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One Person, Two Hats--The Dilemma of the Design Professional

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Editor's Note

This timely paper explores a conflict of interest that most design professionals and construction lawyers have been aware of for many years, that arises as a result of the design professional acting both as designer and contract administrator on a construction project. Under applicable codes of ethics and practice handbooks for architects and engineers, a design professional owes a duty to his or her client while acting as the agent for the client, while at the same time must administer the contract without showing partiality to either party. In some cases, where the designer's work is impugned, the designer's self-interest plays a role as well. The paper contains a review of the applicable case law dealing with these issues, which demonstrates that various courts have recognized the dilemma faced by designers.

Following an analysis of the conflict of interest issue, the authors discuss possible solutions and ways in which the conflict can be mitigated, including various fee arrangements, incorporation of codes of ethics into consulting agreements, retention of an impartial decision-maker to take over the contract administration role, and reduction of the scope of the consultant's decision-making authority. Some of these approaches have been attempted in other countries.

This problem has persistently reared its head in Canadian construction disputes. It is hoped that this thoughtful paper will cause construction practitioners and professionals to consider some of the approaches discussed.

1. INTRODUCTION

In the times of Brunelleschi and Palladio, the architect was the master builder, responsible for both design and construction. Towards the 19th century, the master builder became two: the designer and the contractor. In recent times, even further specialized fields of knowledge and roles have developed, and the design professional's scope has narrowed. [1]

***52** The primary function of today's architect or engineer is still considered to be the creator of the project's design. However, during construction, the design professional's role is generally confined to administration of the contract between the owner and the contractor, including interpretation of contract documents and determination of disputes between owner and contractor. It is this contract administrator function that has been examined over the years due to the inherent conflicts arising from the duty owed by the consultant to their client, self-interest in limiting professional liability, and the duty to act fairly and impartially in determining rights and obligations as between the client and contractor. Therein lies the “one person, two hat” (or insofar as professional fees are concerned, “three hat”) conflict.

As the construction industry evolves, will the design professional's role be even further narrowed, or are there alternative paths which might reduce the conflicts of interest?

2. CONFLICTS OF INTEREST

2.1 Consultant's Role as Administrator of Contract

The Canadian Handbook of Practice for Architects ("CHOP") divides the architect's contract administration duties into two distinct parts: office functions and field functions. The architect's specific office functions during construction include the following: [2]

- review shop drawings, samples and product data submittals;
- provide timely interpretation of the contract by responding to Requests for Information ("RFIs");
- prepare and issue proposed change forms;
- review contractor's quotations in response to proposed changes and claims for extras;
- prepare and issue change directives and change orders;
- review progress payment requests.

The architect's field functions comprise the following: [3]

- conduct general reviews or field reviews;

***53** • attend site meetings;

- interpret contract documents and/or resolve problems;

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- observe testing or other procedures;

- review and accept samples or mock-ups;

- meet with consultants, contractors and client to monitor progress;

- determine percentage of work completed for certificates.

A similar list of an engineer's obligations can be found in engineering guidelines such as the Association of Professional Engineers and Geoscientists of Alberta's Professional Practice Guideline *Responsibilities for Engineering Services for Building Projects.* [4]

Under the RAIC's Document Six [5] and in the standard Canadian engineering contract, the Association of Consulting Engineering Companies' Document 31, [6] the consultant's responsibilities during the construction phase include general review services; attendance at site meetings; receipt of WSIB certificates; receipt and review of construction schedules from the contractor; receipt and review of a schedule of values from the contractor; receipt and evaluation of applications for payment; the interpretation of the contract documents; review of shop drawings; preparation of supplemental details and instructions; receipt of RFIs; preparation of change notices, change orders and change directives; certification of substantial performance and deemed completion; and finally arranging for takeover and warranty review.

Those obligations are mirrored in the Ontario Association of Architects ("OAA") 600 standard form contract. [7]

The above duties of design professionals are also included to some extent in most construction contracts, despite design professionals not being parties to these contracts. As an example, the most common fixed price contract used in Canada for design-bid-build projects is the CCDC 2-2008. That contract provides that the project consultant has the authority to act on behalf of the owner to the extent provided in the contract documents; [8] must administer the contract, [9] issue certificates for payment [10] and interpret the contract documents; [11] and must review shop ***54** drawings, [12] prepare change orders [13] and determine substantial performance. [14] Significantly, GC 2.2.9 of CCDC 2 provides that interpretations and findings of the consultant must be consistent with the intent of the contract, and that in making such interpretations and findings, the consultant will not show partiality to either the owner or the contractor. While the consultant is not a party to this contract, it is clear that both the owner and the contractor expect the consultant to carry out all of their duties and responsibilities as set out therein.

The main areas where conflicts of interest for design professionals typically arise during the administration of a construction contract are the requirement that the consultant act as the agent of the owner on the one hand (while receiving payment from that hand), but as the impartial decision maker on the other hand. Further, design professionals are required to assess their own design throughout construction and potentially make findings that could result in claims against them. Lastly, if the professional

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services agreement is structured in such a way that the consultant receives a fixed fee for contract administration duties, they are incentivized to spend less time on these responsibilities. These conflicts of interest are explored in turn below.

2.2 Agent of and Paid by the Owner

The former Chief Justice of Canada has summarized the inherent conflict in the consultant's role as decision maker: [15]

> The dangers of the architect or engineer acting as decision maker between the parties are obvious. The architect or engineer is retained and paid by the owner. Moreover, it may be doubted whether the person responsible for the plans and specifications of a project can be objective on questions of compliance with the contract specifications.
>
> [...]
>
> Because of the obvious potential for abuse arising from the fact that the architect or engineer is employed by the owner and has been personally involved in the design of the project, courts have tended to construe provisions conferring decision- ***55** making powers on architects or engineers cautiously and sometimes restrictively.

