Breaking Down the Walls: A Series on Construction Delay

In the fast-paced world of construction, delays and disruption can pose significant challenges to project success. In this *Breaking Down the Walls* series, Gary Brummer, a partner at Margie Strub Construction Law LLP, and Jacob Lokash, an associate at the firm, draw upon their extensive legal expertise to explore the complexities of construction delays. They have collaborated with Thomas Certo, a senior director in the Construction Disputes and Advisory Group at Ankura Consulting Group LLC, whose insights into the technical aspects of delay analysis provide a comprehensive perspective on this critical issue.

Together, they simplify the fundamentals of construction delays, providing readers with the necessary tools to proactively identify and assess delays on their own projects in Canada. At the end of this six-part series, we will have explored the following topics:

1. Delay Claim Basics
2. Delay Damages
3. Disruption vs. Delay
4. Concurrent Delay
5. Forensic Schedule Analysis Techniques
6. Construction Delay Best Practices in Canada

Concurrent Delay

Concurrency is a commonly argued concept when putting forth or defending against a delay claim. This contentious issue in construction arises when both contractor and owner impacts have the same effect on the critical or near-critical paths to completion. [1]

The complex nature of concurrent delays can make it challenging to accurately quantify the delays and ultimately determine responsibility. Many readers may be familiar with the "concurrency defence" where a claim is dismissed with a metaphorical hand wave by pointing out non-excusable issues encountered on the project, regardless of whether these issues actually impacted the critical path.

This article examines some of the fundamental aspects of concurrent delay, including:

- Reviewing the various definitions of concurrent delay,
- Identifying concurrent delay, and
- Recent case law that sheds light on how courts in Canada are addressing concurrency.

Defining Concurrent Delay

The complexity of assessing concurrent delay begins with a lack of clarity on how concurrency is defined for construction delays. Without a clear definition, differing views of concurrency have arisen both in

[1] In a claims setting, these delays are typically the responsibility of opposing parties or force majeure.

terms of scheduling and in assessing legal entitlement to an extension of time ("**EOT**"). These divergent views are readily apparent when searching for industry accepted definitions of "*concurrent delay*", including:

- The Society of Construction Law Delay and Disruption Protocol ("**SCL Protocol**")[2],
- The Association for the Advancement of Cost Engineering International Recommended Practice No. 29R-03 *Forensic Schedule Analysis* ("**AACEi 29R-03**"),[3] and
- The American Society of Civil Engineers Standard 67-17 *Schedule Delay Analysis* ("**ASCE 67-17**").[4]

The SCL Protocol provides two broad definitions. The first definition is for so-called "true" concurrent delay, and the second provides a "more common" description of concurrency:

> *10.3 True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.*
>
> *10.4 In contrast, a more common usage of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.*[5]

Moving to the AACEi 29R-03, we encounter five different definitions within the same document. The document presents a selection of differing opinions and applications associated with concurrent delay:

> (*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 period.*
>
> *(3) True concurrent delay is the occurrence of two or more delay events at the same time, one an employer 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.*[6]

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[2] The Society of Construction Law's Delay and Disruption Protocol, 2nd edition, February 2017 .
[3] AACE International Recommended Practice No. 29R-03, April 25, 2011 Revision.
[4] ASCE Standard ANSI/ASCE/CI 67-17, 2017.
[5] SCL Protocol, paragraphs 10.3 and 10.4.
[6] AACEi 29R-03, page 102.

Lastly, the ASCE 67-17 offers that:

> *8.1 Concurrent delay can be described as a situation where two or more critical delays are occurring at the same time during all or a portion of the delay time frame in which the delays are occurring.*[7]

While the definitions contain nuanced differences between each other, they can be distilled into a few common themes in the context of construction claims:

- Concurrent delays involve delays occurring at the same time or in the same analysis period,
- The concurrent delays would cause a movement of the contractual completion date (or another contractual milestone that is being measured), and
- The concurrent delays would each cause critical path delay if the other did not exist.

