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FACILITATING THE CONSTRUCTION DISPUTE RESOLUTION PROCESS

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In 1997, in a paper entitled *"Why Construction Lawyers Must Change",* Geza Banfai wrote that there is "*…a growing disparity between what the construction industry needs and wants, on the one hand, and what the legal profession is prepared to deliver on the other. A further problem is the industry's perception of the legal system and of the lawyers who are the gatekeepers to that system. What is that perception? I suggest that it is that the legal system is inefficient, unpredictable, expensive and slow, and that too many of the lawyers who tend that system are unimaginative, self-interested, unresponsive and insensitive to business realities.*"

For the record, Geza is neither merely a casual observer of the construction industry nor a disenchanted contractor with an axe to grind because his legal counsel has just failed to win a favourable judgement on his behalf in litigation. He is a partner in the Toronto law firm Blaney McMurtry LLP, and chair of the firm's Architecture / Construction / Engineering Services group. In the same article, he quotes John W. Hinchey, one of the top construction lawyers in North America and past-chairman of the American Bar Association's Forum on the Construction Industry – *"The construction industry is extremely frustrated with the legal profession, the judicial system, and, of course, litigation. Nor are they particularly infatuated with arbitration, which they think the lawyers have taken over and botched, just like the courts. To the extent possible, the construction industry wants to march into the 21st century without lawyers in their lives."*

I am sure that all players in the construction industry, whether they be owners, general contractors, subcontractors, or allied professionals can provide strong and informed opinions on this matter, and most can relate their own horror stories of projects gone bad, the resultant disputes, and the time, cost, energy and goodwill expended in their resolution.

One Canadian case settled in the Supreme Court of British Columbia in 1995 serves as a typical example. *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.* arose from a 1989 project to renovate UGG's grain terminal in Vancouver valued at $16M, including a $2.86M subcontract with Crosstown Metal Industries Ltd. for metal spouting. After the project had been completed four months late, Crosstown claimed damages of approximately $1.7M from Foundation, Foundation claimed against the owner for approximately $2.2M, and the owner counterclaimed against Foundation for about $5M. In a decision that has been well documented in legal journals, six years after the project had been completed, following ninety-nine days of discovery and one hundred and thirty-two days of trial, the litigation process produced an outcome recorded in a three hundred and thirty page decision whereby the settlements awarded to each of the parties were far outstripped by the legal costs which each incurred. The final result was further protracted by an appeal which consumed an additional two years without materially changing the outcome.

A much earlier case, *McIntosh vs. the Great Western Railway,* was settled in Britain's Court of Chancery in 1865. The disputed claim concerned difficult ground conditions on two separate contracts related to railroad construction, one for embankments at a river crossing at Hanwell west of London, and the other for work between Bath and Bristol. The engineer for both contracts was I.K.Brunel, a well-known railroad engineer of the day with a reputation for good engineering practices, but with a track record of poor working relationships, time and cost overruns, and the resulting disputes which ensued. The matter was finally settled in McIntosh's favour after twenty-nine years of litigation, and in his judgement the judge was critical of Brunel's management practices. As it was subsequently observed, this was of little consequence to Brunel, since both he and the principal contractor involved had died several years before the decision was rendered.

It is therefore evident that today's problems have existed to some degree for as long as construction disputes have occurred. Given the well-known and well-documented problems of cost and time associated with the litigation and arbitration processes, what options are available to owners and contractors for more efficient resolution of construction disputes?

Most standard construction contracts including CCDC 2 - 1994 now make provision for some form of formal dispute resolution process. However, there exists a wide range of techniques, and variations thereof, available to project participants which can be employed to assist in the achievement of timely and cost-effective resolution of construction disputes before resorting to the commonly prescribed sequence of mediation — arbitration — litigation. Some jurisdictions have experimented with the use of referees and Dispute Resolution Boards, with mixed success. Neither approach appears to have gained wide acceptance in the Canadian industry.

One of the fundamental obstacles to the effective resolution of disputes at the project level is that it is often the same individuals who caused the problem in the first place who then attempt to resolve it. Positions harden, emotions frequently get in the way, and the process quickly reaches a stalemate. For these reasons, the intervention of a third party, in some manner and to some degree, is often the catalyst required to break the impasse and move the parties towards a settlement. Following is a brief description of three alternative approaches with which Revay and Associates Limited (Revay) has had some first-hand experience, and which may offer some positive benefits without

resorting to more expensive and time-consuming options.

