, it is quite a different bid process than that contemplated by *Ron Engineering*. Therefore, while a privilege clause allowing negotiation has been accepted in passing by the BCCA, the outcome of litigation where this matter is addressed squarely by a court is far from certain.

## CONCLUSION

In summary, courts have upheld a range of privilege clauses that allow the owner significant freedom in assessing bids and awarding work to contractors. However, while courts will generally uphold privilege clauses, they will interpret them strictly, such that it is important that Owners ensure the privilege clauses are as clear, detailed and unambiguous as possible. Further, while courts may be willing to uphold clearly worded, unambiguous privilege clauses, it is not clear from available cases to what extent courts will balance this with the requirement for fairness and equity in the bidding process. Hence, the best practice for Owners is to assess and award bids in as objective, fair and reasonable a manner as possible. This process can be aided by specifying exactly which criteria will be considered when assessing the bids. The use of an objective ‘scoring system’ is often useful in this regard. In reality, courts consider privilege clauses but will also try to cure any unfairness they see in the process. Reconciling these two principles is often difficult and further case law is required to more clearly resolve this tension.

## Footnotes

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- <sup>1</sup>[1981] 1 S.C.R. 111 (SCC)  
<sup>2</sup>Discussed and upheld in *Elgin Construction Ltd. v. Russel Township* (1987), 24 C.L.R. 253 (Ont. HC)  
<sup>3</sup>[1999] 1 S.C.R. 619 (SCC)  
<sup>4</sup>[2000] 2 S.C.R. 860 (SCC),  
<sup>5</sup>*Sound Contracting Ltd. v. Nanaimo (City)*, [2000] 5 W.W.R. 545 (C.A.)  
<sup>6</sup>[2005] A.J. No. 847 (Q.B.), affirmed on appeal [2005] A.J. No. 1581 (C.A.), leave to appeal application pending  
<sup>7</sup>5 C.L.R. (3d) 140 (BCCA)



# Arbitration Joinder In Multi-Party Construction Disputes

## THE PROBLEM AND POTENTIAL SOLUTION

*by Robert D. Wood*

**C**onstruction contracts (including those containing standard provisions such as CCDC-2) frequently contain mandatory arbitration provisions, requiring parties to submit disputes to binding arbitration. While that mechanism works satisfactorily when the dispute is only between the two parties to the contract, it can easily break down when there are more than those two parties who are potentially responsible for the matters in dispute.

### CONSIDER THE FOLLOWING SITUATION:

Owner hires Contractor to build a project, using a CCDC standard form contract containing mandatory arbitration provisions. Contractor contracts with Sub-Trade to perform a portion of the work, also using a CCDC standard form of contract including mandatory arbitration provisions. Construction of the project is delayed and Owner seeks to recover its losses from Contractor. Owner issues Notice to Arbitrate. Contractor blames Sub-Trade

for the delays and seeks to be indemnified by sub-trade to the extent that the Contractor is responsible to Owner. Ordinarily, Contractor would want to have both related issues dealt with as part of the same proceeding.

Unfortunately, the CCDC arbitration provisions do not provide a mechanism for the Contractor to require the Sub-trade and Owner to participate in the same arbitration, leaving the Contractor in the unenviable position of having to proceed in separate parallel proceedings. Apart from the increased costs, the Contractor runs the risk of the two proceedings producing different results.

One might expect that Alberta's *Arbitration Act* might assist the contractor in these circumstances. Unfortunately, based on the few cases decided on this point, it appears not. In *Western Oil Sands Inc. v. Allianz Insurance Co. of Canada*<sup>1</sup>, the Plaintiff sought to have two arbitrations consolidated under Section 8 of either the *International Commercial Arbitration Act* or the *Arbitration Act* (there was some debate over which Act applied). The Court concluded that the legislation specifically provided for consolidation of arbitration proceedings, but **only** on the consent of **all** parties to the arbitration proceedings. The Court further ruled that the specific legislative provisions ousted the Court's otherwise inherent jurisdiction to prevent a multiplicity of proceedings. In the result, it may well be that a single uncooperative or difficult party can prevent consolidation of arbitration proceedings by refusing to consent.

