

Acceleration – Between A Rock and A Hard Place*

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1. — Defining Acceleration

(a) — Generally

Acceleration occurs whenever a contractor must carry out its work at a faster pace than was initially anticipated. Obviously, this presumes:

- (i) time is of the essence (and it almost always is in construction contracts);
- (ii) there is a contemplated start and end date for the work in the tender or contract and thus, the contractor has already planned its work at a certain pace which is presumably reflected in the price; and
- (iii) some event or series of events occurs thereafter which necessitates a faster pace of work.

Acceleration is typically achieved through performing tasks concurrently and/or increasing capital, material and labour resources dedicated to the project.

Either the owner or the contractor may wish, for their own reasons, to accelerate the work and thus, examples of acceleration can include:

- (i) a project, otherwise on schedule, which must be completed earlier than originally specified;
- (ii) a project which has fallen behind schedule and must be accelerated to meet the originally specified completion date; and
- (iii) a project which is far behind schedule and has no hope of meeting the specified completion date which is nonetheless accelerated to reduce, as much as possible, the delay between the specified completion date and the subsequent actual completion date.

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The most common scenario dealt with by the decided Canadian case law is example (b) above. A judicial¹ definition of acceleration which has been cited in other cases², is as follows:

... by acceleration I mean speeding up the work — increasing the rate of performance of the work — in order to overcome delays and complete by the date specified in the contract work which has fallen behind schedule. Acceleration may be undertaken in order to finish by the contract dates work which has fallen behind schedule due to:

- 1) delays for which the contractor is solely responsible;
- 2) delays attributable entirely to the owner; and
- 3) delays which are a combination of the two . . .”³

Acceleration can be further broken down into the categories of “*directed acceleration*” and “*constructive acceleration*”. Although these categories are more commonly discussed and applied within the American context from whence the concepts originated, there has been only limited Canadian consideration of the concept of “*constructive acceleration*”.⁴ Further, as will be discussed below, the Canadian cases which have dealt with “acceleration claims” without the use of these categorical labels have usually been dealing with a claim for “*constructive acceleration*”. Whether by design or not, attention is usually focused upon facts which look remarkably similar to the list of elements that constitute the American concept of “*constructive acceleration*” without necessarily making express reference to same. Thus, an explanation of these two concepts is presented below.

(b) — Directed Acceleration

The American authors Bramble and Callahan in their work *Construction Delay Claims*, 2nd ed.,⁵ define *directed acceleration* as “. . . when the owner specifi-

¹Per Macdonald J. in the trial decision of *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority (No. 2)* (B.C. S.C.); reversed in part by (1978), 85 D.L.R. (3d) 186 (B.C. C.A.).

²See for example *W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.* (1987), 27 C.L.R. 113 (B.C. S.C.) at 178.

³*Ibid.* at Pt. 11.3 of B.C. S.C. judgment cited in *W.A. Stevenson* at 178.

⁴*Emil Anderson Construction Co. v. British Columbia Railway* (1988), [1988] B.C.J. No. 230, 1988 CarswellBC 704, 28 C.L.R. 90 (B.C. S.C.) at 10 [B.C.J.]; reversed in part (1991), [1991] B.C.J. No. 819, 1991 CarswellBC 822, 45 C.L.R. 201 (B.C. C.A.), but not on the issue of acceleration where the Court of Appeal upheld the trial decision.

⁵B. Bramble and M. Callahan, *Construction Delay Claims*, 2nd. ed., Toronto: John Wiley & Sons, Inc., 1992.

cally instructs the contractor to increase the pace of the work or to complete by an earlier date.” However, a more complete definition of *directed acceleration* includes the concept that the owner recognizes its obligation to pay for the costs of such acceleration in situations where:

- (i) there has been delay (not attributable to the contractor) which requires the project to be speeded up if the original deadline is to be met; or
- (ii) the owner simply wants the original contract period shortened.⁶

In the context of the former situation, a directed acceleration has been described as a method by which the owner can “buy back”⁷ an extension of time the contractor is contractually entitled to by reasons of the delay for which the contractor is not responsible.

Because there is recognition of the obligation of the owner to pay for *directed acceleration* by definition, there is usually little dispute about the obligation to pay for this type of acceleration. If the cost of the *directed acceleration* is agreed, and hopefully documented, before the acceleration is carried out, little work will be created for litigation lawyers. Disputes can arise when the costs of acceleration are not known or agreed before the program is carried out and disputed afterwards.⁸

It may be the case, for instance, that a dispute arises after the program of *directed acceleration* is carried out where the contractor has underestimated the cost or impact of same. For example, in *Doyle Construction Co. v. Carling O’Keefe Breweries of Canada Ltd.*⁹ the construction of an expansion to a bottling plant facility was delayed in comparison to its original schedule due to problems experienced by the contractor in working around the bottling equipment being installed in the plant by the owner during construction. At one point, the contractor presented a revised schedule which showed a delay of one month for the area in which a bottle washing machine was to be installed. The contractor attributed the delay to interferences in the construction sequence of work caused by the equipment installations citing the large number of previously issued change orders. The owner insisted that the originally scheduled date for the bottle washing area be met so that the bottle washing machine could be installed on time. The contractor responded that an additional shift and additional workers

⁶*Ibid.* at §6.4.

