Where Dispute Resolution Boards Do Not Work

by Harvey J. Kirsh

A recent Google search of “Dispute Resolution Boards” and “Dispute Review Boards” generated more than 15 million and 27 million hits respectively

Success of Dispute Resolution Boards in the Construction Industry

The mythology surrounding Dispute Resolution Boards (“DRB”s) in the construction industry is that, since their inception 50 years ago, they have worked exceptionally well, have helped to nip disputes in the bud “(w)hen it appears that the dispute cannot be resolved on Site”, and have been a significant addition to the spectrum of alternative dispute resolution processes.

Although the earliest reported use of a form of DRB (then called a “Joint Consulting Board”) was on the Boundary Dam Hydroelectric Project in

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1 This paper was delivered at the Dispute Resolution Board Foundation’s 17th Annual Meeting and Region 1 Conference in Miami, Florida on September 20, 2013
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3 This quotation is excerpted from the DRB provision in the construction contract between the contractor and the transit commission relating to the “Subway Project” defined and discussed below
northeastern Washington in the 1960s\textsuperscript{5}, the genesis of their more common use occurred in the mid-1970s on civil engineering works, particularly tunneling projects. Since then, their use has expanded to include a multitude of complex private and government construction projects throughout the world, including heavy civil engineering, infrastructure, industrial, institutional, and commercial projects.

Sample U.S. projects using DRBs include\textsuperscript{6} Washington, D.C.’s Metropolitan Transit Authority; Phoenix’s America West Arena (concert hall and Phoenix Suns’ basketball arena); the Inter-Island Terminal of Hawaii’s International Airport; Washington State’s SR-90 Bellevue Transit Access project; and Colorado’s Hanging Lake Viaduct.

Furthermore, U.S. owner agencies that have used DRBs include state highway departments (e.g., The California Department of Transportation (Caltrans) and Florida Department of Transportation (FDOT), which use DRBs on many projects); public transit authorities; municipal public works projects (including bridge rehabilitation, building renovation, combined

\textsuperscript{6} See “DRBF Practices and Procedures Manual”, Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)
sewer pipelines and tunnels, convention centers, court houses, highways, libraries, parking structures, prisons, schools and water supply projects); universities (e.g., classroom and medical buildings, libraries, research facilities, and sports complexes); airport expansions; dams; hydroelectric projects; mines; manufacturing plants; office buildings; port facilities; private research laboratories; and public stadiums.

Internationally\(^7\), dispute boards have also been used in the Peoples’ Republic of China (e.g., the US $3.4 billion Ertan Hydroelectric Project\(^8\)); on Uganda’s Owen Falls Extension Hydroelectric Project\(^9\); on the US $15 billion Folkestone (England) to Calais (France) Channel Tunnel; on the London Docklands Light Railway project; and on numerous projects in Australia, Bangladesh, Botswana, Denmark, Dominican Republic, Ethiopia, Honduras, Hong Kong, Hungary, India, Ireland, Italy, Lesotho, Madagascar, Mozambique, New Zealand, Pakistan, Poland, Romania, Sudan, Uganda, the U.K. and Vietnam.

\(^7\) See “DRBF Practices and Procedures Manual”, Chapter 1, Section 3 (revised April 2007), pages 2-3 (at http://www.drb.org/manual/1.3_final_4-07.doc)
\(^8\) For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation), Vol. 8, Issue 2 (May 2004), at page 1
\(^9\) For a Case Study of this project, see Forum (the newsletter of The Dispute Resolution Board Foundation), Vol. 8, Issue 1 (February 2004), at page 1
In Canada, the use of DRBs has been breaking ground only over the course of the last 20 years. Projects employing them have included the Toronto Sheppard Subway Twin Tunnels Project (1994-2002); the Sir Adam Beck hydroelectric generation complex at Niagara Falls, Ontario (1996-2005); the Confederation Bridge Project, spanning the Northumberland Strait between mainland New Brunswick and Prince Edward Island (1993-1997); the Seymour-Capilano Tunnel in Vancouver, British Columbia (2004-2008); the Port Mann Water Supply Tunnel in Vancouver, British Columbia (2011-2014); Hydro Quebec’s Romaine II Powerhouse (2012-2013); the Trans-Canada Highway project in New Brunswick (2006-2007); the Southeast Trunk Sewer Tunnel in York Region (north of Toronto) (2011-2014); and the Toronto-York Spadina Subway Extension Project (2009 and ongoing).