In a more recent case, Justice Romaine denied a general contractor's application for an Order compelling the owner to arbitrate. In that case, the owner had sought to involve one of its consultant's, (its architect) in the arbitration, and the architect had refused. Justice Romaine declined to grant the order and instead ordered that the matters proceed by way of litigation, in which the owner has procedural rights to compel the architect's participation in the lawsuit.<sup>2</sup>

So, what can a party to a construction contract do to ensure that multi-party disputes can be arbitrated under one umbrella proceeding?

A recent case out of the UK offers some hope. In *City & General (Holborn) Limited v. AYH Plc*<sup>3</sup>, the owner (C&G) applied for an order requiring its project manager (AYH) to participate in an existing arbitration that C&G had with its main contractor. The contract between C&G and AYH included a provision that where the dispute to be referred to arbitration raised issues:

...which are substantially the same as or are connected with issues raised in related disputes between either party... and any other person... the dispute [under that agreement] shall be referred to the arbitrator appointed to determine the related dispute.

The UK Court ordered AYH to participate in the existing arbitration involving the general contractor. In doing so, the Court held that the fact that not all of the issues in the disputes between owner and project manager on the one hand, and owner and general contractor on the other, were the same was not fatal to the application—it was sufficient that a material portion of the issues were the same.

Of course, the key to that decision was the contractual provision requiring joinder of arbitration in "related disputes". Parties entering construction contracts may want to consider whether such a joinder clause is appropriate in their circumstances, particularly where it is likely that multiple contractors or sub-contracts will be involved.

#### Footnotes

<sup>1</sup> *Western Oil Sands Inc. v. Allianz Insurance Co. of Canada*, (2004) ABQB 79

<sup>2</sup> Memorandum of Decision of Romaine, J. in *Man-Shield (Alta.)*

*Constructions Inc. v. Calgary Board of Education*, (2006) ABQB 713

<sup>3</sup> *City & General (Holborn) Limited v. AYH Plc.*, [2005] EWHC 2494

## What We've Been Up To

Arnie Olyan is the current Chair of the Southern Alberta Construction Subsection of the Canadian Bar Association ("CBA").

Donald Chernichen was a guest speaker on the topic "Contractual Risk Allocation Strategies" at the Western Canadian Construction Update Conference held in Calgary, Sept. 12-14, 2006 and presented the same topic at the Southern Alberta Construction Subsection of the CBA, Nov. 20, 2006.

During the summer of 2006, John Taylor and Arnie Olyan led four lunch seminars with the commercial and legal teams of one of their clients on the topic of "Recent Contracting Trends, Issues and Possible Solutions in the Management of Risk and the Importance of Warranty Provisions in Construction Contracts".

John Taylor and Arnie Olyan will be speaking on Nov. 24th, 2006 to a Joint Meeting of the Southern Alberta Natural Resources and Construction subsections of the CBA on the subject of "The EPC Contract: Owner and Contractor Perspectives".

David Strand will be speaking on Builder's Liens on Dec. 12, 2006 at a one day Loram seminar "The Fundamentals of Construction Contracts in Alberta".

# Managing Contaminated Sites

## AN UPDATE

by Patricia Quinton-Campbell

As part of its Contaminated Sites Management Systems Project, Alberta Environment (“AENV”) has undertaken a number of related initiatives designed to enhance its management of contaminated sites. These include the petroleum storage tank program, the introduction of remediation certificates and the development of new remediation guidelines.

As a first step in the process, AENV announced in May 2006, that effective June 9, 2006, all petroleum tank environmental site assessment reports would be required to be signed by a member of the Association of Professional Engineers, Geologists, and Geophysicists of Alberta (APEGGA) before being submitted to AENV. That announcement indicated that a professional APEGGA member was required to oversee reporting, management and cleanup of all petroleum storage tank sites. It also announced the introduction of remediation certificates for petroleum storage tanks in the fall of 2006.