⁷Office of the Chief of Engineers, Department of the Army, Modifications and Claim Guide, EP-415-1-2, at B-1 (July 1987) as cited in *Construction Delay Claims*, 2nd ed., *Ibid.*

⁸*W.D. Laflamme Ltd. v. National Capital Commission* (May 5, 1975), Morden J., [1975] O.J. No. 492 (Ont. H.C.).

⁹(1988), [1988] B.C.J. No. 832, 1988 CarswellBC 204, 27 B.C.L.R. (2d) 89 (B.C. C.A.).

per shift would be required, (i.e. there would have to be an acceleration). The owner agreed to the proposal and the parties agreed to the issuance of a change order for the lump sum of \$67,600.¹⁰ In other words, the parties engaged in a *directed acceleration* program, even though that label was not used. For reasons partially, but not entirely, related to the topic at hand however, a dispute subsequently arose which will be summarized for completeness.

The contractor subsequently submitted a claim for impact costs occasioned by all the equipment installations problems (of which the above cited change order was the single largest). The impact claim was for a total sum of \$318,206 of which \$227,250 was labour. The trial judge found that, contrary to the contractor's contention, it should have known from the tender documents there would be equipment installations by the owner during construction,¹¹ that such installations did not constitute a breach of contract by the owner¹² and in fact that the contractor's revised schedules reflected anticipated times of arrival and installation of equipment which frequently gave rise to changes orders at agreed upon values.¹³ (In other words, the court felt that a deal was a deal). The trial court also found that the contractor's impact claim must also fail for lack of proper and timely notice pursuant to the contract provisions.

The B.C. Court of Appeal upheld the trial judge's findings and disposition. It should be noted that one of the panel members, Macdonald J.A., did not agree with the trial judge that all impact costs could be assumed to be included in each change order¹⁴ (i.e. rejected the "deal is a deal" analysis) but did agree with the other basis for dismissal of the claim. The Court of Appeal also noted that *the contractor never sought an extension of the contract time* as a result of the interferences it alleged.¹⁵ As we shall see, a contractor's request for and entitlement to a time extension is central to the analysis of *constructive acceleration*, the topic to which we will now turn.

(c) — *Constructive Acceleration*

Constructive acceleration occurs when an owner refuses a time extension and insists on completion by the scheduled date following a delay for which the contractor is not responsible. As a result, the contractor is forced to accelerate the work to meet the original deadline.

¹⁰*Ibid.* at 2.

¹¹*Ibid.* at 4.

¹²*Ibid.* at 5.

¹³*Ibid.* at 4.

¹⁴*Ibid.* at 11.

¹⁵*Ibid.* at 9.

The doctrine of *constructive acceleration* originated in the United States in the 1960s in the context of an administrative board struggling to keep disputes that were brought before it within its jurisdiction.¹⁶ The U.S. Board of Contract Appeals could not deal with breaches of contract directly, but only claims within a contract, and thus, characterized certain actions of the owner as a “constructive” request to the contractor to accelerate. Thus, in *Electronic & Missile Facilities, Inc., Re*¹⁷, *constructive acceleration* was found where:

- (i) the owner had refused to consider and grant legitimate extensions of time in an expeditious manner; and
- (ii) by its words and acts, the owner had insisted that the contractor meet the original completion date.¹⁸

A more full recitation of the factors which constitute *constructive acceleration* by Bramble and Callahan based upon their review of Board of Contract Appeals decisions is as follows¹⁹:

- (i) There must be an excusable delay
- (ii) There must have been timely notice of the delay and a proper request for a time extension
- (iii) The time extension request must be either postponed or refused
- (iv) The owner or other party must act by coercion, direction, or in some other manner that reasonably can be construed as an order to complete within the unextended performance period
- (v) The contractor must actually accelerate its performance and thereby incur added costs

Consideration of “*constructive acceleration*” expressly by Canadian courts is rare. In one of the few Canadian cases²⁰ where the claim was asserted as a “*constructive acceleration*” claim, it failed. It did so not because the court rejected the doctrine of *constructive acceleration* as expressed in *Electronic & Missile Facilities Inc.*, (which case the contractor’s counsel cited in argument), but because the court found, as a fact, that the contractor had voluntarily accelerated to overcome a complicated labour relations problem and not in response to any denial of an extension to the contract time by the owner. In reviewing Canadian

¹⁶See generally the discussion of this American doctrine and its history in *Construction Delay Claims*, 2nd. ed., *supra* note 5 at §6.8.

