

How Much Justice Can your Afford?

A Case for Expert Arbitration

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Occasionally I get a call from a property owner who has seen my name 'online' and asks if I can come to look at their property and "give a quote" to write a report that they can take to court. I ask if they have hired legal counsel, and the answer is often, "*No, I want to have your report first.*" Of course, I advise them that if they hire me directly and then don't use my report – perhaps because they don't like my answer – it is likely that the lawyer on the other side of the claim will demand it be produced. I tell them that if they wish to sue someone, I would prefer to work through their legal counsel to protect solicitor-client privilege.



Next, they ask if I can recommend a lawyer. I usually say I would recommend a construction law expert, and, at about that point, I ask what they think the value of the claim would be. Often they will say, "*Oh, it's high, possibly \$200,000*". That is followed by an audible sigh from me. Now I don't wish to minimize the merits of a claim that is about \$200,000. It is not a small amount. But many people have no concept of either the time it takes or what it costs to move a dispute through the court process. There are document exchanges, discoveries, pre-trial, expert reporting and reply reporting, and various 'appearances' processes before it gets before a trial judge. And that doesn't even consider the anxiety they will endure through the years it will take. Of course, there are also discoveries that can take a day or more in preparation and attendance, depending on the number of parties. Then there is the trial which may not occur for several months, maybe a year or more later, involving several days in front of a judge who likely has to be schooled on the technical grounds for the claim, the valuation of damages, and argument in the defense of each of those claims. The property owner will burn through a big chunk of the claimed \$200,000 and still have no assurance of success or legal and expert witness costs recovery. The 45-minute TV investigation and resolution at trial has completely skewed peoples' perception of what the legal system looks like. It's a problem.

Given that backdrop, let's circle back to the call I got from the property owner about the expert report. What that caller wants is resolution. They want it to be fast. They want it to be fair. They want it to be affordable. The current legal system is anything but fast or affordable (for most), and, in an effort to be fair, it tends to push the duration and thus the costs of obtaining 'justice' to disproportionate amounts considering the claim value.

But take heart, there is a possible alternative. Supposing that instead of calling me for an ‘expert opinion report’, the person called for an ‘expert arbitration’. Logistics would have to be worked out such that both parties agree that I, as the expert arbitrator, get the documents that each party intends to use as evidence to support their case along with a brief story giving a description of why they are making the case, how their documents support their case, and what they want to achieve out of my arbitration. I make a site visit with all parties and ask questions in an open forum. If they wish to bring experts and lawyers, that is fine, but I ask the questions in a concurrent evidence format. Then, instead of writing an ‘expert report’, I write a decision. They get a resolution or at least the answer they would likely get in court, assuming they can afford that much ‘justice’. It would take place within a few weeks of the claim and response. The decision would be based on the obligations under a contract, applicable building codes and standards, and my own subject-matter expertise. With costs shared between the parties, on a per party basis, it would cost a lot less than the classic trial and possibly even the mediation route¹.

Incidentally, the same arguments apply to a similar call I have had from a contractor. And – short of my recommending that they hire a different lawyer - a similar call has come from a lawyer with a client struggling with the costs to advance a claim for payment or for deficiencies in work. All are ripe for expert adjudication.

Yes, it is different. But not so different. Ontario Canada has implemented a similar process through the *Construction Act 1990* for payment adjudication². Moreover, look at what it could do for the simple construction dispute resolution process. It would make room in the courts for more complicated claims. It would significantly speed the process and win or lose, it would reduce the prolonged period of anxiety experienced by the parties. Most importantly, it would help reduce the disproportionate costs associated with the current process. It would allow ADR professionals with subject-matter expertise to take a leading role in the construction claims process.

It is worth a try.

¹ I am not trying to persuade anyone from not pursuing an early settlement through a facilitated mediation, but too often, mediation is conducted so late in the process that expenses have climbed to unreasonable amounts and settlement occurs just to stop the bleeding.

² *Construction Act*, R.S.O. 1990 C.30, as amended, 2017, s 13.5-13.17