In support of those initiatives AENV developed two new guidelines for contaminated sites:

- i. Draft Tier 1 Soil and Groundwater Remediation Guidelines (2006) (the “Tier 1 Guidelines); and
- ii. Draft Development and Application of Tier 2 Remediation Guidelines in Alberta (2006) (the “Tier 2 Guidelines”)

AENV invited the public to provide comments on the two draft guidelines and are currently reviewing the comments received.

Although the Draft Guidelines were first developed for the petroleum storage tank program, the Tier 1 Guidelines are generic guidelines. AENV has advised that they are intended to provide a single comprehensive source of Tier 1 soil and groundwater remediation guidelines for use in Alberta.



Similarly, AENV has produced the Tier II Guidelines with the intention of providing stakeholders with information on the process of deriving a site-specific remediation endpoint that is still protective of health and the environment.

Since May 2006 AENV has revised the time frame for the implementation of remediation certificates for petroleum storage tank sites to early 2007 and has advised that these remediation certificates will be issued for specific areas, depths and substances. The remediation certificates are intended to provide regulatory closure after a limited period of liability. AENV anticipates that such closure will provide an incentive to remediate contaminated petroleum storage tank sites. The limited period of liability has not yet been determined.

While no time period has been identified, AENV has advised that remediation certificates for all upstream oil and gas sites are expected to be introduced later in 2007.

As part of the remediation certificate program, AENV, together with Sustainable Resource Development and the Alberta Energy and Utilities Board, have been reviewing the inclusion of the concept of professional, or specialist, sign-off. This new framework will shift the assurance of environment clean-up work from the government to the private sector. As a result, six professional regulatory organizations have developed a joint practice standard to address that specialist sign off. The six organizations are: APEGGA, the Alberta Institute of Agrologists, the Alberta Society of Professional Biologists, the Association of the Chemical Profession of Alberta, the College of Alberta Professional Foresters and the College of Alberta Professional Forest Technologists. This joint practice standard is intended to define the professional and ethical responsibilities of professional members in the completion and assurance of reclamation and remediation work in Alberta. The draft standard has been circulated for review to members of each association and is available online at [www.appega.org](http://www.appega.org).

# Letter of Intent

## A Binding Agreement or Not?

by Candice J. Jones

Does this sound familiar? A construction contract has been in negotiation for months with a fast approaching deadline for commencement of preparatory site work. The parties seem to be in substantial agreement, so a Letter of Intent is executed, assuming a formal contract will follow shortly. Months pass but the contract never materializes while the work proceeds. Then problems arise. What is the effect of the Letter of Intent? And how might these problems have been avoided?

### LETTERS OF INTENT

Letters of Intent, or LOI's, are commonly used in the construction industry to get preliminary work started prior to the execution of a formal contract. At this early stage, the parties have reached some level of comfort with each other and an initial understanding to enable the preliminary work to begin while the final contract details are worked out.

Fundamental to this arrangement is the expectation of a more thorough and detailed formal contract coming into existence at a later time, which will govern the relationship between the parties. The LOI is thus an interim measure. However, in many instances, the formal contract is never completed, leaving only the LOI to govern the relationship of the parties.

### BINDING AGREEMENT OR NOT?

The law is clear that an "agreement to agree" is not enforceable. But has the LOI crossed the line from being a mere agreement to agree, to being a binding agreement? In the absence of the originally anticipated formal contract, there are two primary considerations to determine whether an LOI constitutes a binding agreement: certainty of terms and intention of the parties.

If an LOI sets out all of the essential terms of the relationship between the parties, a binding agreement will be created and the terms of the agreement are said to be certain. The mere fact that the LOI anticipates that these agreed terms will be incorporated into a subsequent formal document will *not* affect the enforceable nature of the LOI.