**Cornerstone Values Of DRBs**

The cornerstone values of DRBs are said to consist of independence, impartiality and fairness, in terms of procedures and protocols; as well as
dispute avoidance, and the promotion and maintenance of good project relationships\textsuperscript{10}.

Consider what several independent writers have observed:

- One writer, citing DRBF statistical information, commented that "(i)n North America, the DRB process has been used on over 1,000 projects, and 99\% of those projects were completed without resorting to arbitration or litigation"\textsuperscript{11}; and

- Another writer observed that "a DRB acts as a buffer which absorbs all unresolved disputes from negotiation and prevents their escalation to a higher, more protracted level of resolutions like arbitration and litigation"\textsuperscript{12}; and

- A Briefing Report of the CPR Institute observed that "(t)he costs of DRBs are minimal and are far outweighed by the benefits they provide"\textsuperscript{13}.

\textsuperscript{10} See Jim Phillips, "When is Fair Not Fair? Ethics in the DRB Process", in 
\textit{Forum} (the newsletter of The Dispute Resolution Board Foundation), Vol. 11, Issue 1 (February 2007), at page 1. Also see "DRBF Practices and Procedures Manual (January 2007)", Chapter 1, Section 1, page 1 (at http://www.drb.org/manual/1.1_final_12-06.pdf)

\textsuperscript{11} John W. Hinchey and Troy L. Harris, \textit{International Construction Arbitration Handbook} (Thomson/West, 2008), at page 30 and fn. 6 of para. 1:10

\textsuperscript{12} Carol C. Menassa and Feniosky Pena Mora, "Analysis of Dispute Review Boards Application in U.S. Construction Projects from 1975 to 2007", \textit{Journal of Management in Engineering} (April 2010), at page 74

\textsuperscript{13} CPR Dispute Prevention Briefing Report (at page 8), authored by Randy Hafer and the Construction Advisory Committee of the International Institute for Conflict Prevention & Resolution; but see, contra, Kathleen M. J. Harmon, "Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project", \textit{Journal of Legal Affairs and Dispute Resolution in Engineering and Construction} (February 2009), particularly the section entitled "Did Use of DRBs Reduce Cost of Resolving Disputes?", at page 7
Furthermore, “(t)he DRB is generally recognized as one of the most efficient and effective means of preventing and resolving claims and disputes on a construction project”\(^\text{14}\).

Are the Reports About DRBs Uniformly Positive?

There are projects where DRBs have *not* worked as well as expected for any of the parties, and where the process has faced criticisms and has generated considerable expense, delay and frustration\(^\text{15}\). As one writer wryly commented, “Oscar Wilde is reported to have said of George Bernard Shaw that he hadn’t an enemy in the world, but none of his friends liked him either. The same could be said of dispute review boards”\(^\text{16}\).

Case Study of A Current Subway Construction and Tunneling Project

A new subway construction and tunneling project is currently underway in Canada (the “\textbf{Subway Project}”), under the auspices of the municipality’s transit commission, and is not expected to be completed before the Fall of 2016. Since the project is ongoing, and since the DRB is expected to

\(^{14}\) ibid

\(^{15}\) See, for example, Kathleen M. J. Harmon, “Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project”, supra, fn. 13, particularly at pages 5 ff

\(^{16}\) Duncan Glaholt, “Reviewing Dispute Review Boards”, *JAMS Global Construction Solutions Newsletter* (Fall 2010), at page 7
continue to perform its traditional role for several more years, neither the project nor the participants will be identified in this article. As Sergeant Friday, of the old TV series “Dragnet”, might have said, “The story you are about to hear is true. Only the names have been changed to protect the innocent”.

