Evaluating Concurrent Delay — Unscrambling The Egg*

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I — Introduction

While it is common for an owner or a contractor to assert a delay claim against the other, in this paper, we consider what happens when a delayed project has suffered from two or more sources of delay at the same time. We will examine the approaches that are taken by courts in dealing with situations of concurrent delay.

The task faced by the parties and the court is to unscramble the overall project delay into its component parts, determine the impact of those discrete parts, determine which litigant or third party was responsible, and calculate the resultant damages. A good starting point is to ensure there is an understanding of the lexicon of "delay" in isolation, before adding the complexity of concurrency.

II — Delay

A — Types of Delay

There are two main categories of delay:

> (a) *Excusable Delay* — delay for which there is entitlement by the claimant to a time extension, compensation, or both; and
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> (b) *Non-excusable Delay* — delay for which a party assumes the risk of cost consequences, not only for itself but possibly for the other parties as well.[1]

Excusable delays can further be classified as either compensable or non-compensable. Where the excusable delay is non-compensable, there is an entitlement to a time extension, but no entitlement to additional money. Where an excusable delay is compensable, a party will be entitled to a time extension as well as additional money for the impact of the delay. Generally speaking, "a delay that

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[1] Bramble, Barry M. and Callahan, Michael T. *Construction Delay Claims*, 2nd ed. (Toronto: 1992) at 2 and 3.

could have been avoided by due care of one party is compensable to the innocent party suffering injury or damage as a result of the delay's impact."[2]

The Ontario Superior Court in *Bemar Construction (Ontario) Inc. v. Mississauga (City)*[3] provided examples of the foregoing types of delay, citing with approval an article by Christopher J. O'Connor[4]. Without including the accompanying prose, the examples cited by the court included the following:

Examples of Non-Compensable Delays[5]

(a) weather;
(b) strikes;
(c) floods, fires, earthquakes and other similar disasters;
(d) acts of municipal and governmental authorities;[6]
(e) acts of God or force majeure;
(f) delays by subcontractors and suppliers arising from unforeseeable events caused beyond the control and without the fault or negligence of the contractor, subcontractor or supplier; and
(g) unanticipated soil conditions beyond the reasonable contemplation of either party.

Examples of Compensable Delays Caused by Owner[7]

(a) excessive changes to the design;
(b) design deficiencies;
(c) failure to provide unimpeded access to the worksite in a timely fashion or at all;[8]
(d) the failure to obtain permits for work in public areas;
(e) the failure to co-ordinate the job where separate contracts are awarded (assuming that there is no contractual clause requiring the contractor to do so); and
(f) the failure of the architect or engineer to provide design drawings or approved shop drawings or samples within a reasonable timeframe.

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[2]*Ibid.* at 6.

[3](2004), 30 C.L.R. (3d) 169, 2004 CarswellOnt 222 (Ont. S.C.J.)

[4]O'Connor, Christopher J. *Delay and Acceleration*, Insight Seminar, March 29-30, 1993.

[5]*Supra* note 3 at ¶171 and note 4 at p. 7.

[6]See for example *Vanir v. Field Aviation, infra,* note 47.

[7]*Supra* note 3 at ¶172 and note 4 at p. 5.

[8]See for example *Penvidic Contracting Co. v. International Nickel Co.* (1975), [1976] 1 S.C.R. 267 (S.C.C.) and *W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.* (1987), 27 C.L.R. 113 (B.C. S.C.) at 178.

Examples of Compensable Delays Caused by Contractor[9]

(a) failure to properly staff the job;
(b) failure to properly co-ordinate its subcontractors;
(c) poor workmanship; and
(d) failure to order material and equipment in a timely fashion.[10]

While the foregoing are illustrative of the concepts, one must always return to the contract between the parties to see if the risk of the particular delay was anticipated, allocated and in what way (i.e. whether the innocent party is entitled to an extension of time, payment of money or both).

B — Contractual Provisions:

One can easily identify provisions that deal with classes of the above-noted types of delay in common construction contracts. Delay is expressly dealt with in General Conditions 6.5 in the CCDC 2 – 1994 form of contract. For example, G.C. 6.5.1 deals with (from the contractor's point of view) excusable compensable delay (time extensions and money) as follows:

> 6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.