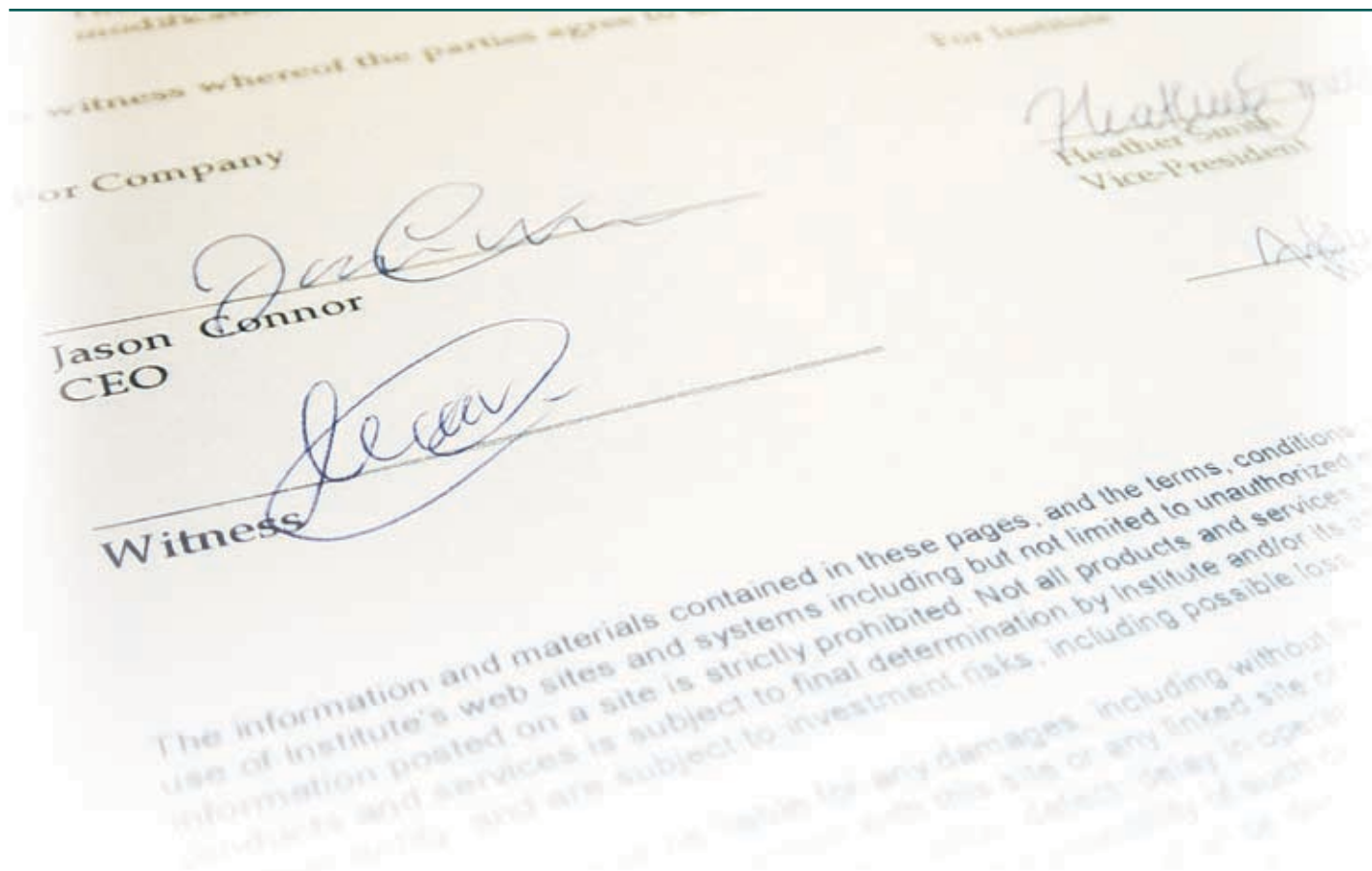
For example, the essential terms of a binding construction contract may be as simple as identifying the parties, providing a basic description of the work to be performed and including some reference to compensation. Details such as *how* the obligations under the agreement will be performed or details concerning price or payment may *not* necessarily be considered essential terms, particularly where the parties have made reference to a standard form contract or are prepared to rely on the "standard practice" in the industry.

