Dispute Boards
Their Use in Canada

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"When you come to the fork in the road – take it"

Yogi Berra

Increasingly, contracting parties are looking at dispute boards as an effective means of resolving disputes efficiently. This paper will consider whether the current 'stepped ADR' resolution methods, promulgated by the Construction Industry in Canada, work for every project; a brief history of dispute boards; types of dispute boards; when dispute boards are an appropriate vehicle; how best to structure such boards; and how they can be used to contribute to dispute resolution processes.

The Current Alternatives:[1]

Stepped Alternative Dispute Resolution (ADR) provisions have been progressively incorporated by the Canadian Construction Documents Committee (CCDC)[2] into Canadian standard construction contracts[3] (and the standard subcontract)[4] since the concept was first introduced in 1994.[5]

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[1] This paper contains edited extracts from an article, written by John G. Davies, published in the October 2010 edition of the Canadian *Construction Law Reports* entitled *"Alternatives to the Alternatives"*.

[2] The Canadian Construction Documents Committee (CCDC) is a joint committee composed of owners and representatives of the design and construction industries, charged with the task of preparing standard construction documents and guides for their use throughout Canada.

[3] CCDC 2 2008 *Stipulated Price Contract*; Document 14 - 2000 *Design-Build Stipulated Price Contract*; Document 15 – 2000 *Design-Builder/Consultant Contract*; as well as the remaining CCDC series of Owner/Contractor Contracts as they were progressively updated by the Committee to date.

[4] Standard Construction Document CCA 1 – 2001 *Stipulated Price Subcontract between Contractor and Subcontractor*, Part 8 – DISPUTE RESOLUTION.

[5] See PART 8 - DISPUTE RESOLUTION Canadian Standard Construction Document CCDC 2 – 1994 *Stipulated Price Contract between an Owner and Contractor*.

Typically these provisions exist to permit an aggrieved party to challenge:

1. an interpretation, application or administration of the contract or a failure to agree where the contract requires such agreement, which has not been resolved by a finding of the consultant (or, in the subcontract agreement, the contractor)[6] ... or

2. matters in which the consultant has no authority to make a finding.[7]

Such challenges are formally called ‘disputes’.

Disputes are to be resolved in the first instance by way of amicable negotiation, followed, in the event of failure, by mediation and finally by way of binding arbitration. This is the process known as ‘stepped ADR’.

In order to achieve a consistent and structured process for dispute resolution these three techniques were given a set of Rules comprising standard procedures to be followed when these stepped ADR procedures are invoked.[8]

Although the CCDC’s original intent was to expedite the timely and cost-effective resolution of construction disputes, these stepped ADR provisions have not always accomplished these goals in practice.

In general ADR providers are not customarily engaged until long after a dispute has become entrenched and all practical (and pragmatic) avenues of resolution have been explored by all the parties without success.

In many instances multiple disputes are warehoused until after the project is complete.

When the time comes for resolution these disputes are consolidated into one single dispute and presented to an ADR provider for resolution.

To achieve this end the time constraints set out in the CCDC 40 Rules have to be retroactively waived and agreed to by mutual consent of all parties prior to any procedure taking place.

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[6] See for example, CCDC 2 – 2008: *Stipulated Price Contract* General Condition GC 8.1 paragraph 8.1.1

[7] *Ibid.* paragraph 8.1.2

[8] CCDC 40 – 2005: *Rules for Mediation and Arbitration of Construction Disputes (for use with CCDC Contract Forms)*.

This consent is often **difficult to secure.**

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The problem with the early introduction of negotiation-based dispute resolution methods in the construction dispute resolution process is that these methods become, by way of the express wording of the contract, the only option available to the parties at a time when there has been no serious attempt to solve the dispute within the actual context of the wording of the contract.

If a dispute arises, for example, as a result of a flawed consultant's finding or worse, a self-serving, biased or partial consultant's finding, there is no available path within the wording of the standard forms to secure a resolution within the four corners of the contract. Instead, techniques are immediately imposed on the parties to seek 'outside the box' negotiated (or assisted negotiated) solutions.