The difficulty in defining concurrent delay has fuelled uncertainty in construction disputes and left the concept of concurrent delays open to exploitation. The next sections will shed light on how these different approaches are implemented and present situations where the "concurrency defence" may be overcome using the documents in the project record outside the schedules themselves.

Identifying Concurrent Delays

Project schedules can have a seemingly infinite number of moving parts, and forensic schedule analysis attempts to identify when and where delays occur within these elaborate schedule networks. While a forensic scheduling expert will strive for accuracy in their analysis, the SCL Protocol cautions that virtually no analysis will be perfect:

> *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.*[8]

The Canadian courts have acknowledged this "common sense" approach to the practical complexity in identifying and assessing concurrent delays. This was eloquently summarized by Justice Hood in *Walsh Construction v. Toronto Transit Commission et al.*, 2024 ONSC 2782 [**Walsh**]:

> *A construction project of any complexity consists of a multitude of moving parts. Work can be carried out at the same time at a number of locations; it is not simply a linear process like the building of a Lego model. A delay on one aspect of a project may not have an impact on its ultimate completion date because there may be other delays happening concurrently that are, in the scheme of things, more important or critical to the eventual completion of the project.*

Even a robust schedule analysis will involve some amount of subjectivity. A clear and rational opinion, based on the contemporaneous records and facts of the cast, rather than a non-sensical one simply based on the schedules alone, would be more acceptable to the trier of fact. An analysis is strengthened by ensuring that it is well reasoned and considers the available information in the contemporaneous project record, in addition to the project schedules.

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[7] ASCE 67-17, page 15.
[8] SCL Protocol, paragraph 10.11.

The following subsections discuss some of the factors that a forensic scheduling expert could consider, within both the project schedules and the contemporaneous project record, in identifying and apportioning concurrent delays. These factors include:

- The Literal and Functional Theories of concurrency,
- Pacing delays,
- Acceleration measures, and
- The "but for" concurrency argument.

i. Literal and Functional Theories of Concurrency

Concurrency is based on the idea that multiple delays are impacting a project's critical path at the same time. However, there are different interpretations of what "at the same time" means to an analyst. While two or more events are occurring on the same calendar day, these events are what AACEi 29R-03 refers to as "literal" concurrency. However, if the events merely occur within the same analysis period,[9] they are said to have "functional" concurrency. AACEi 29R-03 explains:

> *Under the Literal Theory, the delays have to be literally concurrent in time, as in "happening at the same time." In contrast, under the Functional Theory, the delays need to be occurring within the same analysis period.*
>
> *Of the two, the functional theory is more liberal in identifying and quantifying concurrency since the delays need only occur within the same measurement period, while in the literal theory, only delays require same-time occurrence.*

Considering the SCL Protocol definitions cited previously, it also differentiates between "literal" and "functional" approaches (definition repeated below for ease of reference):

> *10.3 True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. True concurrent delay will be a rare occurrence. A time when it can occur is at the commencement date (where for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work), but it can arise at any time.*
>
> *10.4 In contrast, a more common usage of the term 'concurrent delay' concerns the situation where two or more delay events arise at different times, but the effects of them are felt at the same time.*[10]

The AACEi 29R-03 Literal Theory is commensurate with the SCL Protocol "true" concurrent delay definition, while the AACEi Functional theory is more consistent with the SCL Protocol "common" definition.

The Literal or "true" theories insist that, to demonstrate concurrency, the delay events must occur at the same moment in time. An example implementation of the AACEi Literal Theory or SCL "true" theory on delays to a condominium tower is demonstrated in the following Figure 1:

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[9] A common forensic schedule analysis technique is to delineate the project timeline into analysis "periods" or "windows" when evaluating critical path delay. This technique will be further discussed in Part 5 of this series in *Breaking Down the Walls: Forensic Schedule Analysis Techniques.*

[10] SCL Protocol, paragraphs 10.3 and 10.4.

