Delay, Disruption and Acceleration Claims
Douglas Sanders and Chris W. Eagles
May 11, 2001

I. INTRODUCTION

The effect of delays on a construction project can be quite significant. Delays can be caused by the owner, the owner’s consultant, a contractor, third parties or natural events. The legal impact of the delays depends on the attribution of obligations and allocation of risk in the contract(s) between the parties. It is difficult to discuss these issues without the specific contractual matrix being included in the discussion.

Delays can and usually do impact all of the participants on a construction project. The owner’s project is delivered late, the consultant’s fixed fee is insufficient to cover the new project length, and the contractor’s costs are increased because of increased project duration.

This paper will define some of the terms used in these types of claims and provide an introduction into the world of delay and disruption claims. The topic is much too complex to do anything but scratch the surface of this area. Related topics such as damages will be discussed elsewhere in the Seminar.

II. SCHEDULING PRINCIPLES AND ALLOCATION OF RISKS

A. Scheduling Principles

A contract schedule is a tool for use by all parties on a construction project to plan the construction activities. Contract schedules can be simple, hand-drawn efforts or complex, computer-generated works of art. Scheduling is viewed by many as being a scientific exercise, when in reality it is more of an art. A well done schedule provides all of the parties with a better opportunity to complete the work on time and on budget, while a poorly done schedule creates a significant risk that the project will be a disaster.

Historically, the most common type of schedule was a bar chart. Each activity is given a start date and an end date and shown on a chart. The bar chart’s
simplicity is both its greatest advantage and its greatest weakness. Most bar charts do not show an inter-relationship between the activities. Without this information activities cannot be sequenced in such a way as to achieve maximum efficiency.

Network diagrams, on the other hand, require activities to be related to one another such that the dependency of one activity on another can be determined. For instance, before a pile foundation can be poured, a hole must be dug. In a bar chart, this relationship and the dependency of the concrete supply for the pile on the excavation work would not be shown. In a network diagram, the relationship between these two activities would be identified. One of the principal types of network diagram is known as the Critical Path Method (CPM). This method identifies the activities that must be achieved and in what order to achieve the most efficient schedule.

B. Allocation of Risks

The contract(s) will allocate risks between the parties. The risk of delays can be allocated using a number of variables (discussed below). It is important to determine the best allocation of risks for the project.

III. DEFINITIONS

A. Excusable and Non-Excusable Delays

An excusable delay is one that generally results in entitlement to an extension of time. A non-excusable delay does not result in entitlement to a time extension. Entitlement to compensation for the delay may or may not be tied to the issue of excusability.

The contract will define the delays that are excusable and whether such will result in entitlement to an extension of time and/or damages or neither. Generally, delays caused by the breaching party will be non-excusable while those that are caused by the non-breaching party will be excusable. Delays caused by conditions beyond the control of either party to a contract may be excusable or non-excusable depending on the terms of the contract.

B. Critical and Non-Critical Delays

A construction schedule will have many events that are independent of each other. The schedule will also have a path of events that are dependent upon
each other, the critical path. Any interference with events that are on the critical path will result in an extended duration to the project.

Another way of describing this issue is to segregate delays into those that affect the critical path and those that do not. Delays that impact the critical path are more important than those that do not, at least from the perspective of time extensions. By definition, a time extension will be unnecessary unless the delay is on the critical path. The critical path is less relevant to the issue of compensation as the extended performance of a non-critical path item may well result in an increased cost, while not necessitating an extension of the contract time.

C. Concurrent Delays

Delays are often caused by more than one event and/or more than one party. A concurrent delay is one which is caused by a different party or event than that which caused the principal delay.

Concurrent delays may or may not be contemporaneous. A contemporaneous concurrent delay is one which occurs at the same time as the principal delay. Some U.S. courts have required that for a delay to be concurrent it must also be contemporaneous while others have held that the delay can happen at any time and still be concurrent. Another variable is whether the principal delay and the concurrent delay must both be on the critical path.

D. Compensable and Non-Compensable Delays

A compensable delay is one for which compensation is provided, while a non-compensable delay is one for which no compensation is applicable.

E. Delays, Disruption and Acceleration

While confusing, these terms have distinct meanings. A “delay” is an event that causes extended time to complete all or part of a project. A “disruption” is the effect of an event that detrimentally effects a project, but may or may not extend the time to complete. An “acceleration” is an increase in labour or equipment to shorten the time for completion or mitigate the effects of an impact or a delay.

To use a fictitious example, a project is delayed by one month because the owner failed to obtain financing. One of the effects of that delay is that work that was to be done in the summer is now done in winter conditions, thereby increasing the cost of performance. Under GC 6.5.1 of CCDC 2 - 1994
(discussed below), the contractor through a delay claim would be entitled to both an extension of the project time (by at least one month or maybe more due to the work in the winter) and the costs associated with the delay (perhaps the cost of maintaining staff during the one month period and the cost of the lowered efficiency that results from now conducting work in the winter). If the owner then introduced another contractor on the same work site thereby negatively impacting the efficiency of the contractor’s work force, this would result in an impact claim. Finally, if the owner required the contractor to finish earlier than required under the contract by directing the contractor to increase the available labour and equipment, this would result in an acceleration claim.

