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Concurrent delay in Canada – What now?



In this article, Capital Consulting International's Seán Hollywood FRICS, FCIQB, MCI Arb, PQS, MSc, BSc (Hons) opines on why Concurrent Delay relating to Construction Projects has been the subject of much debate over the years. By their very nature, Construction Projects are often multifaceted bringing together multiple

resources to carry out various activities of varying durations, complexity and criticality. Due to the foregoing nature of these Projects, delays may occur with associated claims. When it comes to the issue of Concurrent Delays, a component of the debate has been on the establishment of a simple definition.

Various papers on Concurrent Delay based on jurisprudence and professional expertise have been developed. Some of the leading authorities on the subject are the Society of Construction Law (“SCL”) and the Association for the Advancement of Cost Engineering (“ACE”). Both Organizations have published documents which seek to define Concurrent Delay, which are set out in the following paragraphs.

A. Definitions of Concurrent Delay

SCL Protocol 2 [1] includes “Concurrent delay-effect on entitlement to EOT” as a Core Principle [2] and states:

“True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer [Owner] Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer [Owner] Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer [Owner] Delay to Completion, the Contractor’s concurrent delay should not reduce any EOT due.”

ACE[3] defines Concurrent Delay as:

“(1) Two or more delays that take place or overlap during the same period, either of which occurring alone would have affected the ultimate completion date. In practice, it can be difficult to apportion damages when the concurrent delays are due to the owner and contractor respectively.

(2) Concurrent delays occur when there are two or more independent causes of delay during the same time period. The “same” time period from which concurrency is measured, however, is not always literally within the exact period of time. For delays to be considered concurrent, most courts do not require that the period of concurrent delay precisely match. The period of “concurrency” of the delays can be related by circumstances, even though the circumstances may not have occurred during exactly the same time of period.

(3) True concurrent delay is the occurrence of two or more delay events at the same time, one an employer [owner] risk event, the other a contractor risk event and the effects of which are felt at the same time. The term ‘concurrent delay’ is often used to describe the situation where two or more delay events arise at different times, but the effects of them are felt (in whole or in part) at the same time. To avoid confusion, this is more correctly termed the ‘concurrent effect’ of sequential delay events.

(4) Concurrent delay occurs when both the owner and contractor delay the project or when either party delays the project during an excusable but non-compensable delay (e.g., abnormal weather). The delays need not occur simultaneously but can be on two parallel critical path chains.

(5) The condition where another delay-activity independent of the subject delay is affecting the ultimate completion of the chain of activities.”

Both authorities come from differing backgrounds and knowledge bases. SCL’s base is predominantly in the United Kingdom, however is used globally, whereas the AACE is principally used in North America. Although differing, the definitions from the authorities confirm that the delay must:-

1. Affect the Critical Path / Completion Date, and
2. Include two or more delay events.

However, complications occur in respect to delays, when trying to identify concurrent delays to the critical path and which events affect the Project deadlines (Milestone Dates and / or Scheduled Completion Dates). For a delay to result in a time extension it has to impact the critical path.

B. Concurrent Delay in Practice

Due to the foregoing, it has often meant that Scheduling Experts are often referred to as people who practice “dark arts”, and it seems as if they learnt their craft at Hogwarts^[4] not through actual experience on Construction Projects.

In the past, I have witnessed Owners’ Project teams dismiss Extension of Time (“EOT”) claims because they felt that the Contractor’s own Delay Events had an equal or greater effect on the Critical Path / Completion Date.

On one such occasion, the Owner’s Project team had challenged that the Delay caused by the Contractor relating to Supervisory Control And Data Acquisition (“SCADA”) implementation had a greater effect than the Owner’s Delay in providing the permanent power for the building. Although these events / activities (SCADA vs Permanent Power) did not have the same potency or consequence on the Project Schedule, it took over one year for the Contractor to receive the remedies it originally requested, such as an EOT, Prolongation Costs and relief from Damages.

