CANADIAN DESIGN-BUILD INSTITUTE
1900-275 Slater Street Ottawa ON K1P 5H9
Tel: 613-236-9455
Fax: 613-236-9526
cdbi.org

Prompt payment in any construction or design-build project - a current topic attracting much attention - is often discussed/debated at our Canadian Design-Build Institute (CDBI) conferences and meetings. The following article may assist those in the design-build, or construction industry in general, to understand the contractual obligations of owners for payment and when those obligations may not be achieved with a payment certification by the owner's consultant.

The Risk Management Committee of the CDBI will continue to circulate articles of this nature to members as they become available. We trust this will be found to be of interest and beneficial to the members.

Consultant Certificate Controversy: Are Progress Certificates Binding?
By Joshua Ungar, Brownlee LLP

It is a common misconception that once a consultant has certified work completed by a contractor, the owner is bound to that certification and will be required to pay the amount certified in a timely manner regardless of the circumstances. While the older case law predominantly supports this position, and while the general premise still holds some merit, a deeper examination suggests that there are several instances in which an owner may be entitled to dispute its obligation to pay.

We start with the premise that timely progress payments are fundamental to building contracts. A failure by an owner to make such payment is both a breach of the contract, and when coupled with an indication that future payments will not be made, may actually amount to a repudiation of the contract itself.[1] As such, if an owner is going to refuse or challenge the entitlement to payment for work certified by its consultant, it will need to take precautions to ensure it is certain it has sufficient grounds to do so. An owner should further ensure that its conduct is limited to disputing that particular certificate, and as a result is less likely to be interpreted as a repudiation of the entire contract.

A common situation in which an owner may rightfully refuse to make a payment despite a progress certificate being issued is where the owner wishes to set-off certain debts or liabilities owed (or allegedly owed) by the contractor to the owner.[2] This can occur, for example, when the contractor fails to complete the contract resulting in costs to the owner, or when the owner is making a claim for deficiencies, delays or overpayment against the contractor. Often at issue in these circumstances is whether the owner's claim for damages can be set-off against the certified amounts, and specifically whether the payment of the certified amounts must await determination of the owner's cross-claims.[3]

---

[1] Thomas G. Heintzman and Immanuel Goldsmith, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters: 2014) at 6-14 [Heintzman].
[2] Heintzman at 6-31.
[3] *Swagger Construction Ltd v University of British Columbia*, 2000 BCSC 1839 at para 4 [Swagger].

While the older jurisprudence generally holds that progress certificates are binding and the right of set-off is of limited use,[4] more recent Canadian case law tends to suggest that as long as the right of set-off is not contractually excluded, an owner will have the right to defend against claims by a contractor for payment under a progress certificate by way of set-off.[5] This defence can arise either contractually or through equity, as long as certain equitable requirements are met.[6]

In particular, while the law in England once held that a consultant's certificate was "akin to cash" and created a special debt which could not be burdened or held-up by disputed claims, this was overruled by the House of Lords in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*,[7] and this principle has since been accepted in several Canadian decisions.[8]

Following these decisions, the key consideration in determining the availability of set-off versus the binding nature of a progress certificate is to look at the terms of the contract itself. As noted, the starting point in this analysis is that absent specific language holding otherwise, an owner will generally have the right to set-off claims, such as for defective work or materials, against an amount certified for payment.[9] As the Courts have noted in coming to this conclusion, parties to a building contract are free to limit the right of set-off and to make progress certificates binding and unassailable, but this must be done by express language.

Generally, the Courts have held that as written the modern provisions in the CCDC 2 Stipulated Price Contract *do* contemplate set-off being available. In particular, GC 1.3.1 has been held to preserve the common-law right of set-off,[10] especially when read in conjunction with Article A-5.1, which holds that the obligation to make progress payments is "subject to the provisions of the Contract Documents".[11]

As a result of this general trend in the jurisprudence, owners should be aware that they are not necessarily bound to pay an amount their consultant certifies if the contractor otherwise breaches the building contract, while contractors should be aware that having a certificate in hand from the consultant will not guarantee payment if the contractor's work or contractual performance is otherwise deficient. Owners and contractors should also consider whether they want to modify these rights contractually prior the work commencing, and if so this should be done by unequivocal contractual language.