¹⁷(1964), B.C.A 20,979.

¹⁸As recited by Macdonald J. in *Emil Anderson*, *supra* note 4 at 11.

¹⁹*Construction Delay Claims*, 2nd. ed., *supra* note 5 at 179.

²⁰*Emil Anderson*, *supra* note 4.

cases on acceleration, those contractors which have proven facts which look remarkably like the shopping list of elements of *constructive acceleration* described above have tended to be successful with their claims. On the other hand, if one reviews the claims which have been denied, one can easily pick out which of the elements is missing. This despite the fact one will be hard pressed to find Canadian cases which have expressly adopted the term “*constructive acceleration*” or have adopted the five listed criteria. The elements, missing or present, are easily recognized in the discussion of the cases which follow.

2. — Canadian Acceleration Cases

(a) — *Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority* (No. 2)²¹

This is the case for which this paper is named as the contractor was working physically under a mountain and was put in an almost impossible position by the owner with respect to completing its work on time. The contractor was the successful bidder to build the world’s largest powerhouse (which happened to be located underground) and other related facilities at the Peace River Project which at the time was one of the largest hydro electric projects in the world. The contract, signed in 1965, required power to be first delivered by the fall of 1968. The contract also provided that time was of the essence and contained liquidated damages clauses of up to \$3,000,000. The other facts in this 66-page decision are lengthy, but a sampling of those facts include the following:

- (i) the flow of water from the previously build diversion tunnels had changed the topography of the riverbed, to the knowledge of the owner. However, the owner did not disclose such information to the bidders (including the plaintiff contractor) at the time of tender;
- (ii) the change in conditions meant the design was incomplete and the project engineer was slow to produce new drawings throughout the project;
- (iii) there were delays at the beginning of the contract caused by unusual weather, indecision by the contractor and some actions of the owner. However the owner’s contributions to delay at the early stages were not substantial;
- (iv) a rock fall during the excavation of the underground powerhouse chamber caused the contractor to question the safety of the rock-bolting design and stop excavation while the design was reviewed. The engineer viewed the contractor’s concerns as insincere and an attempt to create a

²¹(1978), 85 D.L.R. (3d) 186 (B.C. C.A.).

situation in which a claim for a change in design could be made. In the circumstance, no directions were given by the engineer for two months and in the interim, the contractor proceeded with an increased bolting pattern for which the owner refused to pay, (with the ultimate finding by the trial judge that the roof design *was* inadequate and that refusal to pay for the increased bolting was a breach of contract);

(v) an example of the impact of the late drawings was the inability of the contractor to utilize the services of a Vancouver rebar firm to pre-cut and manufacture the rebar so that it could be delivered to the site in usable form which would have saved time and expense. Because of the late delivery of concrete drawings, the contractor was forced to establish a plant on site to cut and bend the rebar, resulting in additional expense and lost time;

(vi) by the spring of 1966, the contractor presented a revised schedule which showed that the project would be at least seven months late in delivering first power. The court found that it was clear at this point an acceleration program was needed if the work was to be completed on time; and

(vii) in June of 1966, the owner (B.C. Hydro) decided to add a fifth generating unit to another plant near Vancouver for which they required funding from the Province. Unbeknownst to the contractor, the owner made a commitment to the Province not to pay for acceleration at Peace River if funding were provided for the fifth generating unit near Vancouver. This promise was found by the court to be the reason the owner consistently refused to pay any acceleration costs.

The Court of Appeal summarized the situation as follows:

Hydro had substantially contributed to the delays that put construction so far behind the original schedule and it had now resolved not to pay for acceleration to overcome those delays. But it continued to insist on adherence to the original completion dates. It pointed to the penalty clauses in Contract 25 and it communicated with the contractor's bonding company. Mr. Ottersen [Hydro's project manager in Vancouver] had reported that there were delays for which Hydro was responsible. Rejecting his views in favour of IPEC's, [the engineering consultant which was wholly owned by Hydro] Hydro denied any responsibility for the delay.²² [brackets added]

The contractor and the owner had a meeting at which the owner insisted upon power on time. The contractor produced a schedule showing power on time with an accompanying letter stating that the delays were not the fault of the contractor, that the accelerated work would involve additional expense and that the con-

²²*Ibid.* at 207.

tractor would look to the owner for full reimbursement. The owner responded saying the contractor would be responsible for the acceleration costs, approving the new schedule, apparently expressing a dim view on requests for extensions and demanding that the work be completed on time.

Hydro's own project manager summarized succinctly the situation in an internal memorandum to management:

If the Contractor is entitled to extensions of time, and yet has to stay on schedule, then he is entitled to increased costs incurred in lieu of such extensions.²³

Notwithstanding, the project manager's position was not accepted by Hydro's management. The contractor received six letters in February 1967 rejecting six claims for payments and extensions of time.