The recognition of the design professional's conflict is not new. Almost exactly 100 years ago, the Chief Justice of the Saskatchewan King's Bench, in *Blome v. Regina (City)*, [16] held as follows:

> The provision in the contract which makes the defendants' own engineer, the arbitrator in case of dispute, the judge as to what repairs are necessary, is one that was insisted upon by the defendants themselves, and largely for their protection. The plaintiffs in agreeing to such a condition must know that there would be a natural tendency on the part of the engineer to adopt the point of view of his employers. It is, however, a condition which is not uncommon in contracts of this character, and is evidently considered a necessary safeguard from the point of view of the party embarking on expensive and important operations. The dual capacity that an engineer or architect is thus called upon to fulfil is, to say the least, not easy. It is clear, however, that the engineer when called upon to act the part of the arbitrator or in a quasi-judicial capacity must, to a certain extent, keep himself aloof from both parties, and must certainly guard against being unduly influenced by his employers.

In *Dilcon Constructors Inc. v. British Columbia Hydro Power Authority*, [17] the court commented on the “one person, two hats” conflict and quoted from the earlier British Columbia decision in *Morrison-Knudsen Co. v. British Columbia Hydro Power Authority*: [18]

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> The issue of the engineer's role had arisen during the trial when a claim of privilege was made over certain communications between counsel for B.C. Rail and the engineer. In unreported reasons dated April 3, 1987, Vancouver Registry No. C842418, B.C.S.C., Macdonald J. noted that because the contract gave the engineer dual and disparate roles, "one person must wear two hats" and the potential for conflict was obvious. On the other hand, the contractor was aware of that situation when it tendered. Mr. Justice Macdonald stated at pp. 5-6:
>
> In his function as interpreter of the contract, the Engineer has no common interest with B.C. Rail. He is obliged to perform that function in an even-handed and ***56** equitable manner, undistorted by personal feelings or his obligations (as B.C. Rail's representative thereunder) to protect its interests. A formidable task indeed! ...
>
> However, while he is charged with the performance of two separate and sometimes incompatible functions, the Engineer is one person. There is much to the submission of B.C. Rail that the Engineer is, first and foremost, a servant of B.C. Rail with a primary duty to his employer. Part only of that duty is his appointment to act as the Engineer under the contract in question here.

The fact that this is not a theoretical problem, but a very real concern, is reflected in the comments of the Ontario Court of Appeal in *Noren Construction (Toronto) Ltd. v. Rosslynn Plaza Ltd.*: [19]

> The second ground upon which it asked that the costs be disallowed was that, as the terms of the contract specified no money to be payable except upon the certificate of the architect and as all requisitions certified by the architect had been paid when certified it, the defendant, was never in default. This circumstance would have carried some weight with this Court were it not for the particular finding of the learned trial Judge. The result at which he arrived was in effect based upon one essential finding regarding the architect. He noted that the architect had a dual responsibility, one to the defendant to whom he was responsible for proper supervision of the work and the other acting in a judicial position in which he was required under the contract to adjudicate as between the plaintiff and the defendant any dispute that arose. The trial Judge found in very certain terms, I won't go into all the reasons set out in his judgment, that the architect in this instance did not act judicially; that he was influenced, and in fact dominated, by an officer of the defendant and as a consequence failed to exercise his judgment judicially. There was ample evidence to sustain this finding. Such being the case, the terms of the contract as to payment did not apply and the defendant under these circumstances can gain no benefit from those terms. [emphasis added]

***57** While some early case law suggested that there was no need for a duty of impartiality where the contract appointed an employee of the owner as consultant, that distinction has been abandoned in later cases such as *D.W. Matheson Sons Contracting Ltd. v. Canada (Attorney General)*: [20]

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> In either case, the agent is financially tied to the owner and owes a duty of loyalty to the owner, which conflicts with a duty to act judicially when making decisions that affect the interests of both parties. I see no reason to go one way for engineers who are employed, and the other way for those who are more temporarily contracted.

The Supreme Court of Canada has stressed that a consultant must not be influenced by extraneous considerations and, particularly, that its judgment must not be affected by the fact that it is being paid by the owner. [21] A payment certifier who certifies on the basis of matters outside the requirements of the contract, for example, abdicates its proper function under the contract. [22] Similarly, a payment certifier who simply accedes to the instructions given by the owner ceases to be impartial and abdicates its function under the contract. [23] A consultant's certificates may be overruled or ignored by a court if the conduct of the consultant departs from its obligations. [24]

These warnings from Canadian courts should be sufficient to prevent self-interest and loyalty to the design professional's client from interfering with impartial decision-making and contract interpretation. However, time and time again, wherever there is a dispute about project delay or additional compensation, there is inevitably an allegation that the consultant has failed in their contract administration duties.