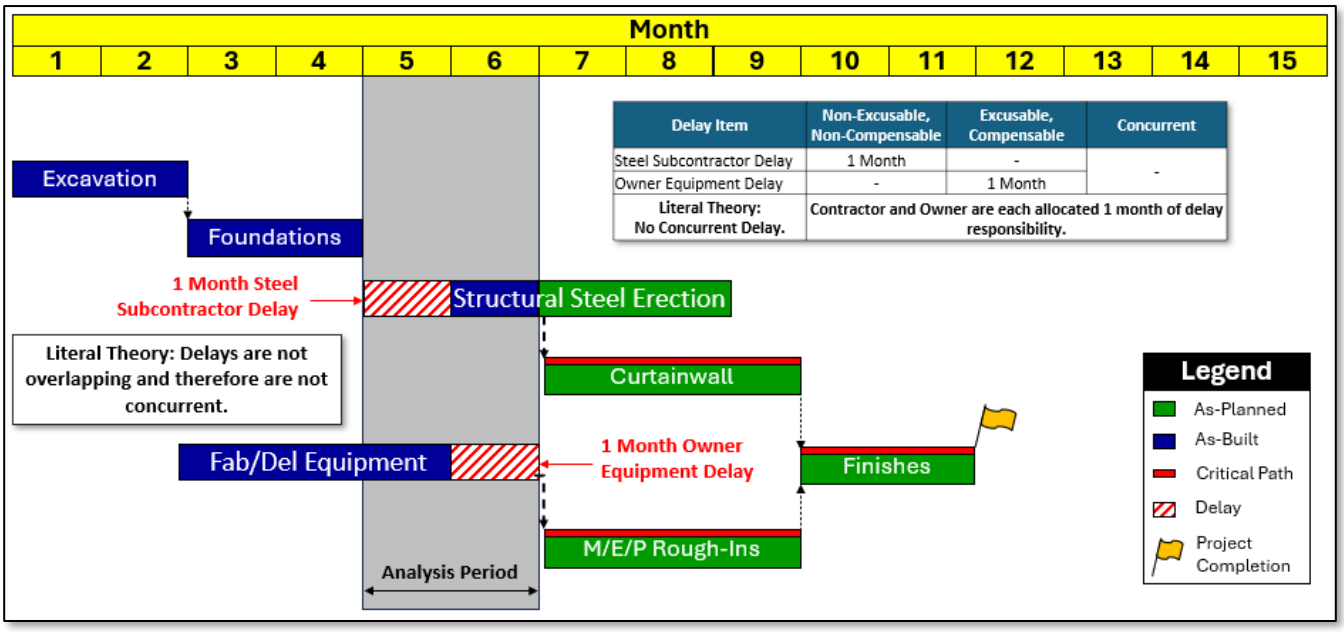

Figure 1 - Literal Theory of Concurrency Example

In Figure 1 above, the two-month period from the start of Month 5 through Month 6 is being analyzed for delay. The project had two separate delays which impacted critical paths to completion: a one-month delay from the structural steel subcontractor failing to mobilize during Month 5, and a one-month delay to the delivery of owner-supplied equipment during Month 6. Under the AACEi Literal Theory or SCL "true" theory, these delays are not occurring at the same time and are therefore not concurrent. The analysis would assign one month of non-excusable, non-compensable delay to the contractor for failing to mobilize its subcontractor, and one month of excusable, compensable delay to the owner for the late owner-supplied equipment rather than 2 months of concurrent delay in the analysis period.

Although the delay days may appear to be a "wash" in this period, as both parties are allocated one month of delay responsibility, the allocation remains an important factor when determining delay damages. If one party's alleged delay damages (or liquidated damages) are higher than the other, the result is no longer a simple offset, and one party may be at a net loss position because of this critical path delay allocation.

In contrast, the Functional Theory considers delays across the entire analysis period to identify concurrency, as illustrated in Figure 2, below.