---

[4] Heintzman at 6-34, footnote 6.167.
[5] Swagger at para 9.
[6] A leading test for equitable set-off is outlined in more detail in *Coba Industries Ltd v Millie's Holdings (Canada) Ltd* (1985), 65 BCLR 31 (BCCA).
[7] [1973] 3 WLR 421 (UKHL).
[8] See for example Swagger at paras 19-23; *Point on the Bow Development Ltd v William Kelly & Sons Plumbing Contractors Ltd*, 2007 ABQB 530.
[9] Heintzman at 6-34.
[10] This provision holds that the rights and remedies under the contract are in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law.
[11] Heintzman at 6-34; *Centura Building Systems Ltd v Cressey Whistler Project Corp*, 2002 BCSC 1220.

It is worth noting that despite this general trend, the Courts have still held in certain circumstances that the language in a building contract with respect to payment and certification was sufficiently specific that it precluded set-off.[12] This may be especially true in cases where a progress certificate has been issued and the Court determines that the parties' mutual expectations were that the amounts certified by the consultant would be paid without dispute.[13] The Courts also have held that a failure of an owner to establish that it suffered a loss may preclude it from claiming set-off as a bar to payment of a progress certificate.[14]

Another point to consider is whether an owner can set-off amounts allegedly owed pursuant to related building contracts, or whether this set-off is limited to amounts due under the same contract. While it was in relation to holdback amounts, the BC Court of Appeal held in *Kinetic Construction Ltd v Tuscany Village Holdings Ltd*[15] that claims for set-off could actually extend between related but distinct contracts relating to the same work site. Thus, if a contractor sought payment under one contract with an owner but was in default under another, it is possible the owner could claim set-off as a defence if it established that the two contracts were interrelated, and it was inequitable for the contractor to collect under one contract without the Court first addressing the default under the second.

With respect to whether the administrative decisions in a consultant's certificate are binding on the parties, the jurisprudence has also shifted away from this position. Under the CCDC 2 Stipulated Price Contract, the consultant is not considered an arbitrator but is rather an interpreter, leading some to conclude that payment certificates issued by the consultant are open to review and dispute.[16] Further, the Courts have suggested that the modern interpretation of the consultant's powers is such that, despite the consultant being authorized to administer the contract, the parties have not surrendered their contractual rights to enforce the contract and contest the consultant's findings.[17]

As a result, while the consultant's certificates may be strong evidence as to such issues as the value and completeness of the work, they are not necessarily binding.[18] Do note that the failure of a party to challenge the consultant's findings on a timely basis or to initiate appropriate dispute resolution mechanisms may, however, limit that party's right to later challenge such findings by the consultant. Even if the administrative decisions are found to be binding, however, keep in mind that the owner may still be in a position to refuse payment and assert set-off.[19]

Finally, note that a consultant's certificates will not be binding in two further situations, including when the consultant follows a procedure not set out in the contract as far as the method for certifying payment, or when the consultant ceases to act impartially and fairly.[20]

---

[12] Heintzman at 6-35.
[13] *Metro-Can Construction (HS) Ltd v Noel Developments Ltd*, 1996 CarswellBC 1508.
[14] *Jameson House Properties Ltd*, *Re*, 2011 CarswellBC 1863 (BCSC).
[15] 2008 BCCA 417.
[16] Heintzman at 13-26.
[17] Heintzman at 13-19, 20 and 21; *Corpex (1977) Inc v Canada*, [1982] 2 SCR 643.
[18] Heintzman at 13-26, 26; *Demcon Construction Inc v Lee*, 2006 CarswellOnt 3459.
[19] See the discussion in Swagger at para 21.
[20] Heintzman at 6-22.

In conclusion, both owners and contractors should be aware that the recent trend in Canadian jurisprudence is to move away from holding that consultant's certificates are binding on the parties, especially with respect to progress certificates and progress payments. The owner is generally entitled to set-off related debts or liabilities against a progress certificate, and even administrative decisions of a consultant such as the value and completeness of certified work may be subject to further review. If owners and contractors wish to alter this relationship to give the consultant the power to make binding decisions, this should be done through clear and incontrovertible contractual language.

Joshua Ungar began working at Brownlee LLP in 2014 as a summer law student. Following completion of his Juris Doctor, Joshua joined the firm as an articling student. Following the required articling term, Joshua joined Brownlee LLP as an associate in the Business Group. With significant interest in investing, Joshua has long been intrigued by the structure, management and transactional work required for the success of all types of businesses, both public and private. Joining the Business Group has allowed him to pursue this interest first-hand, and Joshua enjoys taking part and assisting with the numerous and complex issues facing businesses today. brownleelaw.com