2.3 Review and Comment on their Own Design

In exercising their contractual decision-making powers, and when adjudicating between positions taken by the owner and the contractor, consultants will often be placed in the situation in which they have to comment on or review contract documents they themselves have ***58** prepared. Obviously, in such situations, they have an interest in the outcome. More than a century ago, the House of Lords held that: [25]

> My Lords, it has been pointed out in several cases in the Court of Appeal, and particularly by Lord Bowen in *Jackson v. Barry Ry. Co.*(1), that the position of these arbitrators is a very important one, and that the system could not have been allowed to exist, had it not been that it has been found that persons in the position of engineers or architects are able to maintain, and do maintain, a fair and judicial view with regard to the rights of the parties. My Lords, it has to be remembered that in the great majority of cases they are the agents of the employers. It has also to be remembered that they not infrequently have to adjudicate upon matters for which they themselves are partly responsible. Both these matters have been pointed out by Lord Bowen. It is therefore very important that it should be understood that when a builder or contractor puts himself in the hands of an engineer or architect as arbitrator there is a very high duty on the part of that architect or that engineer to maintain his judicial position. [emphasis added]

Justice McLachlin and her co-authors comment as follows: [26]

> Architects or engineers are not required to be entirely disinterested. They are employed by the owner, either under contract or as salaried individuals. They have frequently drawn the plans and prepared estimates of cost, and often have recommended the contractor and approved the contract which they are subsequently called upon to interpret. They may have made mistakes in their plans which increase the cost. Should their

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> decisions not please the owner, they run the risk that the owner will terminate their employment as architects or engineers or not re-employ them.

A determination entitling the contractor to additional time and compensation due to a design error or omission may lead to a claim by the client. This puts the design professional in a difficult situation. While there is some comfort in that the standard of care does not require perfection,[27] the design professional could be motivated to attempt to ***59** avoid litigation about whether that standard has been met by simply ruling against the contractor. This conflict of interest often leads to a relationship of mistrust between the consultant and the contractor.

2.4 Profitability of Contract Administration Phase

A design professional's fees can be calculated on various bases. RAIC Document 6, for example, contemplates a fixed fee, a percentage fee based on budget and actual cost, or a fee based on time spent by the consultant's personnel.[28] Similarly, the ACEC Manitoba's Consulting Engineers Fee Guideline 2019 outlines three common approaches to fees: time basis, percentage of construction basis and fixed fee or lump sum basis.[29] Where the fee is based on a fixed or percentage basis, the RAIC allocates fees to the typical five project phases. The RAIC states that on a traditional architectural project, the contract administration phase accounts for approximately 25-35% of the total fee.[30]

Compounding the conflict of interest issues identified above, if contract administration is performed by the design professional on a fixed fee basis, then there could be little incentive to spend more than estimated time on these services in order to avoid financial losses.

Changes in construction legislation across the country could have an unintended consequence of amplifying this conflict of interest. Rapidly expedited time frames under the new prompt payment rules in force in Ontario (and soon other Canadian jurisdictions) will mean that many of the consultant's contract administration obligations outlined above will have to be performed in abbreviated periods of time. For example, since Ontario's new *Construction Act* does not permit a certificate for payment to hold up cash flow,[31] the owner will likely require the consultant's assessment of any given proper invoice well within 14 days in order for the issuance of a notice of non-payment if warranted. Adjudication may also lead to new obligations placed on the design professional. Time will tell if consultants will be required by their clients to submit statements or if they will be called upon by the adjudicator to answer questions in the adjudication.

If professional services continue to be provided on a fixed fee basis, unadjusted for additional services which may be required as a result of legislative changes, the tension between earning fees and administering the construction contract will increase.

*60 3. POTENTIAL WAYS TO REDUCE CONFLICT

The above conflicts lead to the “one person, two hats” dilemma identified by the British Columbia Supreme Court in *Morrison-Knudsen Co. v. British Columbia Hydro Power Authority*.[32] Despite these issues having been identified as long as a century ago, the industry continues to have design professionals act as owner's agents and as impartial contract administrators under largely unchanged project delivery models. We will explore several possible solutions to the dilemma below, all of which would require changes in industry mindset.

3.1 Fee Adjustment

The conflict identified in section 2.4 above can be more easily resolved than the others. As pointed out in that section, three common approaches to professional fees are on a time basis, percentage of construction basis and fixed fee or lump sum basis.[33] Given the current uncertainty about the consultant's role in the prompt payment and adjudication regime, it is submitted that fixed fees should be avoided if possible. While such fixed fee arrangements might give the owner a sense of certainty, there

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will likely be changes to allow for fair remuneration at a later date, or the owner will risk that an architect will limit its services to a level commensurate with the fixed fee.

The RAIC's Guide to Determining Appropriate Fees for the Services of an Architect suggests that fees for construction administration ought to be amended:

> Fee Adjustment Factor 9--Construction Administration
>
> Today many clients are demanding a level of service by the Architect and other consultants which exceeds that which is required to exercise a reasonable standard of care during the field review and contract administration phase of the project.
>
> Such services may include, but are not limited to:
>
> • Additional meetings, coordination and/or site visits with client's representatives, user groups, contractors, sub-trades which normally do not require the consultant's presence at the time;
>
> • Requirements for the Architect to chair and/or minute meetings called by others and are the responsibility ***61** of others and requirements for a minimum number of meetings and site visits regardless of whether it is warranted by the construction process; and,
>
> • Additional clarifications and site visits resulting from the Client's selection of specific contractors, sub-trades, suppliers and/or products.
>
> The Architect and Client should discuss this higher level of service for field reviews and construction administration at the outset of the project to determine what is required and the necessary fee adjustment.

CHOP warns against the use of fixed fees unless both the client and the architect thoroughly understand and agree on all tasks required. As soon as there are any unknown factors, fixed fees are likely to result in strained relationships and may lead to substantial losses for the architect. [34]

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The OAA has released an updated October, 2019 version of its Document 600, which includes reviewing, evaluating, revising or providing additional drawings, specification, proposed change notices, change orders, change directives or other documents which are requested by the client in relation to the provisions for prompt payment under the *Construction Act* as additional services under GC 3.2.11. It is submitted that all professional services agreements should adopt the 2019 OAA Document 600 changes.

