

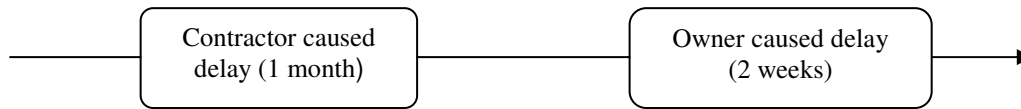
Concurrent Delays: An Owner's Sword, Shield...or Land Mine?

Part 2 -Concurrent Delays – A short Canadian legal perspective

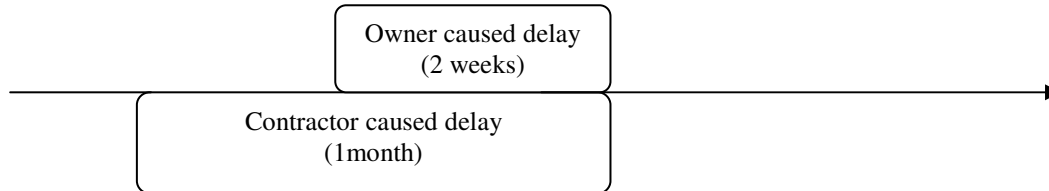
**Presented To: IADC's 2018 Midyear Meeting
February 10-15, 2018**

I: The legal issue: concurrent delay damages caused by each contractual party

First example: subsequent delays, no overlap:



Second example: overlapping delays:



In regards to how concurrent delays are treated, there is an interesting Canadian case outside Construction law: *Sunrise Co. vs. Lake Winnipeg (Le)*, [1991] 1 S.C.R. 3 (Supreme Court of Canada) that is summarized below:

The *Kalliopi L*, while downbound on the St. Lawrence River, met but did not collide with the upbound *Lake Winnipeg* and went aground. The trial judge found the *Lake Winnipeg* entirely responsible for this grounding. The ship ran aground a second time while proceeding to an anchorage area and was further damaged. This incident was unrelated to the first and occurred through no fault of *Lake Winnipeg*. The damage caused by the first incident required 27 days in dry dock to repair. The repairs required by the second incident were carried out during this 27-day period and would have required 14 days in dry dock if they had been done separately. The time in dry dock solely attributable to the first incident, therefore, was 13 days. The key issue was the loss of profit for each dry dock day.

Judgment: “ In summary, there is no causal link between the second incident and the loss of profit suffered by the owners of the *Kalliopi L*, such damage being merely coincidental. The *Lake Winnipeg* must, as a consequence bear the responsibility for the full 27 days detention in dry dock.”

Therefore, the trier of fact determined there was actually no true concurrency in this case, and therefore Lake Winnipeg was solely responsible for the delay.

II: Penalty damages vs. Contractor’s damages

Typically, a penalty clause (liquidated damages) in the contract provides for precise damages for individual delay days caused by the Contractor. However, when there are concurrent delays, caused by the Owner and by the Contractor, who’s entitled to what?

The first approach is to deny damages to both parties as shown in the case below.

- *Perini Pacific Ltd vs. Greater Vancouver Sewerage and Drainage District*, (1966) 57 D.L.R. (2d) 307 (B.-C.C.A.): the Contractor was behind schedule because of his faults but delays were also caused by the Owner; the British Columbia Court of Appeal decided that both parties cannot claim delay damages; no damages apportionment;

On the opposite, a second approach is to apportion the delay damages, as in Québec:

- *Ansa construction inc. c. Québec (Commission hydro-électrique)*, 1987 CanLII 799 (QCCA): the Court of Appeal of Quebec expressly rejected the *Perini* approach and ruled that, when possible, the Court should apportion the delay damages;
- *Ed Brunet et associés Inc. c. La Pêche (Municipalité)*, 2004 CanLII 46988 (QC CS);
- See *Les réclamations de l'entrepreneur en construction en droit québécois*, Guy Sarault, Éditions Yvon Blais, 2011, p. 222 to 225;

III: Contractual clauses regarding concurrent delays

Several issues could be dealt by the inclusion of more robust contractual clauses instead of leaving concurrency interpretation solely at the discretion of the Court, such as:

- quantification of delay damages : non-excusable delays (liquidated damages) for the Owner to recover as well as excusable compensable delays for the Contractor;
- clauses that clearly make a choice between the 2 options regarding the cancellation or apportionment of any delay damages if both parties are responsible for a delay on the critical path that is considered concurrent;

However, the problems encountered in Canada in regards to apportioning concurrent delays include:

- The Canadian Construction Documents Committee issues standard construction contract forms (Stipulated Price Contracts, Cost Plus Contract, Construction Management contract, etc.) that do not include any provisions dealing with the concurrent delays;
- Many major sophisticated infrastructure contracts for the construction of a bridge or a dam in Québec are silent in this respect;

Therefore, an example of a court case in which contractual clauses dealing with concurrent delay was upheld is shown below:

- *North Midland Building Limited vs. Cyden Homes Limited* [2017] EWHC 2414 (TCC): example of a contractual clause that prevents the Contractor to excuse its delay because of another delay due to the Owner : “*any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account*” in relation to an extension of time; the Court upheld this clause that expressly disallowed the Contractor for an extension of time in cases of concurrent delays; this clause was “crystal clear” and enforceable;

Therefore, it is clearly possible that more robust and descriptive clauses could be and should be included in future contracts in order to avoid the sole reliance on the courts to determine concurrent delay entitlement.