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Editor's Comments

We are proud to provide you with the 8th edition of our Insurance Law Newsletter.

M^{re} Meïssa Ngarane reviews a recent judgment of the Superior Court concerning a claim for delays caused to a construction project due to the pouring of irregular concrete. This case illustrates how important an expert opinion can be in establishing that delays on a construction project are not necessarily caused by the incident which the client or general contractor try to put the blame on.

Due to the coming into force, next July 1st, of the Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act (better known under the name of **Canada's Anti-Spam Legislation**), sending newsletters such as this one by email will be, from that date, governed by restrictive provisions. To ensure you continue to receive our newsletters in the future, we strongly encourage you to reply positively to the email that delivered it, or if you have received this newsletter otherwise, to send an email to a member of our team giving us your consent to receive our future publications by email.

Finally, we would like to remind you that we offer many conferences recognized by the *Chambre de l'assurance de dommages (CHAD)* and will be pleased to give lectures to groups of 10 or more participants that you may wish to organize.



M^{re} Paul A. Melançon

The schedule of a construction project: A critical standard measurement in evaluating a claim for delay



M^{re} Meïssa Ngarane

To support a claim for delay in the progress of a construction work, a claimant must demonstrate that the delay for which damages are claimed was actually caused by the alleged fault. Within the framework of such legal action, contemporary documents evidencing the progress of the work both before and after the occurrence, such as the project master schedule, daily reports and records demonstrating the use of labour, machinery and materials, are of great importance.

The recent judgement rendered by the Superior Court in *Développement des éclusiers vs. Ciment Québec inc.*¹ provides a great example of the need to rely on documents that show the progress of a construction project when assessing the impact of a delay in the completion of a sequence on the advancement of the overall project.

Facts

On October 20, 2003, defendant supplied concrete for the pouring of approximately twenty columns under the terrace and ground floor's structural slab of the project's phase in dispute.

On October 21, 2003, it was found that the concrete supplied by defendant was irregular. On October 22, 2003, demolition and reconstruction of the affected items began. The ground floor slab was completed on November 14, 2003, while the structure of the phase in dispute was completed on February 17, 2004.

At the trial, plaintiff's claim amounted to \$1,011,534.99, including \$77,333.94 for costs directly related to the demolition and reconstruction of the affected elements, while the remainder consisted of additional costs for completing the project caused by the delays that the need to remediate the affected elements occasioned.

Plaintiff claimed that the need to redo the elements containing irregular concrete, particularly during a period where winter conditions and the holiday season prevailed, significantly delayed the completion of the project. According to plaintiff, costs

related to the additional delay of eight weeks should be borne by defendant.

Defendant counterargued that the delivery of irregular concrete had in no way affected the critical path of the project. It claimed that, at the beginning of the corrective work, the master schedule was already behind by eleven working days. Once the repairs work was completed, the master schedule was only behind by twelve working days.

Analysis

• Impact of corrective work on the progress of the overall project

Since defendant admitted the non-compliance of the concrete in the affected elements, the Court had to decide whether the corrective work had impact on the advancement of the project.

Before starting its analysis of the evidence, the Court stated that:

"[53] The onus of proof and the preponderance of the evidence are the two main pillars of the temple on which plaintiff's claim must rely. The advancement of a construction project is not assessed in the abstract but depends on several factors that are more or less predictable. A construction project, especially one of the scope of the project in dispute, should necessarily depend on plans and specifications and construction schedules. As correctly pointed out by both parties, there must be a critical path in the conduct of the work if construction deadlines and anticipated costs relative to the project are to be respected.

[54] A delay in one portion of the site does not necessarily imply a delay on the overall project. Let us consider a simple example: a window manufacturer must deliver its windows on site by December 1st, the date scheduled for the installation of windows in order to close the building when comes winter time. Windows are delivered on December 15th. Disaster? Yes, if the building is ready to receive windows; no, if the structure is incomplete. Delay? Yes. Impact? No."¹²

[Our translation, our emphasis]

Plaintiff claims that the work schedule was only useful for financing purposes was not retained by the Court. Moreover, the Court seems to have given little probative value to the testimonial evidence and expertise presented by plaintiff on the advancement of the work. The Court noted that the evidence was based on vague memories reported nearly nine years after the events in dispute.

The Court preferred the testimony rendered by defendant's expert who opined that the project was already behind by eleven days from the initial work schedule at the beginning of the corrective work. Indeed, the testimony of defendant's expert was notably based on photographs and daily project reports.

The Court found that the mitigation measures implemented by plaintiff and its subcontractor, related to the corrective work, had only served to preserve the delay already incurred upon delivery of irregular concrete.

In the end, the Court concluded that plaintiff's claim should be established at \$ 89,946.44 plus taxes, representing the direct costs related to the replacement of the irregular concrete, more

precisely the cost of demolition and reconstruction of the affected elements and mitigation measures for corrective work.

1. 2013 QCCS 6307.
2. *Ibid*, paragr. 53 & 54.

The content of this newsletter is intended to provide general comment only and should not be relied upon as legal advice.

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