Only when these techniques fail to arrive at a resolution do the Rules permit reverting to the wording of the contract to secure a final and binding arbitral resolution.

There is, for example, no opportunity to test the credibility of the consultant's findings before embarking on the mandatory stepped ADR process.

Although the stepped ADR process set out in the standard contracts offers a potentially less expensive and more expedient solution to construction disputes than the more conventional route of pursuing litigation through the courts, the process of arbitration is now, in many ways, becoming just as expensive and time consuming as litigation, with the added impediment of an inability to appeal the final and binding award, except under very narrow circumstances.

The current stepped ADR method promulgated by CCDC in Canada, by its very structure, also eliminates opportunities to consider other tried effective and equally appropriate, methods of dispute resolution. However, these other alternatives are worthy of consideration.

The major criticism of the stepped ADR process is that it is **reactive** rather than **proactive**.

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Notwithstanding, it is still necessary to continue with the provision of professional consulting services during the construction phase of a project. Drawings need to be interpreted; inspections (reviews) of work-in-progress need to be performed; the 'general review' provisions of the various building codes need to be serviced; assurances need to be sought as to the compliance by the contractor with the requirements of the plans, specifications and other construction documents prepared by the consultant; non-compliant work needs to be rejected; and technical problems arising during the course of the construction need to be resolved in the context of the design by properly qualified professionals familiar with, and professionally responsible for, the original intent of the design.

Problems arise when the consultant participates in activities that impact on the contractor's understanding of its contract with the owner at the time of bidding, or when outside influences interfere with the contractor's plans for delivery of the work as bid. Depending on their content, a consultant's interpretations and findings can be perceived as being arbitrary and influenced by self interest or by the interests of the owner, to the detriment of the contractor – particularly when the consultant is only paid by the owner!

Wherever possible therefore, the role of the consultant, beyond that of interpretation of the ongoing design, changes thereto, and verification of compliance with the requirements of Codes and the contract documents during the construction phase, would best be performed by independent third parties, free of influence from either party, and paid for promptly, jointly and equally by both the owner and the contractor.

In this scenario, the consultant would be relieved of any potential conflict of interest and remain free to consult and advocate on behalf of the owner with impunity throughout the duration of the construction and thereafter throughout the warranty period.

Should there be nuances, errors, inconsistencies or omissions, lack of coordination between the designs of various sub-disciplines, or even negligent or deliberate acts, manifesting in the services provided by the consultant, disputes arising and impacting on the contract price, or delays occurring and impacting on the contract time, these could all be dealt with, in an 'arm's length' and independent manner, by the independent third party or dispute resolver.

Such a replacement role can be effectively played by a **Dispute board**.

Brief History of Dispute boards:

Dispute boards have been successfully employed in Canada on the Toronto TTC Twin Tunnels Sheppard Subway Line ($1B), the Niagara Water Diversion Tunnel Project ($1B) (currently under construction), and the Seymour-Capilano Tunnel in Vancouver BC ($100M+) and in the United States on the Washington D.C. Metropolitan Transit Authority project ($3B), the Boston MA "Big Dig" ($14.6B) and other major infrastructure projects in more than a dozen States.

Internationally, they have been successfully employed in the construction of the UK/France Channel Tunnel ($21B), the China Yellow River Diversion Project ($1.5B), the Hong Kong Airport ($15B), and the Docklands Railway Project in UK ($500M).

The concept of dispute boards evolved in the US in the 1960s with the construction of the Boundary Dam in Washington State.

Following this the National Committee on Tunnelling Technology undertook a study into improved contracting practices. This led to a publication in 1974 entitled *Better Contracting for Underground Construction.* As a result the first dispute review board was established in 1975 for the Eisenhower Tunnel in Colorado USA.

Both the (UK) Institution of Civil Engineers (ICE) and the International Federation of Consulting Engineers (FIDIC)[9] standard forms of contract originally empowered the 'engineer' to act in a quasi-judicial manner (arbiter in the first instance) when settling disputes that arose between contracting parties. As suspicions grew concerning the independence of an owner's agent to act fairly to determine the outcome of disputes, and as costs in the resolution of claims through arbitration and litigation increased, the need grew for an inexpensive and time sensitive method of dispute review for large infrastructure projects where parties of differing nationalities were involved.