The Subway Project consists of a new underground subway line extension, which has been designed by the transit commission and its consultants. The implementation of that design contemplates the excavation of twin bored tunnels, using earth pressure balance (EPB) tunnel boring machines, and the construction of a number of new subway stations, all of which is projected to cost several billion dollars.

The construction contract between the transit commission and the contractor provides that disputes which cannot be resolved by negotiation may be submitted, on the agreement of both parties, to arbitration. However, the contract also stipulates that neither arbitration nor litigation may take place until after the completion of the work. Accordingly, “in an effort to avoid construction delay and litigation”\textsuperscript{17}, either the transit commission or the

\textsuperscript{17} This quotation refers to the goal expressly set out in the DRB provision of the construction contract
contractor may “appeal” a dispute to the DRB, as soon as it appears that the normal dispute resolution effort is not succeeding.

But, as the story begins to unfold, we learn about some of the shortcomings and challenges confronting the DRB process.

**Selection of DRB Panel for Subway Project**

Ideally, it is fundamental to a successful DRB “culture” that Board members are selected for their neutrality, integrity, experience and expertise\(^\text{18}\). And as one writer observed, “the moral authority of [DRB] recommendations seems to lie in the parties’ confidence in their dispute review board members’ technical expertise, first-hand understanding of the project conditions, practical judgment, and the overall transparency of the dispute review board process”\(^\text{19}\). But aside from the technical knowledge required for complex construction, engineering and infrastructure projects, Board members must also have the skill to address “contract interpretation issues . . . that generate disputes relating to a variety of

\(^{18}\) See Donald L. Marston, “Dispute Resolution Boards (DRBs) – Creative ADR for Infrastructure Projects”, Vol. 18, No. 2 (Fall 2009), Canadian Arbitration and Mediation Journal 30, at 31

\(^{19}\) Duncan Glaholt, “Reviewing Dispute Review Boards”, supra, fn. 16, at page 9
matters, such as contractual requirements relating to scope, delays, scheduling, and performance issues”\textsuperscript{20}.

In an interview for this article, the transit commission’s Senior Counsel, when asked for his view of DRBs, advised that “it changes from day to day”, but the “the makeup of the Panel is critical”\textsuperscript{21}. One of the shortcomings, he opined, is that attorneys have not typically been welcome participants in the DRB process, either as counsel or as Board members, which often means that the Board members, whose backgrounds are usually in engineering, tend to struggle with legal and contract interpretation issues\textsuperscript{22}. In the same vein, another commentator recently wrote that “DRB panel members are likely to be less effective in interpreting commercial contract terms and/or statutes, especially when the parties’ issues may depend on construing duties that are implied under common law”\textsuperscript{23}.

\textsuperscript{20} Donald L. Marston, “Dispute Resolution Boards (DRBs) – Creative ADR for Infrastructure Projects”, supra, fn. 18
\textsuperscript{21} Telephone interview with Senior Counsel for transit commission on Thursday, July 11, 2013
\textsuperscript{22} In his article “Dispute Review Boards: What the Case Law Says About Them” (Dispute Resolution Journal, November 2010-January 2011), Daniel D. McMillan wrote: “Many proponents of DRBs discourage appointing attorneys to the panel. However, as DRB practice continues to evolve, parties are increasingly seeing the value of having an attorney or retired judge experienced with construction law on the board. This is because legal and procedural issues are often intertwined with the resolution of technical issues”. The article is published online at: http://findarticles.com/p/ni_qa3923/is_201011/ai_n57034686/?tag=content;co1
\textsuperscript{23} Douglas S. Oles, “Dispute Review Boards” (paper presented at August 4, 2011 Annual Meeting of American Bar Association’s Section on Dispute Resolution, Toronto, Ontario), at page 5
With respect to the Subway Project, there was what appeared to be a closed process in the form of a formal tender call by the transit commission for the submission of competitive bids (called “Proposals”) from prospective DRB members, resulting in a short preferred list of six applicants from Illinois, California, New York, Idaho, and Colorado. The fact that none of the prospective Board members were resident or carrying on business in Canada meant that schedules might be more difficult to coordinate, and that there would be an additional cost, in terms of travel time and disbursements, for the Board members’ services. The contractor had no role in this procurement process, other than to make a selection from the pre-screened short list.

