The Revay Report

Volume 19
Number 1
January 2000

Published by
Revay and Associates
Limited

Construction Consultants
and
Claims Specialists

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This January is the first month of a new millennium and people from all walks of life are trying to predict the future by looking at the past, but it has a further significance to some of us. We at Revay and Associates Limited are celebrating our thirtieth anniversary and I am also looking at the past with a view to predicting the future of construction contracting in general and dispute resolution in particular.

Our company was formed in response to a perceived need for independent consulting services with broad experience in the Canadian construction industry. Assisting in the preparation and/or evaluation of claims was just one of the many areas where we had extensive experience with specific reference to two of the most significant construction disputes of the day: the Portage Mountain litigation and the Mactaquac arbitration. The combined face value of these two disputes exceeded $70 million in 1968 dollars, and their resolution lasted more than five years each. Perhaps because of this background and also because probably no other claims consulting service existed at that time in Canada, dispute resolution became our most recognized service. During the past thirty years our firm was involved in nearly three thousand construction disputes, representing claimants and defendants in about equal proportion. Let me underscore, however, that we have neither invented construction claims — even though once I was accused of doing just that — nor were we the first claims consultant in history. Far from it. English literature refers to claims specialists whose full time job, in 1894, was to look for grounds for claiming extra compensation in the civil engineering sector. Claims have accompanied construction contracting for a long time and are certainly not a newly discovered malaise, even though the Canadian construction industry was relatively fortunate in avoiding significant claims perhaps until the construction of the St. Lawrence Seaway in the early fifties. This was probably more a result of the type of contracts used in those days in Canada than of enlightened contract management. More importantly, cost overruns in those days were often remedied with "ex-gratia" payments.

Lessons Learned from 30 Years of Handling Construction Disputes

WHY CLAIMS?

Many construction practitioners have asked this question over the years, especially since 1970, at least in Canada. In the seventies the Canadian construction industry was not particularly profitable. For example, in 1977 in Ontario 777 general contractors (the number reported by Statistics Canada) completed $1.2 billion worth of work earning $18 million profit before tax, which amount was made up of $28.6 million of profit and $10.6 million in loss. For every dollar of profit made by one of the profitable contractors another less fortunate lost $0.37. Further research revealed that outstanding receivables, e.g. unresolved claims, represented a major reason for this predicament. By then, jobs were getting bigger and outstanding receivables were getting proportionally more significant without a commensurate increase in the size of the working capital of many firms. Increased competition for an inadequate volume of work skimmed off all the "fat" from prices, leaving little or no room for the traditional "give and take". More complex projects and some mega-projects demanded skills in excess of the available supply. Claims, therefore, became a necessity at a time when no suitable dispute resolution practice existed.

Reading the above explanation one might easily conclude, as many owners in those days did, that presenting claims is the contractors' way of seeking compensation for their inadequacies which is why owners were becoming hard-nosed when responding to claims.

There is little question that the marketplace has a significant influence on the size and frequency of claims. This, however is not their root cause. Claims are the unavoidable result of the philosophy entrenched in the contracts used by our industry. Even the contracts of today, which admittedly are much more "user friendly" than their predecessors of thirty or forty years ago, create obligations which can be complied with by the contractor only if the tender and/or contract documents provide all necessary information in a clear and unambiguous language. This, unfortunately, is not the case. Owners are seldom prepared to spend the money required for the preparation of complete and unambiguous documents and instead are relying on the adjudicative power granted to their consultants by the contract to keep the contractors "in line". Incomplete or ambiguous documents will invariably give rise to requests for information. In response to those questions change orders are issued by the consultants under the guise of clarifications thereby giving rise to disputes even if no genuine change condition is encountered. The consultants, who have the power either to recommend payment or not for the unanticipated work required to remedy these shortfalls in the contract documents, are often reluctant to look at these so-called clarifications as changes and will refuse compensation.

More importantly, for a contractor to be successful in getting a contract, it probably has to submit the lowest bid and to do so must take advantage of all apparent ambiguities and only include in its bid the cost of work specifically called for in the documents. I.N.D. Wallace, QC, the editor of the tenth and eleventh editions of

"Hudson's Building and Engineering Contracts", in a paper he presented at the Twelfth Annual Construction Conference held on September 17, 1999 at the King's College in London, calls this a "price plus" policy under which the tendered price represents only a "best possible scenario", certain to be substantially exceeded in the event of a host of express claims permitted for additional payment. He, of course, condemns this policy and would prefer if all of the gains various construction associations achieved over the years by shifting some of the risks to the owners were reverted to contractors. Such a retrograde suggestion is not likely to be accepted, certainly not in Canada where, in recent years, the courts have shown a great tendency to favour equity and fairness even if it goes against existing jurisprudence (see Number 2, Volume 17 of the Revay Report).