PARTNERING

While it is a fundamental principle of the partnering process that disputes be dealt with, in the first instance, by project participants at the level directly involved in the dispute before being escalated within the respective organizations, it is common to have an independent third party facilitate the development of the project partnering agreement, and sometimes to facilitate the negotiation of major issues as well.

In recent years, the partnering process has achieved some measure of acceptance by both owners and contractors in Canada. There are those on both sides who claim significant improvements in the dispute resolution process on their projects, and who have adopted it as standard practice for all projects. Others have tried and abandoned the process, claiming it had made no significant difference. Indeed, one does not have to look too far to discover examples of major and protracted disputes on partnered projects. Whatever its benefits, it obviously is not a panacea for all projects.

The delivery of construction projects has continued to evolve in recent years, driven in many cases by factors such as the expectation of more rapid completion of facilities, technical complexity, or the necessity to adopt innovative forms of project financing. These factors have in turn led to significant changes in the traditional allocation of risks between project participants, the evolution of innovative project delivery models (Design/Build, Build/Own/Operate/Transfer, Public-Private Partnerships, etc.), and the development of related strategies such as partnering.

Typically, an owner who wishes to avail itself of the potential benefits of partnering will indicate its intention in the contract documents. After the tendering and award of the construction contract is complete, a separate non-binding partnering charter or partnering agreement may be executed by the parties independent of the construction contract. A fundamental problem may exist because typically owners and contractors have differing objectives, and therefore construction contracts tend to be adversarial in nature, with the rights and obligations of both parties clearly identified, whereas partnering agreements tend to stress cooperation and collaboration between the parties. Furthermore, other project participants such as designers, project managers and major trade contractors, whose interests are governed by entirely separate contracts with very different terms, may be included within the scope of the partnering agreement.

Under these circumstances, when a serious dispute arises, there is a tendency for the parties to protect their individual interests by reverting to the relative comfort of the terms of their traditional contracts rather than to follow the principles established in the partnering agreement. Some jurisdictions have attempted to rectify this situation by amending the terms of their standard contracts such as ICE or FIDIC to more closely align them with the principles of the partnering agreement.

A further step in the evolution of a true alliance environment for construction projects is the development of a multi-party contract. Although at least two examples of this form of contract have been developed since the year 2000, the legal complexities involved in such a document have precluded its widespread adoption until such time as it has been proven in both the field and in the courts.

THE THIRD-PARTY NEUTRAL (OR PROJECT NEUTRAL)

A second approach, and one with which Revay has had some first-hand experience on major industrial projects in the Alberta oil-patch, is commonly referred to as the Third Party Neutral, or alternatively, the Project Neutral.

In its purest form, the owner makes a decision to adopt this technique prior to tendering any contracts. The intention to utilize this approach, the methodology, and in most cases, the identity of the Third Party Neutral is then specified in the contract documents. It is critical to the success of the technique that the individual (or firm) selected be both knowledgeable and experienced, not only in the general construction environment, but also in the particular type of work being undertaken. In general, the methodology requires the sharing of all costs of the process between the participants on an equal basis. Presumably, prospective bidders have the opportunity to seek clarification of any related issues during the tendering process, or in the extreme, can elect not to participate in the project if they have an aversion to the process. The process can be applied to issues which arise between any of the project participants who agree to the terms, and not just exclusively to disputes between the owner and the prime contractor.

Revay has, however, been involved in the capacity of Third Party Neutral on some projects where the owner elected to adopt the process, and to bear all associated costs, subsequent to the award of the construction contract, and imposed that decision on the contractor.

The objectives of this approach are to provide a voluntary, independent, consistent, fair, expeditious and non-binding aid to dispute resolution on a cost-effective basis. A secondary benefit is that, through the involvement of a third party, the process minimizes the adversarial attitudes which might otherwise develop between the parties, and allows the principals to focus their energies on the main project delivery objectives rather than on disputed issues.

