Actual Acceleration and Constructive Acceleration in Canadian Construction Claims

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When one treads the intricate path of construction claims, a keen understanding of concepts such as ‘actual acceleration’ and ‘constructive acceleration’ becomes crucial. While these terms may appear to be mere technical jargon at first glance, they in fact encapsulate distinct scenarios that arise from deviations in schedule and unforeseen delays, which can profoundly impact the complex machinery of a construction project. A construction contract, much like an orchestra, requires all its elements to work harmoniously towards the culmination of a performance—in this case, the successful completion of a project. An irregularity or delay can disrupt this harmony, necessitating adjustments or, in our terms of interest, ‘acceleration’.

The principles of ‘actual’ and ‘constructive’ acceleration are not only elucidated in textbooks or legal dictionaries but have also been tested and refined in the crucible of the courtroom. One such illuminating case that explicates these concepts in the Canadian legal milieu is the 2002 British Columbia Supreme Court (BCSC) case, Golden Hill Ventures Ltd. v. Kemess Mines Inc.

Actual Acceleration: An Examination and its Implications

In the construction world, ‘actual acceleration’ describes an environment where the project owner, in response to unforeseen and excusable delays, directs the contractor to hasten the pace of work, with the aim of completing the project before

the extended deadline. As the term ‘actual’ suggests, this acceleration arises from a concrete instruction by the owner, making it a tangible aspect of project management.

The BCSC decision in Golden Hill Ventures Ltd. v. Kemess Mines Inc. succinctly summarizes this concept. However, to truly grasp the implications and nuances of ‘actual acceleration’, one must delve into the precedents from which it emerged. A particularly informative case in this regard is Morrison-Knudsen Company v. British Columbia Hydro & Power Authority, in which the concept of ‘acceleration’ was elaborated by Justice Macdonald. He defined acceleration in a construction contract as the act of ‘speeding up the work’ or ‘increasing the rate of performance’ to surmount the challenges of delays and to ensure the work is completed within the stipulated contract dates.

In this expansive understanding, actual acceleration isn’t just a one-dimensional response to delays; it covers a spectrum of situations where delays can be attributed either to the contractor, the owner, or a combination of the two. It serves as a mechanism to foster equitable treatment of the parties involved. In instances where the delays are squarely within the owner’s sphere of responsibility, and despite these delays, the contractor is compelled to accelerate, the additional costs borne by the contractor become the owner’s liability. This principle of actual acceleration underscores the importance of fairness in contract execution and enshrines the idea that the financial burdens arising from owner-induced delays should not be shouldered by the contractor.

The realm of actual acceleration, therefore, is not merely about catching up with lost time. It is about understanding the root causes of the delays, attributing responsibility appropriately, and ensuring that the eventual financial implications are justly addressed. It forms a cornerstone of construction contract management by emphasizing fair treatment and the sharing of risks and responsibilities between the

contractor and the owner.

Constructive Acceleration: An Explication and its Ramifications

The concept of ‘constructive acceleration’ introduces an additional layer of complexity to our understanding of acceleration within construction contracts. The term ‘constructive’ implies a scenario where an acceleration is inferred rather than being explicitly ordered, illustrating the nuanced interplay between contract management and legal interpretation.

In this vein, constructive acceleration is born out of circumstances where there has been an excusable delay which, for whatever reason, the owner refuses to accept, thus pressing for adherence to the original completion date. This may occur even when an extension to the project schedule could have been a reasonable and feasible solution. Consequently, the contractor is forced to operate within a compressed timeline, effectively ‘accelerating’ the work pace without explicit instructions to do so.

This somewhat abstract concept is more easily understood through concrete legal precedents. A prominent case that serves to elucidate the essence of constructive acceleration is W.A. Stevenson Construction (Western) Ltd. v. Metro Canada Ltd. Here, the contractor was bound to the original milestone dates, despite facing a range of external challenges such as adverse weather conditions and a delay in the removal of buildings by the owner. In this context, the insistence of the owner on meeting the original deadline obligated the contractor to expend additional resources, leading to a clear-cut instance of constructive acceleration.

The case illustrates that a strict adherence to original contract timelines, even in the face of external delays or hindrances, can inadvertently lead to a situation where the

contractor is essentially running a race against time, striving to maintain pace with the project schedule. Here, the constructive acceleration becomes a byproduct of a rigid contract enforcement approach, which fails to account for the evolving dynamics of a construction project.

In conclusion, constructive acceleration represents a delicate balancing act between contractual obligations and the practical realities of project execution. It showcases the need for flexibility and mutual understanding between the owner and the contractor, with an emphasis on accommodating unforeseen changes in project dynamics.

Judicial Interpretation and Practical Implications

The concepts of actual and constructive acceleration aren't just theoretical constructs. They carry profound implications for project management, financial risk, and dispute resolution within the sphere of construction contracts. A meticulous analysis of judicial decisions is essential to discern the practical significance of these concepts.

The principles derived from the cases of Morrison-Knudsen and W.A. Stevenson Construction underline the importance of equitable treatment and reasonable adjustment of timelines. In these cases, the owners imposed a rigid completion date despite their own delays, which under usual circumstances, would have warranted extensions for the contractors. As a result, the contractors had to apply more resources, such as equipment and personnel, to speed up project completion. The owners, therefore, were obliged to indemnify the contractors for these additional costs.

Interestingly, the courts' understanding of acceleration was not confined to the whole project but extended to 'parts of the work'. The ruling in Golden Hill Ventures Ltd. v. Kemess Mines Inc. emphasized that acceleration of certain sections of the work, triggered by the necessity to adhere to an updated

schedule, was sufficient to establish an obligation to compensate. In essence, this ruling extends the scope of acceleration, placing it not just at the macro-level of the entire project but also at the micro-level of individual work components.

In conclusion, it is essential to approach actual and constructive acceleration not merely as theoretical constructs, but as practical tools for managing and resolving construction disputes. They require owners to balance their desire for swift project completion with the realities of excusable delays and the financial burdens they impose on contractors. These principles promote fair treatment and risk-sharing, holding owners accountable for delays within their control and preventing them from enforcing inflexible deadlines. By doing so, they ensure that the wheels of the construction industry keep turning, even in the face of unexpected roadblocks.

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