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GUEST ARTICLE

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WILL ADJUDICATION IMPROVE CONSTRUCTION PERFORMANCE IN ONTARIO?

INTRODUCTION

Ontario's Ministry of the Attorney General has introduced legislation which would, if passed, result in momentous change to the construction industry in Ontario. The authors of a Report entitled "Striking the Balance: Expert Review of Ontario's Construction Lien Act", on which the legislation is based, recommend that the *"breadth and scope"* of the proposed changes are such that the current *Construction Lien Act* should be renamed the *Construction Act: An Act Respecting Security of Payment and Efficient Dispute Resolution in the Construction Industry*. This article adds a project management viewpoint to the debate over the efficacy of a proposed new dispute resolution process known as "Adjudication".

The fundamental problems necessitating this sea change are posited to be late payment and the absence of effective, binding interim dispute resolution. Owners sometimes stop payment to protect rights of set-off, and then the contractor, deprived of payment, may stop work. According to the Report, the ensuing dispute "*burdens stakeholders for years, withdrawing unrecoverable human and financial resources from the Province's construction economy*".

Adjudication, a dispute resolution approach adopted in the United Kingdom and other jurisdictions, is proposed as the *proven* solution that will provide effective and timely interim dispute resolution. But is delayed payment and its consequences really all, or most, of the cause of the time

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and cost over-runs and claims on construction projects? Will adjudication yield decisions that conduce to improved project performance so that economic waste is avoided, or will it simply get the money moving?

These questions, which introduce a project management and performance perspective, are considered in this article.

Delayed Payment and Gridlock

Two aspects of the prompt payment problem are identified in the Report. One is encountered in the "*ordinary course*" where payment of monthly progress draws and holdbacks may be delayed in relation to their due dates. To address this problem, the United States, for example, has adopted prompt payment legislation (note that Ontario's Bill 69 prompt payment initiative follows the American model).

Absent from the U.S. prompt payment approach, however, is a means to resolve the other major payment-related problem cited in the Report; namely, the "gridlock" situation, which occurs when a significant dispute arises involving delay and damages, payment is withheld, and potentially protracted litigation may ensue.

Adjudication

To solve the problem of gridlock and eliminate late payment and non-performance, the Report proposes adjudication. Parties to a construction contract or subcontract would refer, to adjudication, a dispute that flows from a proper invoice including valuation of work, contract change orders and proposed changes, set-offs and deductions, and delay issues as they relate to claims for payment. *Per* the Report, a major benefit of adjudication is the short resolution time frame (28 days in the case of the U.K. model) relative to litigation or arbitration.

The Report declares that adjudication "*works*" and is now utilized internationally. It is proclaimed to be "*a proven and pragmatic solution*" which should be adapted to suit Ontario. Based on the Report's stated objectives then, adjudication can be expected to be an efficient dispute resolution approach which results in cash flow efficiency; improved productivity; swift resolution of disputes avoiding litigation; and, avoidance of the waste of human and financial resources.

A Test Case for Adjudication

To fully understand what we will be getting with adjudication, it is necessary to know the nature and quality of adjudication decisions. It may be instructive to consider how a commonly encountered dispute scenario would be adjudicated. Let us consider a hypothetical construction project. Achieving the scheduled completion date is very important to the owner and so the contract includes terms enforcing a regime of proactive project management, planning and control.

A detailed planning and schedule specification requires resource-loaded Critical Path Method ("CPM") schedules subject to review and acceptance, and monthly updates, and variance reporting. In this performance-based system, meaningful schedules are an important centrepiece, providing an accurate and reliable picture of the past, present and future of the work, and thereby creating transparency about performance problems (on the part of owner, consultant or contractor) and accountability for the same.

Further, the contract requires contemporaneous treatment of requests for extension of time and/or compensation. Accordingly, the schedule is to be used to forward-price not only the direct cost of changes, but to evaluate the possible delay and/or disruption effects of the change. In addition, the schedule is expected to provide early, actionable intelligence about time risks which might enable the owner to avoid or mitigate damages. In summary, there is a mutual agreement, codified in a contract, which prescribes a clear path to contemporaneously dealing with all of the issues.

Contract Non-Compliance

Suppose there is a dispute, and it goes to adjudication. The adjudicator quickly discovers that the schedules for the project have little or no value in determining when the project will actually finish, let alone analyzing the causes and effect of the alleged delay issues. The contractor's original schedule was more a summary level bar chart than a detailed CPM schedule. The progress schedule updates were submitted sporadically, with gaps of as much as four months between submissions. The schedule forecasts did not reflect current planning or in-progress status; instead, the originally planned logic and durations were preserved without change despite the fact that what was actually taking place on the ground each month bore little or no resemblance to the originally planned schedule.