C. Concurrent Delay in Canada

The recent Superior Court of Justice case in Ontario, Canada between Schindler and WBP^[5] provided some clarity to the Concurrent Delay debate from a Canadian perspective. WBP alleged that Schindler, including Schindler Elevator Corporation and several subcontractors, had delayed the performance of their respective contracts. These delays had allegedly impacted the Critical Path of the Women’s College Hospital Capital Redevelopment Project (the “WCH Project”). This was a complex case involving multiple delays that the Court had to understand and decide upon.

1. Case background

In 2010, WBP commenced construction of a new 624,000 square foot hospital to replace the former Women’s College Hospital at 76 Grenville Street in downtown Toronto. The WCH

Project involved the phased demolition of the existing hospital buildings and phased construction of new facilities.

Schindler was subcontracted to fabricate, deliver and install all the elevators.

During the hearing it was reported that, *“Prior to Schindler commencing on site, several projects’ delays had already occurred.”* [6] *As work progressed, Schindler encountered their own delay, WBP in turn “issued numerous written notices of default to Schindler... WBP withheld all future payments.”* [7]

WBP argued that “Schindler’s delays in fabrication, delivery and installation of six elevators critically impacted the project schedule, resulting in WBP incurring both extensive costs to mitigate the overall project delay and contractual penalties for late completion of the first phase.” [8]

Whereby upon “completion of Schindler’s subcontract work, Schindler registered a claim for lien for nearly \$1 million on account of unpaid services and materials.”[9] *WBP counterclaimed for \$2.2 million in damages and contractual penalties for Schindler’s delayed performance.*

2. Critical Path Delay

In order to determine liability for overall project losses, the Court needed to understand if Schindler had in fact caused the critical path delay to the WCH Project.

The Court confirmed that the “critical path” was defined as “the longest chain of logically connected activities in a project schedule that, if delayed, will delay the end date of a project.”[10]

The Court confirmed that WBP had the “evidentiary onus of proving on a balance of probabilities, that there is a causal connection between Schindler’s delays and WBP’s delay and impact losses,”[11] in order to indemnify WBP’s costs for mitigation and delay penalties.

WBP acknowledged that other subcontractors also contributed to the Project Delay through the same period adding to the complexity of the delay scenario.

The Court confirmed that in assessing a delay to a fixed completion date in a Contract, “it is appropriate to begin by looking at the term containing the completion date and assessing any allowable extensions contemplated by the contract on the facts to determine whether the work was completed on time”[12]. To this end the Court then had to consider “[w]hether a delay is excusable or non-excusable determines whether a claimant is entitled to a time extension, compensation, or both”.[13]

To consider these types of delays further, the Court utilized the Construction Law Review Article by Grenier, G., “Evaluating Concurrent Delay: Unscrambling the Egg” [14].

In the article, Grenier confirmed that evaluating a Concurrent Delay is a “much more involved and speculative process compared to an isolated or singular cause of delay. Analysis of concurrent delay requires breaking the overall delay into its component parts and apportioning time, responsibility and costs.” [15]

Upon reflection of the views put forward by the Scheduling Experts, the Court rejected the testimony of Schindler's Scheduling Expert which was based on the SCL Concurrency definition "*that concurrent delay meant there were two co-critical, co-controlling activities that had the same timing and duration.*" [16]

Instead, the Court confirmed the observation from Grenier's article 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.*" [17]

The Court further confirmed that "*unless there are clear facts supporting more singular responsibility for project delay, may unfairly result in one party being held solely responsible for delay on a project where the evidence supports a finding of multiple parties delaying the project and difficulty assessing responsibility*" [18] and the Court's view that Grenier's article is "*more realistic and, in terms of the court's assessment, more likely to lead to a fair and just result*" [19] instead of the "*but for*" [20] analysis position asserted by Schindler's Expert's on concurrency, which in the Court's view was "*too rigid for use by courts, at least in more complex cases of concurrency.*" [21] This "*apportionment*" approach came to prominence in Scotland through *City Inn Ltd v Shepherd Construction Ltd*, [22] where the Scottish Appeal Court decided that apportioning the delay between the parties would be appropriate where there was no dominant cause of delay. The United States case *William F. Klingensmith, Inc. v. United States* [23] summarizes the general rule that "*[w]here both parties contribute to the delay neither can recover damage[s], unless there is the proof a clear apportionment of the delay and expenses attributable to each party.*" *Blinderman*, 695 F.2d at 559, quoting *Coath & Goss, Inc. v. United States*. [24]