Power was first made available in the fall of 1968 and the project was finished on schedule, the contractor having accelerated to overcome the previous delays and incurring expenses in doing so. If one now reviews the elements of *constructive acceleration* listed previously, there is no doubt they are all present in this case.

The trial judge found that the owner was in fundamental breach of the contract respecting payments for acceleration. The actual contract terms are lengthy but essential in determining if a breach occurred and if so, the liability for such breach. At the risk of oversimplification, the Court of Appeal's interpretation and findings with respect to such contract terms can be summarized as follows:

- (i) "What is important is that the owner is obliged to pay for acceleration directed by the owner to overcome non-contractor-caused delay. So long as such term exists it does not matter whether it be express or implied."²⁴
- (ii) The judgment and argument before the Court of Appeal tended to treat delay as "owner-caused" or "other delays", with the owner responsible for the former and the contractor responsible for the latter. The Court of Appeal disagreed with this division of responsibility;
- (iii) "Section 1.02.02 of the contract (set out in Part 7) provides for contractor-caused delays and delays beyond the contractor's control. Owner-caused delays would fall within the latter and need not be segregated from other delays that are beyond the control of the contractor. In this contract the contractor is not responsible for delays that are beyond his control whether they are owner-caused or otherwise."²⁵

²³*Ibid.* at 211.

²⁴*Ibid.* at 233.

²⁵*Ibid.*

(iv) “We agree with the trial Judge’s conclusion that the appellant’s conduct respecting payment for acceleration constituted fundamental breach.”²⁶

While the contractor was successful with respect to establishing its entitlement to acceleration costs, the *Morrison-Knudsen* appeal decision is equally notable for its ruling on the issue of *quantum meruit*. Based upon his findings of fundamental breach that would have justified the contractor terminating the contract, the trial judge awarded damages on a *quantum meruit* basis or, in other words, the total cost of the work to the contractor less what had been paid to that point. The Court of Appeal found the trial judge made an error in law in this regard and ruled that the contractor, faced with a fundamental breach, had the election to terminate or proceed with the contract. Having elected to proceed and finish the contract, the contractor was not entitled to an equitable remedy of *quantum meruit*, but instead was entitled to damages for breach of contract, as measured by the terms of the contract. Since the trial judge had not made findings or a ruling of damages on that basis, the Court of Appeal, very reluctantly, concluded that they had to send the matter back to the trial judge for a quantification of damages pursuant to the terms of the contract.

The writ for the contractor’s claim was issued July 17, 1967. The Court of Appeal judgment was released April 24, 1978. Now look once more at the title of this paper.

*(b) — W.A. Stephenson Construction (Western) Ltd. v. Metro Canada Ltd.*²⁷

In this case, the contractor was retained to construct a portion of the Vancouver light rapid transit system which was to be in place in time for Expo ’86. More specifically, the contractor was to erect 103 concrete columns shaped like “T”s upon which the elevated train system rested, plus portions of one of the stations. The work was to be carried out in and amongst busy streets and buildings in Vancouver and New Westminster. Although the defendant was a wholly owned subsidiary of the Province of Ontario which had entered into a contract with British Columbia Transit to provide a turn-key system, it was referred to in the judgment as “owner” and will be so referred to here for ease of reference.

For the purpose of considering the acceleration claim that was eventually made, the following facts are of note:

(i) the contract contained a “time is of the essence” provision;

²⁶*Ibid.*

²⁷(1987), 27 C.L.R. 113 (B.C. S.C.).

- (ii) The bid documents and contract drawings showed the work area that was to be available to the contractor. However, the work area was not delivered free of obstructions and was often occupied by buildings, traffic, overhead utilities and underground utilities. The court, relying upon Supreme Court of Canada authority²⁸ and its interpretation of the contract documents concluded that the owner was in breach of its obligation to provide the contractor the work space it was entitled to, resulting in disruptions to the sequencing of the work and tight working conditions;
- (iii) There were weather delays and labour interruptions which entitled the contractor to extensions of time under the contract;
- (iv) Throughout, the owner refused to grant any extensions of time when requested by the contractor, even for owner caused or excusable delay. The court in fact found “In a deliberate, anticipatory breach of contract by means of a policy decision, the owner decided that the time for completion would not be extended, no matter what the cause.”;²⁹
- (v) The contractor was being bombarded with letters from the owner regarding meeting milestone dates in the face of the denial of its requests for extensions which the court found ought to have been granted;
- (vi) The owner issued a demand that the contractor accelerate the work, reminded the contractor that time was of the essence, and that the costs of acceleration would be the responsibility of the contractor;
- (vii) The contractor initially refused the order to accelerate in light of the history of the positions taken by the owner but indicated that it was willing to discuss the matter. Notwithstanding, the contractor accelerated a portion of the work (pile driving) in any event;
- (viii) After a series of meetings and letters, the owner only agreed to pay “reasonable substantiated costs of acceleration” for one of the six portions of the work, after a delay of 5 weeks from the initial acceleration directive.