HOW HAVE CANADIAN COURTSTREATED CONSTRUCTION CLAIMS?

It is not in my purview to comment on jurisprudence, nevertheless it would be impossible to describe the evolution of construction disputes without taking at least a superficial look at some of the more important decisions over the years.

Prior to the seventies Canadian contractors could seldom win a case against owners. Courts tended to look at construction contracts as an absolute obligation to be complied with regardless of the circumstances. The following are some of the most noteworthy cases from those years:

- *The King* v. *Paradis and Farley Inc.,* (1942);
- *Atlas Construction Company Limited* v. *City of Montreal,* (1954);
- *Dryden Construction* v. *Hydro*, (1960);
- *Peter Kiewit Sons Co.* v. *Eakins Cost Ltd.,* (1960);
- *Swanson Construction Co. Ltd.* v. *Government of Manitoba,* (1964);
- *Steel Company of Canada* v. *Willard Management Ltd.,* (1966); and
- *Carman Construction Ltd.* v. *Canada Pacific Railing, et al.,* (1980).

This last case in this series came somewhat later, but was based on the same principles.

The first sign of light, from the point of view of the contractors probably appeared in:

- *Perini Pacific Ltd.* v. *Greater Vancouver Sewage and Drainage District,* (1967).

During the sixties the Federal Government took a 180 degree turn in its contracting practices by introducing compensation for changed soil conditions and for neglect or delay on the part of the Crown. This trend was followed by a number of private owners, most notably Churchill Falls Power Corporation and subsequently by some of the Provincial Highway Departments as well as by the CCDC, as it was known by 1974.

From the seventies on this change of direction also became evident in decisions by our Supreme Court. Perhaps the most significant example of this change was in *Penvidic Contracting Co. Ltd.* v. *International Nickel Co. of Canada Ltd.,* (1975), followed by:

- *Trident Construction Ltd.* v. *Wardrop and Associates et. al.,* (1979);
- *Corpex (1977) Inc.* v. *Canada*, (1982);
- *Vermont Construction Inc.* v. *The Queen, No. B-3538* (an unreported case from the Exchequer Court of Canada);

and more recently in:

- *B.G. Checo International Ltd.* v. *British Columbia Hydro & Power Authority,* (1993); and
- *Edgeworth Construction Ltd.* v. *N.D. Lea & Associates Ltd.,* (1993).

I have not included Ron Engineering in this list, not because I do not consider it a milestone decision, but simply because I do not think it had much impact on the way construction disputes are currently treated in Canada. This is not a complete list by far; I never intended it to be. These examples simply illustrate the change that took place during the past thirty years.

ALTERNATE DISPUTE RESOLUTION

In the seventies, contractors who could not settle their dispute through negotiations and were unprepared to give up could either go to court or try arbitration, which very few did. Canadian contractors had little use for arbitration then and perhaps have not much more today. Very few contracts then contained a mandatory arbitration clause.

The arbitration clause used for many years in the Standard Form of Construction Contract RAIC-CCA Document #12, was held by the Ontario Court of Appeal in *Re MacNamara Construction of Ontario Ltd.* v. *Brock University,* (1970) to be "merely a pathway to arbitration if both parties wanted". Although the language was rewritten in the new CCDC #12 (Article GC 16.2) it remained nothing more than a pathway. The Arbitration Acts of most common law provinces (the Judicature Act in Newfoundland) that were a copy of the British Act with its statement of case provisions, did not provide a real alternative to litigation. In Quebec arbitration was an even less suitable alternative because of the open hostility demonstrated by the Quebec courts against arbitration.

Nevertheless during the summer of 1985 the Canadian Construction Association appointed a committee under my chairmanship to investigate and recommend to the Board suitable guidelines for the arbitration of construction disputes. Although the Board adopted the committee's recommendations, including the Construction Industry Arbitration Rules in March 1996, it was obvious, based on the reaction of some members, that a large segment of the industry would never agree to mandatory arbitration. It was hoped that this attitude would change after the fall of 1986 when the Federal Government enacted the Commercial Arbitration Act and most provinces, including Quebec, decided to modernize their acts (see No. 2, Vol. 5 of the Revay Report). Unfortunately, such a hope was unjustified. Although today there is somewhat more arbitration of construction disputes than in the past, it is safe to say that domestic arbitration — as opposed to international arbitration (see No. 2, Vol. 2 of the Revay Report) — has reached its peak and is probably on the decline.