In the 1990s the World Bank issued a modified FIDIC contract to employ the use of a dispute review board that was empowered to publish non-binding recommendations.

[9] Known as FIDIC from its French title Fédération Internationale des Ingénieurs-Conseils, an international organization based in Geneva, Switzerland representing consulting engineers.

In 1996 FIDIC followed with a new version of its Design-Build contract introducing the concept of adjudication as well as permitting the optional use of adjudication in its other standard forms of contract.

In 1999 FIDIC followed with the introduction of this concept as a standard feature for all of its contracts while, at the same time, finally removing the engineer as the first-tier and quasi-judicial decider from all of its forms.

In 2000 the World Bank issued a new edition of *Procurement of Works* which moved towards the interim binding FIDIC model of adjudication and away from the US model of non-binding advice and/or recommendations model.[10]

Types of Dispute Boards:

The International Chamber of Commerce (ICC) based in Paris, France promulgates three distinct applications based on the dispute board principle:[11]

1. Dispute Review Boards (DRBs): Issue non-binding recommendations for consideration by the parties. If neither party objects, then the determination becomes binding on the parties. Failure to agree leaves the parties free to select any appropriate method of resolution (litigation, arbitration, expert determination, etc.)
2. Dispute Adjudication Boards (DABs): Issue enforceable provisionally binding decisions. These decisions may be reversed or modified by an arbitral panel or the court should one or other of the parties succeed in securing such a hearing. In the interim these decisions remain binding on the parties.
3. Combined Dispute Boards (CDBs): Issue non-binding recommendations that may be upgraded to provisionally binding decisions.

FIDIC promulgates the use of Single or Three Party Dispute Adjudication Boards (DABs).[12] These DABs may be 'full-term', 'ad-hoc', or a combination of both, as the need determines. All FIDIC boards are empowered to adjudicate disputes. These

[10] The foregoing facts were extracted from *Chern on Dispute Boards* © 2008 by C. Chern. ISBN-13: 978-1-4051-7062-8: at pages 8 – 9.
[11] See ICC Publication No. 847 (r. 2008). ISBN 978-92-842-0051-1; at pages 50-52; Articles 4-6.
[12] The FIDIC Contracts Guide ISBN 2-88432-029-6 at Page 303.

adjudications may be either 'interim' or 'final' and, subject to timely challenge by one or more of the parties within time limitations, binding. FIDIC contracts[13] are used throughout the world for engineering, infrastructure and building projects. A major user of these documents is the World Bank.

The Dispute Resolution Boards Foundation (DRBF), based in Seattle WA,[14] offers two distinct levels of dispute boards – those that result in the provision of informal and timely advice on potential disputes (frequently accepted by the parties)[15] and those that result in formal hearings and the issuance of Advisory Opinions and Recommendations.[16] Unlike the FIDIC and ICC models, acceptance of DRBF recommendations is influenced by the fact that the recommendation is admissible in subsequent arbitration or litigation proceedings in the event that negotiations (that are expected to follow the issuance of formal or informal advice or recommendations) are unsuccessful.

When is a Dispute Board an Appropriate Vehicle for Resolving Disputes?

A dispute board operates on the principle of offering a proactive and timely response to an evolving dispute within the four corners of a contract as opposed to reacting to and resolving a dispute after positions have hardened (as favoured in the more common stepped ADR techniques currently promulgated by the Canadian Construction Industry).

They function best where the quasi-judicial (arbiter in the first instance) role of the consultant, traditionally carried in standard Canadian contracts, has been deleted.

Dispute boards are therefore best employed when the parties wish to engage and resolve potential disputes as they occur on an ongoing basis, as opposed to warehousing them to the end of the project, and to eliminate all perceptions of bias and conflicts of potential interest in the administrators of these contracts.

