

A top-down view of a desk with a laptop, a cup of coffee, a mouse, a notebook, and glasses. The background is a dark, muted teal color. The text is overlaid in white, sans-serif font.

# CONSTRUCTION DISPUTE RESOLUTION CHALLENGES?

IS UTILIZING A PROJECT REFEREE THE ANSWER?

MEA CONFERENCE 2024, OTTAWA

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## CONSTRUCTION DISPUTE RESOLUTION CHALLENGES- IS USING A PROJECT REFEREE THE ANSWER? MEA 2024

### ■ **Presentation Overview:**

- Construction Disputes-What is the current suite of dispute resolution options?
- What are the advantages and disadvantages of each option?
- Another option: The Project Referee; What is it and how does it work?
- Advantages and Disadvantages of the Project Referee option?
- What types of projects is the Project Referee best suited for?
- Q & A

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## **CONSTRUCTION DISPUTE RESOLUTION CHALLENGES- IS USING A PROJECT REFEREE THE ANSWER? MEA 2024**

- Construction Disputes; Common on your projects?
- How to minimize disputes in your contracts?
- Are you satisfied with your current dispute resolution processes?
- OPSS/CCDC (Part 8) Contract Dispute Resolution processes?
- Municipal Special Provisions/Supplementals

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- Option One: Direct Negotiation
  - Always the first and best option
  - Advantages:
    - ✓ Simple and cost effective
    - ✓ No need for legal representation
    - ✓ Control remains in the hands of the people who know the project best
    - ✓ No fixed timeframes and flexible process
  - Disadvantages:
    - ✓ No fixed timeframes so can drag on
    - ✓ Can get too personal
    - ✓ May require significant explanation to senior management to obtain buy in on the negotiated result

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- Mediation:
  - Advantages:
    - ✓ Often an interim step prior to arbitration or litigation
    - ✓ Can be cost effective and time efficient
    - ✓ Maintains party's control over the final decision
    - ✓ Timelines are better defined and included in most contracts in some form
    - ✓ Parties must agree on a mediator
  - Disadvantages:
    - ✓ No guarantee of agreement
    - ✓ Not binding
    - ✓ Requires willingness of both sides to come to an agreement
    - ✓ Mediator's role is to try to get an agreement but not necessarily a "correct" one

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### ■ Arbitration:

#### • Advantages:

- ✓ Defined rules and process
- ✓ Binding on both parties
- ✓ Cheaper and quicker than litigation
- ✓ Can agree on an arbitrator that has experience in your type of construction and contract
- ✓ Confidential

#### • Disadvantages:

- ✓ Can limit possible appeals to the decision
- ✓ Legal representation usually required
- ✓ Can still become very expensive
- ✓ Many people are uncomfortable with the arbitration process

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- Adjudication:
  - Advantages:
    - ✓ Court enforceable “interim” decision
    - ✓ Quick decisions and process can be flexible if parties agree
    - ✓ Cost effective and time efficient
    - ✓ Confidential and you do not have to disclose all your relevant information
    - ✓ Right to pursue litigation or other dispute processes is preserved
    - ✓ Provides internal justification for any payment required
  - Disadvantages:
    - ✓ If you don’t agree on adjudicator ODACC will appoint one
    - ✓ Contract cannot be “complete” as considered under the Construction Act
    - ✓ Contractor can trigger at any time so you may be “ambushed”
    - ✓ Must be an adjudicable issue and be a “single” matter
    - ✓ Other party does not have to disclose all relevant information

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- Litigation:
  - Advantages:
    - ✓ Process allows for full examination and presentation of the facts
    - ✓ Rules of evidence apply
    - ✓ Construction lawyers, claims experts can be utilized
    - ✓ Fair hearing of facts in front of a judge
    - ✓ Opportunity to “settle” on the court room steps
    - ✓ Avenue to appeal decision may exist
  - Disadvantages:
    - ✓ Time consuming (years) and expensive
    - ✓ Legal counsel required
    - ✓ Each side becomes more and more entrenched in the belief of their position as time passes
    - ✓ Judge likely will have no expertise in technical construction issues
    - ✓ Public



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- Project Referee Role: What is it?
  - Provides the project with a contractually engaged, qualified, independent, unbiased third party to review a dispute and provide a rational and informed recommendation with respect to the dispute to facilitate an agreement between the parties.
- Project Referee: How does it work?
  - Dispute resolution process is documented in contract and how the Project Referee will function within that process
  - Project Referee is appointed at the initiation of the contract **prior** to any disputes
  - How does the Referee typically get involved in a dispute?:
    - ✓ Dispute Notice is issued by one party
    - ✓ Other party provides a Response to the Dispute Notice
    - ✓ Dispute then goes to a Project Steering Committee for resolution
    - ✓ If not resolved, either party can have the dispute referred to the Project Referee for review
    - ✓ Project Referee, after review, provides a written recommendation
    - ✓ Parties review and accept the recommendation of the Referee OR;
    - ✓ Either party can choose then to pursue further options within the contract if they disagree with the recommendation

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### ■ Referee Process:

- Project Referee conducts review in the manner that the Referee decides is most suitable given the dispute
- The parties shall cooperate with the Referee and provide information as required/requested by the Referee
- The Referee may retain another person with specialized knowledge or expertise to assist with the review
- This review, in addition to document review, can include site inspections and discussions with personnel involved
- Time is very limited.....as little as 10 days unless the parties agree otherwise
- The Referee's recommendation is not binding on the parties
- The Referee is not permitted to represent either party nor participate in further legal proceedings

### ■ What else to expect?

- A Project Referee Agreement is required to be signed between the three parties
- The cost of the Referee is split 50/50 between the contracting parties
- One party cannot unilaterally decide to change the Project Referee
- Typical Hourly Fee plus a nominal Monthly Fee

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- Project Referee:
  - Advantages:
    - ✓ Parties jointly select a referee who is respected, experienced and qualified for your project
    - ✓ Provides parties with an informed, expert, independent, unbiased recommendation on the dispute
    - ✓ The recommendation provided should assist in facilitating resolution of the dispute
    - ✓ Quick, value-added step prior to litigation, mediation, arbitration
    - ✓ Cost effective and time efficient
    - ✓ Referee conducts review in the manner that the Referee decides is most suitable
    - ✓ Without prejudice and confidential process
  - Disadvantages:
    - ✓ Non-binding decision
    - ✓ May not avoid arbitration/litigation/adjudication
    - ✓ Time limitations may be unreasonable for complex disputes

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## CONSTRUCTION DISPUTE RESOLUTION CHALLENGES- IS USING A PROJECT REFEREE THE ANSWER? MEA 2024

- What types of projects is a Project Referee best suited to?
  - Longer duration, higher value projects
  - Projects with a high-risk profile for significant change
  - Technically complex
  - Political and/or in the public spotlight
  - Where senior management wishes to have an independent, unbiased, informed opinion on disputes
  - Where unresolved disputes can have potential for significant negative financial and schedule impacts

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## CONSTRUCTION DISPUTE RESOLUTION CHALLENGES- IS USING A PROJECT REFEREE THE ANSWER? MEA 2024

- Who is using a Project Referee Process?
  - City of Toronto (Gardiner Expressway Rehabilitation Project)
  - MTO (Referee and Referee Panel) OPSS.Prov 100, GC 3.14.13
  - Other municipalities??

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Questions???

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