Clauses 6.5.2 also provides the contractor with excusable compensable delay in the more specific case of stop work orders issued by the court or other public authority provided that the stop work order was not a result of an act or fault of the contractor or those working under the contractor.

A clause which deals with excusable non-compensable delay (extensions of time, but no extra money) is GC 6.5.3, which lists third party caused delays which are neither the fault of the contractor nor owner.

> 6.5.3 If the *Contractor* is delayed in the performance of the *Work* by labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractor's association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound), fire, unusual delay by common carriers or unavoidable casualties, or without limit to any

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[9]*Supra* note 3 at ¶173 and note 4 at p. 9.

[10]Unless the owner is contractually responsible for the supply of such equipment. See for example *Foundation Co. of Canada v. United Grain Growers Ltd.*, [1995] B.C.J. No. 2235, 25 C.L.R. (2d) 1, 1995 CarswellBC 1113 (B.C. S.C.); reversed in part at [1997] B.C.J. No. 969, 33 C.L.R. (2d) 159, 1997 CarswellBC 1021 (B.C. C.A.).

> of the foregoing, by a cause beyond the *Contractor*'s control, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the Contractor. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner*.

Delays by the consultant to furnish instructions are often cited as a cause of excusable compensable delay. Further to G.C. 6.5.5, there is a codification of how long the consultant has to give instructions before a claim for delay can be made, namely (up to) 10 working days.

III — Concurrent Delay

A — Defining Concurrent Delay

To put it simply, concurrent delay is when there are two or more causes of delay operating at the same time. Of course, multiple independent delays which are the responsibility of a single party (by convention, by contract or factually) do not cause the concurrency problem with which we are concerned because there is no need to apportion the various causes of delay. Apportionment becomes necessary when different parties are responsible for different concurrent delays, or a third party delay runs concurrently with delay caused by one of the parties. For example, in *Kor-Ban Inc. v. Pigott Construction Ltd.*[11], the causes of delay ran the gamut discussed above:

> "Delays resulted from a variety of causes, including, but by no means limited to, subcontractors not carrying our their work in accordance with the schedule. . .changes ordered in the work by the owner or architect and strikes by various trades."[12]

Although concurrent delay is difficult to evaluate because of the simultaneity of delays, the basic principles applicable to delay still apply. Before any type of extension and/or compensation can be allowed, the delay must be shown to be excusable and/or excusable and compensable from the perspective of the claimant. However, evaluating how each event delayed the completion of a project makes concurrent delay a much more involved and speculative process compared to an isolated or singular cause of delay.

It is not necessary for the independent causes of delay to occur exactly at the same time for them to be considered concurrent. Indeed, it is rare that concurrent

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[11] 1993 CarswellOnt 825, 11 C.L.R. (2d) 160 (Ont. Gen. Div.)

[12] *Ibid.* at ¶19.

delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events.

Indeed, causes of delay may appear quite consecutive or sequential but still be treated as "concurrent" if they relate to the same circumstances. For example, in *Raymond Constructors of Africa Ltd. v. United States*,[13] there were three apparently sequential delays, all related to the supply of construction equipment. A contract was signed between the U.S. and Sudanese governments for the construction of a road as part of a foreign aid program. Pursuant to the agreement, the U.S. government[14] was to procure major items of construction equipment which would be delivered to the Sudanese government at a coastal port. The Sudanese government would then transport the equipment overland to make it available to the contractor at the construction site. The contractor hired a Sudanese subcontractor to do part of the work utilizing the equipment. At the end of the project, the equipment would remain the property of the Sudanese government. The completion of the project was delayed by a total of 142 days for which the contractor blamed the U.S. government, hence the lawsuit.[15]

The court found at least three causes of delay, namely: the U.S. government's delay in procuring the equipment and delivering same to Sudan; the Sudanese government's delay in shipping the equipment overland to the site; and delay caused by the contractor's Sudanese subcontractor which was inexperienced, inefficient and failed to use the available equipment to its maximum advantage. These delays appear largely sequential, but there was some overlap. For example, the (inefficient) subcontractor was working throughout the period of (late) equipment delivery which occurred over a 10-month period.

