A Case for a Collaborative Approach to Assessment of Deficiencies and Damages in Construction Disputes

by: Gerald R. Genge, C.Arb., Q.Med., P.Eng., BDS, BSS[1]

1 ODACC Adjudicator, Arbitrator, Mediator, Forensic Engineer at Genge Construction Adjudications.

1 MOST CASES RESOLVE AT SETTLEMENT HEARINGS OR FORMAL MEDIATIONS

Yes, cases settle. In fact, most cases settle. My experience as an expert witness over the past 20 years has been that 98% of cases have settled. Nevertheless, extreme amounts are often invested in determining the quantum and pinpointing the faults and breaches in construction disputes before that settlement.

While no small sum is spent by disputing parties on legal representation, it is evident that each party to a dispute finds it necessary to engage its own expert witnesses and valuation consultants. This approach, it would appear, is a tag-along effect of the legal adversarial them-versus-us process. Doubtless, over the past few decades, there has been a substantial shift in the resolution of claims by way of a mediated settlement. The process leading up to that settlement remains, for the most part, highly devoted to that adversarial process. The money invested in the representation process ensures that all available rights and protections and legally available delays and deflections remain at the forefront of the representation. These are core to the "process as justice model" and, thus, clients are assured that the expenditures are necessary to advance their position most zealously.

Since all but the rare construction claims settle before trial, one must question the actual foundation of those settlements. Is it that the time, cost, and anxiety have reached a point when the case is ripe for settlement? Is it that the confidence level in the case succeeding has been eroded by cogent points advanced by the other parties? Is it that the combination of these has approached the nexus at which the diminishing returns for additional investment against increased time, cost, and anxiety make an escape from the case the most appealing option.

Julie Macfarlane's article on mediation as an alternative[2], while written some 24 years ago, advances the position that settlement discussions at an early stage would "take place in the shadow of the law." The idea is that rights must be protected, but settlement based on best satisfying interests will end a matter quickly. Furthermore, she was not the first to discuss the value of dispute resolution outside the courts. In fact, in the modern era, a treatise by Morton Deutsch advanced notions of both constructive and destructive processes involved in conflict resolution.[3] The benefits are not new to good lawyering. One would imagine that the walls between parties looking to resolve disputes would have been broken and have crumbled by now. However, today, it has been my experience that the impediments to resolving civil disputes have been reduced only marginally. The bottom line is that lawyers need to do more to advance means to reduce the mounting costs of dispute resolution.

2 WHY DOES IT TAKE SO LONG TO GET TO MEDIATION?

The backdrop from which most mediations of commercial disputes arise is an allegation of failure to comply with some aspect of a transaction and the associated damages arising from that alleged failure. I have acted

[2] Julie MacFarlane, *Rethinking Disputes: The Mediation Alternative*, Toronto Emond Montgomery, (1997) at 6-8

[3] Morton Deutsch, The Resolution of Conflict: Constructive and Destructive Processes, Yale University Press, (1973).

as a claim's expert on files that, on occasion, have spanned more than ten years between the incident and the resolution. Lawyers often complain about how slow and tedious the process is as the claim trudges through the prolonged technical and legal process. Investigation work is completed under the auspices of mitigation, probing for facts via examinations for discovery taking days at times, documents are exchanged, motions for access are advanced, expert opinion and valuation reports are drafted, and responding reports and counter responding reports are issued. The documentation can become unwieldy. Would it not make sense to modify the process of gathering opinion evidence to expedite this process and maybe pre-empt some steps?

3 SEEKING AGREEMENT ON FACTUAL DATA

The influence of the 'perspective' of independent expert reports on the content of reported findings should not be underestimated. Since the 'perspective' from which a report is developed frequently comes from the nature of the question put by legal counsel, it makes sense that the way that the question is framed will determine the focus placed on the response. For example, consider a construction claim for non-payment due to alleged defects. The contractor's legal counsel will ask for the valuation of the work completed against the contract or the quantum meruit. The payor's counsel will ask for an assessment of deficient work and costs to complete. Add a complicating factor such as delays in completion, which from the two party's perspectives, are each the other's fault, and the expert reports on the same matter may look totally different. Both may be accurate from the writer's standpoint, but neither addresses the entire issue. There are often gaps that can leave a trier of fact without necessary data on which to decide a matter. Moreover, the absence of any commonality in the reports does nothing to advance settlement.

What if the lawyers involved could agree on the issues in dispute and ask the experts to determine the assessment process and meaning of results collaboratively? What if the process was modified such that the experts were given a set of common instructions? What if the experts wrote a joint report on their assessments, results, interpretation, and quantum?

A collaborative approach would seem outrageous to many litigation counsels but perhaps not so much so to counsels more attuned to dispute resolution. This is understandable. Control of the process is fundamental to how many lawyers would choose to manage a case. As bluntly put by Joel Trachman in his book, The Tools of Argument, "*The power to frame the question is the power to decide the case*."[4] This would seem to allow the plaintiff to frame the case in the best light for their position, but while the defendants must respond, they can add issues and argue the case is not the sort presented at all. Such would be the case in a claim believed to be about non-payment that has morphed into a claim about defective work and additional costs for correction, delays, and completion. So, control of how a case is framed may not be such a valued commodity after all. If all these issues are going to become part of the overall claim, why not spread them out on the table and look at them all at once?