This approach would address the issue discussed at section 2.4 above and eliminate any enticement to spend as little time and effort as possible on professional services provided during construction.

3.2 Incorporation of Codes of Ethics into Consulting Agreements

Solutions to the other conflicts identified in this paper are less straightforward.

All provinces and the Northwest Territories have legislation that governs the practices of architecture and engineering. [35] These jurisdictions have ***62** established codes of ethics for these professions, be it directly in the statute, in regulations under the statute, or in the by-laws of their associations.

These codes are meant to protect two types of confidence, the personal confidence of the client in the technical competence of the engineer, and the confidence of the public at large in the integrity and ethical conduct of the profession as a whole. [36] For example, the Manitoba Association of Architects Code of Ethics mandates that the consultant protect the interests of the contractor and the client equally. [37]

It has been argued that the duties of loyalty, good faith and avoidance of conflicts of interest described in these codes of ethics governing design professionals could be construed as implied terms of the contractual arrangements between the design professional and the owner. Would it resolve the conflict of interest issue if the codes were expressly incorporated into the professional services agreement between the client and the consultant?

This argument was dismissed by the Alberta Court of Appeal in *Terra Energy Ltd. v. Kilborn Engineering Alberta Ltd.* [38] The court held that while it was true that the engineer's actions constituted a conflict of interest, that did not mean that the owner had a contractual remedy against the engineer. Instead, the remedy was to lodge a complaint against the engineer with the disciplinary bodies and procedures set up by the governing body of the profession, in that case the Association of Professional Engineers, Geologists and Geophysicists of Alberta.

***63** That decision was followed in *Deans v. Assn. of Professional Engineers, Geologists Geophysicists (Northwest Territories)*, [39] where the court held that whether the engineer's actions constituted a conflict of interest that he should have disclosed and whether he breached the applicable Rules of Conduct were matters properly the subject of disciplinary proceedings under the *Engineering, Geological and Geophysical Professions Act*, [40] not matters for breach of contract litigation.

More recently, in *LaPrairie Works Inc v. Ledcor Alberta Limited*, [41] the court cited *Terra Energy* for the proposition that Codes of Ethics are not automatically implied into contracts:

> It is not automatic that code-of-ethics provisions governing a “governed person's” behaviour *vis-à-vis others* is incorporated into a contract between those persons. Even if LaPrairie and Ledcor had entered into a contact governing bidder behaviour, the principles and norms outlined in the cited code would not automatically have been implied as terms of the contract. LaPrairie did not explain how any code provisions here would have been imported into any such contract, instead merely pointing to the code's existence.

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Therefore, the courts have indicated that the incorporation of codes of ethics into contracts will not serve to further safeguard against conflicts of interest, since the remedy for breach lies with disciplinary action and not damages. No courts outside of Alberta and the Northwest Territories seem to have ruled on contractual damages arising from breaches of duties set out in professional codes of ethics. It remains to be seen how the rest of Canada will treat this issue.

3.3 Eliminate Role Altogether

The most drastic way to address the inherent conflict of interest of an "impartial" decision maker employed by one of the parties would be to eliminate the decision making role altogether and have the owner make its own determinations.

However, the consensus in Canada seems to be that despite any misgivings about apparent conflicts, the consultant's role is crucial, and it is difficult to imagine a project of any size in which owner and contractor try to interact without their assistance. In her standard work on the law of consultants, Justice McLachlin states as follows: [42]

> ***64** On the other hand, the role of interpreter and judge may be seen as a continuation of the design process. The architect or engineer charged with the design of the project is equipped as no one else to make decisions about its execution. For the owner and contractor to attempt to resolve their differences alone without the aid of the architect or engineer might prove difficult indeed. Moreover, in view of the integrity with which architects and engineers have generally conducted themselves, the system appears to have worked quite well.

An owner's decision to assume the role of certifier or decision maker itself is problematic and has generally been met with resistance from the courts. In *Bird Construction Co. v. Theo C. Ltd.*, [43] for example, the court held as follows:

> It is clear that the original contract had a fixed time for completion and provided procedures for extending the time. These procedures involved the consultant. The consultant's role in the original or written contract was clearly intended to provide a competent person to implement orderly procedures for change orders, extensions, certification of delay and hold back of money. It is also clear that throughout the contract, at the insistence of the owner the consultant's role under the contract was reduced although he did attend at the site and participated at the conference meetings. The processes put in place by the parties did not conform to the letter of the contract but fulfilled the intent of the contract.
>
> [...]
>
> It would be absurd to allow Theo to substantially reduce the role of the consultant in the operation of the contract and then rely on the non-action by the consultant to get away from the clear intent of the contract. The parties by their conduct carried on the project without much of the documentation required from the consultant.