In the result, the court held that there was insufficient evidence to make a precise allocation of responsibility between the various causes of delay. Thus, the court simply split the responsibility for the overall delay three ways and awarded the contractor 1/3 of the costs incurred for the delay as against the U.S. government.

As with the *Raymond Constructors* case, one generally finds that the courts are not overly concerned with matching causes of delay temporally in order to consider the causes concurrent.

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[13]188 Ct. Cl. 147, 411 F.2d 1227 (U.S. Cl. Ct., 1969)

[14]In fact, several agencies of the U.S. Government were involved but are referred to herein as the U.S. Government for simplicity.

[15]The U.S. government did argue that there was no contract between itself and the contractor upon which to base a suit, but the Court did find there was a sufficient contractual nexus for a number of reasons cited in the decision, *Supra* note 13 at p. 8.

B — General Principles in Evaluating Concurrent Delay

In getting a sense of how courts do treat concurrent delay, (which we have and will see is a general best attempt to allocate the delay between parties) it is interesting to note what the courts *do not* appear to do in dealing with concurrent delay.

Upon review of numerous Canadian cases on concurrent delay, it does not appear that the courts "let sleeping dogs lie" or let losses remain as they were incurred if the two litigants are each responsible for delay. One well respected Canadian commentator[16] has suggested with respect to "truly concurrent delays" that is what courts do, without citing any cases, and then making the observation that a construction job can seldom be divided into neat parcels (by which it is understood that it is hard to find "truly concurrent" delays as delays often overlap and have unequal durations). A similar conclusion, but for slightly different reasons, was reached by American authors Bramble and Callahan[17] when they stated "If parties cannot allocate the delay, the court may not attempt to apportion the responsibility for the concurrent delay."[18] That appears to be more of an evidentiary issue rather than a principle that the courts should not interfere to shift loss in the case of concurrent delay.

For the former proposition, one is reminded of the old common law tort principle which once held that if a tort victim was partially responsible for his or her own injury at all (i.e. was contributorily negligent) no recovery against the tortfeasor was possible. Such a principle has long since been done away with by statute[19] as being inequitable. Rather, the courts will now not hesitate to make an allocation between the various parties' contribution to the cause of the accident (including the plaintiff in the case of contributory negligence) and apportion responsibility for damages accordingly.

A reading of contemporary Canadian cases dealing with concurrent causes of delay reveals an almost indistinguishable exercise of apportionment being carried out by the courts with respect to the causes and impacts of the concurrent

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[16]Revay, Stephen G. *Delay and Acceleration: Legal Principles and Quantification*, Insight Seminar, March 29-30, 1993.

[17]*Supra* note 1.

[18]*Ibid.* at p. 8.

[19]Negligence Act, R.S.O. 1990, c. N.1; see sections 1 and 3. Section 3 provides as follows:

> In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively. R.S.O. 1990, c. N.1, s. 3.

delays. Such an exercise makes sense in that the "all or nothing" approach could leave one party shouldering a disproportionate burden of the cost of delay by happenstance if the other party (which did not initially bear the brunt of the delay impact) could demonstrate the claimant contributed to the delay, even a little bit. Thus, the task of the competing parties in concurrent delay litigation becomes providing the court with the better theory and evidence as to the distinct causes of delay as well as the duration and impact costs of each source of delay.

As one may expect, there is a proportionately larger U.S. experience in these types of cases and a review of such experience is instructive. A summary of the broad principles applied by U.S. courts to concurrent delay can be found in Bramble and Callahan's treatise on *Construction Delay Claims*[20] which has been abbreviated and summarized below:

> (a) (as mentioned above), the parties must be able to satisfactorily demonstrate and apportion both the causes and costs of the concurrent delays. The party seeking to recover delay costs has the burden of demonstrating the allocation:[21]
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> (b) where, for example, the contractor has experienced concurrent delay caused by third parties (i.e. excusable – non-compensable delay) and delay of its own making (i.e. non-excusable delay), the older cases have held that the contractor is not entitled to a time extension[22] but the "more well-reasoned approach"[23] is that a contractor is entitled to a time extension;[24]
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> (c) where a contractor experiences concurrent excusable delays where one is compensable (extension of time and money) and one is non-com-

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[20]*Supra* note 1.