Locke J. found that the case was analogous to the situation in *Morrison-Knudsen*. He quoted extensively from the trial decision in that case including the definition of acceleration found in the first part of this paper as well as the following passage from the trial decision of Macdonald J:

... Section 10202 requires completion of the work by specified dates and empowers the engineer to allow extensions of time ... he is not required to

²⁸*Penvidic Contracting Co. v. International Nickel Co.* (1975), [1976] 1 S.C.R. 267 (S.C.C.).

²⁹*Supra* note 27 at 186.

grant extensions no matter what the cause of delay. If he should decide against an extension of time, in a clear case of owner-caused delay, the result is that the contractor remains legally bound to complete by the contract dates. That may involve acceleration — at additional cost to overcome the delay. In such circumstances fair treatment would require the owner to pay that extra cost . . .

If extensions of time for owner-caused delays are refused, and a contractor accelerates to overcome those delays plus others which are solely his responsibility, he is entitled to be paid the portion of his acceleration costs attributable to the owner's default. . .³⁰

Locke J. granted judgment for acceleration for all portions of the work accelerated and not just the one area agreed to by the owner noted above.

(c) — *Foundation Co. of Canada v. United Grain Growers Ltd.*³¹

This was a case involving renovations to a grain elevator. Both the contractor and its subcontractor claimed damages for delay, principally arising out of the delay by the owner in delivering pre-selected equipment to be installed, late delivery of drawings and late completion of an administration building by another contractor hired by the owner which prevented the timely completion by the claiming contractor. There were some delays caused by the contractor with the end result being the delay was apportioned by the court between the owner and contractor 75% and 25% respectively. Thus, the contractor was able to recover 75% of its delay claim and receive contribution towards its subcontractor's delay claim in the same percentage.

The subcontractor also made an acceleration claim. The trial judge noted that neither the contractor nor the subcontractor ever formally applied for an extension of time. The contractor argued that the project consultant should have unilaterally issued an extension for the owner caused delay. The court rejected this submission and stated that it was up to the contractor to seek an extension of time. But the court did find that the record was replete with evidence of written notice of delays by both the contractor and the subcontractor.

The trial judge stated that the trial and appeal decisions in *Emil Anderson*³² provided that “an obligation to pay for acceleration requires an express direction in

³⁰Macdonald J. in the trial decision of *Morrison-Knudsen*, Pt. 11.3, as cited by Locke J. in *W.A. Stephenson*, *supra* note 27 at 178-9.

³¹(1995), [1995] B.C.J. No. 2235, 1995 CarswellBC 1113, 25 C.L.R. (2d) 1 (B.C. S.C.); reversed in part at (1997), [1997] B.C.J. No. 969, 1997 CarswellBC 1021, 33 C.L.R. (2d) 159 (B.C. C.A.), but not on the acceleration issue.

³²*Supra* note 4.

writing signed by the owner or the contractor directing the acceleration”³³. I must admit that such a statement caused me to reread *Emil Anderson* to look for such a statement of law. I stopped looking when I read a comprehensive case comment about the *Foundation* decisions by Jonathan Speigel³⁴ in which he stated bluntly “Unfortunately, *Emil Anderson* said no such thing.”

The trial judge in *Foundation* went on to note that with respect to the period between July 21, 1989 and August 10, 1989, the subcontractor advised the contractor that it was going to accelerate its work to make up lost time in response to numerous prior delays caused by others and repeated verbal requests from the project consultant to accelerate. However the trial judge noted that no express written direction to accelerate was issued by the contractor or project consultant. Thus, the trial judge concluded that the acceleration expense was not recoverable except to the extent it could be characterized as a reasonable response to the delays experienced in which case it could be recovered as an impact or mitigation cost. The trial judge thus only allowed the subcontractor to succeed on a portion of its claim.

After August 10, the court found that the contractor expressly agreed to pay for the subcontractor’s acceleration from that time onwards and allowed recovery against the contractor. Because the contractor had never obtained the agreement of the owner to the acceleration program, the court did not allow the contractor full indemnification from the owner for same, except to the extent it could be characterized as a reasonable impact cost of delay. Thus, the trial judge allowed recovery by the contractor of 75% of the acceleration costs, being the same apportionment of fault between the contractor and the owner for delay. The Court of Appeal did not disturb these findings or rulings.