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A contractor can no longer rely on a consultant's certificates if the owner takes over the functions of the consultant with the result that the owner or the owner's employee assumes the responsibilities of the consultant. [44] Where an owner, to save money or for whatever other reason, decides to ***65** assume the role of the consultant, it must take utmost care to maintain the consultant's role as originally envisioned by the contract, even if the other party were to accept the elimination of the role. In *Domco Construction Inc. v. Aliva Holdings Inc.*, [45] the court criticized an owner's failure to do so:

> Change orders represent a change to the contract and are either "extras" which increase the price of the contract or "credits" which decrease the price of the contract. Pursuant to general condition 3 of the contract, the consultant was also "in the first instance, the interpreter of the requirements of the contract documents and the judge of the performance thereunder by both parties ...". Walter Buchko of Chamberlain Architect Services Limited originally fulfilled this role. However, early in the contract, to save money, Randy Yano decided not to use his services and to fulfill that role himself. Mr. Yano was neither an architect nor an engineer. His decision would prove to be "penny wise and pound foolish". By his own acknowledgment, Mr. Yano did not understand the construction industry or how it worked. He placed himself in a position he was not equipped to deal with.
>
> It is clear from the evidence that while Domco accepted Mr. Yano's decision to act as his own consultant, there was no discussion between them on how change orders would be dealt with as a result of that decision. This is not surprising given the time constraints the parties were working under. Pursuant to general condition 3.10 of the contract, the consultant was to prepare the change orders. As Mr. Yano assumed the role of consultant, this obligation should have been assumed by him. It was not.

As early as 1914, the British Columbia Court of Appeal held that where the contract stipulates that a contractor was to be bound by the decisions of an independent engineer, an owner could not eliminate the role of that engineer and assume the role itself: [46]

> We think the Canadian Northern Pacific Railway Company should be dismissed from this appeal, and we can see no reason why they should not have the costs occasioned by their being brought here, the charges of fraud having failed. The plaintiffs, therefore, must pay such costs. We think the learned trial judge was wrong. It seems to us that the plaintiffs were to be bound ***66** only by the estimate of the engineer of the Construction Company. The Construction Company, however, had no engineer. There was, therefore, no person qualified to give the certificate which the defendants are relying upon. It is one thing to submit to the decision of an engineer to whose employer's interest it is to secure a fair if not a generous classification, and quite another to submit to the classification of one to whose employer's interest it is to keep down the cost of construction to the lowest possible notch.

The idea of eliminating the consultant's role as decision maker altogether has therefore not found much favour in Canada.

3.4 Separate Contract for Architect in Charge of Administration Only

The problem of requiring a consultant to judge its own design could be addressed by an owner entering into two different consulting agreements with two different design professionals: one for the design, and another one for contract administration.

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Until very recently, the American Institute of Architects ("AIA") had a standard form document to accommodate that solution: AIA Document B209-2007, the "Standard Form of Architect's Services: Construction Contract Administration, for use where the Owner has retained another Architect for Design Services". B209--2007 was not a stand-alone document and had to be incorporated into an owner-architect agreement such as AIA Document B102--2007, Standard Form of Agreement Between Owner and Architect, to provide the Architect's sole scope of services. The contract was unavailable in a number of states on certain projects that require that the architect who signs and/or seals the contract documents must also perform construction contract administration services. [47]

However, the AIA has retired B209 in November of 2019 as it re-thinks the roles, responsibilities, and liabilities of the architect when the architect takes over as architect of record or to provide contract administration services. [48] It would appear that AIA B209 has received no judicial attention, so it is unclear to what extent it ever achieved its aims.

***67** It is uncommon in continental Europe for the designing architect to also be in charge of contract administration and to act in a judicial capacity: [49]

> To a continental European, the design professional as judge seems incongruous. With the exception of Great Britain, European construction administration might include the design professional giving his interpretation of design documents he drafted, but he would not be given a "judging role". The close association between owner and design professional based on the former's selection and payment of the latter precludes this role being given to the latter.

In France, for example, employers tend to task either engineering consultants or architects who specialize in construction supervision with the administration of the contract. It has been suggested that this is due to the approach in French architecture schools, which emphasize the design over the construction process. [50] Whatever the reason, over the last thirty years or so, engineering agencies have assumed tasks that were traditionally performed by architects.

The concept of having separate consultants for design and construction administration is not common in Canada. Absent any statutory prohibition, though, it could well be a viable means of eliminating the conflict stemming from having to comment on one's own design.

3.5 Reduce Scope of Consultant's Decision-making Authority

Related to the proposition discussed immediately above, another potential solution might be to have the same professional perform both design and contract administration roles, but to reduce the scope of their decision-making authority to technical issues and appoint a third party to determine all other matters.

In some European countries, such as the Netherlands and Sweden, there is a trend away from having the design architect supervise the entirety of the construction phase, instead limiting that role to the aspects designed by itself. [51]

***68** Currently, in Canada, the consultant has broad authority to interpret contract requirements. Using the CCDC 2 example, a contractor is required to submit any matter in question as to any aspect of the contract documents to the consultant to make a finding, and the consultant is required to do so in a timely manner. [52] The consultant's interpretations and findings must be consistent with the intent of the contract documents. [53] While some of those contract documents will have been prepared by the consultant, it is more likely that many were prepared by the client and the contractor, without any input from the consultant. This could make it difficult to ascertain the parties' intent in drafting the contract documents.

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Further, contract interpretation often involves the application of legal principles. While the consultant is well positioned to determine whether the contractor has built something to specification, the consultant will also have to determine the amounts properly held back with respect to applications for payment, for example, or assigning responsibility for delay. [54] As a matter of fact, *any* difference between the parties to a CCDC 2 contract as to the interpretation, application or administration of the contract or any failure to agree where agreement between the parties is called for, must be resolved in the first instance by findings of the consultant. [55] There is no limit of this authority to matters which are more technical in nature.

