

POLICY BRIEF: DISPUTE RESOLUTION & CONFLICT AVOIDANCE

The public sector invests in excess of \$60 billion a year on infrastructure across Canada. These projects range from small buildings and structures, up to multi-billion dollar transit lines and hospitals. Projects face different issues through their development due to a number of factors that can be within or out of each parties' control, and as a result claims are a normal part of the construction process. The issues often lead to claims, disputes, and can end up being resolved through legal channels. Disputes add an average of 22% to the cost of projects and extend projects by an average of 9.5 months in Canada. Every level of government in Canada would benefit from mandating a dispute resolution process that is simple, fair and impartial, cost-effective, timely, and expert-facilitated.

Ineffective dispute resolution cause negative knock-on effects that include:

1. undermining the trust between the government owner and contractor on the project;
2. taking expertise and leadership away from the core task of project delivery;
3. driving up overall project costs as bidders have to factor in the additional resources and impact on cash flow of drawn-out dispute processes; and
4. increasing costs and reducing availability of project insurance.



Every level of government in Canada would benefit from mandating a dispute resolution process that is simple, fair and impartial, cost-effective, timely, and expert-facilitated. There is also an opportunity to become more proactive by introducing a conflict avoidance process that can prevent issues even getting to dispute.

Key Asks:

- 1 Develop a single provincial approach to dispute resolution to be adopted on infrastructure projects that is underpinned by the principles of simplicity, fairness, cost-effectiveness, timeliness, and expertise;
- 2 Introduce a conflict avoidance process to significantly reduce the number of issues that go to dispute.

COST OF DISPUTES

Based on research covering almost 100 Canadian projects, disputes increased project costs by an average of 22 per cent, or C\$71 million (US\$53 million), and extended project timeframes by 9.5 months. KPMG also estimated claims on urban transit projects could amount to between 10-20% of the contract value. Given the scale of investment, the impact of these additional costs takes a sizeable chunk out of infrastructure budgets, which already face pressure from volatile material prices, and skills and labour shortages.

The approach to dealing with disputes and claims is different across Canada, there is a lack of consistency even within governments. With a patchwork of different processes and mechanisms in place with different public sector owners to handle disputes, many of which are seen to be overly complex, or favour the public sector owner, it results in disputes being drawn out and ultimately being settled by lawyers.

For small companies the complexity can make settlement of claims cost prohibitive, even for relatively small claims. Companies bidding for larger, more complex projects also have to price in more people to handle disputes, adding unnecessary costs and taking time from technical experts responsible for delivering the project. As claims remain unsettled the impact on cash flow has a destabilizing effect on businesses of all sizes, particularly for smaller companies. It can further undermine relationships along the supply chain that will have negative impacts on project schedules and budgets, and see companies right along the supply chain build in contingencies to reflect the additional costs associated with dysfunctional dispute resolution processes.

The longer claims are left to fester the more it damages the environment for project delivery, eroding trust between the public and private sectors and hindering progress. An approach that draws out the claims process and defer payments presents a false economy for government as the process itself ends up costing a lot more for all parties, it sucks up leadership and expertise who should be focused on delivery, it also either dissuades companies for bidding on public sector contracts, or forces them to price in the risk of increased costs of dealing with claims. A simpler, fairer dispute resolution process would help governments to attract more quality bidders for projects in Canada over the large pipeline of projects promised in the United States.

DISPUTE RESOLUTION PROCESS

Owners should focus on building an approach around a set of core principles. If the current system in place does not meet all of these criteria it will likely be ineffective and drive parties to use costly legal options. A clear, simple, fair process will help to improve project delivery by reducing risks of incurring additional costs and experiencing delays by providing greater certainty to all parties involved.

Principles:

1. **Simple:** a clear process, mapped out transparently in a clear sequence with a proportionate number of steps and reasonable information requirements to resolve disputes.
2. **Fair and impartial:** the process must be seen to be fair to both parties and ensure judgement is impartial based on the facts presented. The process around escalating disputes to the next stage must be even and open to both parties, with neither party able to block progress unilaterally.
3. **Cost-effective:** emphasis should be on resolving issues quickly and enabling both parties to move on, with the process being proportional to the size of claim.
4. **Timely:** quick action with fixed time limits for resolution to ensure that issues do not drag on for both parties. Compensation should be transferred automatically once a claim has been settled to ensure there is adequate cash flow for suppliers.
5. **Expert-facilitated:** both parties must feel confident that jointly chosen independent experts have the required technical knowledge, and problem-solving skills, to determine the root causes of disputes and work with both parties to find proportionate resolutions.

