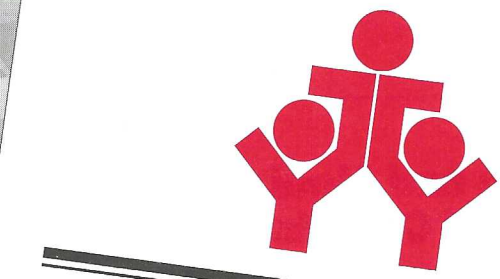

Canadian Arbitration and Mediation JOURNAL
d'Arbitrage et de Médiation Canadien

A publication of the Arbitration and Mediation Institute of Canada Inc.
Publié par l'Institut d'Arbitrage et de Médiation du Canada Inc.

Vol. 3 No. 2
Winter/ Hiver 1995

TABLE OF CONTENTS

The role of the project mediator in Canadian construction contracts

by Gail H. Forsythe

Innovative dispute resolution systems are "alive and well" and flourishing in Canada. Canadian innovations in dispute resolution are occurring in the public and private sectors. [1]

A recent example developed in the construction industry during June, 1994 when the Canadian Construction Documents Committee endorsed a revised Stipulated Price Contract, known throughout the industry as the "CCDC 2". [2] The CCDC 2 incorporates a staged dispute resolution system: negotiation, mediation, arbitration or litigation.

The CCDC 2 dispute resolution system is designed to facilitate the economical, efficient, fair and less adversarial resolution of construction disputes. The success of other dispute resolution systems in meeting similar design requirements suggests that the CCDC 2 can play an important role in assisting stakeholders to reduce the financial costs, delay, power inequities and business and personal costs normally associated with litigation. [3]

This paper addresses: (1) conflict in the construction industry; (2) the stages of the dispute resolution system set out in Part 8 of the CCDC 2 and (3) the role of a project mediator appointed under the CCDC 2.

I. Conflict in the construction industry

Construction project stakeholders typically face many obstacles to the successful, litigation-free completion of a project: multiple parties, technical complexities, extremely narrow profit margins, "creative" marketing, intense personality conflicts and adverse weather conditions. It is the combination of these obstacles that creates a "formula for litigation."

It is not the dispute itself, but the failure to resolve the dispute quickly that causes the greatest financial and personal hardships for the parties.

The successful completion of a construction project often depends upon the willingness of individuals to respond appropriately to and communicate with one another. Disputes and defensive postures may arise because of communication breakdowns and personality clashes. Disputes frequently escalate so severely that legal action is resorted to without assessing the long-term costs of being involved in litigation.

The impact of personality and communication difficulties is illustrated by comments from many stakeholders on a highly visible, major Vancouver project that was under construction in 1994. The project stakeholders experienced an unusually high degree of conflict and said:

- "People do not speak to one another for days"
- "Shouting matches occur"
- "I get sick to my stomach at the prospect of going to the site"
- "I feel ignored, humiliated, abused, taken advantage of, discounted, manipulated..."
- "The next blow up may mean the gloves are off!"

The escalation of unresolved disputes, personality and professional clashes, the need to be financially viable after an extraordinarily low bid, and unrealistic budgets and expectations are ingredients that cause disputes to escalate and enter the legal system. Once in the legal system, disputants generally find themselves involved in very costly, time-consuming and often surprising or unsatisfactory outcomes.

Disputes on a construction project are a reality. It is not the dispute itself, but the *failure to resolve the dispute quickly that causes the greatest financial and personal hardships for the parties.* The construction industry, and Canadian taxpayers, cannot afford to ignore disputes and allow them to escalate.

The history of disputes in the construction industry demonstrates the severe financial, business, personal and lost opportunity costs associated with the negative "ripple effect" of unresolved construction disputes. Neither stakeholders nor the Canadian public can afford to ignore the consequences of unresolved disputes. Stakeholders indicate they simply want to get the job done, not prepare for or be involved in costly litigation.

If Canadians want to be competitive and viable in a global economy, disputes must be reduced in number and dealt with quickly to ensure that valuable financial and other resources are used in the

most effective manner possible. Effective dispute resolution requires a change in attitude—a willingness to resolve disputes rather than avoid conflict. Effective dispute resolution also requires a recognition that an immediate investment in effort and time can have long-term positive results and reduce the negative "ripple effect" of construction disputes.