The design professional's broad decision-making power is not limited to CCDC documents. The architect's own standard form agreement, OAA 600, stipulates that on the written request of either the client or the contractor, the architect renders written interpretations and findings within a reasonable time, consistent with the intent of and reasonably inferable from the construction contract documents, showing partiality to neither the client nor the contractor, on claims, disputes and other matters in question between the client and the contractor relating to the execution or performance of the work or the interpretation of the construction contract documents. [56]

Similarly, under the RAIC Document Six, the architect is, in the first instance, the interpreter of the construction contract, and must make written interpretations and findings that are impartial and consistent with the intent of the construction documents. [57] Some of those ***69** determinations will involve matters for which an architect or engineer is not trained. Requiring a consultant to make findings on legal matters might also constitute the practice of law, which under provincial legislation is restricted to members of the legal profession. [58] The OAA recognizes this difficulty in its 2019 version of Document 600. Importantly and prudently, in its updated agreement, the OAA clearly delineates work which architects are equipped to handle and that which they are not. The new amendments clarify that it remains the client's responsibility under that contract to provide any legal, accounting and insurance counselling services as may be necessary at any time for the project, including issues related to the provisions for prompt payment under the *Construction Act* or other applicable legislation. [59]

A 2011 paper by John Davies published in the *Construction Law Reports* discussed the introduction of a third party payment certifier in addition to the usual consultant in the CCDC 14 Design-Build Contract in response to the consultant's conflict of interest issue. However, that payment certifier was also designated (and presumably paid) by the owner, leading the author to question the utility of the process and argue that such third party must be paid by both parties: [60]

> Unfortunately this “solution” is only the other side of the same coin. To be truly perceived as independent, the payment certifier should not be seen to be held to ransom by one party over the potential rights and benefits of the other. To be truly deemed independent, the remuneration for the payment certifier, for example, should be equally divided between both parties and payable in full in advance of the services to be provided, and the parties should be held jointly and severally liable for the full advance payment of this remuneration. There should also be an added provision that, in the event that one party fails to pay, the other party is obliged to pay the full amount due, with the unpaid amount being recoverable from the party in default.

Of course, this solution would lead to increased costs for both the owner and the contractor. The authors of a paper in the 2013 edition of this Journal noted this result in reviewing one of the international responses to the consultant's dilemma. [61] The International Federation of ***70** Consulting Engineers' amendment to their Conditions of Contract for Works of Civil Engineering Construction replaces the consultant as initial decision maker with a dispute adjudication board. The authors stated: [62]

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> [T]he FIDIC solution appears to relinquish the value of the Consultant's knowledge of the project, the design, and the contract documents, and it imposes on the parties the added expense of having an independent board appointed with obligations to visit the site and, presumably, to remain current with the progress of construction from time to time.

> In other words, for the purposes of FIDIC contracts, it appears that the Consultant's conundrum has been fundamentally resolved, but not necessarily for the benefit of the project as a whole. For a dedicated architect or engineer, the impairment of efficiency or benefit to the project is a significant, and perhaps even unacceptable, price to be paid to eliminate an inevitable conundrum for the Consultant.

While the above cost concerns may be valid, statutory adjudication is now being implemented throughout Canada. Where parties have a dispute, such disputes will be referred to an adjudicator for a streamlined determination. In essence, this appears to be a statutory version of the scheme adopted by FIDIC, without a dispute adjudication board being paid to remain current with the project. Thus, in Canada, adjudication may well be suited to the proposition advanced herein to reduce the consultant's decision making scope to technical matters, while leaving other issues to be resolved by those with training to do so. The amendment to standard form contracts could be achieved by reference to either the appropriate jurisdiction's legislation or a contractual adjudication process where none has been mandated by law.

3.6 Re-merging of Designer and Builder

Research into the narrowing of the design professional's role over the centuries shows that the reasons for this direction could include that design professionals are not following construction trends and technologies as closely as other industry stakeholders and that they are generally risk adverse.[63] Perhaps a return to the era where design professionals and builders become one again could be a potential ***71** resolution to the conflict issue. In today's terms, this could be equivalent, from a conceptual standpoint, to design-build[64] or integrated project delivery (“IPD”).

An AIA architect and author noted that design-build is akin to the process common before the 18th century, when projects were brought to life by a “master builder” rather than by a splintered group of architects, engineers, and contractors, and that some forms of design-build are common in countries such as Japan and France.[65] The AIA's Code of Ethics prohibited architects from participating in design-build projects due to a perceived conflict of interest in protecting the owner while at the same time profiting from construction, however this prohibition was lifted in 1986.[66]

In Ontario, Regulation 27 of the *Architects Act* still provides that a member has a conflict of interest where the member has a direct or indirect interest in an entity that is, among other things, the design-builder of a project with respect to which the member provides architectural services.[67] In an OAA practice tip, the Association advises its members:[68]

> It is the position of the OAA that a conflict of interest exists where the architect is engaged to provide both architectural and construction services on a project. It is extremely difficult to be impartial in such circumstances. As the architect's duties often include responsibility for certifying the value of work and

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> advising the owner on the quality of work of a constructor, it creates a "conflict of interest" to act in both capacities.

Other provincial associations do not share that view. By-Law 31.5 of the Code of Ethics and Professional Conduct of the Architectural Institute of British Columbia, for example, provides that "an architect may be a project's contractor only if the project is also designed by the architect or if the architect also produces the construction contract documents, and makes disclosure". The same provision is contained in s. 14.3.5 of the Architects' Association of New Brunswick's Guideline to AANB General By-Law No. 14 - Code of Ethics and Professional Conduct.