[21]*Ibid.*, at pp. 8–10.

[22]The references cited by Bramble and Callahan have been reproduced herein for the utility of the reader: *Aerokits, Inc.*, ASBCA No. 12324, 68-2 B.C.A. (CCH) ¶7,088 (1968); *Mann Chemical Laboratories, Inc. v. United States*, 182 F. Supp. 40 (U.S. D. Mass., 1960); but see *Fieser Services, Inc. v. Saline Sewer Co.*, 643 S.W.2d 92 (U.S. Mo. Ct. App., 1982).

[23]*Supra* note 1 at p. 10.

[24]*Ibid.* at pp. 10–11, citing *Robert P. Jones Co.*, AGBCA No. 391, 76-1 B.C.A. (CCH) ¶11,824 (1976); *Titan Pac. Constr. Corp.*, ASBCA No. 24148, 87-1 B.C.A. (CCH) ¶19,626 (1987); *Meyers-Laine Corp.*, ASBCA No. 18234, 74-1 B.C.A. (CCH) ¶10,467 (1974).

pensable (time extension only) the latter will "override"[25] the former and the contractor is entitled to an extension of time only;[26] and

(d) where a contractor experiences two concurrent compensable delays (time and money) there will be only one cost recovery and one time extension.[27]

C — Apportioning the Responsibility For Delay

1. — Precise Apportionment

In some cases, the courts simply roll up their sleeves, look at the case day by day or week by week and allocate the delay. In *Pacific Coast Construction Co. v. Greater Vancouver Regional Hospital District*[28] a delay claim by the contractor was made with respect to the construction of the emergency wing of the Shaughnessy Hospital. One of the main issues was the allocation of delay caused when unanticipated soil conditions (excess water) were experienced during the drilling of two caissons for the elevator core. The chronology was as follows:

(a) March 21-24 – the caissons were drilled and water began to flow;

(b) March 26 – the contractor requested instructions from the architect as to how to deal with the water problem;

(c) April 7 – the contractor discovered his subcontractor had drilled the caissons one metre out of position;

(d) May 11 – the subcontractor re-drilled the caissons in the correct position, the flow of water increased causing the ground surrounding the caissons to subside on May 12;

(e) May 20 – the contractor repeated the request for instructions;

(f) May 22 – the architect advised the contractor to stop work around the caissons;

(g) June 11 – the architect and soils engineer issued instructions to the contractor which began to implement the solution on June 12;

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[25]*Ibid.* at p. 11.

[26]*Ibid.*, citing *Randolph Eng'g Co.*, ASBCA No. 5480, 1962 B.C.A. (CCH) ¶3,502 (1962); *Acme Missiles & Constr. Corp.*, ASBCA No. 11794, 68-1 B.C.A. (CCH) ¶6,734 (1968); *Welch Constr., Inc.*, GSBCA No. 6391, 83-2 B.C.A. (CCH) 16,742 (1983); *Beckman Constr. Co.*, ASBCA No. 24725, 83-1 B.C.A. (CCH) ¶16,326 (1983).

[27]*Ibid.*, citing *James Munro*, IBCA No. 486-3-65, 67-2 B.C.A. (CCH) ¶6,559 (1967).

[28]1986 CarswellBC 727, 23 C.L.R. 35 (B.C. S.C.).

(h) July 6 – the contractor repeated its request for instructions when the initially proposed solution appeared to be ineffective, (threatening a large delay claim);

(i) July 9 – new instructions were given;

(j) July 13 – problem was solved.