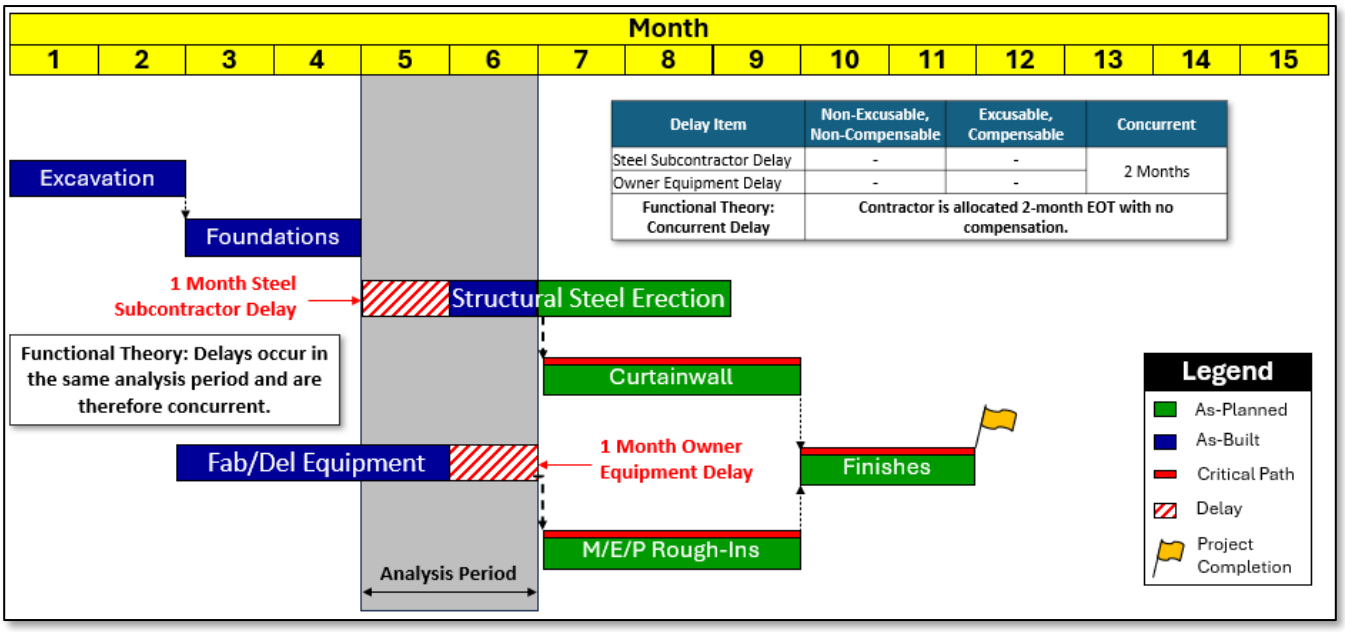

Figure 2 - Functional Theory of Concurrency Example

The above Figure 2 shows the same project delays and analysis period as the AACEi Literal Theory and SCL "true" theory in Figure 1, but will yield different results. The AACEi Functional Theory and SCL common theory state that delay events attributable to opposing parties across an entire analysis period can be considered concurrent. As a result, the Month 5 steel subcontractor mobilization and Month 6 owner-supplied equipment delays are considered concurrent during the two-month analysis period. The analysis would conclude that, in this period, the contractor would be entitled to a two-month EOT and associated relief from owner liquidated or delay damages but not entitled to claim for its own delay damages.

The choice between these theories can significantly influence the outcome of delay claims. Both theories have seen success in different jurisdictions, although the Walsh decision seemingly favored the AACEi Functional Theory and SCL common theory.

While both the Literal and Functional Theories are grounded in the project schedules, it should first be determined if the delays are actually causing critical path delay prior to determining whether they are concurrent. For example, if an owner knows that it is responsible for excusable delay in a period, it may try to argue that the contractor encountered its own, non-excusable delay in this same period (either simultaneously under the Literal Theory or simply within the analysis period under the Functional theory).