In their Proposals, the bidders were required to declare and disclose any possible conflict of interest, but only insofar as the municipality and the transit commission were concerned, and without regard to the contractor. There being no point system or other method of discriminating or discerning between the various bidders, it appeared that the Proposals were then evaluated on the basis of their hourly rates (notably in the US $225.00 range).

Curiously, despite the fact that DRB Board members were expected to be independent and neutral, the bidders were required to “propose and offer to
perform the Work as assigned by the [transit commission]. Furthermore, the bids were to be open for acceptance for a period of 60 days from the bid closing date, “and that the [transit commission] may at any time within the said period accept this Proposal.” The transit commission maintained control over the process.

Although the short list of bidders for Board positions included candidates who were consulting engineers with broad construction and engineering experience, it did not appear to include engineering professionals who were prominently on the radar screen as having the most significant underground construction and mass transit project experience and expertise, and who had also recently served as a member of other dispute boards. In fact, the preferred list of selected bidders even included a manager/supervisor of a heavy engineering construction firm who was not an engineer.

Initial Organization of the DRB

Obviously, a DRB is only as good as its constituent members, and their adherence to organized, proper and fair procedures and protocols. However, on the Subway Project, it appeared that the DRB was somewhat distracted
and confused in its initial organization. Both the Rules of Operation and the DRB Three-Party Agreement, drafted and issued by the DRB, contained inaccuracies, discrepancies, conflicts and inconsistencies, and even referenced sections of the construction contract which did not exist. Also, in correspondence with the parties, the DRB erroneously referred to itself as the “DAB” (i.e., “Dispute Adjudication Board”), which of course is a different form of standing neutral process used predominantly in Europe under FIDIC’s suite of “Red”, “Yellow” and “Silver” Book construction contracts.

Significantly, the documents also improperly identified the name of the contractor, referring to it as a “joint venture” rather than as a “limited liability partnership”. From a legal perspective, there is an important difference. When these items were pointed out, the DRB apologized, stating that the misnomer of the contractor arose out of the fact that, when the documents were being drafted, the DRB relied on e-mail addresses and business cards, rather than on the actual construction contract itself.

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24 Fédération Internationale des Ingénieurs-Conseils / International Federation of Consulting Engineers
25 For an overview of the “DAB” (i.e., “Dispute Adjudication Board”) and FIDIC’s suite of construction contracts, see Harvey J. Kirsh, “Dispute Review Boards and Adjudication: Two Cutting-Edge ADR Processes in International Construction”, supra, fn. 4; and Jesse B. Grove and Richard Appuhn, “Comparative Experience with Dispute Boards in the United States and Abroad”, The Construction Lawyer (Vo. 32, No. 3, Summer 2012), at page 6
Additionally, the DRB conceded that, with respect to the inaccuracies, discrepancies, conflicts and inconsistencies in the drafting of those documents, it had mixed up the Subway Project with another, stating that the documents were sent out before they were proofread, and undertaking to issue a corrected version. However, despite the passage of more than a year, the DRB has done nothing to formally correct either the Rules of Operation or the DRB Three-Party Agreement.

This lack of care and attention to detail has caused the parties, particularly the contractor, to lose a measure of confidence and trust in the DRB process.

The Hearing Process

Although the DRB provision in the construction contract for the Subway Project stipulates that the DRB “shall formulate its own rules of operation”, it also provides that “(d)isputes shall be considered as quickly as possible”. Similarly, the Rules of Operation call for the “timely prevention and resolution of disputes”.