The Ontario Supreme Court ultimately found that there was no clear evidence that Schindler materially contributed to the overall critical path delay. While there was a delayed turnover of the Freight Elevators which directly impacted the immediate subsequent activity, the manner in which the subsequent activity caused delay to the overall project was "*less clear*". [25] Therefore, the Court concluded that "*Schindler did not cause or materially contribute to the failure to achieve the Interim Completion deadline.*" [26]

The Court had arrived at two important conclusions:

1. There had been no critical delays by Schindler, however
2. The concurrency issue was not explained well enough by the Experts and the Court had to apportion delays as they saw fit.

However, in light of the extent of Schindler's performance delay, the Court concluded it would be "*inequitable to excuse Schindler entirely of causally connected losses and damages.*" [27] The Court reviewed each of Schindler's disputed activities which allegedly caused the delay and assessed the evidence for each claim. The finding was that Schindler owed a total of "\$51,653.79" [28] to WBP for its delay and the Court dismissed WBP's remaining claims for damages. The net result was that the Court determined that "*Schindler is entitled to a lien in the amount of \$650,786.20, inclusive of HST, and judgment against WBP in the same amount, plus pre-judgment interest.*" [29]

Although the Court deviated from the SCL Protocol [30] definition of True Concurrent Delay, it should be noted that the SCL protocol at core principle 10.11 states; – "*the Protocol*

recommends a common sense approach to delay analysis. In particular the Protocol recognizes that delay analysis is rarely precise down to the day (or even few days). The application of common sense requires that the margin for imprecision should be taken into account in reaching a conclusion on concurrency.”

D. Records

Through the Court’s findings, it is evident that in order to understand the delay and the cause(s) of the delay there needs to be exemplary contemporaneous records, for the “[a]nalysis of concurrent delay requires breaking the overall delay into its component parts and apportioning time, responsibility and costs.[31]”

As stated in the opening paragraph of this article, construction projects are multifaceted and are “not every size fits all” when preparing records for Mediation, Adjudication, Arbitration or Court. In reality sometimes the records available are not able to support all the asserted claimed impacts or defend the claimed impacts, but ideally, there should be enough records to support the following:-

1. Linkage to the original impact.
2. The consequence of the impact, both prospectively and retrospectively,
3. The time each type of resource was impacted,
4. How the resources (labour, equipment, and supply chain) were affected over the impacted duration,
5. The “Cost^[32] of the impact on each type and level of resource.

Records are not only important in pursuing a delay but also in defending a concurrent delay defense. A common argument by Owners is to say that the Contractor did not progress with the work in a diligent manner and had production issues which caused the delay. A Contractor’s defense to the Owner’s allegations is to state that the Contractor had to “*pace the works in order to mitigate costs*”. If the “*spacing*” argument is utilized by the Contractor; the Contractor must:

1. Inform the Owner that spacing will occur until the Owner delays are finished
2. Keep records of spacing decisions and productivity achieved
3. Never undertake spacing voluntarily without informing the Owner of the decision.

During the hearing, the Court also considered the types of consequential losses which may be suffered by the Contractor when a contract is delayed “*as explained by McRae J. in Brule Construction Ltd v Ottawa (City) (1989), 14 ACWS (3d) 121 (Ont HCJ) at para. 25, outlined by I.N. Duncan Wallace ed., Hudson’s Building & Engineering Contracts, 10th ed. (London: Sweet & Maxwell, 1970) at 597-598.*”^[33]

In order to appropriately understand the losses and the causation of the delay, the Contractor should collate enough information / records to enable the Court to understand the delay and to enable the “*breaking of the overall delay into its component parts requires*

breaking the overall delay into its component parts and apportioning time, responsibility and costs.”^[34]

Although the Court’s ruling in *Schindler v. WBP*^[35] is very recent, the phenomenon of record collection and the failure to provide enough records to assist in a dispute is not new.

