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PROJECTS

## Ontario lawyers take refresher in handling delays

Don Wall July 10, 2020

**COVID-19** 



Ontario construction lawyers revisited first principles of the law on project delays during a recent professional development session, with webinar participants warned that the initial spirit of collaboration that characterized the early days of the COVID-19 pandemic

**O** might soon be coming to an end.

Jason Annibale, partner with McMillan LLP, served as co-chair for the June 25 Osgoode Professional Development session billed as Advanced Construction Issues: Construction Project Delay and Impact Claims.

Project delays are on the Osgoode curriculum every year but Annibale said in an interview that the topic has never been more important given the impending spike in COVID-related delay claims.

Procedural improvements in the arbitration system that handles most disputes were cited by Annibale as a top priority for reform.

“The phenomenon of delay and measuring it is a real challenge and there are different methodologies employed to understand it,” Annibale explained. “You really do need to understand as a decision-maker, as counsel and as an expert what methodologies ought to be employed and why. That is the key to demystifying the black magic that surrounds delay.”

It’s at the arbitration stage that the “dark art” of loss calculations is on full display, Annibale said.

“The point is how arbitrators and courts perceive the role of experts,” he remarked. “There is some cynicism around it because of the challenge in measuring this phenomenon. And that opens up creativity for some people in terms of advocating certain points over others and that creativity leads to cynicism with decision-makers.”

One reform, Annibale suggested, would see the role of expert witnesses moving beyond advocacy, with experts and the parties “hot-tubbing” to arrive at agreements on facts and getting to the truth.

Annibale and co-chair Andrea Lee, a partner with Glaholt Bowles LLP, identified five best practices as takeaways from their overview session during their webinar. Construction schedules must be more precise, realistic and kept up to date; there must be high levels of communication among construction partners; stakeholders need to appoint designated, responsible project personnel to deal with scheduling; documentation must be more meticulous, organized and consistent; and all parties need to focus on collaboration and innovation to find solutions.

“A happy surprise has been the discovery of a spirit of collaboration and maybe the spirit of innovation too,” Annibale said of the COVID era.

“Using traditional project delivery methods, you can see how contracts pit parties against each other, pointing fingers at each other as a crisis arises. But this didn’t really happen with the clients I was servicing.

“It was, ‘Look, we’ve got a problem, we’re in this together, let’s try to solve this.’”

Examples he gave included a condo developer who went beyond the dictates of the contract to ensure all workers had personal protective equipment, and another condo developer who swiftly stopped a project before any government lockdown took effect to ensure worker safety, even though it triggered an owner-caused delay.

But now, Annibale said, it appears the sector might be entering a phase where parties start being more hard-headed.

“The reason is because parties have overcome the real-time challenge of the pandemic’s impact on the construction process by working together to get the job done as efficiently as possible in the circumstances,” he said, discussing the recent peace. “Working in this way is in all parties’ best interests through real-time adversity. Their interests in mitigating loss align with a collaborative approach.”

But with this phase accomplished, the parties will become more active assessing responsibility and compensation for impacts.

“I think we are going to see parties say, ‘OK, we have the delay, let’s assess the extent of the delays, did COVID-19 really cause the delay you are claiming? Is the delay as long as it is? Is it as expensive as you say?’”

And so, Annibale advised, it will become more important that documents and work schedules be kept up to date with such key elements as photos of the site and evidence of delay claims.

Annibale also noted that many Ontario construction contracts fall short in protecting parties hurt by the pandemic, with few explicitly laying out force majeure relief even though there is a force majeure clause laid out in the CCDC 2 form. Contractors have been forced to turn to the doctrine of frustration or the prevention principle as defences.

For current contracts, Annibale supports the call issued by the Canadian Construction Association and other advocates for governments to offer contractors contractual relief where force majeure relief is not available.

As for the future, he noted that the legal sector is scrambling to prepare documents that account for the new risks.

“Now that it has happened, it could happen again,” Annibale said, “and so people are moving to redraft contracts to accommodate for pandemics and epidemics, and have appropriate notices in play to deal with them.”

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