WHAT OTHER ALTERNATIVES, THEN, ARE AVAILABLE?

First of all there is mediation, either privately arranged or by court order (e.g. Ontario). A further development in mediation is the so-called fact-finding mediation and more recently the introduction of the Dispute Resolution Board (DRB) (see No. 1, Vol. 13 of the Revay Report). The DRB is a relatively informal solution according to which a three-man panel conducts hearings at the request of either party

and renders non-binding decisions. The Board actually operates on an inquisitorial basis because it is allowed to gather information on its own from documents it regularly receives during the currency of the project. Although it is more popular in the US, its use is spreading internationally, but perhaps not so much in Canada. Since its introduction the DRB was used on 477 projects where it handled 596 disputes of which 579 were settled. More than 85 percent of DRB assignments occurred within the past eight years.

Since the late eighties contractors working for the Federal Government may bring their disputes to the Contract Dispute Advisory Board (CDAB), which admittedly was more popular in the early nineties than it is today. The CDAB is a good alternative to litigation even today. Unfortunately, it may not be as readily acceptable to the Government as it used to be.

DISPUTE AVOIDANCE MEASURES

In 1970 the Department of Public Works (as it was known then) decided to embark upon improved ways and means of buying construction services with a view to reducing construction claims. To this end it held a two-day seminar in January 1971 to expose senior department officials to the latest thinking in the field of project management. According to the DPW, as expressed during this seminar, under the project management system the traditional role of the general contractor would be eliminated. In spite of the DPW's good intentions, by 1981 the backlog of construction claims within the Federal Government had reached such proportions that the then President of the Treasury Board, the Honourable Donald Johnston, ordered an investigation by officials of the Board with a view to finding a solution for this untenable situation. My reciting this background here is not intended as criticism of the management method of contracting, which has its application; but simply to underscore that it certainly is not the method which would eliminate or even reduce claims. In our experience some of the projects where this method was used by the DPW, such as the construction of the different major postal facilities, turned out to be a hotbed of disputes. The construction of the Mirabel Airport, although under Transport Canada and not the DPW, was no exception.

Although the design/build method of contracting pre-dates the management method, it was only during the nineties that it surpassed the management method in popularity. Many advocates of the design/build method of contracting would like to make one believe that it will reduce disputes. During the past ten years we have been involved in a large number of design/build projects which all ended up in major claims and expensive litigation, simply because the contracted obligation of the design/build contractor and the owner's expectations were not harmonized (see No. 2, Vol. 16 of the Revay Report). Additionally, one should not forget that whether the main contractor is a general contractor, a package dealer (i.e. design/build contractor) or a management contractor the actual construction is always carried out by independent trade contractors on a firm price contract. The potential for disputes between the main contractor and its trade contractor remains the same regardless of the relationship between the main contractor and its client.

Although these two methods of contracting were advertised for their use in avoiding claims, their principal role was to act as a vehicle for buying construction services.

Partnering on the other hand — that is the US Corps of Engineers' version of partnering — has no other use but its alleged ability to avoid disputes. Although the concept originates with Demming it was specifically altered by the US Corps of Engineers to be used as a dispute avoiding measure in construction contracts. It is expressly ex-contractual (i.e. stated not to affect the parties' strict legal entitlements) but envisages an early "team-building meeting" with every entity involved in a given project. At these meetings, mutual undertakings to cooperate in good faith and without regard to financial or other advantages in order to assist the resolution of such problems or difficulties as may arise, are exchanged. This exchange of "vows", which is usually memorialized in a document, is to be regarded as morally binding upon all the participants. That is, until the first real dispute arises, after which the owner hides behind the protection of the contract. The US Corps of Engineers was apparently quite successful for a while in avoiding disputes, but even its success rate is declining. Experience with partnering in Australia has been unhappy, if not disastrous, as has been reported by Dombkins of the University of New South Wales (March 1996) in a paper entitled "Why Partnering is Failing" in which he calls partnering a "failed fad". To the best of my knowledge, there is no corresponding Canadian study available, but if partnering reduced claims, it certainly did not affect our volume.