However, where essential terms are still to be negotiated, a binding agreement will not be formed. What constitute essential terms will be heavily dependent on the particular circumstances of the construction contract in question.

Likewise, the intention of the parties will be fact specific. What the parties had intended by their execution of the LOI will be determined by various factors, including the specific language of the LOI. Is there unconditional acceptance of the terms of the LOI, or is there some prerequisite prior to the parties' obligations arising? For example, the LOI may be "subject to the execution of a formal agreement to be mutually agreed upon", which indicates an intention not to be bound by the



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LOI. Another factor that a court may consider is the subsequent conduct of the parties. Rendering services in reliance upon the LOI with reciprocal acceptance of such services indicates an intention by the parties to be bound by the LOI. Another consideration may be the application or expectation of behaviour in accordance with industry “norms” or standard practice. No one factor is definitive. Rather, all the factors will be given consideration in determining the parties’ intention.

Even when the parties have agreed to the essential terms, if the parties do not intend to create enforceable obligations, they need only say so specifically and the LOI should not create a binding agreement. Then again, if the rationale for the LOI is to allow preliminary work to commence, the parties must have a mutual intention to be bound by its terms, at least with respect to the preliminary work. So how can these potentially opposite outcomes be sorted out in advance?

#### TIPS

The most effective way to avoid later confusion, uncertainty and unintended consequences is to ensure the LOI includes (i) specific limits on the scope of the work, (ii) a maximum expenditure amount, and (iii) a deadline for completion of the formal contract. Among other things, this will delineate the particular work authorized by the LOI from the larger project, which should be the subject of the formal contract.

### Ensuring the LOI includes the necessary limitations and specifications will go a long way in preventing or minimizing possible problems down the road.

Language might also be incorporated that clearly indicates that the LOI is not intended to create binding relations, except in respect of the specific work described. The LOI might state that it is subject to the execution of a formal contract, the approval of senior management or shareholders or regulatory approval. Other examples of limitations would include any of the following:

- ▶ “Without in any way committing Company X prior to execution of a formal contract,...
- ▶ “In the event the parties are unable to conclude a formal agreement by [date], they shall have no further obligations to one another except as set out herein.”
- ▶ “Company X hereby authorizes Company Y to proceed with the Work [as specifically described] on the understanding that compensation for such work shall not exceed [maximum cost allowance].”

#### CONCLUSION

There is clearly a risk in rushing to sign an LOI without focussing on its intention and without addressing the ramifications of its wording. Ensuring the LOI includes the necessary limitations and specifications will go a long way in preventing or minimizing possible problems down the road.

A recent Alberta case, *Husky Oil Operations Ltd. v. Leducor Industries Ltd.*, 2006 ABCA 122, reflects the dangers in orally amending a written contract. In hearing this case, the Court of Appeal commented as follows at para.1:

This appeal arises because two major sophisticated companies, Husky Oil Operations Ltd. (“Husky”) and Leducor Industries Ltd. (“Leducor”) made major changes to a multi-million dollar contract and failed to document those changes. Not surprisingly, the parties reached different conclusions about the nature of their new agreement.

In 1998, Husky retained Leducor to build a 62 km sour gas pipeline near Rocky Mountain House, Alberta. The basis of payment was a lump sum of \$14 million, with an agreed completion date of March 31, 1998. The original contract was 160 pages long.

From the outset, the project experienced significant problems. Several changes to the scope were made. The project start-up was delayed due to a delay in receiving construction permits. These permits contained unforeseen conditions that required three river crossings to be directionally drilled. Additionally, the mechanised technique selected to weld the pipe could not meet the stringent weld specification required by Husky under the contract. A large number of welds were failing inspection and had to be repaired or replaced at Leducor’s expense.