IV. GC 6.5 OF CCDC 2 -1994

A copy of GC 6.5 is attached as Appendix “A”.

GC 6.5.1 provides for an extension of time and reimbursement for cost where the contractor is delayed by the Owner, the Consultant or anyone employed directly or indirectly by them.

GC 6.5.2 provides for an extension of time and reimbursement for cost where the contractor is delayed by a stop work order (from a court or other public authority) provided that such order was not issued as the result of an act or omission of the Contractor or anyone employed directly or indirectly by them.

GC 6.5.3 provides for an extension of time but no reimbursement for cost (unless caused by the Owner) for a number of causes that are beyond the contractor’s control.

By omission, the Contractor would not be entitled to either an extension of time or reimbursement where the Contractor was the cause of the delay.

GC 6.5.4 provides that notice of a claim must be given within 10 days to entitle the Contractor to claim an extension. This clause “... only bars a contractor’s right to an extension of the contract.” It does not refer to the Owner’s obligation “… to reimburse the contractor for any costs incurred by it as a result of the owner caused delay ...” (Pacific Coast Construction Co. Ltd. v. Greater Vancouver Regional Hospital District (1986), 23 CLR 35 (B.C.S.C.) adopted in Foundation Co. of Canada Ltd. v. United Grain Growers (1997), 23 CLR (2d) 23 (B.C.C.A.)). Hence, the entitlement to an extension of time and to reimbursement of costs are separate and reimbursement is possible even though a time extension may be barred.
V. CONTRACT CLAUSES

A. General

As discussed above, the various terms related to delay can be thought of as variables that should be used to define the risk allocation in a contract. Ultimately, the question becomes under what circumstances is one of the parties entitled to an extension of time and compensation.

From the contractor’s perspective, the questions are as follows:

1. If the Owner causes a delay, does the Contractor get an extension of time and/or compensation? If time is to be extended or compensation provided, is that only for delays that are on the critical path or for all owner-caused delays, and is there a deduction for concurrent delay (if there is a deduction, is it only for contemporaneous delays? Or only for delays on the critical path? Or is it dependent on who caused the concurrent delay?);

2. If the Contractor causes a delay, does the Owner get compensation? If compensation is to be provided, is it based solely on the date for substantial completion or is it based on interim milestones?

3. If a third party or natural event causes a delay, does the Contractor get an extension of time and/or compensation? If time is to be extended or compensation provided, is that only for delays that are on the critical path or for all owner-caused delays, and is there a deduction for concurrent delay (if there is a deduction, is it only for contemporaneous delays? Or only for delays on the critical path? Or is it dependent on who caused the concurrent delay?).

It is also important to understand whether compensation is only for out-of-pocket costs or whether the Contractor is entitled to overhead and profit.

The same analysis can be done for disruption and acceleration claims.

B. Time is of the Essence

Many owners place “time of the essence” clauses in contracts believing that they will force contractors to perform on time. What they fail to realize is that this clause applies equally to both parties. In Corpex (1977) Inc. v. Canada, [1982] 2 SCR 643 (SCC), the Supreme Court held:
As regards the cost resulting from loss of efficiency of the labour force during the winter and from wage increases due to delays, I am of the view that these should be treated like the costs of work in addition to that provided for in the plans and specifications, in light of clause 7 of the General Conditions which states that time is of the essence of the contract. This clause applies to both parties, and if the changes ordered by the Owner cause a disruption of the critical path and an increase in costs, the Owner must bear them provided the other clauses of the contract make provisions therefor, as I think is the case here.

In many cases, courts have required the presence of a “time is of the essence” clause to enable a claim for late performance. Where a party is required to meet a mandatory schedule or complete by a specific date, it would seem duplicative to require a “time is of the essence” clause. If there is a concern about enforcing a claim for delay from the owner’s perspective, then it seems obvious that this clause should be incorporated as long as the owner understands the impact on fulfilling their obligations. For the contractor, it would be imprudent to assume that the lack of a “time is of the essence” clause would invalidate any claim by an owner for late performance or that the contractor should be overly concerned that any potential claim by the contractor would be negatively impacted.

C. Entire Contract

CCDC 2 1994 contains the following clause:

Article A-2 AGREEMENTS AND AMENDMENTS

2.1 The Contract supersedes all prior negotiations, representations, or agreement, either written or oral, relating in any manner to the Work, including the bidding documents that are not expressly listed in Article A-3 of the Agreement - CONTRACT DOCUMENTS.