The court found that it was dealing with several overlapping delays some of which were caused by the parties and some of which were simply unanticipated. It allocated the responsibility for the delay as follows:

(a) while the contractor had requested instructions on March 26, the soils consultant thought (and the court agreed) that it was prudent to wait until the caissons were drilled in the correct place before implementing a solution as the change in position may have changed the situation (as indeed it did with an increase in water flow causing soil subsidence). The contractor's intention was that the caisson-drilling subcontractor would return to the site within a week of the discovery of the mistake; however the subcontractor did not return until May 6th, completing the work May 11th. The court found the delay from March 24 to May 12 was the responsibility of the contractor who was liable for its subcontractor's delay in returning to the site;

(b) no instructions were given as to how to remedy the problem from May 12th to June 10. Notwithstanding the prudence in awaiting the correct positioning of the caissons, the court held that the soils consultant should have been developing a contingency plan after March 26. The court found that the plan should have been developed and communicated within 10 days[29] of May 12, being May 22 when the stop work order was issued. The court thus attributed the delay between May 22 and June 10 to the owner (which was responsible contractually for the architect and its soils consultant); and

(c) from June 10 until July 13, the parties were dealing with the problem of unanticipated subsurface conditions which, according to the court's interpretation of the contract, was neither an owner nor a contractor caused delay. While the contractor was entitled to payment for the extra costs of implementing the remedy to the unanticipated water problem, the contractor was not entitled to claim for any delay impact costs.[30]

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[29]The particular contract in question had a provisions very similar to GC 6.5.5 noted above and provided that no claim for delay attributable for failure to furnish instructions could be asserted unless instructions were not forthcoming within two weeks after a demand for such instructions was made, and then, only if such claim was reasonable.

[30]The natural question is whether the contractor would thus be entitled to an extension of the contract time for this *four week* period of time commencing June 10. It appears that the contractor did not seek same and may have been defeated in any event, by a lack of proper notice. The owner raised a lack of proper notice with respect to the *three week* period commencing May 22 which was awarded, citing the notice provisions of the contract. The court held that the said notice provisions only dealt with extensions of time and

Accordingly, the court was able to allocate the delays precisely, even though some of the delays overlapped.

2. — Rough Justice

Whether or not the apportionment in *Pacific Coast Construction Co.* was relatively easily accomplished as compared to other cases, the fact remains that the ability to allocate the delay with such precision is not a prerequisite to apportioning responsibility. In many cases the courts, after reviewing the various causes of concurrent delay, find they are unable to apportion with precision and make an estimate, allocating responsibility on a 50-50 or some such similar basis. Rarely do the courts simply throw up their hands and refuse to make an allocation at all.

The case of *Evergreen Building Ltd. v. H. Haebler Co.*[31] concerned a 95-day delay in completing the construction of a 10-storey commercial and residential complex in downtown Vancouver. Problems arose with respect to the site purchase, zoning, permits, financing, the engagement and performance of subcontractors and design changes, but the overriding problem was the inability of the two principal participants to get along.[32] As compared with the day by day analysis in *Pacific Coast*, the following comments by the trial judge in *Evergreen* are noteworthy:

> It is unnecessary to tell the story as it unfolded day by day, event by event, so I will deal with separate topics and cluster around each topic some events only relevant to it. I am aware that such a segmentation distorts reality because many things went wrong at the same time and separate disputes on different aspects of the work were interconnected and were raging at the same time.[33]

Any reading of this lengthy case leaves little doubt that factually, it is one of the leading candidates for "poster child" for concurrent delay cases in Canada. In the end, the trial judge had the following to say with respect to precision and apportionment of delay:

> It is unrealistic to hope that a precise quantification of blame for delay can be measured against Haebler [the contractor] or Laxton [the owner]. I can only deal with the responsibility for delay on an overall basis and apportion the blame. I do so by apportioning two-thirds of the blame against Haebler, par-

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not delay damages. Thus, the answer may be that no extension of time was sought or given with respect to the *four week* period of time commencing June 10 because of a lack of proper notice, but the case does not make this clear.

[31] 1983 CarswellBC 712, 5 C.L.R. 70 (B.C. S.C.)

[32] *Ibid.* at ¶2.

[33] *Ibid.* at ¶26.

> ticularly for his unwillingness to order the mechanical equipment. The three-month delay occasioned by that alone accounts for the delay in completion. The other one-third of blame is chargeable to Laxton, particularly for his recalcitrance in refusing to accept any change quotations whatever between November 1979 and February 1980, **which is the same three months more or less.** His stubbornness was matched by Haebler's stubbornness and a stand-off resulted. The fault was unequal but they both contributed to it.[34] [parenthesis and emphasis added]

In the result, the contractor was allowed one-third of his delay damages, (or the owner was able to successfully defeat two-thirds of the delay claim, depending upon one's perspective). In addition, the owner was allowed two-thirds of its delay damages comprised of lost rent during the three months of delay.