Ideally, the Third Party Neutral should maintain an ongoing involvement, at least on a periodic basis, throughout the course of the project, even when there are no active disputes. This ensures that in the event that a dispute does arise, the Third Party Neutral is aware of all current issues, that the learning curve is minimized, and that the objective of expeditious resolution of disputes is not compromised. In order to minimize costs, this ongoing involvement may consist of periodic attendance at site meetings, or simply by being copied on minutes of meetings and other key correspondence.

As in any other form of dispute resolution, it is incumbent upon the claimant to demonstrate the cause and effect of any alleged impact, its contractual entitlement to recover any resulting damages, and an accurate quantification of those damages. It is generally assumed that prior to activating the services of the Third Party Neutral on a particular dispute, the parties have exhausted all reasonable attempts at a negotiated settlement. Under these circumstances, each party presents its position, and provides access to all its project records for the Third Party Neutral in the event that additional fact-finding is required. It is customary for the Third Party Neutral to submit his/her opinion in a report to all participating parties within a specified timeframe, subject to challenge by any of the parties. When a challenge is deemed to have merit, the initial report may be regarded as an interim report, and may subsequently be amended in a final report.

It has been our experience that although the opinion expressed in the final report is not binding on the parties, provided that the individual's experience and judgement are respected by the parties, the report of the Third Party Neutral is often enough to promote an amicable settlement of the issue in lieu of the prospect of a protracted and expensive litigation. In fact, on one memorable project the prospect of the relatively minor cost involved in seeking an opinion from the Third Party Neutral on each issue which arose was sufficient to send the parties back to the negotiating table on each occasion that a dispute arose. The outcome was that the entire project was completed without the services of the Third Party Neutral being engaged. While this obviously did not contribute much to Revay's bottom line, the process itself could be considered a resounding success, even without being formally activated. By its very existence, the process fulfilled its objectives of providing a timely, cost-effective and non-adversarial dispute resolution mechanism!

THE INDEPENDENT CLAIMS CONSULTANT

Another variation of what could be considered as a successful third party intervention in the resolution of construction disputes has been applied during Revay's

current experience on the $4.4 billion Airport Development Program for the Greater Toronto Airports Authority (GTAA) at Lester B. Pearson International Airport (LBPIA) in Toronto.

Shortly after the GTAA assumed responsibility for the management, operation and maintenance of LBPIA on December 2, 1996, work on the design and construction activities associated with the program was initiated. This comprehensive program is planned to provide facilities to accommodate growth in passenger traffic from the current level of just under 30 million passengers per year to a forecast level of 50 million enplaned/deplaned passengers in the year 2020. It comprises four main components, each of which in turn comprises a number of discrete, but inter-related projects.

The most high profile component of the program is the Terminal Development Program. The main element of this program is the new four-level terminal building which will encompass over 390,000 square metres of floor space in the central processor and five piers in its ultimate configuration. Stage 1 of the building is scheduled to open in the spring of 2004, followed by stages 2 and 3 which are currently forecast to be finished by the year 2008. Stage 4 is presently planned for future development as demand warrants it. In addition to the new terminal building, an adjacent eight level parking structure with an ultimate capacity of approximately 12,600 cars – the largest in North America, is being constructed in stages, with 9,000 spaces completed in the first stage. The first stage of the Airport People Mover, a fully automated elevated train system, will link the new terminal and Terminal 3. Extensive road and bridge construction has been undertaken to provide access to and egress from the new facilities, and the aircraft apron, along with aircraft fuelling facilities, will be expanded by about 650,000 square metres in Stages 1 and 2 to serve the new terminal.

The Airside Development Program was planned to increase the airfield capacity by about 30%, commensurate with the new terminal facilities. To date, it has seen the successful completion of an extension to existing Runway 05-23, a dual taxiway system adjacent to the terminal apron, a new Central Deicing Facility, and the new Runway 06R-24L. Another new runway, 05R-23L and a new North Deicing Facility are slated for future development.

The recently completed Infield Development Program was implemented to address the relocation of cargo and other support facilities displaced by the new terminal and other development programs. It comprised an access tunnel to the infield, new cargo facilities, a new Air Canada Equipment Maintenance Building, new aircraft hangars, a new Cara Flight Kitchen, a temporary Infield Terminal, site access roads, and the relocation of the Pearson International Fueling Facilities Corporation.

