

PAYMENT, INTERRUPTED



Unless specifically excluded in a contract, owners have a right of set-off which allows them to withhold payment if certain claims are raised

BY CORBIN DEVLIN

Certificates for payment issued by an architect or engineer are typically final and binding, depending on the specific language of the construction contract. However, this does not prevent the payer from resisting payment if there are legitimate claims for set-off.

Two recent cases have clarified the law regarding certificates for payment. In the Ontario case of *Federated Contractors Inc. v. Ontario Realty Corp.*, Federated was a mechanical subcontractor for the construction of a treatment center in Brockville, ON.

When a dispute arose, the court eventually had to decide whether monthly certificates issued by the consultant were final and binding. There was evidence that the progress claims by Federated were “front-end loaded” with the effect that the sum of the monthly progress claims was much more than the actual value of the work.

The court concluded that the time to contest the value of the work was before the monthly certificates were issued, as indicated in the contract. The court reasoned that, “In contracts that are for a fixed price rather than a cost plus, it would be manifestly unfair to test a claimant years after the fact by a nuts and bolts accounting that was never contemplated and where possibly detailed records were never made, kept or retained. The parties subjected themselves to the expertise of a payment certifier and not to a nuts and bolts accounting for court.”

Even if there were errors by the consultant, the certificate was determinative because it was not challenged in accord-

ance with the contract. The court was careful to emphasize that this depends on the language of the contract in question. However, most construction contracts involving the use of certificates for payment include language indicating the certificate is determinative.

More recently, in the Alberta case of *The Point on the Bow Development Ltd. v. William Kelly & Sons Plumbing Contractors Ltd.*, Kelly was the mechanical contractor for a high rise condominium development under a CCDC2 stipulated price contract. Kelly claimed against the owner for payment for work performed and impact costs; the owner claimed against Kelly for delays, deficiencies and overpayment.

On the strength of authorities like the *Federated Contractors* case, Kelly applied to the court to require the owner to make immediate payment of the amounts certified by the consultant. The court held that the value of the payments certified by the architect could not be challenged – in other words, the contractor could not dispute the

value of work performed. However, the payments to the contractor were still subject to set-off for the owner’s claim for damages. There is a general common law principle that a defendant is entitled to a set-off for damages as a result of the plaintiff’s breach of contract, and that principle can only be waived by clear language to that effect.

In other words, the owner may not have the right to contest the value of the work certified, but that does not prevent the owner from raising a delay or deficiency claim against the contractor – and from withholding payment until that claim is resolved.

These cases illustrate that certificates for payment are final and binding, but they do not prevent the payer from withholding payment on the basis of claims not related to the value of work under the certificate. While this is the typical case, owners and contractors should beware of the possibility of contrary language in the contract. ☐

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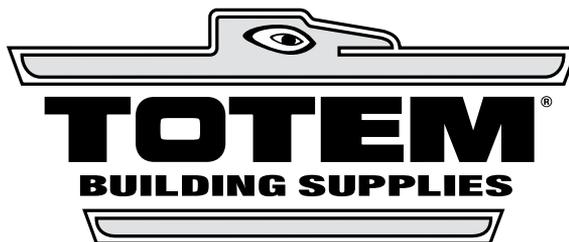
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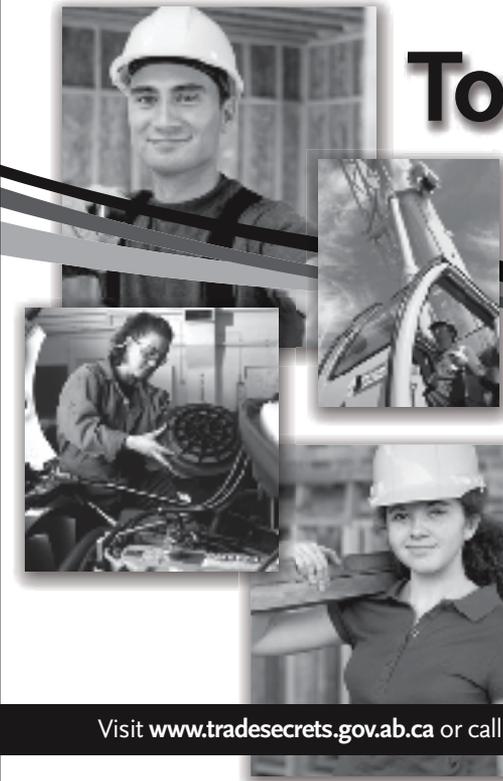


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