It could be said that the pre-August 10 acceleration claim should have failed as a “*constructive acceleration*” claim as there was no wrongful denial of a request for an extension of (sub)contract time for excusable delay. As mentioned above, neither the contractor nor the subcontractor sought a time extension. It may be harsh to deny the pre-August 10 acceleration claim as a ‘directed acceleration’ claim simply because it was not in writing, even though the project consultant gave verbal instructions to accelerate. In response the subcontractor did advise the contractor (which did not give the instruction to accelerate) that it was in fact accelerating and setting out the costs of same. There is no discussion of whether or how the contractor responded to such notice. Thus, this acceleration claim failed as such, but relief was partially given by repackaging the claim as a delay claim.

³³*Foundation*, *supra* note 31 at para. 704.

³⁴Jonathan Speigel, *Foundation Co. of Canada v. United Grain Growers Ltd. -- \$5 Million Dispute Resolution* [Case Comment], (1996), 29 C.L.R. (2d) 188.

(d) — Other Cases

*Emil Anderson*³⁵ mentioned previously was, at trial, a claim for “*constructive acceleration*” arising from the construction of a railway tunnel. There were findings of delay, including the late delivery of site access, a work camp shutdown attributed to the owner and differing subsurface conditions including the presence of excess water and unanticipated hydrogen sulfide gas. None of these delays were attributable to the contractor. The contractor was able to make up the lost time and made a claim for constructive acceleration. While the court found that there was indeed an acceleration, it found that the contractor did not accelerate because of the owner or the delay, but for other reasons.

The contractor originally tendered on the basis of three crews working 6 days on and 1 day, (Sunday) off. The agreement with the union also contemplated a 5 to 7 day break every 40 days. The contractor and the union wanted to reduce this to a 4-day break, but there was a concern that the workers would still take the full 5 to 7 days off, giving rise to an absenteeism problem, with its effect on production. Thus, the contractor decided to add a fourth crew and move to a 24 and 8 schedule where each crew would work 24 straight days, then take 8 days off. Thus, three crews would always be working round-the-clock shifts while the fourth crew was off. After 8 days, the crew on break would return and the next crew would have 8 days off. Thus, the work was continuous crews worked through Sundays and holidays. The contractor of course had to pay double time and other premiums for the holiday work, but the job was accelerated and the days which would have been idle under the originally contemplated schedule with three crews were productive.

The court found that the changed (accelerated) schedule was not caused by the various delays for which the contractor was not responsible, but by the contractor doing so voluntarily to avoid labour problems. In addition, the court found:

(i) there was no refusal by the project consultant to extend time before the contractor’s decision to implement the 24 and 8 schedule. The contractor had given notice it was delayed by the problems of initial site availability and camp shutdown, but had not quantified the number of days or quantum sought with respect to such delays. The project engineer indicated that he wanted to receive the claim for both time and costs and was willing to consider an extension. The court stated that this was about as far from a refusal to grant a time extension as one could get (and indeed, a time extension of 31 days was eventually given);

(ii) during the same series of meetings, there was initial discussion of deleting certain portions of the work which the court found was another

³⁵*Supra* note 4.

way of shortening the time required, and such a reduction in fact occurred; and

(iii) the court found that the discussions concerning scheduling between the owner and contractor fell far short of what was required to constitute constructive acceleration.

On this last point, I suggest that the discussions, detailed by the trial judge in the decision, did not constitute something akin to the fourth element in the shopping list of “*constructive acceleration*” being an “act by coercion, direction, or in some other manner that reasonably can be construed as an order to complete within the unextended performance period.”

In reviewing the trial decision, the Court of Appeal also observed that while the contractor suggested in a letter that the owner contribute to some portion of the premium time costs, there was no suggestion in such letter that the completion date should be extended. The Court of Appeal agreed that the motivation to move to the 24 and 8 schedule was to resolve a labour problem, was voluntarily undertaken and was not caused by any failure of the owner to extend the completion date. “In other words “damages”, in the form of costs to accelerate, do not flow from the failure to extend.”³⁶

In *Dexter Construction Co. v. Canada (Minister of Public Works)*³⁷ an acceleration claim in respect of the construction of a portion of highway failed for a number of reasons. When, in the last months of a two-year contract it appeared the contractor would not finish on time, the owner directed the contractor to use whatever means were necessary to see that the contract was completed on schedule. The contractor’s acceleration claim failed because:

- (i) the court did not find that any of the causes of delay cited by the contractor were in fact items for which the owner was responsible;
- (ii) the owner was justified in giving the acceleration order because the contractor was behind in its projected completion date through no fault of the owner; and
- (iii) following the acceleration order, no new equipment was employed and no additional overtime was incurred. At best, the contractor kept equipment and crews on the job it might have returned, but presented no evidence of the costs of same.

If one were keeping a scorecard, this contractor failed to prove items (i) and (v) of the shopping list of elements that constitutes constructive acceleration.

³⁶(1991), [1991] B.C.J. No. 819, 1991 CarswellBC 822, 45 C.L.R. 201 (B.C. C.A.) at 14 [B.C.J.].