The Airport Support and Utilities Program comprises a variety of projects required to accommodate existing facilities impacted by the Airport Development Program, as well as those required to service the new facilities. These projects include two new firehalls, a new Airfield Maintenance Complex, and several administration buildings for various agencies. In addition, a new Central Utilities Plant was constructed, and redevelopment of utility infrastructure was undertaken consistent with the Utilities Master Plan, including work on the electrical distribution network, storm and sanitary sewer systems, water supply system, hot and chilled water supply systems, and the information technology and telecommunications systems.

In short, the Airport Development Program represents an almost complete redevelopment of LBPIA's infrastructure. In addition to the scale and technical complexities of many of the projects, many other challenges had to be addressed. Historically, airport development projects have had a high degree of exposure to the risk of changing user requirements, and this program was no exception. The constraints imposed by airport safety and security requirements, a fast-track design and construction schedule, and the superimposing of new facilities on top of existing facilities which had to continue to process almost 30 million passengers per year presented significant obstacles to the successful implementation of the program.

All-in-all, at the outset the situation appeared to provide many of the ingredients typically associated with bitter, protracted and expensive construction claims. However, almost seven years into the program, with construction valued at several billions of dollars successfully completed and the new terminal building about to open, the program has established an impressive track record for resolution of construction disputes. To date, not one claim has proceeded to either litigation or arbitration. Although some claims are still actively in the resolution process, and undoubtedly more will occur prior to completion of the program, there is no reason to believe that this record cannot be maintained.

How has the GTAA achieved this impressive record?

One contributing factor was the fact that the GTAA embraced the philosophy articulated in its Value Statement – *"Create a problem solving environment that is practical, flexible and creative through a candid, clear communications process based on the core values of mutual respect, trust, honesty/integrity and individual accountability."* The application of partnering principles reinforced this philosophy.

A second significant factor was the selection by the GTAA of the most appropriate contracting strategy for each major component of its program. Based on factors such as experience, available resources, risk, timing and complexity, the GTAA selected traditional fixed price contracts for the airside and roads and bridges projects, design-build for the infield development, and construction management for the new terminal building and parking structure as well as for the new Central Utilities Plant.

A third factor was the establishment and application of a formal issue resolution process from the outset of the program.

Each individual trade contract was based on the Standard Construction Document CCA 17 - 1996, with the incorporation of the standard Dispute Resolution clause from CCDC 2 - 1994 Stipulated Price Contract, as well as other amendments specific to each project. This process was adopted with two objectives in mind. First, the process encourages a speedy and inexpensive resolution of disputes in an informal setting through negotiation, and if necessary, through assisted negotiation with the assistance of a project mediator. A second objective was that quick settlement of disputes would allow the parties to complete their contractual obligations without continued animosity.

The GTAA also conferred a significant role in the dispute resolution process on its construction manager for the new terminal building project, PCL/Aecon. The Construction Management Agreement required that, with respect to claims and disputes, the Construction Manager:

"…Take actions, make recommendations and provide advice to avoid, minimize, and protect the Owner, against claims and disputes by Trade Contractors and Suppliers … Notify the Owner, Consultant and Project Management Consultant of potential claims or disputes. Provide advice, make recommendations and take actions to mitigate claims or disputes … Collect, document and submit to the Owner, Consultant and Project Management Consultant all relevant facts and cost data related to claims or disputes … Negotiate resolution of claims or disputes in consultation with the Owner, the Consultant and the Project Management Consultant. Make recommendations for settlement of claims or disputes and, subject to the Owner's prior approval, settle such claims or disputes … Assist the Owner with the resolution of claims or disputes through mediation, arbitration, litigation or other dispute resolution mechanisms."

Many claims and disputes have been resolved through the negotiation process during the course of the project between individual trade contractors and the Construction Manager, with the input of the Consultant, without further recourse to other parties or other steps within the dispute resolution hierarchy. When required, the dispute resolution process established for the program incorporates the usual steps of finding by the Consultant, notification of dispute, reply to dispute, amicable negotiation, mediation, arbitration and litigation. Each step in the process is subject to specified notification requirements and time limitations.

A fourth factor which has contributed to the success of the dispute resolution process, in the eyes of the participants, has been the involvement of an independent claims consultant in the procedure.