In the words of the Appellate Court, “a great deal of frustration ensued”. Husky was faced with an ever-increasing force account and Leducor was becoming increasingly concerned with their ability to complete the work within the lump-sum budget. Because of these issues, the parties mutually agreed to amend the terms of the contract, changing it from the original lump sum basis of payment to a cost-plus contract with a 12% mark-up. Unfortunately, the revised agreement did not address several key items. In particular, it did not address which party was now responsible for the cost of repairing the welds that had failed inspection. Additionally, the parties did not put their new agreement in writing and not surprisingly, had different understandings of its terms. Leducor was under the impression it was no longer

## ORAL AMENDMENTS TO A CONTRACT

# A Risky Business

by Simon L. Lee, P. Eng., Student-at-Law

**While commercial parties often put a great deal of effort and expense into negotiating the initial construction contract, they are often less disciplined in their approach to recording amendments to the contract.**

obliged to repair the welds that had failed inspection, or to complete the project by the deadline. Husky believed that the only change to the contract was to the basis of payment.

In February 1998, with the March 31st deadline approaching and with the project behind schedule, Leducor realised it could not remain on site after the deadline for reasons related to its collective labour agreement. Husky agreed to write a letter asking Leducor to leave the site by March 31st. Leducor demobilised, leaving considerable work still to be completed. The pipeline was not completed, and many welds still required repair. Husky retained another contractor, and the project was finished in late May 1998.

Leducor invoiced Husky \$18 million for work completed prior to leaving the project. Husky paid \$11.5 million as the undisputed part of the invoice but refused to pay the balance and sued Leducor for \$10 million for breach of contract.

Husky claimed the cost of repairing the welds that failed inspection, as the *original* contract indicated that the contractor was responsible for these costs. Husky also claimed for ‘consequential costs’ incurred by Leducor failing to complete the project by the original deadline of March 31st. These costs included the new contractor’s mobilisation and demobilisation costs.

Leducor counterclaimed for their unpaid invoices of \$6.5 million and an additional \$5 million in punitive damages. It took the position that the original contract had been “vacated”. Leducor argued the new agreement was for an open-ended cost-plus contract that entitled it to the cost of making repairs to the welds that failed to meet specification, and that it was not obliged to complete the project at all.

At trial (*Husky Operations Ltd. v. Leducor Industries Ltd.*, 2003 ABQB 751), it was found on the facts that the original contract had not been vacated. Leducor was still required to make good the welds that failed inspection. However, two important terms of the original contract were amended. The basis of payment was changed to a cost-plus basis of payment and the requirement for completion by March 31st was also removed. In light of these findings, the Court allowed the claim, awarding Husky the costs of having another contractor repair the failed welds.

Leducor appealed, arguing that because the trial judge found that Husky had agreed to Leducor leaving the project and the original

completion date had been removed, the trial judge could not then award damages for the additional costs to complete the project. The Alberta Court of Appeal agreed.

The Court of Appeal summarised the amended contract as follows at para. 43:

In summary, the parties were left with a contract without a set cost, an expected date of completion, or even a requirement that the contractor complete the project. It is as though Husky had simply said to Ledcor, “Help us build a pipeline. We will pay you for work done. Work as long as you think that you are able.” *Ledcor was no longer required to supply a finished pipeline, built to specification, nor was it responsible for any costs arising from delay caused by the need to make repairs.* While it still had to attempt to weld to specification, for as long as it remained on site, Ledcor’s only contractual obligation, should those welds be found deficient, was to repair or replace them at its expense—a commitment to which it was still bound under the specific terms of the amended agreement. When Ledcor left the project it remained responsible for the cost of repairing any defective welds that it left behind. *[Emphasis added].*

In conclusion, this litigation resulted because two parties spent a significant length of time negotiating a lengthy contract but then subsequently varied fundamental terms orally, without revising the written agreement, and without a common understanding of the new terms.