The CCDC 2 dispute resolution provisions are designed to keep control of the outcome of the dispute in the hands of the stakeholders as long as possible. Disputants must assume responsibility for their actions by resolving their disputes rather than prematurely passing that responsibility onto an overburdened legal system. The Canadian legal system is not designed to assist parties to create unique, mutually acceptable settlements. The Canadian legal system relies upon the opposite concept: adversarialism. Adversarialism is costly and breaks down relationships.

The CCDC 2 dispute resolution provisions create a system designed to promote privacy, outcome control, simplicity of use, timeliness, flexibility and economy for the parties. The CCDC 2 dispute resolution system is also designed to encourage a change in attitude, or proactive approach, toward conflict within the construction industry. A proactive approach can include learning about and using the dispute resolution system in the CCDC 2 rather than applying adversarial methods such as "chain saw law" [4] when disputes become problematic.

II. The dispute resolution system set out in Part 8 of the CCDC 2

There were many revisions to the CCDC 2; the revision that is of interest to disputants, mediators and arbitrators is the amendment of the dispute resolution clause in Part 8 of the general conditions of the contract. The revisions to Part 8 are of interest because:
(1) The amendment provides stakeholders with a step-by-step or systematic approach to dispute resolution;
(2) The dispute resolution system promotes the concept of disputant accountability and outcome control by including mediation as well as arbitration;

Effective dispute resolution requires a change in attitude — a willingness to resolve disputes rather than avoid conflict.

(3) The early appointment of a project mediator increases the likelihood of immediate access to a skilled neutral and an anticipated proportionate increase in the number of disputes that are resolved.

How does the revised CCDC 2 dispute resolution system work? The CCDC 2 defines a dispute as "a difference between the parties to the contract as to the interpretation, application or administration of the contract or any failure to agree where agreement between the parties is called for." [5]

Once a dispute arises, the CCDC 2 "system" or "steps" for resolving the dispute govern. The CCDC 2 dispute resolution steps are:

1. The consultant's finding. The consultant shall make a finding if the consultant has authority to do so. The architect or the engineer (or the respective firm) shall be identified as the consultant in the contract. [6] If a dispute arises in respect of a matter in which the consultant has no authority to make a finding, the contract specifies that the procedures for work to continue under the consultant's instructions pending resolution of the dispute by negotiation, mediation and arbitration shall apply. [7] The contract provides that the parties shall act immediately and according to the consultant's instructions to prevent delay pending settlement. [8] It is a term of the contract that neither party's claim is jeopardized by acting immediately according to the consultant's instructions.

If the matter is not resolved by the consultant, then the negotiation, mediation and arbitration provisions set out in GC 8.2 apply. GC 8.2 set out additional steps and time frames to resolve the dispute as quickly, economically and fairly as possible.[9]

2. Notice of dispute. A party is conclusively deemed to have accepted the consultant's finding and expressly waived and released the other party from all claims relating to the finding unless, within 15 working days after receipt of the finding, the party sends a written notice of dispute, outlining the particulars and the relevant provisions of the contract documents, to the consultant and the other party. [10]

3. Notice of reply. Within 10 working days after receipt of the notice of dispute, a party shall send a written notice of reply to the consultant and the other party. [11]

4. Direct negotiation. After the notices of dispute and reply are exchanged, the parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents. [12]

5. Mediation. After 10 working days after receipt of the notice of reply, the parties *shall* request the appointed project mediator to assist them to reach agreement on any unresolved dispute.

If mediation does not resolve the dispute within 10 working days, within such further period agreed by the parties, then the pro-

ject mediator shall terminate the mediation by giving written notice to both parties. [14]

6. Arbitration. If an impasse occurs, either party *may* refer a dispute to be finally resolved by arbitration by giving written notice to the other party not later than 10 working days after the date the mediation is terminated. [15]

All disputes that are referred to arbitration *shall* be consolidated and held in abeyance until the work is substantially performed, the contract is terminated or abandoned (whichever is earlier) unless a party requires by notice in writing given with 10 working days of the date of notice requesting arbitration that a dispute be arbitrated immediately. [16]

7. Litigation. If a notice to arbitrate is not issued within 10 working days after the mediation termination date, the parties may refer the matter to the courts or to any other dispute resolution process which they have agreed to use. [17]

If the foregoing dispute resolution system is followed, it is most likely that many disputes will be resolved by direct negotiation or mediation. It is important to note that the requirements to negotiate in good faith and to mediate are obligatory, not optional.

