

Under Construction: Concurrent Delay Claims and the Courts

Though construction contracts require projects to be completed within a specific time frame, many issues may arise during construction that cause delays in the work. In some cases, a period of delay may be attributed to two or more sources, which is otherwise known as concurrent delay. While concurrent delay may be more difficult to evaluate, the basic principles of delay apply (see our article: [The Anatomy of a Delay Claim](#), in the NRCA February 2020 newsletter). In order to bring a claim and seek damages related to a delay, concurrent or otherwise, it must be determined that the delay is on the 'critical path', that is, one which affects an important milestone date or the completion date. Further, it is necessary to establish which portions of the delay are excusable versus non-excusable. A non-excusable delay is generally one which was within the control of the relevant party and is therefore usually not compensable.

Delays generally cause additional costs, and the contract terms allocate between the parties the risks of such additional costs. The right to recover damages is most often determined by the contract¹; nonetheless, where the contract is ambiguous or silent on the matter, and where the contract terms do not preclude claims for delay, the court may imply terms to determine liability and damages.

The courts' approach to apportionment for concurrent delay in Canada is not entirely settled, however, the general principles are discussed below.

To bring a claim for delay, the party seeking compensation must establish that the opposing party caused or is otherwise contractually responsible for the delay, and that it

experienced a loss as a result. For example, where a property owner claims compensation for a delay, it must demonstrate that the contractor was responsible and that the owner suffered loss as a result, such as additional expenses for increased consulting professional time. The burden then shifts to the contractor to demonstrate the project would have been delayed regardless of the contractor's actions². The parties must present evidence of the specific causes and costs resulting from the various causes of delay. Expert evidence is helpful in this regard. In evaluating the evidence related to concurrent delays, the courts will attempt to apportion the responsibilities of each party and the associated costs.

For some cases, the courts will examine each day or week of the project and allocate the various delays and costs to specific parties. However, this type of analysis is not always possible, or cannot be done with any precision or efficiency. In such cases, where liability cannot be apportioned precisely, the courts often simply determine the responsible parties for each period of concurrent delay and allocate responsibility equally between the responsible parties³, or based on a rough estimation.

Where the property owner and contractor, for example, have both caused the delay of a project, when defending a delay claim, arguments often include minimization of the amount of contribution to the delay, or that the delay would have happened regardless of their contribution to the delay. For example, in *Graham Construction & Engineering (1985) Ltd. v LaCaille Developments Inc.*⁴ the contract stipulated that the contractor would be reimbursed for a delay caused by the

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owner. Although the contractor was held to be responsible for a portion of the delay, the court found that the project would not have been completed any sooner had the contractor's delay not occurred. Thus, the court awarded the contractor damages. In other cases, however, where a contractor has sought damages from an owner who caused a delay in the project, the owner has succeeded in a counterclaim by arguing that the contractor was responsible for a portion of the delay and therefore the owner's quantum of damages should be reduced accordingly⁵.

*Vanir Construction Services Ltd. (Receiver of) v Field Aviation Co.*⁶ is an example where the contractor successfully protected itself from the owner's delay claim. The contractor had installed lighting but subsequently decided to upgrade the type of fixtures used which resulted in the project to be completed late. The contractor sought compensation for the additional time spent and the increased cost of the fixtures. However, the owner counterclaimed for the delay. The contractor argued that the delay was caused by numerous changes the owner had made to the project, and the court denied the owner's delay claim.

More recently, in a recent Ontario case, *Schindler Elevator v Walsh Construction*⁷, the subcontractor brought a claim for unpaid services and materials. The design-builder counterclaimed for losses caused by the subcontractor's alleged delay. It was acknowledged by the design-builder that there was concurrent delay, some of which was caused by other subcontractors. Both parties relied on expert evidence to support their claims. The court applied a 'material contribution' assessment, acknowledging that such an approach is often suitable for claims of concurrent delays on complex construction projects, where it is impossible to prove whether the delay would have resulted regardless of that party's fault. The court confirmed that the party claiming delay has the burden of proving the delay that impacts the

critical path to establish the following:

- (a) the cause of the delay must be isolated and defined;
- (b) the delay must be analyzed to determine whether it is excusable or the responsibility of the contractor;
- (c) if the delay is the contractor's responsibility, the contractor must bear the cost. If it is excusable, the extent of the delay must be determined;
- (d) actual or constructive notice of the delay was given if required by the contract;
- (e) whether the delay affected items on the critical path or whether it merely reduced or eliminated the float;
- (f) the contract must be reviewed to assess whether it provides that the contractor is entitled to a remedy of extension of time only or time and compensation; and
- (g) the quantum of compensation must be determined⁸.

The court recognized the difficulty in accurately evaluating the effects of concurrent delay in complex projects and held that there need not be a precise calculation, but the analysis does require the breakdown of the overall delay into its components, and the apportionment of each "time, responsibility and costs"⁹. The court also made it clear that, in assessing damages, any determination must be supported by evidence¹⁰. The court confirmed that independent causes of delay may be concurrent delays, even where they are not of identical timing or duration, and simply overlap. The court held that the evidence was insufficient to show that the subcontractor materially contributed to delay to the critical path. But did find that the subcontractor's delay directly impacted immediate successor events. As such, the contractor was entitled to set off a portion of the damages as a result.

Concurrent delay requires the apportionment of time, responsibility, and costs amongst the appropriate parties. This is often difficult to determine with any precision; so, courts will do their best to make an estimation based on the evidence before them. Since the case law on concurrent delay is fairly unsettled, parties entering construction projects are advised to contemplate and expressly address the allocation of concurrent delay risks in their contract to establish more certainty. The courts also require evidence of the material contribution of each party to delay and costs. Therefore, it is advisable to keep clear and complete contemporaneous records of communications and events, including photographs.

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¹ *Dilcon Construction Ltd. v ANC Developments Inc.*, 2000 ABCA 223

² *Graham Construction & Engineering (1985) Ltd. V LaCaille Developments Inc.*, 2006 ABQB 898

³ *Bianchi Grading Ltd. v University of Guelph*, 2007 O.J. No. 1441

⁴ *Supra*

⁵ *Alberta Engineering Co. v Blow*, 1914 28 W.L.R. 391

⁶ 1988 CanLII 3845 (AB QB); 1992 ABCA

⁷ *Schindler Elevator v Walsh Construction*, 2021 ONSC 283

⁸ *Supra* at para 299

⁵ *Supra* at para 303

⁶ *Supra* at para 337

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