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[13] Red Book (Conditions of Contract for Construction); Yellow Book (Conditions of Contract for Plant and Design-Build); Silver Book (Conditions of Contract for EPC/Turnkey Projects); and Orange Book (Conditions of Contract for Design-Build and Turnkey).
[14] www.drbf.org
[15] Overview of the Process and Best Practice Guidelines © 2007 DRBF Section 1 – Chapter 2 January 2007.
[16] *Referral of a Dispute to the DRB* © 2007 DRBF Subsection 2.5 – Chapter 5 January 2007

How are Dispute Boards Structured?

A dispute board comprises of a single, 3 or a combination of other odd numbered, objective, independent and unbiased experts carefully selected to provide a balance of technical expertise, who become familiar on a day-to-day basis with the nature and progress of the work, are able to respond promptly when disputes of a technical nature arise, and either make recommendations with respect to settlement or, when authorized, make final and binding decisions on disputes.

Dispute boards can be structured to suit each individual project with an emphasis placed on the most likely component of the work that would give rise to a dispute.

A dispute board is customarily appointed after award of the construction contract and before work starts onsite.

Its mandate requires the board to become familiar with the scope and nature of the work and to maintain and update this familiarity as the work progresses, throughout the duration of the project, in order to be able to:

1. observe trends as they develop and to offer helpful intervention and advice in a timely manner; and
2. be ‘on-call’ to review disputes and offer either, recommendations for their resolution or settlement, or to make final decisions and awards - depending on the level of authority assigned to the board in its mandate.

Because of the diverse nature of claims prevalent in construction projects it is possible to structure a dispute board with a combination of technical experts as well as other professionals with expertise in allied fields … it all depends on the nature of the project.

Dispute boards generally deal with the technical matters at issue and not the contractual/legal/financial aspects of a project.

If, for example, the projects is relatively small ($5M - $50M) and involves significantly few trades, it is quite possible to engage a single dispute board (otherwise known in the Industry as a “Project Neutral”).

If, for example, the project is larger ($100M -$500M) it is customary to employ a 3 person board.

If, for example, the project involves specific techniques (such as tunnel boring in rock) there may be more than one dispute board - i.e. one to deal solely with the technical issues relating specifically to the boring of the tunnel made up of leading engineering experts in tunnel boring techniques, and another(s) for addressing general contractual/legal/financial issues that may arise as a consequence of the findings of the technical board members. These boards may operate separately from, or in conjunction with, one another depending upon the nature of the dispute.

The *Channel Tunnel* project, for example, had a dispute board of five persons. All five members heard all the disputes, but the final decisions were made by a three-person panel composed of the chair and two of the other members (selected for their particular expertise)[17]

How do Dispute Boards Operate?

FIDIC and other dispute board professional organizations[18] offer rosters of independent pre-qualified professional dispute board members to owners and contractors for their use in determining the make-up of these dispute boards.

Sadly, there are no equivalent dedicated bodies offering rosters of such qualified dispute board personnel in Canada but there is plenty of access to the various professional organizations who can list suitable members.

Failure to secure suitable candidates can quickly be remedied by way of issuance of a Request for Qualifications (RFQ).

Short-listed and pre-qualified board members are customarily selected from the independent body's referral roster. These candidates are listed by owners in their bid instructions for selection by contractors and inclusion by them of selected members in their bid forms at the time of submitting bids.

In order to maximize the dispute board's performance, its member(s) must be suitably qualified, impartial, and accepted and trusted by both parties.

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[17] *Chern on Dispute Boards* at page 11

[18] e.g. The *Dispute Board Federation* based in Geneva Switzerland; the *Dispute Resolution Board Foundation* based in Seattle Washington USA; or the *International Chamber of Commerce* based in Paris, France.

Equally important, they must be free from any prior relationships that could be seen as leading to a conflict of interest -- limitations of a minimum of two years free from prior involvement with either party are recommended in order to further reduce the perception of possible bias.

Standard forms of contract for the engagement of individual dispute board members are available from multiple sources and options are available for adjusting these forms to address the diverse needs of Common Law, Civil Code and Shariah Law jurisdictions.[19]

As a minimum, dispute board members are initially required to familiarize themselves with the nature and content of the contract documents as executed by the parties.