In *Earl Thomson Road Construction Co. v. Peter Leitch Construction Ltd.*[35] which concerned a concurrent delay dispute between a contractor and a subcontractor, the trial judge stated:

> To apportion delay between the plaintiff and the defendant is a difficult task. The following statement by Martland J. in *Prince Albert Pulp Co. v. Foundation Co.* [citations omitted[36]] is opposite: "The trial Judge recognized that the damages to be awarded could not be ascertained by precise means. He had to make an estimate." I must do the best I can."[37]

Similarly in *Convert-A-Wall Ltd. v. Brampton Hydro-Electric Commission*[38], the court explicitly stated that "the apportionment of liability cannot be a precise calculation."[39]

IV — Concurrent Delay As A Defence

Another perspective in reviewing cases on concurrent delay is to observe that it is frequently used as a defence to a delay claim.

In *Alberta Engineering Co. v. Blow*,[40] the contractor brought an action for the balance of contract owing for the supply and erection of cast iron columns. The owner counterclaimed for delay in that the project was delivered 4 months, 9 days after the agreed completion date and the owner lost rental income as result.

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[34]*Ibid.* at ¶107.

[35]1989 CarswellSask 318, 35 C.L.R. 83 (Sask. Q.B.)

[36](1976), [1977] 1 S.C.R. 200, [1976] 4 W.W.R. 586, 1 C.P.C. 74, 68 D.L.R. (3d) 283, 8 N.R. 181 (S.C.C.)

[37]*Supra* note 35 at ¶32.

[38]1988 CarswellOnt 776, 32 C.L.R. 289 (Ont. Div. Ct.)

[39]Ibid at ¶32.

[40]1914 CarswellAlta 165, 28 W.L.R. 391, 17 D.L.R. 497 (Alta. T.D.)

The contractor *did not* assert a delay claim for its own damages, but *did* assert that the owner, which carried out some of the construction work itself, was responsible for some concurrent delay. The court found that the owner was not diligent in having its own workers attend and work immediately after the contractor's iron erection work. Further, although the owner complained that the delay had pushed his work into the winter months and thus, work could not proceed until spring, the court found that financial problems, and not weather, was the reason more work was not completed during the winter months. In the result, the court attributed just over one-quarter of the concurrent delay to the owner, and thus limited the owner's delay claim for rent to just 3 months, rather than the full 4½ extra months the project took to complete.

It is unclear as to why the contractor in *Alberta Engineering* did not assert its own delay claim, but the age of the case may lend a clue. But let us suppose for a moment that the contractor, or any party in the position of a contractor, suffers no damages as a result of delay or is unable to effectively demonstrate such a loss, or the loss is speculative or remote and thus, subject to discount or rejection. If the demonstrable rate at which the defendant suffers from delay damages is substantially less than the claimant's, then attempting to simply set off one's own delay damages against the claimant's may be an ineffective defence. However, if one can successfully assert a concurrent delay such that the court apportions the concurrent delay in the manner seen in many of the cases cited above, then one is able to reduce such a claim, dollar for dollar, by the percentage of concurrent delay for which the claimant is responsible. In the alternative, if one can demonstrate that an excusable but non-compensable delay ran concurrently with the compensable delay, one can try to defeat the delay claim entirely arguing that the non-compensable delay overrides the compensable delay such that an extension of time only is permitted.[41]

The same concept has been expressed slightly differently in the sense of an evidentiary burden of proof. The authors of the *Canadian Encyclopedic Digest*, citing the decision of the British Columbia Supreme Court in *East Kootenay Community College v. Nixon & Browning*[42], state the principle as follows:

> In an action for damages for delay under a construction contract, the property owner bears the onus of proving that there was a delay for which the contractor was responsible. Once this is established, the onus then shifts to the contractor to show that the project would have been delayed in any event beyond

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[41]See text *supra*, accompanying notes 25 and 26.