Having said that, the DRB process has experienced significant delays, which have frustrated the parties, and, again, have caused them to re-examine their commitment to the process. Some hearings have been scheduled for dates months off into the future; the DRB has in some instances permitted one of the parties to adjourn hearing dates, over the objection of the other party; and the time between the actual hearing and the release of the DRB’s Findings and Recommendations is sometimes unduly excessive, measured in months, rather than based on the 2-week specification set out in the construction contract\textsuperscript{26}. As one author wrote, “The whole purpose of a DRB is to resolve disputes contemporaneously. . . . While hope springs eternal, those experienced in the industry know that the longer a change order/claim sits and awaits resolution, the more positions harden and cost grows”\textsuperscript{27}.

The problem of DRB delays on the Subway Project is exacerbated by the fact that the contractor has many million of dollars in claims, with 90% of them remaining unresolved, and that, as indicated above, the construction contract stipulates that neither arbitration nor litigation may take place until

\textsuperscript{26} The DRB provision in the construction contract provides that “(t)he Board’s decision for resolution of the dispute will be given in writing within two weeks of the completion of the hearings unless the Board requires more time in which case [the contractor] and [the transit commission] will be so advised” (emphasis added)

\textsuperscript{27} Kathleen M. J. Harmon, “Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project”, supra, fn. 13, at page 5
after the completion of the work. This means that the contractor has to carry its outstanding claims for at least several years, without whatever cash flow and other benefits might possibly be achieved by a more efficient and expeditious DRB process. In the circumstances, therefore, there is a perception that the process is inequitable, in that delays tend to work in favour of one party (the transit commission) and to the detriment of the other (the contractor).

Another concern regarding the hearing process is that, although neither the DRB provision in the construction contract nor the Rules of Operation nor the DRB Three Party Agreement expressly preclude the right of a party to be represented by counsel at a hearing, the DRB has typically not permitted legal representation (including in-house counsel), even when contract interpretation and legal issues are to be addressed.

Similarly, the Rules of Operation generally provide that only essential personnel from each party may attend hearings, and that only one person for each party should be designated as the primary presenter. The DRB process, though, should be accommodating and culturally sensitive to differences in the contractor’s language and culture. In an age when the global marketplace
dictates that contractors may have “foreign” countries as their home bases, with different cultures and legal systems, and with mother tongues other than English, it may be intimidating and difficult for a contractor representative to properly and coherently put forward the requisite technical and contractual submissions to the DRB. In this regard, the Briefing Report of the CPR Institute, referred to above, commented that “(W)hile DRB presentations are typically made by project personnel with first-hand knowledge of the facts and occurrences on the project, it may be necessary at times to have an attorney make such presentations. For example, if project participants have language difficulties then the use of an attorney may be desirable”28.

Given the multitude and complexity of some of the individual and inter-related time extension and compensation claims which have arisen on the Subway Project, and the informality and restrictions of the hearing process, the parties are of course also concerned whether the DRB in fact has understood the nature and nuances of the claims, both in terms of liability and compensation; whether the DRB understands and has addressed all of the issues; and whether those possible concerns, if accurate to any extent, would

28 See CPR Dispute Prevention Briefing Report (at page 13), supra, fn. 13
affect the ability of the DRB to make a comprehensive, fair, equitable and reasoned recommendation.

**The DRB’s Findings and Recommendations**

(i) **“Splitting the Baby?”**: The transit commission’s Senior Counsel, interviewed for this article\(^{29}\), observed that no one should be under the illusion that DRB members are tasked with resolving problems on the site or disputes between the parties. Their role is limited only to reviewing the matters referred to them, to promoting a dialogue between the parties\(^{30}\), and to providing their advisory, non-binding opinions. As a result, it is his view that a major “flaw” in the process is that many DRB members tend to try to appease both parties, to take a middle-of-the-road approach, and generally to “split the baby”. However, given the cash flow predicament which any contractor would encounter in having to postpone the determination of its claims, this view on “splitting the baby” would not likely be shared by a contractor who perceives that the DRB’s recommendations tend to appease

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\(^{29}\) Telephone interview with Senior Counsel for transit commission on Thursday, July 11, 2013

\(^{30}\) Promotion of an ongoing dialogue between the parties is evident in the Project’s DRB provision, in the construction contract between the transit commission and the contractor, which provides that “It is not intended that the [transit commission] or the [contractor] default on their normal responsibility to amicably and fairly settle their differences by indiscriminately assigning them to the Board. It is intended that the Board encourage the [transit commission] and the [contractor] to resolve potential disputes without resorting to this appeal procedure”. 
one party (the transit commission) to the detriment of the other (the contractor).