An entire contract clause is intended to, among other things, eliminate pre-contractual discussions from the contract. At the trial level in Foundation Co. v. UGG (1996), 25 CLR 1 (BCSC), the Court held that the language used therein (“The Contract … represents the entire agreement between the parties. The Contract supersedes all prior negotiations, representations or agreements, either written or oral, including the bidding documents”) did not bar claims in tort, and was only sufficient to bar a contractual cause of action based on pre- or extra-contractual representations. The Court also found that the clause was
ambiguous as the bidding documents formed part of the contract so how could “The Contract supercede … the bidding documents”.

D. Contract Schedule

GC 3.5 of CCDC 2 - 1994 states:

3.5.1 The Contractor shall:

1. prepare and submit to the Owner and the Consultant prior to the first application for payment, a construction schedule that indicates the timing of the major activities of the Work and provides sufficient detail of the critical events and their inter-relationship to demonstrate the Work will be performed in conformity with the Contract Time;

2. monitor the progress of the Work relative to the construction schedule and update the schedule on a monthly basis or as stipulated by the Contract Documents; and

3. advise the Consultant of any revisions required to the schedule as the result of extensions of the Contract Times as provided in Part 6 of the General Conditions - CHANGES IN THE WORK.

This clause has no requirement for following the Contract Schedule. It puts in place a requirement to produce a contract schedule and to keep it updated, but nowhere is there a requirement to abide by the contract schedule.

Effectively the same clause was used in W.A. Stevenson Construction (Western) Limited v. Metro Canada Limited (1988), 27 CLR 113 (BCSC). The principal issue in the case was lack of access to the work site. Provision of a contract schedule was mandatory, but it was not clearly stated that the parties had to follow the schedule. The Court held that the schedule did not enshrine a linear sequence, but that the owner’s obligation was to provide unobstructed access to the work space so that the contractor could carry the work out in accordance with its desired methods. The contract schedule was used to demonstrate the contractor’s desired work methods.
If a contract schedule is not only to be provided but also followed, then both parties will be required to meet their obligations in accordance with that schedule.

E. Notice Requirements

GC 6.5.4 of CCDC 2 - 1994 states:

6.5.4 No extension shall be made for delay unless notice in writing of claim is given to the Consultant not later than 10 Working Days after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.

Courts will look for substantial compliance with notice provisions as a prerequisite to, in the case of GC 6.5.4, claiming an extension of time. It is interesting to note that GC 6.5.4 only deals with extensions of time and does not refer to compensation.

At the trial level in Foundation Co. v. UGG, the Court discussed many decisions in respect of notice provisions and concluded that notice was required, but could be satisfied by something less than formal written notice. In fact, the Court concluded that evidence of complaints in meeting minutes could constitute notice. The Court of Appeal concurred with this finding. While it is not recommended that such be relied on exclusively, the courts are looking for substantial compliance with such provisions.

F. Suspension of Work

A stop work order will have a different impact depending on the source of the stop work order and the contractual provisions. GC 6.5.2 of CCDC 2 - 1994 (see Appendix “A”) provides for a time extension and compensation for stop work orders issued by courts or other public authorities as long as the contractor was not directly or indirectly responsible for such. The contract does not speak to stop work orders issued by the owner or its consultant.

G. No Damages for Delay

These clauses are usually in favour of the owner and attempt to allocate the risk of delays to the contractor. Many of these clauses permit extensions of time as the contractor’s sole remedy for a delay.
As with any exclusion of limitation clause, “no damages for delay” clauses will be narrowly construed against their maker. As such, courts will seek to limit or negate application of these clauses where the type of delay was either not covered by the clause or not contemplated by the parties. Courts are also likely to limit or negate these clauses where the delay was unreasonably long, application of the clause was waived by the other party explicitly or implicitly, the other party misrepresented the intent of the clause during negotiations or the delay was a result of active interference or conduct by the owner.

H. Other Clauses

There are other clauses relevant to the issue of delay and disruption claims. Contract change claim and differing site condition clauses are being covered elsewhere in the Seminar.

VI. CONCLUSION

There is a paucity of Canadian case law on the subject of delays and disruptions. The cases cited above represent the heart of jurisprudence in Canada. The degree of sophistication within these decisions varies, but it is relatively clear that the U.S. legal system is much more advanced in discussing and dealing with delay and disruption claims.
APPENDIX “A”

GC 6.5 DELAYS

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, 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.

6.5.2 If the Contractor is delayed in the performance of the Work by a stop work order issued by a court order or other public authority and proving that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, 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.

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 recommend for its members by a recognized contractors’ 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 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 Owners.

6.5.4 No extension shall be made for delay unless notice in writing of claim is given to the Consultant not later than 10 Working Days after the commencement of delay, providing however, that in the case of a continuing cause of delay only one notice of claim shall be necessary.

6.5.5 If no schedule is made under paragraph 2.2.9 of GC 2.2 - ROLE OF THE CONSULTANT, no claim for delay shall be allowed because of failure of the Consultant to furnish instructions until 10 Working Days after demand for such instructions has been made and not them, unless the claim is reasonable.