Once briefed, they are required to visit the construction site to such an extent that they become current, familiar with, and fully informed as to, the progress of the works.

They are permitted access to all documentation and are allowed to attend such meetings as may be necessary to become and remain informed.

They are prohibited from performing any sort of advocacy for either of the parties (unless the delivery of such advocacy is agreed to by both parties) and they remain under a constant duty to disclose any potential conflicts of interest that may arise during their term of office.

Incipient disputes are required to be promptly addressed and recommendations for remedy are expected to be delivered in writing within a short but reasonably established time frame.

Should disputes arise, the parties are required to submit briefs to the board who will then organize a hearing and formalize a written recommendation or decision depending upon the nature of its authority.

Their term of office usually expires at substantial completion of the project but can be revived as needed should a post completion dispute arise during the warranty period.

They are required to maintain files on the project in current status and to prepare interim and site review records for future reference should a dispute arise.

[19] See *Chern on Dispute Boards* for custom form content recommendations; see also The *Dispute Board Federation* based in Geneva Switzerland; the *Dispute Resolution Board Foundation* based in Seattle Washington USA; or the *International Chamber of Commerce* based in Paris, France.

They do not have authority to order work or changes and must confine their deliberations, recommendations, and/or decisions to those matters that arise solely in the wording of the contract.

Remuneration of Dispute Boards:

The terms of remuneration for dispute boards are mutually agreed to by the parties when agreeing to the terms of the appointment.

Traditionally each party is responsible for paying one-half of the remuneration.

The parties are customarily, jointly and severally liable to pay the dispute board.

Any default by the contractor to do so will result in the owner paying the full amount due and deducting the defaulted half from any amounts owing by the owner to the contractor in its progress draws or vice versa by the contractor adding the default amounts to its certified progress draws.

Customary fee components include:

- An **initial retainer fee** to familiarize all board members with scope of contractual provisions and work
- A **fixed monthly retainer fee** for:
- conducting familiarization site visits
- being conversant with project developments
- **Daily (hourly rates) fees** for:
- conducting claims related site visits
- reading pleadings and claims related materials
- conducting hearings and preparing recommendations/decisions … plus
- **office, travel, disbursements and overheads.**

Cost of Dispute Boards:

Although the cost of a dispute board can vary from project to project and whether the board is advisory as opposed to one that renders interim-binding decisions, the Dispute

Resolution Board Federation based in Seattle WA offers the following scale of average costs for a DRB for a typical infrastructure engineering project:

> "*DRB cost ranges from 0.05% of final construction contract cost, for relatively dispute-free projects, to a maximum of 0.25% for difficult projects with disputes. Considering only projects that refer disputes to the boards or that had difficult problems, the cost ranges from 0.04% to 0.26% with an average of 0.15% of final construction contract cost, including an average of four dispute recommendations*."

Conclusion:

While the current CCDC contracts and Rules signal a structured approach to dispute resolution they, by their very structure, exclude the many and varied alternative methods of dispute resolution that are otherwise available.

Unless and until the CCDC Rules are adapted to permit other equally appropriate methods of dispute resolution, the attraction of stepped ADR, as being the only solution to problem solving, will remain unpopular and underutilized in the Construction Industry in Canada.

Notwithstanding, one should not seriously consider entering into a construction contract without entering into some sort of dispute resolution arrangement – whether it be the current CCDC stepped ADR method or some form of dispute board followed by arbitration or litigation ... i.e. when you come to the fork in the road – take it!

Respectfully submitted this 22nd day of October 2010 at Quebec City, © 2010**.**

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He is the President and CEO of JGD Resolutions, the President and CEO of John G. Davies Architect Incorporated, and a Panellist arbitrator, mediator, fairness monitor, and expert neutral with ADR Chambers in Toronto. www.adrchambers.com He is a licensed Member of the Ontario Association of Architects, an affiliate member of the Ontario Bar Association's Construction Law and ADR sections, a Fellow of the Canadian Design-Build Institute, a Past Chair of the Canadian Construction Documents Committee (CCDC), and a Professional Member of the Geneva-based Dispute Board Federation.

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