***72** IPD could be another viable way back to the "master builder" model, where multiple entities would come together to contribute to the final result. Where traditional delivery approaches establish silos of responsibility that lead to inefficiencies and an "every party for itself" mentality, IPD requires cooperation and risk and reward sharing among all major participants. The AIA has stated:

> One result of this approach is a blending of traditional roles. For example, IPD requires that the constructor have greater involvement in the design process. While it is not the case that "constructors design and designers construct" under IPD models, the discrete responsibilities of the two are more intertwined than in traditional models. The blending of roles, while strengthening the creative process, can lead to the question of who is responsible for particular scopes of work. For that reason, a well-drafted IPD agreement clearly spells out individual work scopes. Collaboration is not a substitute for accountability, at least as it pertains to the primary responsibility for performing one's scope of work.
>
> Current standards of care for designers and constructors remain intact for those activities that are traditionally performed. Nevertheless, IPD requires that, to some extent, the risk of non-performance be shared, thus promoting collaboration across traditional roles and responsibilities. [69]

In IPD, the responsibilities of the prime consultant and other design professionals during construction remain largely the same as in other more traditional project delivery methods: they will have overall responsibility for construction contract administration, respond to RFIs, coordinate with other consultants, provide updates to the building information model (BIM) to respond to field condition and other design needs, issue change documents, work with the prime construction to ensure the construction is proceeding in conformance with design intent, and issue substantial and final completions documents. [70] However, because of the greater effort put into the design phases, construction under IPD should be more efficient with less "surprises", and because individual project participants' financial success relies on project success, there is more incentive to collaboratively resolve issues to benefit the overall project.

***73** IPD is gaining traction in Canada, leading to release of CCDC 30--Integrated Project Delivery Contract in 2018. While in 2012, there was only a single IPD project underway in Canada, [71] by the end of 2019, there were up to 50 IPD projects at various stages of development and, [72] and two years later, Defence Construction Canada and the Department of National Defence embarked on the first-ever federal IPD project, the new $80.6-million base for the Royal Canadian Dragoons in Petawawa, Ontario. [73]

While this project delivery method will take time for industry attitudes to adjust, IPD may be the modern solution to merge design and construction experience and eliminate the "one person, two hat" dilemma of the consultant.

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4. CONCLUSION

As the recent changes to the legislation governing construction across Canada have shown, the mere fact that the industry has been living with any given problem for a century or more does not mean that that problem should persist. From the perspectives of subcontractors and suppliers, they had effectively funded projects for years by suppling services and materials well before receiving payment. This issue has now finally been addressed with the introduction of prompt payment and adjudication in many Canadian jurisdictions.

Similarly, then, the fact that the industry has been coping with the problems outlined above does not mean that those problems do not exist, and that the system could not be improved if they were eventually addressed, be it in one of the manners suggested here, or by other means.

Any changes to the roles or functions of consultants that have remained virtually unchanged in more than a century would take a significant amount of work and time to implement and would require in-depth consultation with all professional associations insurers and other key industry stakeholders.

None of this, however, is a good enough reason to continue to ignore the real dilemma of the design professional.

Footnotes

a1 Glaholt Bowles LLP.

1 See generally Chad B. Jones, “The Role of the Architect: Changes of the Past, Practices of the Present, and Indications of the Future”, Dissertation, https://scholarsarchive.byu.edu/etd/395.

2 Royal Architectural Institute of Canada (“RAIC”), *Canadian Handbook of Practice for Architects*, 2nd ed., 2009, 2.3.10.

3 CHOP, 2.3.11.

4 APEGGA, *Responsibilities for Engineering Services for Building Projects*, V. 1.2, March 2009.

5 RAIC Document Six, Schedule A, section 9.

6 ACEC Document 31, A-7--Construction Administration Services.

7 OAA 600, GC 2.1.20 to 2.1.2.1.35.

8 CCDC 2, GC 2.1.1.

9 CCDC 2, GC, 2.2.1.

10 CCDC 2, GC 2.2.5.

11 CCDC 2, GC 2.2.7.

12 CCDC 2, GC 2.2.14.

13 CCDC 2, GC 2.2.15.

14 CCDC 2, GC 5.4.2.

15 B. M. McLachlin, W. J. Wallace & A. M. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Toronto: Butterworths, 1994) at p. 222.

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24 T. G. Heintzman et al, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2018) at 6§2(d)(ii)(B).

25 *Hickman Co. v. Roberts*, [1913] A.C. 229 (U.K. H.L.); cited in *Welcon (1976) Ltd. v. South River (Town)*, 2009 NLCA 59, leave to appeal refused 2010 CarswellNfld 104 (S.C.C.).

26 B. M. McLachlin, W. J. Wallace & A. M. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Toronto: Butterworths, 1994) at p. 223.

27 *Ibid.* at 101.

28 RAIC Document 6, clause A-12.

29 http://www.apegm.mb.ca/pdf/Guidelines/ConsultingEngineerFeeGuide2019.pdf.

30 RAIC, *A Guide to Determining Appropriate Fees for the Services of an Architect*, 2009, p. 13.

31 *Construction Act*, R.S.O. 1990, c. C.30, s. 6.3(2). An exception exists for AFP projects: s. 1.1(2.1).

32 (December 6, 1974), Doc. Vancouver 2572/67 (B.C. S.C.).

33 http://www.apegm.mb.ca/pdf/Guidelines/ConsultingEngineerFeeGuide2019.pdf.