In mid-1997 the GTAA retained MGP Project Managers, a joint venture comprising Marshall Macklin Monaghan, Giffels, and Parsons, to act as the Project Management Consultant for the Airport Development Program. MGP's mandate included a comprehensive range of project management services, including several activities related to the dispute resolution process. These responsibilities included the establishment of claims avoidance procedures, the preparation of defences against claims from trade contractors and suppliers, the provision of assistance to the owner in mediation or arbitration proceedings, the provision of litigation support, and the provision of settlement recommendations to the owner. Initially, Revay was retained by MGP as a subconsultant with specific responsibilities related to project controls, risk analysis, and claims avoidance. While these same functions continue today, as of December 2002 the responsibilities related to the claims and dispute resolution process have been separated from the MGP mandate and are now provided by Revay, as the independent claims consultant, under direct contract to the GTAA.

In the event that an issue is not resolved directly between the construction manager and the trade contractor, or when particularly complex claims or those requiring specialized analytical techniques arise, PCL/Aecon may request the involvement of the independent claims consultant through the GTAA's Construction Manager. The independent claims consultant, through interface with the GTAA, the construction manager, the trade contractor and the architect or engineering consultant, can provide a measure of objectivity, clarity and understanding which can assist in achieving an equitable and expedient resolution of issues. In this role, the independent claims consultant undertakes an impartial evaluation of the issues, with the goal of resolving the dispute in an objective manner as expeditiously as possible. Generally, this evaluation may include the establishment of factual information, the review of entitlement considerations, and the completion of cost, schedule and productivity analyses. Frequently this role is also expanded to include direct participation in negotiations between the construction manager and the trade contractor.

While the services of the independent claims consultant are provided to the GTAA, the role requires the establishment of a close working relationship with the construction manager. Direction is often taken from PCL/Aecon with respect to the scope of services required in each instance, and the construction manager is relied upon for the provision of essential project documentation and records. More specifically, the range of services may include:

- Analyzing the justification for entitlement based on the terms and conditions of the contract,
- Analyzing critical delays and the responsibility for those delays,
- Evaluating the impact of concurrent delays,
- Determining appropriate methods of damage quantification based on equitable adjustment principles,
- Determining the categories of costs which may be claimed,
- Calculating site overheads and head office overheads,
- Auditing the trade contractor's records to determine actual costs incurred,
- Applying empirical data or theoretical calculation of damages, where appropriate,
- Evaluating the extent of damage mitigation implemented by the trade contractor,
- Establishing any potential counterclaims,
- Developing settlement recommendations to the GTAA,
- Participating in settlement negotiations with the Construction Manager and the trade contractor, and
- Providing support in the mediation, arbitration and litigation processes, as required.

It is of major significance in the success of this process that, although these services have been retained directly by the owner, in all cases where it has been required trade contractors have provided full and open access to their project records in order to facilitate the review. This is a significant departure from the normal adversarial attitudes encountered in construction claim situations, and coupled with the high degree of cooperation from all project participants working towards a common objective of an equitable settlement, has made a significant contribution to the successful track record.

Will these techniques, or other variations, prevent construction disputes on all projects?

Absolutely not. Disputes will continue to arise on construction projects for all the usual reasons, both those within and those beyond the control of the parties concerned.

Will they assist in the achievement of timely and cost-effective resolution of those disputes which do arise on all projects, and help project participants to maintain a positive focus on the principal objective of constructing a quality project on time and on budget?

Maybe. There are absolutely no guarantees.

However, from our experience, there is little or no risk involved in making the attempt, and the potential benefits to be gained in terms of time and cost savings as well as maintaining healthy working relationships on the site far outweigh any risk which may exist.

For those parties for whom a win-lose outcome is the only acceptable result, nothing short of their day in court may suffice. In many cases, even a perceived victory may result in a loss, as in the *Foundation Co. of Canada Ltd. v. United Grain Growers Ltd.* case quoted earlier in this article. However, for those with a broader perspective, who may appreciate the benefits to their project accruing from a win-win outcome, it is our opinion that any technique which offers the potential of limiting the distraction from overall project objectives associated with a protracted dispute is worth consideration. In many cases the involvement of a third party, independent or otherwise, who is knowledgeable with respect to the project and has the requisite technical expertise, can provide objective opinions, minimize the impact of emotions, and assist the parties to move off entrenched positions and towards a settlement.

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