[42][1985] B.C.J. No. 766, affirmed on appeal at [1988] B.C.J. No. 313 (B.C.C.A.); 28 C.L.R. 189.

> the specified completion date for reasons unrelated to the contractor's default.[43]

Another defensive case is *Earl Thomson*.[44] The case involved the construction of a dam for the Crown whereby a subcontractor was retained to perform much of the earthwork portion of the dam. Again, this was a case by a subcontractor seeking payment of the (sub)contract balance. The general contractor counterclaimed alleging delay by the subcontractor, with the delay claim asserted almost identical in quantum to the balance owing. The subcontractor admitted that it was responsible for a large portion of the delay caused by a lack of equipment, equipment breakdown and inadequate supervision. However, the subcontractor asserted, and the court found, that the general contractor contributed to the delay (i.e. caused concurrent delay) as follows:

> (a) the general contractor was responsible for the construction of concrete structures which had to be completed before the subcontractor could backfill around them. There was a three month strike by unionized carpenters which, of course, erect the forms used to pour the concrete. While non-union carpenters were used to fill in, progress was slowed which in turn slowed the subcontractor;
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> (b) there was a "mysterious" fire which, oddly enough, occurred during the strike causing the destruction of some of the forms and damage to some of the concrete structures, which had to be rebuilt. The court also found that this damage to the general contractor's work delayed the subcontractor; and
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> (c) the general contractor was to supply some of the materials used by the subcontractor in construction of portions of the earthwork dam. The delivery of the materials was delayed by a dispute between the general contractor and another supplier as well as a municipally imposed road ban, followed by a road haulage restriction which slowed the delivery of the material. The court found that this occurred during the subcontractor's work and delayed its progress.

In the end, the court found that the contractor was responsible for 8 of the 31 weeks of delay it had claimed as against the subcontractor. The court reduced the general contractor's delay claim against the subcontractor (asserted as a counterclaim) by approximately one-third (or 8/31 to be more precise).

There are several aspects of the case to be noted for our purposes. Firstly, it should be noted that the subcontractor did not assert a delay claim of its own, it simply asserted concurrent delay(s) as a defence to the general contractor's delay claim. It was successful in that it reduced its own admitted responsibility for

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[43]C.E.D. (Ontario) (3rd), Vol. 3, Title 20 "Building Contracts" §303 (Thomson Carswell, 2003) at p. 200-1.

[44]*Supra* note 35.

delay by one-third. In this regard, the court took the following approach to analysing the concurrent delay:

> I will assume the defendant [general contractor] was not responsible for any delay. Thereafter, I will determine if any part is attributable to the defendant."[45] . . .
>
> "To this point, the propriety of the amounts sought to be set-off have been calculated as if the defendant was not responsible for any delay. Now I must determine if any part of the delay is attributable to the defendant."[46]

Secondly, the subcontract provided that the subcontractor would be responsible to the contractor for any delay attributable to the subcontractor. The subcontractor was not to be responsible for delay for reasons beyond its control (expressly "strikes, lockouts, acts of God, or other reasons beyond the control of Subcontractor . . .") provided the subcontractor gave written notice to the contractor "immediately". While there was much discussion in the case about the interpretation of this contractual provision, there is no mention anywhere in the case that the subcontractor in fact gave any notice with respect to any of the concurrent delays which it eventually was able to use to reduce the contractor's delay claim.

Thirdly, if one reviews the causes of concurrent delay noted above, it will be observed that (a) and (b) above are typically excusable non-compensable delay (which would normally entitle the (sub)contractor to an extension of time, but not monetary compensation for such delay) as is part of (c) (the municipal road restrictions) whereas part of (c) (the dispute between the contractor and its other supplier) would normally be a compensable delay from the perspective of the subcontractor. In hindsight, the subcontractor may have been able to further reduce the contractor's delay claim by asserting its own delay claim for this contractor-caused concurrent delay. In such a case however, query whether the court would have been more strict about the notice provisions if the assertion of a concurrent delay is a sword rather than a shield.