(ii) “No Jurisdiction”: The Subway Project is not expected to be completed before the Fall of 2016, and the contractor, having completed only about 50% of its work, already has a multitude of complex claims (plus subcontractor claims) totaling in the millions of dollars, many of which claims are for time extensions and for additional compensation for delay.

Other than taking these claims to the DRB for its recommendations, the contractor may have a right but no remedy at this time to recover its claims, since the contract provides that there is to be no litigation or arbitration until the project has been completed.

What was the cause of the delay, and how were the delay claims addressed by the DRB? The following is the background:

In the Fall of 2011, one of the subcontractors on the Subway Project, while operating a drilling rig, was involved in a serious and tragic mishap, causing a fatality as well as serious injuries to several labourers working on the site.
Immediately, the provincial Ministry of Labour issued a stop-work order and the transit commission followed up with a direction that all work in that area of the site be halted. In due course, after a Ministry and police investigation, both the contractor and the subcontractor were charged with having committed offences under the *Occupational Health and Safety Act*. This exposed the contractor to the prospect of significant penalties, fines, assessments, surcharges, and legislative sanctions for which the contractor is claiming indemnity from the subcontractor.

The incident also resulted in a 3 to 6-month delay in the tunneling and construction activities surrounding the site where it occurred. The net effect on the Subway Project was that some of the contractual milestone dates will not likely be achieved, and, as well, the contractor became exposed to the prospect of having to pay the transit commission a substantial amount of liquidated damages (as much as $70,000.00 per calendar day in some cases).

The contractor’s position is that the effective cause of the delay was the negligence of its subcontractor, but is also alleging that the transit authority has shared responsibility for having stopped the work and for having obliged
the subcontractor to carry out unnecessary work which ultimately lead to the drilling rig incident.

The subcontractor is not involved in the DRB process. When the contractor’s claim against the transit commission for damages for delay was submitted to the DRB, the DRB, after permitting a number of adjournments, then took almost 6 months to issue its recommendations, ultimately determining, without explanation, that it had “no jurisdiction” to deal with many of the delay claims. As observed elsewhere, “the main purpose of the [DRB’s] recommendation is to convince the parties of the wisdom of the panel’s proposed settlement. The recommendation is the way the DRB demonstrates its knowledge of the project; understanding of both sides of the dispute, as well as the analysis of the solution to the disputes, the recommendation itself”\(^{31}\). However, declining jurisdiction to make a recommendation, whether it be credible, informed or otherwise, does not assist the parties in approaching a resolution of their disputes.

\(^{31}\) Kathleen M. J. Harmon, “Case Study as to the Effectiveness of Dispute Review Boards on the Central Artery/Tunnel Project”, supra, fn. 13, particularly at page 6
Also, not all of the issues were addressed by the DRB, and it was the view of the contractor that some of the recommendations showed a lack of understanding as to what was requested.

One might speculate that the DRB did not want to deal with liability and damages issues relating to the delay caused by the stop-work order arising out of the drilling rig incident. However, since the DRB’s mandate and jurisdiction was only to issue non-binding, without prejudice recommendations, one wonders why the DRB did not want to deal with the claims, using “no jurisdiction” as an excuse (and after making the parties wait 6 months).

The DRB process for this one hearing was expensive, unduly lengthy, and ultimately unrewarding. Without any recommendation or hint as to the DRB’s evaluation of the delay claims, the contractor now must carry part of its multi-million dollar claim against the transit commission until after the completion of the project. This of course will result in serious cash flow problems, even for large contractor companies. Once again, this reinforces the perception that the process is inequitable, and works in favour of one party (the transit commission) and to the detriment of the other (the contractor).
(iii) **Admissibility of DRB’s “Recommendations”:** The construction contract for the Subway Project contemplates that the DRB would provide “*verbal or written recommendations*” with respect to disputes which are submitted to it. It also stipulates that, prior to a dispute review, the parties may opt to agree that the “*decision*” of the DRB would be binding on them, in which case there would be no right of appeal, except on an issue of law\(^{32}\). The construction contract is silent and does not expressly address what happens where there is an absence of such an agreement, but one would expect that, in such circumstances, the DRB’s recommendations would be without prejudice, and would be neither final nor binding.

