

Resolving Construction Disputes

BY KAREN MARTIN AND ALLAN WU



Claims are made virtually daily on construction projects in Canada, and most are resolved in a timely way. But when a dispute remains unresolved, the consequences can be disastrous, whether it results in a termination, a legal battle, or even “soldiering on” while one of the parties suffers financially.

There are some simple, proven strategies that can be employed at various stages of a project to reduce the likelihood of disputes, and to efficiently resolve them, if they do arise, with minimal harm to the project.

Reasons to Avoid Litigation and Arbitration

For those who have lived through a trial or arbitration, the disadvantages are clear:

- The legal costs and length of the process;
- The damage to the business of diverting valuable personnel away from new projects;
- The harm to relationships and reputation; and
- The uncertainty of outcome, since the result is determined by an arbitrator or judge (often with no construction expertise).

The BC court case of **Foundation v. United Grain Growers** from the early 1990s provides an example of the consequences of the failure to resolve construction disputes. The case involved claims for delays and extras by a subcontractor and general contractor made against an owner and engineer. Six years after substantial completion, and following 99 days of discovery and 133 days of trial, the “winner” had incurred \$1.2 million in legal expenses to recover a judgment of \$1.1 million (and interest). All of the other parties fared much worse. Note that today the legal costs for this kind of litigation would be several million dollars.

Strategies to Avoid Disputes

Proactive steps can be taken at the front-end of a project to reduce the likelihood of disputes.

Some of the more successful strategies include:

- Choose the right consultant — with the necessary expertise, resources, and good judgment to successfully manage the project.
- Select the best contractual and procurement models, and use a clear and simple contract — involve an experienced construction procurement lawyer, easily done at a relatively low cost.
- Involve a contractor in the design to avoid constructability issues and to identify value engineering opportunities.
- Assign risks to the party best able to manage them, or share them, rather than simply trying to offload as many risks as possible on to the other party (i.e. unexpected soils conditions).
- Use a dispute resolution clause that meets your project’s needs in terms of timeliness, flexibility, and finality — creative options are available.

Critical steps that can be taken during construction to avoid disputes include:

- Ensure the project implementation team spends time with the contract negotiation team and fully understands the contract. Consider getting legal assistance. On recent projects the failure to do this is a common source of disputes.
- Follow the notice and documentation requirements under the contract.
- Follow the contract and insist the other party do so — otherwise, a dispute may arise about whether legal rights have been waived.
- Be aware of the danger zones — delays, scope/extra work, soils, quality of work and design issues.
- Ensure all critical issues are discussed at regular site meetings and that the minutes are accurate. Consider periodic “executive level” meet-

ings, and separate meetings on technical issues or schedule.

- Be timely in performing contractual obligations.
- Ensure accurate project records are being maintained (including photographs).
- Keep your communications (especially emails) fair and reasonable.
- Remember the duty to mitigate — if the other party breaches the contract, you must take all reasonable steps to mitigate your damages.

Strategies to Resolve Disputes

Most construction contracts have a “tiered” dispute resolution process consisting of a series of increasingly formal steps: a consultant decision; followed by negotiations (often involving senior management); an optional non-binding expert opinion; a mediation (negotiation with a mediator); and finally, arbitration or litigation.

Negotiation is by far the best way to resolve a dispute. It is cost effective, and importantly, it gives control over the outcome to the parties.

When a dispute arises, it is helpful first to read the contract and to seek advice about the strength of your legal position. Then, focus on practical solutions with benefits to both parties, and be flexible regarding possible outcomes.

Keep in mind that the parties can always agree to a different process than what is in the contract. With a little legal assistance, it is possible to design a process that fits the dispute and the project, the goal of which is to allow all the necessary persons with the right expertise to adopt a proactive problem-solving approach, without fear of legal liability consequences.

For example, partnering sessions, often with a facilitator, can be used to avoid or address difficult technical, communication or relationship issues. Or the parties may choose to involve a well-respected expert on a technical issue to provide non-binding advice.

One very successful technique is to hold a “without prejudice” brainstorming session without lawyers present. A simple agreement can be set in place that all parties reserve their rights regarding responsibility for the problem, and that proposing solutions does not in any way amount to an admission that could be used in any subsequent legal process. To keep the project moving, without prejudice solutions can be implemented, with the parties reserving their rights to pursue formal proceedings at a later time.

Disputes on construction projects cannot be avoided, but with a little diligence, creativity, and reasonableness, legal proceedings can be avoided. **CB**

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