An example of where a concurrent delay defence completely shielded a contractor from an owner's delay claim is *Vanir Construction Services Ltd. (Receiver of) v. Field Aviation Co.*[47] The contractor undertook the design-build of an aircraft hangar which was delivered approximately three months late, and for which the owner sought delay damages of several hundred thousand dollars. By way of background, the contractor, after reviewing the applicable building codes, designed and priced the facility with non-explosion proof lighting fixtures in the paint shop ceiling on the basis that the Code did not require same.

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[45]*Ibid.* at ¶4.

[46]*Ibid.* at ¶23.

[47][1988] A.J. No. 417, 30 C.L.R. 38 (Alta. Q.B.); reversed in part 1992 CarswellAlta 444, 48 C.L.R. 97, 120 A.R. 324, 8 W.A.C. 324 (Alta. C.A).

The use of such fixtures, which were less expensive than the explosion-proof variety, were clearly set out in the contract documents. The contractor sought a ruling from the Chief Electrical Inspector as to the acceptability of the non-explosion proof fixtures. The Chief Electrical Inspector refused to make such a ruling for reasons the court described as a display of "arrogance and ineptitude".[48] When time dragged on with no ruling, the contractor sought instructions from the owner as to whether it wanted to install the more expensive explosion-proof fixtures to get on with the job, or install the less expensive fixtures and risk the possibility that an occupancy permit may be refused subsequently. The owner told the contractor that it was responsible for ensuring the building could be occupied in time and in accordance with the applicable codes and instructed the contractor to get on with its work, (i.e. the owner did not make a decision but left it to the contractor). The contractor finally ordered the more expensive fixtures and the building was finished, albeit late.

In the action in which the contractor sought the balance of the contract and the extra cost of supplying the explosion-proof fixtures, the owner counterclaimed for delay, blaming the delay on the electrical design problem pointing out that the project was a design-build for which the contractor was responsible. The contractor countered that (concurrently) numerous changes by the owner delayed the project. The court, in denying the owner's delay claim held that:

> . . .the numerous changes ordered by the defendant [owner], to the work, contributed significantly to the delay in completion of the project and that this delay substantially overlaps the delays caused by the changes to the electrical installation in the ceiling of the paint module, which I have already referred to at some length.
>
> Having regard to all of the evidence, I am led to the conclusion that the defendant Field [the owner] is itself to blame for the delay in completion of the project and, therefore, is responsible for any damages flowing from such delay."[49]
>
> [parenthesis added]

The Alberta Court of Appeal upheld the findings on responsibility, but reduced the contractor's claim for damages.

In *Morrell v. Cserzy*[50] a contractor claimed unpaid amounts for a home renovation project from which project the contractor had been removed. The owner defended on the basis that the contractor was in breach of contract in that the contractor failed to meet certain completion milestones and that termination of the contract was justified for such breach. While the court did find that there was

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[48] *Ibid.* at ¶21.

[49] *Ibid.* at ¶67, 68.

[50] 2002 CarswellOnt 658, 14 C.L.R. (3d) 94 (Ont. S.C.J.)

delay by the contractor caused by its inability to secure enough trades people for the job, the court also accepted the contractor's assertion that the owner concurrently delayed the job by ordering numerous changes and that the job was further concurrently delayed by pre-existing conditions in the building that were not discovered until exposed during the renovation. The court attributed the reasons for delay equally between the parties and as a result, could not find that the contractor had breached the contract by failing to meet the construction milestones. The owner's defence to the action on the contract based upon the delay was denied, that is, the contractor was successfully able to use allegations of concurrent delay (both owner-caused and those caused by other factors) to shield itself from the consequences of its own delay.

V — Summary & Conclusion

The key to understanding concurrent delay is the ability to break the overall delay into its component parts and apportion time, responsibility and costs. One must always refer to the contract provisions to ascertain if the parties considered and allocated the risk of particular types of delay and if so, the consequences in terms of damages, time extensions or both. Precision in apportioning responsibility for concurrent delay may be possible, but is not required. Courts will often "do the best they can" and apportion responsibility on an estimated basis. When facing a delay claim, one should not lose sight of the fact that proving a concurrent delay may reduce or defeat the delay claim, even if the defending party is not asserting a delay claim themselves.