However, that inference or assumption does not address the issue of the admissibility of such recommendations in subsequent legal proceedings (i.e., litigation, arbitration, and/or mediation)\(^{33}\). The default position would likely

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\(^{32}\) It is curious that the right of appeal is based on an “*issue of law*”, in circumstances where the DRB members, who typically are not attorneys, may not have the requisite background, experience, expertise or qualifications to canvass issues of law in their “*decisions*”

\(^{33}\) For an excellent discussion of this topic, see Deborah Bovarnick Mastin, “*Admissibility of Nonbinding Written Dispute Board Recommendations*”, *JAMS Global Construction Solutions Newsletter* (Winter 2013), at page 1. Also see Christopher T. Horner II, “*Should Dispute Review Board Recommendations Be Considered in Subsequent Proceedings?*”, *The Construction Lawyer* (Vo. 32, No. 3, Summer 2012), at page 17
be that, although non-binding, the recommendations would nevertheless be admissible\textsuperscript{34}.

For that reason, the contractor on the Subway Project negotiated a collateral agreement with the transit commission to the effect that the recommendations would \textit{not} be admissible. This agreement arose as a result of the parties’ compromised feelings of confidence and diminished expectations with respect to the DRB, but it unfortunately also served to subvert the general intent of the DRB process.

\textit{An Anecdotal Case Study Regarding Admissibility}\textsuperscript{35}

The transit commission had previously developed another subway project in Canada 11 years ago, which also included a twin tunnel component costing approximately $93 million.

The contractor for the tunneling work was a joint venture consisting of 3 experienced and well-respected contractors. The tunneling contract

\textsuperscript{34} In his article “Dispute Review Boards: What the Case Law Says About Them” (Dispute Resolution Journal, November 2010-January 2011), Daniel D. McMillan wrote: “Because DRB recommendations are admissible in subsequent proceedings relating to the dispute, parties can manipulate the DRB process to create evidence for use in litigation or arbitration. To prevent this kind of misuse, model DRB provisions are sometimes modified to make DRB recommendations inadmissible in subsequent legal proceedings”. The article is published online at: \url{http://findarticles.com/p/mb_qa3923/is_201011/ai_n57034686/?tag=content:co11}

\textsuperscript{35} For a more detailed discussion of the case study described in this section, see Harvey J. Kirsh, “Dispute Review Boards and Adjudication: Two Cutting-Edge ADR Processes in International Construction”, supra, fn. 4
established, and set out the procedure, function and key features of, a Dispute Review Board, and the mandate of the Board included the provision of written recommendations to the parties in order to assist in the resolution of disputes. However, although not binding on either party, the contract stipulated that “the recommendations of the Disputes Review Board should carry great weight for both [the transit commission] and [the contractor]”.

The 3 Board members on that project consisted of a prominent engineer who had substantial underground and mass transit project experience and expertise; a Professor of Civil Engineering at Stanford University, who had experience as an expert witness in cases involving geotechnical, contractual or construction practice issues, and who had served both as Chair and as a member of numerous other dispute review boards; and an engineering consultant with substantial experience managing large tunneling and other underground construction contracts, and who also had considerable experience chairing numerous other dispute review boards relating to tunnelling, subway and other construction and infrastructure projects.

