

“PAYMENT CERTIFIERS” AND “SUBSTANTIAL COMPLETION”

1. Payment Certifiers

Section 7 of the new *Builders Lien Act* introduces the concept of a “payment certifier”. A “payment certifier” is an architect, engineer or any person identified in the contract or subcontract as being responsible for payment certification. If the contract or subcontract is silent on the matter, the payment certifier will be either the owner (in respect of amounts owing to the contractor) or the owner and the contractor together (in respect of amounts owing to any subcontractor).

On the request of a contractor or subcontractor, the payment certifier must, within 10 days of the request, determine whether the contract or subcontract has been “completed”. If the payment certifier determines that the contract or subcontract has been completed, then the payment certifier must issue a certificate of substantial completion.

2. Substantial Performance or Completion

The new Act, like its predecessor, defines the word “completed” to mean “substantially completed or performed, not necessarily totally completed or performed”. Previous case law will still be relevant.

The new Act offers some additional guidance in interpreting “substantially performed”. Under section 1(2) of the Act, a head contract, contract or subcontract is substantially performed if the work to be done under the contract is capable of completion or correction at a cost of no more than:

- (a) 3% of the first \$500,000 of the contract price;
- (b) 2% of the next \$500,000 of the contract price;
- (c) 1% of the balance of the contract price.

Section 1(3) states that an improvement is completed if the improvement or a substantial part of it is ready for use or is being used for the purpose intended.

Although these new provisions will be helpful in some cases, they also raise a number of questions, and therefore at least in the short term a lot of uncertainty remains and in many cases it will be difficult for payment certifiers to make the determination required of them.

3. Asking a Lot

The payment certification regime asks a lot of the payment certifier. Under the old Act, a court might take a year or two to delve into the facts, in order to determine when substantial completion occurred. The payment certifier is supposed to do this in 10 days.

To make the regime work, one would have to hope that the court would not second guess the decision of the payment certifier. However, experience tells us that judges are not overly shy about substituting their own decisions.

4. Liability

If a payment certifier fails, *without reasonable excuse*, to issue a certificate of completion within 10 days, then the payment certifier is liable to “anyone who suffers loss or damage as a result”. This is a potentially onerous liability.

For example, we are going to see letters sent by contractors and subcontractors to payment certifiers declaring that, if they do not get the payment due on substantial completion, then they will be on the brink of insolvency, or they will lose a bid on another project because they can’t get bonded, etc. Given the liability of the payment certifier, such threats might influence the determination of whether substantial completion has occurred.

Section 7 also requires that the payment certifier post the certificate and deliver copies to various parties within 7 days of issuance of the certificate. Again, if the payment certifier fails to do so, then the payment certifier is liable to anyone who suffers loss or damage as a result. So, for example, if someone missed the lien filing period as a result, then the payment certifier would be liable.

5. “Without Reasonable Excuse”

Is it “reasonable excuse” if the payment certifier says “I couldn’t get all the facts together in 10 days, and I tried to meet with the parties to discuss it and they were not available”? This remains to be seen.

6. Application to Court

A person who has requested a certificate of completion can apply to the court, under section 7(5), for an order declaring that the contract or subcontract has been completed.

It will be interesting to see if the court will answer the question within 10 days, or will send the matter to the trial list (that is, for decision in one or two years).

Although a payment certifier might be inclined to defer to the court for the decision, section 7(5) does not entitle the payment certifier to apply to court, only the person who is seeking payment. Presumably the payment certifier could, with consent of the person seeking payment, apply to court in their name. This gives rise to a contracting point: the contract (or perhaps the

application for payment completed by the person seeking payment) should expressly authorize the payment certifier to apply to court in the name of the person requesting payment.

7. Contract Documentation

It is necessary, I suggest, to address a number of issues in the contract documentation:

- (a) *Be clear on who is payment certifier.* Architects, engineers, quantity surveyors, project consultants, etc. will want to be clear about whether they are, or are not, payment certifiers. For example, under standard form subcontract BCCA 200, arguably the project consultant is a payment certifier.
- (b) *Authority to make application to court.* As stated above in paragraph 6, the contract documentation should expressly authorize the payment certifier to make application to court in the name of the contractor or subcontractor. If this is not in the construction contract, you should consider putting it into the progress draw application form.
- (c) *Indemnity.* A payment certifier should consider requiring an indemnity from the owner with regard to any claim made against them as payment certifier.
- (d) *Fees.* If the payment certifier is performing the role contemplated by the Act, then the payment certifier should figure this into the fees quoted. Also, perhaps the consulting agreement should extend to time preparing for and appearing in court, and legal costs for obtaining court directions.
- (e) *Release.* The contract documentation should contain a release on the part of contractors and subcontractors of any and all liability in connection with acting as payment certifier, so long as the payment certifier has acted in good faith and made reasonable efforts.

The common perception is that section 42 means that you can't waive your rights under the new Act. But I believe that a reasonable release of this nature does not necessarily offend section 42; and it can't hurt. You are not saying that the Act does not apply, or that the remedies are not available. Rather, a release is being given that is limited and reasonable.

- (f) *Owners.* An owner should consider making the contractor the payment certifier, for all subcontracts. This would shift the burden to the contractor, which is appropriate. The owner would be the payment certifier for its contract with the contractor, and that contract would contain provisions similar to those described in the previous paragraphs.

The owner's contract with the contractor should say that, for the purposes of acceptance of the work and the determination of payments due to the contractor, the owner is not bound by any certification by the contractor or others.

The owner's architect or engineer can *recommend* payments, without being payment certifier.

This treatment of the owner would dovetail with the 80%-10%-10% solution suggested in my paper on the holdback account.

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