Here, a careful review of the project record may support or reject an argument for concurrency if the assertion lacks the causation required for a well-reasoned analysis. While the other party's delay may seem concurrent at first, there may be underlying factors that render the delay non-excusable. Further, a review of the contract may show that concurrency has already been defined, and that definition should be utilized in a forensic review when determining if concurrency existed.

ii. Pacing of Work vs Concurrency

Pacing occurs when a contractor or subtrade deliberately lowers its output to match a supervening delay or "*parent delay*", provided such pacing does not impact the completion of the project. In this way, a contractor could potentially decrease its resources, save costs and mitigate the damages incurred during the parent delay period. AACEi 29R-03 guides:

> *There may be no need to maintain the original schedule in the face of a known delay caused by the other party – no need to "hurry up and wait". In other words, it is the consumption of float created in the pacing activity by the occurrence of the parent delay.*[11]

The decision to pace or suspend a scheduled activity does not come without risk. Pacing in response to a parent delay can appear to be concurrent with owner's delay if the schedules are viewed in isolation. Thus, a contractor may allege that it was pacing the work as a rebuttal to an owner's concurrency argument to maintain the excusable, compensable nature of the parent delay.

It follows, then, that a contractor should be prepared to defend its pacing decision with contemporaneous documentation. It is critical for a contractor to maintain records that demonstrate a clear decision, at the time, to pace a critical or near-critical activity based on the parent delay.[12] Failure to evidence these factors could mean that the contractor's pacing is deemed a concurrent delay and therefore prevent the contractor from claiming prolongation costs. Ideally, a contractor should provide written notice of its decision to pace works.

A review of the contract for pacing terms and conditions should be made prior to implementing the pacing of work to determine what is allowable under the specific agreement.

iii. Impacts of Acceleration on Concurrency

If a project, or part of a project, begins to fall behind its planned schedule duration, the contractor may implement certain acceleration measures. These measures aim to make up for lost time and may be voluntarily deployed by the contractor or directed by the owner.

When a schedule is accelerated, tasks are compressed or stacked to complete the project within the specified amount of time, leading to tasks being performed simultaneously to meet the original deadlines. Acceleration measures increase schedule complexity and the associated difficulty in isolating delays, which can, without sufficient contemporaneous evidence, manifest and may be considered concurrent delay.

In assessing concurrency during a period of acceleration, the project record, including the factors leading to the acceleration, should be considered. For example, if an owner refuses to acknowledge its own delays, but the owner still insists on maintaining the original completion date, the contractor may employ constructive acceleration measures to comply with the owner's demand and may have a stronger case to claim damages in this period.

Acceleration may therefore be one of the exceptions to the rule that concurrency will only result in 'time but no money'.

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[11] AACEi 29R-03, page 111.

[12] AACEi 29R-03 refers to this requirement as "Evidence of Contemporaneous Intent". AACEi 29R-03, page 113.

iv. The "But for" Argument for Concurrency

Like the pacing defence, contractors and owners may try to employ a "but for" argument to establish concurrent delays to limit potential prolongation cost or liquidated damages exposure. In this hypothetical approach, the analyst will assert that, if the controlling critical path delay were set aside, a non-critical path delay attributable to the opposing party will only then appear as critical, and therefore the delays are concurrent for some amount of time.

This approach, sometimes referred to as a "collapsed as-built," attempts to elevate a non-critical impact as critical. This ignores one of the prerequisites for determining concurrent delay, which is to establish that both delay events influence the critical or near-critical path of the project. Often, this theoretical exercise fails to make that determination.