³⁷(1987), [1987] F.C.J. No. 944, 1987 CarswellNat 235, 29 C.L.R. 124 (Fed. T.D.).

3. — The Cost of Acceleration

(a) — *Generally*

Conceptually, when an acceleration entitlement has been made out, the courts are attempting to compensate for the incremental costs which are attributable to the acceleration, ensuring that they do not double count costs that the contractor would have incurred in any event without such acceleration. This simple concept can quickly get more complicated as the following examples of acceleration related costs demonstrate.

(b) — *Labour Costs*

The most obvious and common reaction to a need to accelerate is to throw more labour at the job in terms of additional hours, additional personnel, additional shifts and/or crews.

The premium paid for overtime hours is an obvious cost of acceleration. However, overtime hours may be less productive,³⁸ per hour, than regular hours and thus, a contractor (or the owner which is asked to pay acceleration costs) may wish to examine the diminishing returns as hours become extended.

Even in a clear case of acceleration resulting in well-documented overtime, one may wish to look behind the obvious numbers. Workers tend to want overtime hours to be available to them in the event they feel like working/earning same. Thus, contractors may wish to engage in regular (i.e. non-accelerated) overtime work so as to attract and keep skilled workers,³⁹ particularly in a building boom where certain trades may become scarce. Arguably, some overtime would have been offered and paid by the contractor in the absence of any acceleration. Thus an acceleration request or finding should not be an excuse to “dump” all overtime hours onto the payor without taking into account any built in or systemic overtime.

(c) — *Equipment Costs*

Added pieces of equipment may be required. In the event equipment is scarce, a premium may have to be paid to secure those additional pieces of equipment for the job. Specialized, more expensive pieces of equipment may be required to perform the same work faster than the slower, less expensive equipment originally envisioned (i.e. larger more powerful pieces of equipment or different

³⁸Stephen G. Revay, *Calculating Impact Costs* (1988), 27 C.L.R. 239 at 250.

³⁹*Ibid.*

equipment, such as helicopters⁴⁰ for lifts instead of cranes). Existing equipment may have to be reconfigured (i.e. added lights for night time work or special equipment added for winter conditions). All such costs should be considered (or scrutinized) in assessing an acceleration claim.

(d) — Material Costs

Premiums may have to be paid to induce suppliers to divert scarce materials to the site or suppliers from farther a field may have to be contacted to supply, with resultant increases in shipping costs. One may use different materials at a greater cost such as quicker drying or higher early strength cement which itself, may require additional costs in terms of additional saw cutting or crack repairs. A ramped up production rate may result in less planning and thus, more wastage of materials to accomplish the same work with its attendant increase in costs.

(e) — Productivity Costs (Losses)

Although the absolute rate of production should increase at an accelerated job, (ie the amount of work done per day or week), the cost of each unit of production may be higher than at an unaccelerated rate as efficiency may be impacted. For example, Revay⁴¹ has listed a number of inefficiencies which may increase the cost of accelerated production including:

- (i) Overtime — the overtime hours may become less efficient;
- (ii) “overmanning” — crowding in a given area reduces efficiency and reduces the supervision per worker (unless the number of supervisors is also increased with such attendant costs);
- (iii) Multiple shifts — if one goes from a single shift to multiple shifts, there will be some down time when the outgoing shift explains the status of the work to the incoming shift⁴² (where at least two workers will be paid for the time during such change over communication where no communication was required in a single shift scenario);
- (iv) Stacking of Trades — rescheduling trades from sequential work to concurrent work which may require greater planning, crowding and mistakes;
- (v) Unavailability of Skilled Manpower — increasing the demand for a particular skilled trade can lead to a decline in the average skill and ex-

⁴⁰*Construction Delay Claims*, 2nd ed., *supra* note 5 at 204.

⁴¹Stephen G. Revay, *supra* note 38 at 249.

⁴²*Construction Delay Claims*, 2nd ed., *supra* note 5 at 206.

perience level of the available trades on the accelerated job. Efficiency is lost as less skilled trades carry out the work or learn as they go.

To this list, one may wish to add the concept of “standby costs”. A contractor wishing to maximize and exploit every opportunity to move ahead, may have extra men, equipment and materials on site standing by so that they can be put to use whenever or wherever possible during a particular shift. While waiting for such peak utilization periods, they may be underutilized or even idle, the contractor being reluctant to send them away and lose precious hours retrieving them when site conditions allow.⁴³

In *W.A. Stevenson*,⁴⁴ the court recognized that the loss of productivity included the loss of the ability to meet the standard of the original plan and the lost opportunity to better the plan and profit thereby. In this case, the court accepted the contractor’s submission based upon the judgment call of its owner (in whose evidence the court expressed great confidence) that overall, 15% of the labour costs were squandered in overcoming obstacles and 3.5 hrs/day of equipment use was attributable to the constrained conditions. (It is to be noted here that the lost productivity formula was applied to the entire job, not just the portion that was accelerated, but by implication, the lost productivity formula was applied to the accelerated labour, equipment and material costs as well.)

