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How to prevent projects from becoming nightmares: from dreams to reality

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Every year fewer than three per cent of all claims issued in Ontario courts do not settle before trial. That statistic also holds true for construction disputes. Given the tiny percentage of cases, which actually go to trial, it is important to ask just why it is so many dissatisfied owners, contractors, and tradesmen choose to go to court. Part of the answer lies in our culture. We admire people who come out swinging and the courts are a place where lawyers conduct a form of virtual warfare. Except that their weapons are words.

What we tend to forget is that in any conflict each side has his own perspective; this holds true of the process of custom construction. In any construction project, the owner, contractor and architect all know that they will encounter problems along the way. What they often do not realize is that understanding one another's perspectives helps all parties to prevent disputes, or to resolve them so that they are not an impediment to construction.

THE OWNER'S PERSPECTIVE

Let's assume that you have done all the right things. You have hired the professionals, including an architect who has prepared a blueprint, and a contractor to man-

age and build your custom construction project. Your financing is in place. You have heard the horror stories regarding cost overruns, project delays and stoppage mid-stream that can last for long periods of time. You have done your best to ensure that the contractor has the ability to fulfill his contractual obligations.

However, even careful and experienced individuals run into problems when custom building. Many of these projects, despite all of the caution and preparation, end up in conflict. Where those conflicts result in a work stoppage and in lawsuits, costs begin to mount very quickly.

Understanding why these disputes arise and knowing how to resolve them can save you time, money, and emotional stress. Custom building projects involve hundreds of components dependant upon variables such as manufacturers, suppliers, sub trades, supervisors, inspectors, strikes and weather. Excellent communication, co-ordination and timing are crucial for things to stay on schedule. In almost all custom building projects, there will be mistakes, misunderstandings and unforeseen problems. Constraints of time and money will pressure you into making decisions "on the

fly" with which you may not be happy later. The appropriate responses to these problems, as they occur, can either help you realize your dream or experience a nightmare.

YOUR RELATIONSHIP WITH YOUR CONTRACTOR

In a custom project, you commit an enormous amount of money, which makes most owners uncomfortable. You are forced to trust your contractor upon whom you rely to bring your "dreams to reality" while protecting you from the inherent problems associated with construction. At times when a major problem develops, you may feel that your contractor has betrayed both your trust and your working relationship. Over time, the increasing loss of trust is a form of 'slow conflict poison'.

On the other hand, your contractor feels that he has earned his money working on your project, often doing dangerous work. Once your contractor begins to feel this "conflict poison" he will likely talk about how hard and dirty the work is, and how he has bent over backwards to please you. He may let you know about how hard he has worked to accommodate deadlines and changes. Your contractor may believe that

he has given you more than you are paying for. He may take anything you say very personally especially if you hold back funds.

THE CONFLICT POISON BEGINS TO WORK

Once your relationship with your contractor begins to fray, the first thing likely to happen is that the contractor, fearful that he will not be paid, will threaten to stop work and register a lien on your property. His fear which drives him to make threats, will likely result in your talking to your lawyer, who will tell you to hold your ground. Your lawyer, trained in the art of litigation, will advise you to sue. He may also suggest that you report the contractor to local licensing boards. You and your contractor quite sincerely believe that it's not your fault. You also believe that you have no alternative but to come out swinging, when the bell rings, or to capitulate.

CHOOSING TO DISSOLVE THE CONFLICT POISON

However, you can dissolve this 'conflict poison' by reaching an agreement that is fair both to both parties in an atmosphere of co-operation and mutual respect. You

and your contractor can move to restore your relationship through co-operation while advancing your own interests. While self-help books can be useful, in cases where large amounts of money are involved you may be better served by appointing a trained mediator to help you reach agreement.

Because ninety seven per cent of all civil lawsuits settle before trial, the statistics are in your favor. Parties in dispute find that the mediation process is not only more cost-efficient than litigation, but is also a more satisfying settlement process. Because such settlements are voluntary, and meet your needs and interests without being imposed by a court, you are more likely to honor their terms.

It is important to understand that the positions and concessions made in the course of mediation cannot be used against any party in subsequent legal proceedings should the mediation fail to produce a settlement. Because of the technical complexity of construction lien law, trials of these kinds of cases customarily take several years before the legal rights of all parties are addressed. These kinds of disputes should be dealt with as early as possible by looking at the parties needs and interests and not at their strict legal rights.

PRESCRIBING THE ANTIDOTE TO CONFLICT POISON

During mediation, the parties are encouraged to move away from taking positions, based on their legal rights, to a discussion of their interests. It requires everyone at the mediation table to avoid trashing and bashing one another, which allows both sides to examine and discuss their real interests.

Through skillful questioning, at times with the parties facing each other, and other times with the parties apart, the mediator will begin to understand what actually precipitated the flow of 'conflict poison'.

Once you and your contractor understand each other's needs and perspectives, the mediator can shift the discussion to a consideration of the options that will help both of you to avoid a future conflict. Differences in perspective are normal and should be expected. Recognizing them as a valid part of the construction process allows you and your contractor to tailor solutions, which meet both your needs and have value for both sides. And even if complete agreement is not reached during the course of mediation, you and your contractor can still aim for a partial resolution to keep the project moving.

It is important that the mediator be neutral and impartial. This means that the mediator cannot have a business or social relationship with either of you, or is not an agent or advocate for either. A trained mediator facilitates reaching settlement; their job is not to judge or to decide anything. It is up to you and the contractor to work out the terms of any settlement by examining the available options, choosing those that work best for both of you.

TWO BASIC CHOICES

As soon as you realize that you have a conflict with your contractor that has the potential to escalate, you have two basic choices. The first choice is to encourage your contractor to mediate in the hope of settling the dispute early, allowing you to get on with your project. The other option is to prepare for litigation whose outcome may be uncertain, whose cost may be disproportionate to the value of the construction, and whose timing may take years before there is any result.

While the mediation process takes both commitment and work from you and your contractor, the process has the potential to stem the flow of 'conflict poison', the damage to your working relationship, and the expensive delays and costs, which are part and parcel of any conflict.

We will look at the contractor and architect's perspectives in future columns.

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