

## **DUTIES OF ARCHITECTS AND ENGINEERS IN RESOLVING DISPUTES**

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Generally speaking, architects and engineers are retained as the agents of the owner of a project to design, supervise and administer the construction of a project.<sup>2</sup> In the course of performing their obligations, architects and engineers may be required to adjudicate disputes between the owner and its contractor based on the terms of the construction contract.

The courts have held that an architect or engineer employed by an owner is required to act judicially (i.e. fairly and reasonably) when adjudicating disputes or making decisions under a construction contract.<sup>3</sup> All decisions must be dictated by the architect's or engineer's own best judgment of the most efficient and effective way to carry out the contract. Further, the architect or engineer must not be influenced by extraneous considerations and, particularly, his or her judgment must not be affected by the fact that he or she is retained and paid by the owner.<sup>4</sup>

A contractor will not be bound by a decision of an architect or engineer if the architect or engineer does not adhere to the provisions of the contract and acts arbitrarily, fails to exercise his or her duties in good faith or to act impartially, or makes a decision under the owner's influence.<sup>5</sup> As a corollary to this, because the owner is typically given the power to name its own architect or engineer as an arbiter or adjudicator of a contractor's claims, the courts have held that there is an implied term in the construction contract that the owner must not interfere with the independence of the architect or engineer, meaning an owner is under a contractual duty not to influence or interfere with the architect's or engineer's judgment.<sup>6</sup>

In summary, in adjudicating disputes under a construction contract, the architect's or engineer's duty is to decide claims and disputes impartially, fairly, and with professional competence.<sup>7</sup> An architect or engineer is required to act in an unbiased manner and his or her judgment cannot be affected by extraneous considerations, including the fact that he or she is being paid by the owner. A contractor will not be bound by determination of an architect or engineer where the architect or engineer does not act in such a manner.<sup>8</sup>

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<sup>2</sup> *D.W. Matheson & Sons Contracting Ltd. v. Canada (Attorney General)*, [1999 CanLII 1510](#) (NS SC), citing B.M. McLachlin, W.J. Wallace & A.M. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Toronto: Butterworths, 1994)

<sup>3</sup> *Zurich Insurance Co. v. 356226 British Columbia Ltd.*, [1995 CanLII 1760](#) (BC SC)

<sup>4</sup> *Dilcon Constructors Inc. v. British Columbia Hydro & Power Authority*, [1992 CanLII 353](#) (BC SC), citing *Kamlee Construction Ltd. v. Oakville* (1960), 26 D.L.R. (2d) 166 (S.C.C.)

<sup>5</sup> *Welcon (1976) Limited v. South River (Town)*, [2009 NLCA 59](#) (CanLII), citing *Goldsmith on Building Contracts in Canada* (looseleaf as of February, 2009, Toronto: Carswell, 1988)

<sup>6</sup> *Dilcon Constructors Inc. v. British Columbia Hydro & Power Authority*, [1992 CanLII 353](#) (BC SC)

<sup>7</sup> *Dilcon Constructors Inc. v. British Columbia Hydro & Power Authority*, [1992 CanLII 353](#) (BC SC)

<sup>8</sup> *Welcon (1976) Limited v. South River (Town)*, [2009 NLCA 59](#) (CanLII), citing *Goldsmith on Building Contracts in Canada* (looseleaf as of February, 2009, Toronto: Carswell, 1988)