34 CHOP, c. 2.2.10.

35 Architecture:

British Columbia *Architects Act,* R.S.B.C. *1996,* c. 17, ss. 46-57; Alberta *Architects Act*, R.S.A. 2000, c. A-44. ss. 29-65; Saskatchewan *Architects Act,* S.S. 1996, c. A-25.1 ss. 23.1-38; Manitoba *Architects Act*, C.C.S.M. c. A.130, ss. 14-14.1; Ontario *Architects Act*, R.S.O. 1990, c. A.26, ss. 29-36; Newfoundland and Labrador *Architects Act*, R.S.N.L. 2008, c. A-15.1, ss. 15-31; New Brunswick *Architects Act*, S.N.B. 1987, c. 66, ss. 16-22; Nova Scotia *Architects Act*. R.S.N.S. 2006, c. 12, ss. 36-50; Prince Edward Island *Architects Act*, R.S.P.E.I. 1988, c. E-18.1, ss. 17- 24; Northwest Territories *Architects Act*, S.N.W.T. 2001, c. 10, ss. 34-56. Nunavut and Yukon currently do not have an *Architects Act* or similar legislation.

Engineering:

British Columbia *Engineers and Geoscientists Act,* R.S.B.C. *1996,* c. 116 ss. 28-39; Alberta *Engineering and Geoscience Professions Act*, R.S.A. 2000, c. E-11. ss. 42-77; Saskatchewan *Engineering and Geoscience Professions Act,* S.S. 1996, c. E-9.3 ss. 28.1-45; Manitoba *Engineering and Geoscientific Professions Act*, C.C.S.M. 1998, c. E120, ss. 29-55; Ontario *Professional Engineers Act*

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R.S.O. 1990, c. P.28, ss. 23-39; Newfoundland and Labrador *Engineers and Geoscientists Act* R.S.N.L. 2008, c. E-12.1, ss. 20-37; New Brunswick *Engineering and Geoscience Professions Act* S.N.B. 1999, c. 50, ss. 17-20; Nova Scotia *Engineering Profession Act*. R.S.N.S. 1998, c. 148, ss. 17-17W; Prince Edward Island *Engineering Profession Act*, R.S.P.E.I. 1988, c. E-8.1, ss. 16-21; Yukon *Engineering Profession Act*, L.R.Y 2002, c. 75, ss. 25-58; Northwest Territories and Nunavut *Engineering and Geoscience Professions Act*, S.N.W.T. 2006, c. 16, ss. 28-52.

36 J. Sidnell, "The Code of Ethics" *Canadian Consulting Engineer*, October 1, 2005, https://www.canadianconsultingengineer.com/features/the-code-of-ethics/.

37 Manitoba Association of Architects' Code of Ethics, paragraph 4: "The Architect must guard equally the interests of the Contractor as well as the Client. The Architect must demand of the Contractor the highest quality of workmanship and material in conformity with the contract documents."

38 1999 ABCA 72, reconsideration / rehearing refused 1999 CarswellAlta 348 (C.A.), leave to appeal refused [2000] 1 S.C.R. xxi (note).

39 2007 NWTSC 66.

40 R.S.N.W.T. 1988, c. E-6.

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42 B. M. McLachlin, W. J. Wallace & A. M. Grant, *The Canadian Law of Architecture and Engineering*, 2nd ed. (Toronto: Butterworths, 1994) at p. 222.

43 2006 MBQB 61, additional reasons 2006 CarswellMan 871 (Q.B.), affirmed 2007 MBCA 17.

44 T. G. Heintzman et al, *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2018) at 6§2(d)(ii)(B).

45 2003 SKQB 506 at paras. 18-19.

46 *Spadafora v. Griffin*, 1914 CarswellBC 374 (C.A.) at para. 1.

47 https://contractdocshelp.aia.org/Get_Document_Answers/Document_Instruction_Sheets/By_Series/B-Series/B209-2007.htm. See, for example, N.Y. Comp. Codes R. & Regs. Tit. 21, § 4212.12; Cal. Health & Safety Code § 129805.

48 See https://contractdocshelp.aia.org/Get_Document_Answers/Document_Instruction_Sheets/By_Series/B-Series/B209-2007.htm.

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51 Monika Chao-Duivis et al., *Studies in European Construction Law* (European Society of Construction Law, 2015) at 28 and 571.

52 CCDC 2--2008, GC 2.2.7, 2.2.8.

53 CCDC 2--2008, GC 2.2.9.

54 CCDC 2--2008, GC 5.5; GC 6.5.

55 CCDC 2--2008, GC 8.1.1.

56 OAA 600, 2.1.26.

57 RAIC Doc. 6, 5.4.2.

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58 See, for example, *Law Society Act*, R.S.O. 1990, c. L.8, s. 26.1.

59 OAA 600, GC 4.4.7.

60 J. G. Davies, "Conflicts of Interest, Impartiality and Adapting the Role of the Consultant as Contract Administrator in Canadian Construction Contracts" (2011), 95 C.L.R. (3d) 16.

61 J. D. Vallis and E. Berry, "A Bought Magistrate: The Conundrum of the Consultant" (2013) *Journal of the Canadian College of Construction Lawyers* 29.

62 *Ibid.*

63 Chad B. Jones, "The Role of the Architect: Changes of the Past, Practices of the Present, and Indications of the Future", Dissertation, https://scholarsarchive.byu.edu/etd/395, pp. 80-1.

64 By "true" design-build, the authors contemplate a model where there is a single design professional and builder entity, as opposed to a CCDC 14 structure involving separate design-builder, consultant, payment certifier and owner's advisor entities.

65 Paraphrased from Nancy B. Solomon, "The Hopes and Fears of Design-Build", Architectural Record 11:05, https://www.architecturalrecord.com/ext/resources/archives/practice/pdfs/0511hopes.pdf.

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67 Section 43(1) Regulation 27 of the *Architects Act*.

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