Canadian construction disputes appear to be caused by the same factors as U.S. construction disputes. [18] In order to gauge the potential effectiveness of the CCDC 2 dispute resolution system, the Canadian construction industry may want to refer to U.S. data illustrating the settlement rate of commercial and construction disputes through "mandatory" dispute resolution processes. [19]

If the U.S. experience is transferable to the Canadian context, then 80% of Canadian construction disputes should be resolved by using the mediation or arbitration processes as contemplated in the CCDC 2. [20]

III. The role of a CCDC 2 project mediator:

(a) Appointment of the project mediator. The CCDC 2 provides that the parties shall appoint a project mediator within 30 days after the contract was awarded or, if the parties did not do so, within 15 days after either party by notice in writing requests that the project mediator be appointed. [21] If the

A 1993 survey indicates that mediation is considered more effective and more satisfying than arbitration.

parties are unable to agree on a project mediator within the time required, either party may request the neutral appointing authority named in the Supplementary Condition to the Contract to make the appointment. [22] A judge of the superior court of the jurisdiction of the place of work may make the appointment if a neutral appointing authority is not named. [23]

Before accepting an appointment, the proposed mediator shall provide the parties with a written statement declaring the mediator does not have an interest in the outcome of the case or any knowledge that would raise a likelihood of bias or non-objectivity. [24]

(b) Qualifications of the project mediator. The rules for mediation and arbitration of construction disputes for use with the CCDC 2 describe the qualifications of a "project mediator." [25] A project mediator:

(1) Must be impartial and independent of the parties;

(2) Must be an experienced and skilled commercial mediator;

(3) Preferably shall reside or conduct business in the jurisdiction of the place of work and have knowledge of relevant construction industry issues.

(c) The CCDC 2 mediation process: The project mediator's role is to manage the process in accordance with the rules for mediation of CCDC 2 construction disputes.

Some points of interest that arise from the rules are:

(1) Legal counsel may attend with a party at the mediation; [27]

(2) The time to resolve the matter through mediation may be extended by an additional 10 working days upon agreement by the parties; [28]

(3) If the parties agree, the project mediator may provide the parties with the terms of a non-binding recommended settlement. [29] If the project mediator does provide a recommended settlement, then the parties may not perceive the project mediator as neutral if future disputes arise on the project.

(4) The mediation process described in the rules contemplates private caucusing; [30]

(5) There are specific provisions that address the need for mediator non-compellability, confidentiality, and limitations on future professional contact; [31]

(6) The project mediator's fees and expenses are shared equally by the parties unless agreed otherwise. [32]

The question of whether or not a project mediator should be placed on retainer will ultimately be answered by market place.

IV. Conclusion

People in business negotiate solutions to problems every day. Most people are familiar with a glamourized and often unrealistic understanding of the litigation process. Many people are also familiar with arbitration. Fewer people understand mediation. An even smaller number of individuals will consider mediation in the heat of a dispute.

Unfamiliarity with the mediation process, and the desire to avoid the time and effort needed to negotiate a settlement to a dispute,

may cause disputants to view more traditional processes such as arbitration as more effective than mediation. However, a 1993 survey concerning the effectiveness of dispute resolution processes indicates that mediation is considered more effective and more satisfying than arbitration or other dispute resolution processes. [33]

Disputants rank "save money" as the most important reason to use alternative dispute resolution processes. Other reasons that are ranked "important" are to: save time and obtain a better result. [34] construction disputes handled through dispute resolution procedures constitute 11% of all types of disputes referred to dispute resolution processes. [35]

Mediation is a process that allows parties to save money and time in an effective and satisfying manner. The ability to remain in control of the process and outcome is provided with the mediation stage of the CCDC 2. The mediation process does not contemplate "winning and losing." Mediation contemplates putting communication and business needs foremost. Mediation is recognized for its ability to "level the playing field" and create an arena for creative problem solving.

If long-term gains, business opportunities, and a less adversarial work atmosphere have value to the construction industry, then the CCDC 2 dispute resolution revisions have the potential to be a significant success and benefit to Canadian construction stakeholders.

Gail H. Forsythe, B.Ed., LL.B., LL.M., is a lawyer and mediator in Vancouver. This paper was prepared and presented by her for the Arbitration and Mediation Institute of Canada annual conference, September 1994.

Footnotes

1 For example: B.C. Hydro implemented a dispute resolution system that has demonstrated itself to be highly effective in keeping B. C. Hydro out of Court. The system improved B.C. Hydro's approach to conflict resolution and its business relationship with contractors. For more information, contact Mr. E. I. (Eric) Kostey, B. C. Hydro, Tel. (604) 528-2354.