Potential Damages for Concurrent Delay

Where concurrent delays are proven, the general rule is 'time but no money' entitling a contractor to an EOT without compensation (i.e., its an excusable, but non-compensable delay). This concept that concurrent delays should result in an EOT is confirmed in the final sentence of the tenth core principle set out in the SCL Protocol:

> *Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due.*[13]

Similarly, AACEi 29R-03 provides that:

> *Typically, when both Contractor and Owner are concurrently responsible for an extended period of performance, the Contractor is granted an extension of contract time without compensation and the Owner forgoes the collection of liquidated/stipulated damages.*[14]

While a contractor is typically precluded from recovery of delay damages in cases of concurrency, the contractor may be able to claim additional costs arising specifically from the owner delay event, if proven to be beyond what the contractor would have incurred from its delay event, alone. The SCL Protocol guides:

> *Where Employer Delay to Completion and Contractor Delay to Completion are concurrent and, as a result of that delay the Contractor incurs additional costs, then the Contractor should only recover compensation if it is able to separate the additional costs caused by the Employer Delay from those caused by the Contractor Delay. If it would have incurred the additional costs in any event as a result of Contractor Delay, the Contractor will not be entitled to recover those additional costs.* [15]

While concurrency may serve as a valid defence to shield an owner from a contractor's prolongation claim, the time to complete will be extended, and the owner will likewise be precluded from enforcing any liquidated damages that it would normally be entitled to claim had there been no EOT.

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[13] SCL Protocol, paragraph 10.
[14] AACEi 29R-03, page 101.
[15] SCL Protocol, paragraph 14.

The 'time but no money' concept was recently confirmed in *Walsh*: "*However, this is complicated by the fact that there may be concurrent delays for which Walsh is responsible; these would make an excusable delay non-compensable*.[16]"

Concurrent Delay in Canada (Ontario)

Construction disputes are predominantly battled behind the veil of confidentiality in the arbitration arena, and there is relatively little definitive Canadian authority as to how concurrency should be treated. There are two recent decisions, however, which provide guidance on the Ontario courts' approach to concurrency:

- *Schindler Elevator Corporation v. Walsh Construction Company of Canada* 2021 ONSC 283 [**Schindler**], and
- *Walsh Construction v. Toronto Transit Commission et al.*, 2024 ONSC 2782 [**Walsh**].

In Schindler, Master Robinson seemingly rejected the view that "true" concurrent delay must exist, stating that: "*I do not accept … that concurrent delay requires two co-critical and co-controlling activities that are parallel in time and identical in duration.*[17]" He added that such a position on concurrent delay would, in his view, be "*too rigid for use by courts, at least in more complex cases of concurrency,"* and that such an application, *"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]"

Instead, Robinson favoured the position that, "*It 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*[19]," adding that it "*is more realistic and, in terms of the court's assessment, more likely to lead to a fair and just result.*[20]"

In Walsh, Justice Hood summarised the courts approach to concurrent delays, stating that,

> *Concurrent delay on a project is often difficult to evaluate, since it involves evaluating how each event delayed completion of the project, which is a more involved and speculative assessment 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: see Schindler Elevator Corporation v. Walsh Construction Company of Canada, 2021 ONSC 283, 17 C.L.R. (5th) 253, at paras. 301-303.*[21]

Canadian courts have adopted a more relaxed approach, recognising that concurrent delays can encompass overlapping events, and not simply be confined to simultaneous delays.

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[16] *Walsh* at paragraph 89,
[17] *Schindler* at paragraph 346.
[18] *Schindler* at paragraph 346.
[19] *Schindler* at paragraph 346, citing: Grenier, G., *Evaluating Concurrent Delay — Unscrambling the Egg* (2006) 53 CLR (3d) 46.
[20] *Schindler* at paragraph 346.
[21] *Walsh* at paragraph 89.

Conclusion

We hope that this article (read with Part 1, Part 2 and Part 3 of this series) provides readers with a better understanding of the impact concurrency can have on their delay claims. While this article is written primarily from the perspective of asserting a concurrency defence, the principles apply equally to other stakeholders who are looking to rebut a claim of concurrency.

Ultimately, a determination of whether concurrency exists will be guided by project specific factors such as the quality and availability of documentation and evidence, jurisdictional nuances, and the terms of the contract. Forensic scheduling experts, cost consultants, damage experts, and construction lawyers are best placed to identify and support such claims.

In Part 5 of this *Breaking Down the Walls* series, we will investigate forensic schedule analysis techniques and provide behind the scenes input into what goes into examining delays on a project.

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