Difficulty in arriving at a precise calculation of damages does not justify a court declining to make the attempt and awarding an estimate of such damages:

Quantification of losses arising from inefficiency or lack of productivity is always difficult. Once a wrong and resulting damage is proven, however, the quantum of those damages need not be measured by too fine a standard. Neither absolute precision nor absolute certainty will be achievable in the measurement of such damages. Difficulty in assessment is not a reason for denial of damages.⁴⁵

Similarly, in *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*⁴⁶ the court held that “[a] loss of productivity is often estimated by a trial judge doing the best he or she can on a percentage basis based on the evidence in general regarding the impact of the wrongful acts of the defendants on productivity.”⁴⁷

⁴³*W.D. Laflamme Ltd.*, *supra* note 8 at 14.

⁴⁴*Supra* note 2 at 202.

⁴⁵*Dilcon Constructors Ltd. v. ANC Developments Inc.* (1996), 28 C.L.R. (2d) 209 (Alta. Q.B.); overturned in part on other grounds (2000), 6 C.L.R. (3d) 34 (Alta. C.A.)

⁴⁶(2002), [2002] B.C.J. No. 2340, 2002 CarswellBC 2425, 22 C.L.R. (3d) 26 (B.C. S.C.).

⁴⁷*Ibid.* at para. 951.

In *W.D. Laflamme Ltd.*,⁴⁸ the court was dealing with a (directed) acceleration program where the construction of a bridge had been delayed by unforeseen changes in soil conditions affecting the piling design. Such delays were not the fault of the contractor. The bridge was required for Centennial Day celebrations in Ottawa, including a visit by the Queen, and thus, the time for completion could not be extended. Many of the types of costs and losses of productivity listed above were claimed by the contractor or canvassed by the court including standby costs,⁴⁹ a greatly expanded and thus, inexperienced crew,⁵⁰ reduced supervision,⁵¹ reduced worker efficiency at night,⁵² time lost at shift changes,⁵³ and errors at shift change resulting in work having to be redone.⁵⁴ The contractor claimed 50% of its payroll costs during the period of acceleration as lost productivity. The owner submitted that 10 -15% was correct. The Court awarded 35% having made the general observation at the beginning of the decision that the parties themselves admitted that precision was not possible and stating,

In the result, there is bound to be a highly noticeable element of arbitrariness in many of the decisions reached. All that I can do is point to certain factors, disclosed in the evidence, to be taken into account for or against the various elements of the plaintiff's claims.⁵⁵

4. — Summary and Conclusion

Acceleration claims are now an established part of Canadian construction law. The five listed criteria for the American concept of “*constructive acceleration*” have not been expressly embraced by Canadian courts, but by no means have they been rejected. On the contrary, the facts or findings cited by the courts in granting judgement for acceleration claims seem to fit those criteria rather consistently. Certainly one that can demonstrate all or virtually all of the five factors will have a leg up in fitting themselves within established Canadian case law where acceleration claims were granted such as *W.A. Stevenson, Morrison-Knudsen* and the like.

On the other hand, one should not come away with the impression that an owner who insists, even strongly so, that a contractor complete the contract on time in

⁴⁸*Supra* note 8.

⁴⁹*Ibid.* at 14.

⁵⁰*Ibid.* at 34 -35.

⁵¹*Ibid.* at 35.

⁵²*Ibid.*

⁵³*Ibid.*

⁵⁴*Ibid.*

⁵⁵*Ibid.* at 12.

accordance with the express time provision of the contract is thereby exposing themselves to an acceleration award in favour of the contractor (i.e. *Dexter Construction*). However, having an entrenched policy of refusing time extensions, no matter what the cause, will lead to actions and positions which the court will soon recognize as unreasonable and in breach of common contractual terms which allow extensions of time for excusable delay.

If the job simply must be completed on time, it may be cheaper to “buy-back” the time extension up front than litigate afterwards once the contractor, the contractor’s solicitor and delay expert can creatively add every acceleration cost which hindsight affords. A pre-estimate of acceleration may be cheaper. Better yet, negotiate the contract on the basis that there can be no time extensions and the any costs of acceleration must be born by the contractor and as such, should be factored into the tender price. While there may be an small acceleration premium in the tender price, it will tend to be discounted or at least be priced competitively.

As with all construction matters, keeping meticulous records and setting out one’s position frequently in letters, memorandum and minutes will assist in making or refuting an acceleration claim. Some of the very lengthy decisions cited above demonstrate that the correspondence is at least as important as the contract documents themselves and very often is the determining factor in decisions.