As Abrahamson (Engineering Law and the ICE Contracts, 4th Edition, 1979), wrote:

“A party to a dispute, particularly if there is an arbitration will learn three lessons (often too late): the importance of records, the importance of records and the importance of records.”

E. Lessons Learned

In addition to the ever-changing circumstances through the COVID-19 pandemic, the *Schindler v. WBP* case^[36] further reinforces the need for accurate, contemporaneous and robust records to enable the parties, Owners, Contractors, Counsel and the Courts, to understand the exact nature of the delay and impacts of the delay. At a number of points throughout the *Schindler v. WBP*^[37] hearing “*evidentiary onus*” was mentioned and this needs to be considered when collating records. In addition, that there is a need for Experts to concisely grasp, understand then explain to the Court in an easily understood manner any concurrency issues are an important lesson learned from this case.

This article is not a legal opinion but does serve as a professional courtesy (or perhaps, a warning) to all Owners / Contractors / Supply Chain (Subtrades, Suppliers, Subcontractors) that they should consider seeking out an appropriate consultant to assist initially in the review of records being collated and then getting them on board early enough enable their best foot to be put forward from the start.

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[1] SCL Delay and Disruption Protocol 2nd Edition: February 2017

[2] SCL Delay and Disruption Protocol 2nd Edition: February 2017 Core Principle 10 in Part B

[3] AACE® International Recommended Practice No. 29R-03

[4] Hogwarts School of Witchcraft and Wizardry from the Harry Potter books by J.K. Rowling

[5] *Schindler Elevator Corporation v. Walsh Construction Company of Canada* (Walsh Construction Company of Canada and Bondfield Construction Company Limited, collectively “WBP”), 2021 ONSC 283 (CanLII Can)

[6] Para [26] 2021 ONSC 283 (CanLII)

[7] Para [35] 2021 ONSC 283 (CanLII)

[8] Para [4] 2021 ONSC 283

[9] Para [5] 2021 ONSC 283

[10] Para [296] 2021 ONSC 283, reference to Mr. Stynchcomb’s testimony and first report.

[11] Para [292] 2021 ONSC 283

[12] Para [300] 2021 ONSC 283

[13] Para [300] 2021 ONSC 283

[14] Para [300] 2021 ONSC 283 and Grenier, G., “Evaluating Concurrent Delay: Unscrambling the Egg”(2006), 53 CLR (3d) 46 (2006), 53 CLR (3d) 46

[15] Para [303] 2021 ONSC 283

[16] Para [346] 2021 ONSC 283

[17] Para [346] 2021 ONSC 283

[18] Para [346] 2021 ONSC 283

[19] Para [346] 2021 ONSC 283

[20] Para [346] 2021 ONSC 283
[21] Para [346] 2021 ONSC 283
[22] 2010] ScotCS CSIH_68,
[23] 731 F.2d 805 (Fed. Cir. 1984)
[24] 101 Ct. Cl. 702, 714-715 (1944)
[25] Para [347] 2021 ONSC 283
[26] Para [347] 2021 ONSC 283
[27] Para [348] 2021 ONSC 283
[28] Para [448] 2021 ONSC 283
[29] Para [453] 2021 ONSC 283
[30] SCL Delay and Disruption Protocol 2nd Edition: February 2017
[31] Para [303] 2021 ONSC 283
[32] The definition of "Cost" can differ between forms of Contracts.
[33] Para [302] 2021 ONSC 283
[34] Para [303] 2021 ONSC 283
[35] 2021 ONSC 283
[36] 2021 ONSC 283
[37] 2021 ONSC 283



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