Within a short time after commencing its tunneling work, the joint venture contractor gave notice to the transit commission that it was incurring
additional cost as a result of muck disposal problems due to high foam usage. The contractor alleged that the actual quantity of foam that it was required to use in order to successfully excavate the tunnels far exceeded both what it expected to use and what it could have reasonably been expected to use; and it contended that, as a result of the high foam usage, its tunnel spoil was reduced to such a high-slump condition that its disposal costs were significantly increased. The contractor further alleged that both it and its trucking subcontractor were forced to haul the excavated and conditioned tunnel muck to inconvenient and expensive disposal sites, all at costs far beyond what had been included in its tender.

Subsequently, the contractor submitted its 369-page claim for $4.4 million in additional costs associated with tunnel spoil disposal, but the transit commission responded that there was no valid basis for the claim. After preliminary settlement discussions, the parties agreed to bring the matter before the Dispute Review Board for a formal hearing.

Shortly after a 2-day hearing, the Board released its detailed and comprehensive 41-page written “Recommendation”. The three members of the panel, in unanimously rejecting the contractor’s claim, stated that the
contractor “has not made a reasonable case for extra compensation based upon arguments that lay within the four corners of the contract.”

Subsequently, the contractor notified the transit commission of its rejection of the Board’s Recommendation, and commenced litigation proceedings.

The facts, issues, pleadings, and submissions in the ensuing litigation were virtually identical to those which were put before the Board. However, in its Statement of Claim, the contractor made no reference whatsoever to the hearing before, or to the Recommendation of, the Board. So the transit commission, in its Statement of Defence, pleaded that “(t)he claim being asserted by [the contractor] against [the transit commission] in this litigation is precisely the same claim that was submitted by [the contractor] and [the transit commission] to the DRB for hearing more than 2 1/2 years ago”.

The transit commission also pleaded that the commencement of this litigation gave rise to the risk of the court making a decision that would be inconsistent with the Recommendation made 2 1/2 years earlier by the panel of three eminently qualified and experienced experts comprising the Dispute
Review Board; and that inconsistent decisions would bring the alternative dispute resolution and DRB processes into disrepute.

Furthermore, the transit commission pleaded that, as a matter of public policy, the commencement of litigation, after the same claim was unanimously and unequivocally rejected previously by a DRB, created a precedent that only served to discredit the benefits of the partnering, dispute resolution and DRB concepts and processes, and to discourage other parties on other projects from attempting to resolve their disputes using those concepts and processes instead of litigation.

The litigation settled before trial. And money changed hands. The parties obviously felt that it would be more prudent to settle the claim than to bet on a successful result at trial. Despite the expense, time and resources which were incurred by the parties in initially taking their dispute to the Board, the fact that the Board’s Recommendation was non-binding permitted the party, who was not satisfied with the resulting recommendation, simply to transfer the dispute to another forum.
Epilogue: The Commercial Consequences of the DRB Process

Looking at the bigger picture, DRB members should be mindful of the commercial consequences of their recommendations, or of their failure to make recommendations, and of the unreasonable delays in the DRB process which are not uncommon.

And, by way of overview, one might ask:

- Should there be more quality control with respect to persons who want to serve as DRB members?
- Acknowledging that the DRB process is operating in a real-life commercial setting, what is the duty or responsibility of the DRB to the parties?;
- How does one reconcile the law of contract with the DRB process? This point is somewhat reminiscent of the hot-button issue as to whether arbitrators are required to follow the law36;
- Does the DRB have any accountability to the parties when it does not acknowledge the right of the parties to due process with

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36 For a discussion of this issue, see Roy S. Mitchell, “Must Arbitrators Follow the Law?”, JAMS Global Construction Solutions Newsletter (Spring 2012), at page 1
respect to the submission or defence of claims; does not observe or apply any rules of evidence or legal procedure; does not allow either any discovery process or sworn witness testimony or cross-examination; and does not permit the involvement of attorneys?

- Does a DRB have any accountability to the parties when it waits 6 months after the hearing before releasing its recommendations, only to announce at that time that it has “no jurisdiction”?

As Mr. Justice Felix Frankfurter of the U.S. Supreme Court once wrote, admittedly in another context, “justice must satisfy the appearance of justice”\textsuperscript{37}.

\textsuperscript{37} Offutt v. United States, (1954) 348 U.S. 11, at 14