While commercial parties often put a great deal of effort and expense into negotiating the initial construction contract, they are often less disciplined in their approach to recording amendments to the contract. This is compounded by the fact that these changes are often made under the pressure of severe time constraints and in field conditions. As shown by this case, apparently minor amendments to a contract may have widespread consequences that were not foreseen at the time. For this reason, it is essential for a construction project to have appropriate procedures in place to amend contracts in a controlled



manner. Part of this process should be the education of employees as to the unintentional consequences that may be triggered by informally amending a contract. While the traditional approach of “doing business on a handshake” is admirable, it sometimes fails to recognise the potential complexity of modern construction contracts.

Equally importantly, this case shows how the process of reducing an agreement to writing is a vital project management tool

that ensures mutual understanding of the requirements of the contract. In this case, if the proposed amendments were captured in a written document that the parties then had to review before executing, they would have quickly identified their differences of opinion as to the new terms. In other words, a contract serves not only as a statement of strict legal rights and obligations, but as a way of ensuring a mutual understanding of the practical scope of the contract.



# BD&P's Construction Team

**B**D&P's Construction Team is comprised of 15 dynamic litigators and solicitors who offer full service representation in all facets of the construction industry.

Our Team represents owners, contractors, sub-contractors, engineering firms, developers, banks, and other financial institutions on a wide-range of construction issues ranging from the straight forward to the complex. We review, negotiate and prepare terms and conditions and other documentation for varied construction and engineering projects; provide practical, timely and expert legal support throughout the construction process; and provide experienced litigation services when required.

BD&P's Construction Team represents a diverse range of client interests from those of small local contractors to developers of large-scale energy and infrastructure projects. Whether our clients require the review of a contract, the arbitration of a construction dispute, or the coordination and preparation of the multi-faceted and complex series of transactions demanded by a major project, BD&P is able to provide the individual lawyer or assemble a team with the appropriate depth and experience.

For your easy reference, we highlight both our Significant Areas of Service and examples of Major Projects in which either individual firm lawyers or the firm were involved, which include some of the largest projects carried out in Canada.

## SIGNIFICANT AREAS OF SERVICE:

- Negotiation and preparation of tender packages and joint venture, confidentiality, consulting, engineering services, and architectural services agreements
- Negotiation and preparation of construction, construction management, sub-contract, supply and mining services agreements
- Negotiation and preparation of Engineering, Procurement, & Construction (EPC) and design/build contracts
- Negotiation and preparation of Engineering, Procurement, & Construction Management (EPCM) contracts
- Delay claims
- Industrial design disputes

- Construction and contract disputes
- Tender disputes
- Engineering claims
- Lien claims
- Insurance issues including liability, builder's risk, errors and omissions, and professional liability coverage
- Regulatory and municipal planning approvals
- Preparation of construction security documentation
- Representation at arbitrations and mediations
- Service as arbitrators and mediators in construction disputes

## MAJOR PROJECT EXPERIENCE:

- **Hibernia Project**– offshore oil production platform off coast of Newfoundland
- **Terra Nova Project** – floating production, storage & offloading facility in oilfields on Grand Banks
- **Sable Island Project**– offshore natural gas recovery project off coast of Nova Scotia
- **Horizon Oil Sands Project** – oil sands project in northern Alberta
- **Muskeg River Oil Sands Project**– oil sands project in the Athabasca oil sands region of northern Alberta
- **Long Lake Oils Sands Project**– development project of heavy oil infrastructure in the Athabasca oil sands region of northern Alberta
- **Tangguh Project** – a liquefied natural gas project in Indonesia
- **Confederation Bridge Project**– fixed link bridge across Northumberland Strait
- **Sakhalin Island Project**– large scale oil and gas development project on Sakhalin Island in Russia
- **Husky Oil Upgrader**– development of Lloydminster Heavy Oil Upgrader
- **MEGlobal**– worldwide joint venture for manufacture and sale of ethylene glycols



## Contact the BD&P Construction Team

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