

UNSCRAMBLING THE EGG: NEW GUIDANCE FOR ASSESSING CONCURRENT DELAY ON CONSTRUCTION PROJECTS

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A recent Ontario court decision provides new guidance on how to assess responsibility for concurrent delays in construction projects. In *Schindler Elevator Corporation v. Walsh Construction Company of Canada* (2021 ONSC 283), Master Robinson adopted the approach presented by McMillan's Glenn Grenier in his paper "Evaluating Concurrent Delay: Unscrambling the Egg."^[1] This approach for assessing concurrent delay has important implications for all members of the construction pyramid.

Women's College Hospital Project Suffers Delays

In 2010, Walsh Construction in partnership with Bondfield Construction Company Limited ("WBP") began construction for the redevelopment of Women's College Hospital. The project involved the phased demolition of the old hospital buildings at the site and the phased construction of new ones.

Schindler Elevator Corporation ("Schindler") was among the subcontractors working on site. Schindler was engaged to fabricate, deliver and install all elevators for the new building.

Schindler ultimately brought a claim against WBP for \$952,864 for unpaid services and materials. WBP counterclaimed for \$2,237,638, primarily for losses arising from delay it alleged Schindler caused to the project.

WBP submitted that other subcontractors had also caused delays that occurred during the same time as Schindler's delay (i.e. it was a "concurrent" delay). Relying on the principle of concurrent delay, WBP claimed that Schindler was liable for a proportionate share of WBP's delay losses. Schindler denied liability for those losses.

Court Adopts Grenier's Analysis of Concurrent Delay

Liability for concurrent delay losses is typically assessed by determining which parties materially caused the delay. In this case, WBP had the onus of proving that Schindler's delay caused (at least in part) WBP's losses.^[2]

The Court acknowledged the difficulty associated with evaluating the effects of concurrent delay. In order to do so, one must separate the overall delay into its individual component parts, and allocate time, responsibility

and costs to each component. This is a highly complex and speculative assessment process.^[3]

Several opinions were put before the court to assist it in assessing responsibility for delay. Schindler's expert witness opined that concurrent delay requires two co-critical and co-controlling activities, parallel in time, and identical in duration.

The Court however disagreed, instead preferring Grenier's view that "[i]t 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 delays start and end at the same time. Concurrent delays are more commonly experienced as overlapping events."^[4]

Grenier's approach, the Court stated, is more realistic and likely to lead to a fair and just result. Any other method would be too rigid and may unfairly result in holding one party solely responsible for delay on a project.^[5]

Schindler Delayed Immediate Successor Activities, but Impact on Overall Project Unclear

In a lengthy decision, the Court ultimately concluded that Schindler did breach its subcontract by delayed performance of the elevator installation. The Court also held that Schindler did delay certain immediate successor activities to the elevator installation. WBP was accordingly entitled to set off a portion of the damages it claimed against amounts owing to Schindler. However, the Court also held that WBP failed to prove that Schindler delayed the entire project and most of WBP's claimed damages against Schindler were unsupported.

Implications for Construction Industry

This decision affirms that it is often unrealistic to expect a precise quantification of responsibility for delay. Overlapping events on construction projects often make any such measure virtually impossible. Courts may also prefer to split the responsibility for the overall delay to prevent one party from shouldering a disproportionate share of the cost.

Construction industry members can minimize the risks arising from concurrent delay by regularly updating project schedules, diligently following notice provisions in contracts, and keeping careful records of construction activities. In a complex concurrent delay case, these documents can be critical in establishing responsibility for a delay. Without these records, it will be even more difficult to "unscramble" the causes of delay and ascertain who bears true responsibility.

[1] Grenier, G. (2006) 53 CLR (3d) 46 [Grenier].

[2] *Schindler Elevator Corporation v. Walsh Construction Company of Canada*, 2021 ONSC 283 at para 292-293

[*Schindler*], citing Grenier *supra* note 1.

[3] *Schindler* at para 303.

[4] *Schindler* at para 346, citing Grenier, *supra* note 1.

[5] *Schindler* at para 346.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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