[4] Joel P. Trachtman, *The Tools of Argument – How The Best Lawyers Think, Argue, and Win,* CreateSpace Independent Publishing Platform, (2013) at 40.

4 A PROPOSED PROCESS FOR COLLABORATIVE ASSESSMENT

Disputes in construction will have several defending parties, including the payor, owner, the contractor, several subcontractors, suppliers, architects and engineers, shop or parts fabricators and designers, and on and on. One case I acted on had as many as 14 parties, each of which retained legal counsel and most of which engaged experts to write reports. Imagine 14 reports and responding reports all on the same matter. While that may be an extreme case, it would not be uncommon to have at least five or six experts looking at the same thing from different perspectives. Each pays fees to the expert. Each has its position bolstered by the expert report.

I propose that this narrowly-focused approach be abandoned in favour of a more-inclusive approach. Specifically, I suggest that a process would include the following steps:

1. The legal counsel for all primary parties meets with an expert facilitator with subject matter expertise to establish the "four corners" of the dispute. This can follow the exchange of claim and defense documents necessary to preserve rights. The meeting will discuss the expert evidence needed and possibly who should provide that evidence.
2. On agreement of the process, a tolling agreement is executed to pause the litigation while the experts' investigations and reporting are being completed.
3. The expert facilitator becomes the sole conduit for communication between the parties and the experts. This is, of course, to block influence and interference from legal counsel. They will have a chance later to challenge the experts' proposal.
4. The facilitator meets with the nominated experts to consider the matter and the issues in dispute. At that meeting, the experts establish the scope of assessment, which expert completes that assessment, the budget for each part and aggregate cost, the time frame required, and the implications of findings. A proposal is drafted for presentation.
5. The expert facilitator and experts present the proposed assessment protocol and cost to the legal counsel for all parties for approval or adjustment.
6. Legal counsel discusses and agrees on the distribution of the costs for the expert investigation and report. A formula representative of the allegations and defense proportions could be established at this step with an understanding that a recommendation for reallocation of costs could be presented in the experts' report.
7. With support from the facilitator to coordinate access and provide general coordination, the experts undertake their plan and analysis. As part of this exercise, they are permitted to vary the scope within limits. Still, they must seek approval for expansion or modification of the scope of the assessment beyond pre-established parameters.
8. The experts draft a report describing objectives, processes, observations/findings, analyses, and opinions. Much like decisions of appeal courts, the opinion does not have to be unanimous, and an alternative opinion or confirming opinion for alternative reasons can be presented by one or more experts. The objective is not to allow bullying of any of the experts into a consensus but to demonstrate where the preponderance of opinions land on the matter. Such should be of value to the lawyers and the parties.

5 HOW TO USE THE COLLABORATIVE EXPERTS' REPORT

The merits of a claim, defense, and counterclaim often rest on expert testimony. Such battling of the experts is costly and time-consuming. A report giving a consensus of opinion would likely be welcomed by case management judges, mediators, and parties alike. Case management judges would then have good reason to ask, "Now that you have this report, what is stopping you from resolving this somewhere other than the courts?". Mediators would be able to read one expert report and the briefs on argued legal positions citing support for or against the report. Parties would have a complete perspective of "all four corners" of the matter and, thus, the opportunity, perhaps their first opportunity, to understand the other party's positions.

From the mediator's perspective, a joint report simplifies the factual disputes and may open possibilities for more creative solutions to ending the dispute. Known as the integrative approach or expanding the pie to address more interests, a growing proportion of mediators look to do more than distribute the money in the claim. They seek to find ways that more can be accomplished. By reducing the time spent on haggling in settlement discussions, a greater effort can be put into dealing with the parties' relationship, including issues such as trust, long-term collaboration, and other value-added aspects of moving past the dispute.

6 CONCLUDING COMMENTS

Adversarial advocacy spillage into expert reporting does little to expedite and reduce costs for resolving construction claims. While independence is the mandate, as long as the experts are marching to different drums, their attention tends to be unidirectional and perhaps consistent with their client's point of view. Experts are asked to answer questions rather than explore the full breadth of issues in dispute. This is not an incorrect process, but it is not an efficient use of the skills available. A collaborative approach led and coordinated by a facilitating expert has enormous potential to parse complaints and objections where appropriate, drill down where necessary, and conclude what is appropriate.

Indeed, some knowledge of various contractual obligations is necessary and should be part of the expert facilitator's skill set. Still, each expert does not need to be fully versed in contract law to participate effectively in a collaborative approach. Each expert can be engaged for their unique and specialized abilities. The other experts and parties/counsels can vet each expert so that there is weight behind their contribution. Each may have more than one role to play and thus save, in the aggregate, the expense of multiple retainers from multiple perspectives.

In considering each of the steps to implementation, Aside from initiating a tolling agreement to pause the legal action, I have not integrated the role of lawyers in managing the legal rights of parties. Those would vary from case-to-case but would necessarily include responding to a case management judge about progress of the experts' work. The collaborative approach to defect and damages assessments in construction disputes is not only part of the dispute resolution process but also an important one. I also acknowledge that this process may be considered to be an affront to some litigators who are accustomed to having complete control of the process and use it as a tool to advance their client's position. I only hope that as the budding rejection of many clients to handing over complete control to adversarial-style lawyers matures, the collaborative approach gains momentum and becomes the norm, recommended by triers of fact and forward-thinking legal representatives.