



RECENT CASE UPDATE: *Swagger Construction Ltd. v. The University of British Columbia* 2000 B.C.S.C. 1839 (British Columbia Supreme Court, December 22, 2000)

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In this case the owner successfully argued that it could set-off claims for deficiencies, delay and uncompleted work against a certificate of payment.

The contract contained standard CCDC2 (1994) payment provisions plus a deficiency holdback mechanism. The owner retained the holdback fixed by the consultant, but by the time of the contractor's application for judgment the counterclaim, as estimated by the owner, significantly exceeded both the holdback and the amount of the payment certificate.

The contractor took the position that the payment terms of the contract, including the deficiency holdback, either amounted to an absolute requirement to pay the certificate of payment, or by implication excluded the owner's common law and equitable rights to set-off.

The Court rejected this argument. Substantive rights such as set-off (either at law or in equity) can be contractually excluded, but the language that excludes such rights must be clear and unequivocal. The Court particularly pointed to General Condition 1.3.1 of CCDC2 (1994) which provides that all rights and remedies provided by the contract will be in addition to, and not limit, other rights of the parties.



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In the result the Court dismissed the contractor's application for judgment. The counterclaim would have to be adjudicated before the contractor could have judgment for the payment certificate.

The implication of this case is that contractors cannot rely on payment under a certificate of payment where there is a potential for a counterclaim for deficiencies, delay or uncompleted work, unless there is a clear contractual term that ousts the owner's rights to set-off. Time will tell whether this decision will be followed in British Columbia: it is arguably contrary to established authority in this Province, and it is under appeal.