2 The Canadian Construction Documents Committee is a joint committee composed of representatives of the: Association of Consulting Engineers of Canada, Canadian Construction Association, Canadian Council of Professional Engineers, Committee of Canadian Architectural Councils and Construction Specifications of Canada.

3 For example: The B.C. Residential Tenancy Board statistics concerning the resolution of tenancy disputes by arbitration demonstrate speedy, economical and fair results. B.C. Arbitration and Mediation Society Annual Conference panel presentation by Tara E. McDiarmid, Arbitrator, Residential Tenancy Board, September, 1994.

4 "Chain saw law" is a term used by the author to describe an interaction between a contractor and an owner in dispute over a final payment for a residential housing project. The dispute was resolved to the contractor's satisfaction when the contractor started up his chain saw and "offered" to remove those portions of the construction that the owner indicated were "unsatisfactory." The owner made an immediate payment. This approach to conflict resolution is an extreme example of resorting to power instead of reconciling conflicting interests.

5 Standard Construction Document CCDC 2 1994, Stipulated Price Contract, GC 8.1.1

6 Supra, 8.1.1 and Definitions at 7

7 Id, 8.1.2

8 Id, 8.1.3

9 Id, 8.1.3,

10 Id, 8.2.2

11 Id, 8.2.2

12 Id, 8.2.3

13 Id, 8.2 The mediation shall be conducted in accordance with the latest edition of the Rules for Mediation of CCDC 2 construction disputes.

14 Id, 8.2.5

15 Id, 8.2.6 The arbitration shall be conducted in accordance with the Rules for Arbitration of CCDC 2 construction disputes.

16 Id, 8.2.8

17 Id, 8.2.7

18 *Alternatives to the High Cost of Litigation*, Centre for Public Resources, New York, Vol. 9, No. 12, December 1991 at p. 185 lists the ten principal causes of construction disputes as reported in a 1991 survey of 191 owner and contractor attendees at the Construction Industry Institute annual conference. The 10 principal causes are:

- Unrealistic shifting of risk under the contract;
- Unrealistic expectations;
- Ambiguous documents;
- Low bids;
- Poor communication;
- Inadequate management;
- Failure to deal promptly with change;
- Lack of team spirit;
- A macho or litigious mind set;
- Failure to assume responsibility for dispute resolution.

19 For example the term "mandatory" can be used to describe a Texas District Court Judge's legislated authority to order litigants to participate in a dispute resolution process before the matter can proceed to trial. The degree of mandatory participation may be as limited as an appearance before the neutral in some contexts—i.e. mediation. *Decker v. Lindsay* 824 S.W. 2d 247 (Tex App - Houston [1st Dist.] 1992)

20 For example: The State of Texas District Court Summary of Reported Activity for the Year Ending Aug. 31, 1992 indicates that 30,293 cases that were received between Sept. 1, 1990 and Aug. 31, 1991. During that same period of time, 26,570 cases were closed outside the courtroom using a variety of mechanisms including mediation, arbitration, negotiation and moderated settlement conferences. The cases reported covered a wide range of disputes and include construction disputes. These statistics indicate an 87.7% settlement rate.

21 Id, 8.2.1

22 Standard construction document CCDC 40 1994 Rules for Mediation and Arbitration of Construction Disputes (for use with CCDC 2 - 1994) Part II, Rule 5.2

23 Supra

24 Id, Rule 5.4

25 Id, Rule 5.2

26 Id, Rule 5.3

27 Id, Rule 8.3

28 Id, Rule 9.5

29 Id, Rule 11.3

30 Id, Rule 9.3. The term "private caucusing" is used in the mediation context to describe private meetings between a party, the party's legal representative, and the mediator for the purpose of obtaining and analyzing information that a party may not want to disclose in a joint meeting between all parties. In some cases, the mediator may caucus or meet only with the legal representative or the party in an effort to gain further information or identify obstacles to settlement.

31 Id, Rule 13.1—matters discussed in mediation are on a "Without Prejudice basis" and will not be used in the litigation or arbitration process against a party if the matter does not settle unless the information is otherwise compellable evidence; and Rule 14.1—a Project Mediator will not participate as legal counsel, witness, consultant or expert in a related pending or future investigation, action or proceeding; and Rule 14.2—the Project Mediator will not be subpoenaed to give evidence relating to the Project Mediator's role or the matters in issue.

32 Id, Rule 12.1

33 Deloitte & Touche Litigation Services 1993 Survey of General and Outside Counsels at 5

34 Supra, at 9

35 Id, at 5