The contractor explains that the schedules are intended to support its claim, as opposed to being the useful planning and control tool required by contract. All the quoted contract change quotations submitted by the contractor were qualified with the statement that only direct costs were included, and reserved the right to claim at some later time for delay, impact or other cost. So, the potential time effect of the changed scope of work (amounting to 20 per cent of the contract value) is not reflected in the schedule.

Under these circumstances, how will the adjudicator evaluate the contractor's, say, $10 million delay claim, most of which is for time-based cost? Will the adjudicator first demand to know why the schedule terms and the process of control and dispute resolution enshrined in the contract have been ignored? If one or the other party is clearly responsible for the non-compliance, will that nullify their entitlement and bring a swift end to the dispute? Word of mouth might gradually send a clear message to the industry that the contractually specified process to manage the project efficiently and avoid disputes should not be ignored.

Perhaps both parties failed to comply with schedule requirements, and the adjudicator decides to continue with the process. Would the adjudicator require that the contractor now submit a *contract-compliant* schedule which would include a reliable forecast-to-completion that reflects current progress, resource availability, all of the current scope of work, and known issues potentially impacting the schedule? The adjudicator could allow a short but sufficient time frame to have the contractor produce a meaningful schedule. Schedule and project management expertise would be required to scrutinize and assist in expediting the process. (It is notable that the list of potential adjudicators in-

cludes engineers, architects, quantity surveyors, lawyers, and experienced dispute practitioners, but there is no mention of project managers or scheduling experts). The next step would be to have the parties agree that the schedule reflects a realistic time period to complete. Then, the period of the delay would no longer be in dispute, only the responsibility for it would remain to be determined.

But what if, instead of taking the time to establish, and have the parties agree upon a meaningful schedule-to-complete, the adjudicator decides to evaluate the issues on the basis of the non-compliant "claim" schedule (and other information) before it? Will the delay period, which has not been validated in the first place and may be in error by months, or even years, be used as the crude basis for the adjudicator's adjustments to reflect the perceived merits of the arguments?

To understand the sacrifice in terms of quality which is suffered by this decision, consider what a reliable schedule forecast might reveal. Perhaps the "delay claim" schedule assumes resource limits that are not in fact a limitation on site: one asphalt crew is assumed as per the original schedule, but three are currently being provided to the site and the sub happily provides them without additional cost as it keeps its forces working. Or suppose the schedule assumes that a time-critical shop drawing will be released in one week, but the owner knows that a change will be made that will delay issuance for months.

Consider the time impact of all those change orders that have been, and continue to be, excluded from the schedule, amounting to several months of additional delay. And there is no indication in the available schedule forecast that the electrical work is seriously under-resourced, and will delay the project if crew size is not increased? With all of this hidden, what will be the quality of the resolution? Will it be comprehensive? Will responsibility be properly apportioned? And with all the lurking issues, will the parties not be back in dispute in a couple of months? Is this efficient and durable dispute resolution?

Consider also the consequence for the remainder of the project of moving on from the schedule issue instead of confronting it head on. The opportunity to benefit from a contemporaneous approach like adjudication will have been squandered. The project might have been re-set with a sound schedule plan the parties agree can work, and which would then serve to help efficiently and effectively manage the project going forward and avoid future disputes as the contract intended. Instead, a chronic problem in the construction industry will be perpetuated: the major cause of waste in the construction industry is the absence of a strictly enforced regime of effective schedule and controls that creates transparency, accountability, and understanding of true planning imperatives.

Will Haste Make Waste?

Will adjudication decisions avoid consideration of the questions above because of the constraints of time or lack of skilled resources to ensure the schedule is properly developed? The proponents of adjudication in the Report admit there is a price to pay for the expedited process. Adjudication is described as "*pay now, argue later*", and as offering "*rough justice*" in that "*the justice ... meted out is not always as pure and well prepared for as cases which proceed to a full trial …*". In one case, the Report notes, "*… adjudication under the* [U.K. Construction Act] *is necessarily crude in its resolution of disputes*". Haste does not have to equal waste, but waste and inefficiency there will be, if the above-mentioned performance questions, which require meaningful contract compliant schedules to answer, are given short shrift.

CONCLUSION

A compelling case can be made that payment and performance issues have often resulted in needless waste and protracted disputes, and that an *effective* contemporaneous dispute resolution approach would be enormously beneficial. The proposed changes to the *Construction Lien Act* afford a rare opportunity to produce truly transformative results for the Ontario construction industry, and a model for other provinces. However, as discussed in this article, the quality and nature of the adjudication dispute resolution approach will make all the difference.