EVOLUTION IN THE WAY CLAIMS ARE PREPARED

Whether the number of claims submitted by contractors/subcontractors has actually increased during the past thirty years is hard to say. It is clear, however, that the level of sophistication in preparing claims has significantly increased, as did the number of claims consultants. To start with, contractors or owners who in the past would not even think of using outside help are more likely to do so now because of the increased sophistication required to be successful either in winning a claim or being able to defeat one.

Although I do not consider this to be the right forum for a detailed description of the different methods claims consultants use today on behalf of their clients, I will nevertheless outline the general evolution of the past thirty years, first with respect to impact cost calculation and finally in dealing with delays.

In 1970, in an article published in the Heavy Construction News, we described what we considered to be the best method of calculating impact cost using the so-called "objective method", although at that time we put no name to our calculation. In a series of seminars across the country starting in Ottawa on November 14, 1977 we described four different methods of damage calculation: the objective method, the subjective method, the total cost method and the jury verdict method. In 1986 in London, during a seminar of the International Bar, I described the so-called normal cost method, which today is known as the measured mile method. Since then the objective method has been replaced by the actual cost method

and the subjective method by the measured mile. The total cost and/or the adjusted total cost remained as it was, not a particularly favoured solution, and instead of the jury verdict method claims consultants today will use industry statistics.

More importantly, however, the most significant development in this respect during the past thirty years was the general recognition of impact cost as a valid claim. Prior to 1970 impact cost claims were seldom accepted and then only for costs arising out of acceleration. In those days, impact cost claims were considered by most as a fiction of someone's fertile imagination. This opinion is still maintained by some of the more conservative practitioners.

With respect to delay analysis, the difference between the techniques available today and those used in the early seventies are perhaps even greater. In 1970, one simply compared the as-planned schedule with the as-built one, probably drawn by hand as a bar chart. Now one uses sophisticated computer modelling called the snapshot method of analysis or another method called "but for analysis" (see No. 2, Vol. 13 of the Revay Report). Today, dealing with concurrent delays with a view to apportioning responsibility is becoming a necessity on most complex projects and the theory of the dominant cause of delay is gaining more and more acceptance.

All this evolution, however, is the result of the growth in the use of computers. In 1973, in response to a combined mandate from the Canadian Construction Association and the Department of Trade and Commerce, we carried out a nation-wide survey with the participation of 389 firms concerning "Project Planning and Progress Control Practices in the Canadian Construction Industry". Our report, published by the CCA in January 1974, stated that only nine percent of the firms responding used computers for scheduling, understanding that most of those firms had to go to a service bureau to process their schedules.

The difference in the sophistication of delay analysis, in my opinion, is simply a direct result of the difference in the power of computers. But is all that extra power so beneficial? Let us remember that before the wide use of copying machines, lawyers were able to deal with complex construction disputes using fewer than a thousand exhibits. A similar dispute today would call for an expenditure of more than one million dollars just to scan all, I stress, all documents, necessitating a CD-ROM to deal with most of those totally irrelevant pieces of paper.

Have we learned anything during this time? Today construction litigation is more expensive than ever, probably lengthier and with an even less predictable outcome.

It seems to me we have learned how to make construction litigation more expensive and probably not much more. No wonder the industry is looking for ways to avoid or at least reduce disputes by altering the types of contracts used (see No. 2, Vol. 14 of the Revay Report).

A PURPOSEFUL WAY AHEAD

During the King's College seminar I referenced above when referring to some comments by I.N.D. Wallace, John Uff, QC, a well known author of construction law books, presented an interesting paper "Are Contracts Necessary" suggesting that most contracts in use today create rather than prevent disputes, while Dr. Martin Barnes, the principal author of the New Engineering and Construction Contract ("NEC") had this to say:

> *"As the paper by Ian Duncan Wallace presented to this conference so comprehensively describes, the traditional standard forms of contract used in the UK construction industry have served it ill for a long time. Mould-breaking alternatives are becoming available but we are at a crux as to whether they will take hold and supplant the traditional forms or whether the forces of conservatism and protectionism will prevail."*

I am unsure whether the answer lies in Martin Barnes' NEC, but am convinced that if we, in Canada, intend to reduce or perhaps avoid construction claims in the future, we must come up with more innovative solutions than we did during the past thirty years. Band-Aid solutions if introduced using catchy phrases may gain temporary popularity, as they have done in the past, but lasting solutions will require drastic actions and determined leadership.

By S.G. Revay

The Revay Report is published by Revay and Associates Limited, a national firm of Construction Consultants and Claims Specialists, assisting owners and contractors in achieving profitable and trouble-free construction projects.

Édition française disponible sur demande.

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