CONFLICT AVOIDANCE PROCESS

Owners Recognizing the impact of disputes on the success of project delivery Transport for London worked with the Royal Institution of Chartered Surveyors in the United Kingdom to establish a conflict avoidance process. The Conflict Avoidance Process is designed to encourage cooperation and resolving differences early and prevents them from escalating into disputes, cutting the need for arbitration, adjudication, or litigation. It is about fixing problems early. It encourages owners and contractors to recognise it is in everyone's interest to co-operate and jointly tackle issues through open and honest communication, mapping out consequences if disputes are not resolved, encourages compromise, and avoids escalation.

The process works through the following steps:

1. A group of standing experts is created with technical expertise related to specific projects being delivered;
2. Parties agree to initiate the conflict avoidance process whereby the jointly agreed designated expert takes an inquisitorial approach, visiting sites, holding meetings, reviewing documents and whatever else they deem necessary to understand the issue;
3. Within 28 days the expert issues a non-binding written recommendation on how parties should move forward and resolve the dispute, provides a reasoned perspective of what the outcome would be if the issue were to be adjudicated, arbitrated, or litigated;
4. if the parties do not agree with the judgement they can follow the normal staged approach to dispute resolution but provide their reasoning.

This process was extremely successful in terms of reducing costs, number of issues being escalated, and speed to resolve. It has subsequently been adopted across a number of government infrastructure delivery bodies in the UK, been incorporated into official UK Government guidance within the Construction Playbook, and has evolved into a sector-wide pledge with a rating system that rewards constructive behaviour.

Impact:

- **Transport of London** reduced the cost of resolving issues, cutting the cost of administering the process from an average of £50,000 per dispute to £12,000. Dramatically reduced the number of disputes from over 1200 in 2016 to under 200 in following years. Saw issues resolved in weeks rather than months or years. Reduced increases in overall project cost against tendered price by over 40 percent against the industry average.
- **Network Rail** the UK's largest infrastructure builder which had adopted the conflict avoidance process reported they pay one quarter the expected industry sector average for disputes. It has saved £1.2 billion to date through using a dispute avoidance process.

SUMMARY

There is a growing appreciation that successful projects rely on maintaining good relationships. Tackling disputes quickly is one part of a wider effort required from both government and industry to develop a more collaborative approach to project delivery. This should also include ensuring people have the skills and are empowered to make decisions at the project level, ensuring contracts focus on driving positive project outcomes, and looking beyond lowest cost as the dominant deciding factor for procurement. An effective and trusted dispute resolution process would go a long way to rebuilding the relationship between government and industry delivering projects which will provide wide-ranging benefits for all parties. There is much more that can be done that could deliver outsized benefits from the effort needed to implement it and we would encourage governments across Canada to look at taking steps to build a more collaborative environment across the sector.

ABOUT CLAIMS AND DISPUTES

Construction is complex, with many uncertainties that may materialize along the way, and claims are a normal part of the construction process when unforeseen risks materialize or a change in scope mean additional work has to be completed for the project to move ahead, which typically entails a cost. Common causes of claims include unforeseen site conditions, restricted site access, changes in scope, constructability of design, and changing material costs. These claims can be resolved financially, through jointly identifying alternative approaches to what was originally envisaged, or a combination that may offset some costs and involve a different approach. Claims include both hard costs such as additional materials and labour, and must also factor in impacts on schedules for example.

When contractual language is not clear and there is a disagreement between parties, claims can then turn to disputes. Government organizations then typically have a staged dispute resolution process that includes adjudication, arbitration, and ultimately litigation. The longer the process goes on, the more time it takes away from being focused on the project and the more costs are incurred.

Ahead of claims or issues escalating to dispute there is room for preventative measures such as the conflict avoidance process which has proven to be a cost-effective way of keeping projects on track. A number of other jurisdictions have also taken a number of steps to address the adversarial environment on project delivery by ensuring that contracts focus on shared responsibilities and project outcomes, and creating a joint sector-wide code to encourage better behaviour.

RESOURCES

- Royal Institution of Chartered Surveyors [Conflict Avoidance Process](#) and [Conflict Avoidance Pledge](#) and Toolkit
- Scottish Government [Conflict Avoidance Policy Note](#)
- UK Government [Construction Playbook 2022](#)
- Construction Industry Council [Low Value Disputes Model Procedure](#)

Future of Infrastructure Group

The Future of Infrastructure Group brings together industry leaders in the sector to provide a positive, and coherent voice to help governments across Canada deliver the best value from infrastructure investments. To make the most out of Canada's planned investments, this group discusses and shares their expertise on best approaches to prioritizing, planning, purchasing, constructing, maintaining, and operating infrastructure.

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