CONSTRUCTION LAW LETTER

Volume 39 • Number 5 May/June 2023

SPECIAL ISSUE: DELAY EXPERTS

Howard Krupat
Partner, DLA Piper (Canada) LLP

Introduction

Recent years have been marked by tremendous growth in the size and complexity of construction projects, across all sectors of the industry. It is not a surprise then that construction lawyers have seen a corresponding growth in the magnitude and scope of construction disputes — in all forums of dispute resolution. This trend can be juxtaposed against ongoing efforts to simplify dispute resolution processes. Several Canadian provinces have implemented statutory adjudication. In contractual dispute resolution provisions, laddered processes that are designed to achieve early, sustainable solutions are common. Examples include escalating negotiations, mediations, Dispute Review Boards, referees and expert determinations. Some of these processes are intended to replace traditional arbitration and litigation proceedings, while others are intended to be supplemental.

However, none of these trends have eliminated the prevalence of delay claims in major construction disputes. Moreover, it is has become exceedingly rare to advance or defend a delay claim without a report from a delay expert. Such reports fall into a challenging category of opinion evidence, as they often require a detailed review of virtually everything that happened on a construction project.

Despite the significance of the role that delay reports play and the investment they require, it is not uncommon to see delay reports rejected during hearings for a range of reasons.

The purpose of this Special Issue is to examine the role that delay experts play and how they can most effectively be used in complex construction disputes. I have posed eight questions on these issues to 14 individuals who represent a variety of roles and jurisdictions and, importantly, are "in the trenches". They include lawyers, arbitrators, delay experts and an ODACC adjudicator. I hope that you will find their responses to be insightful.

Glenn Ackerley
WeirFoulds LLP, Toronto

Carol Albert,
Retired Master, S.C.O.

Zey Emir
Revay and Associates Ltd.

Harvey Kirsh
Kirsh Construction ADR Services Ltd.

Chad Kopach
Blaney McMurtry LLP

Seema Lal
Singleton Reynolds LLP

Continued on Page 2

CONSTRUCTION
LAW LETTER

Construction Law Letter is published six times a year by LexisNexis Canada Inc., 111 Gordon Baker Road, Suite 900, Toronto, Ont., M2H 3R1, and is available by subscription only.

ISBN 0-433-51429-9 ISSN 433500824
ISBN 0-433-51438-8 (Print & PDF)
ISBN 0-433-51439-6 (PDF)

Subscription rates: $396 (Print or PDF)
$528 (Print & PDF)

LexisNexis Canada Inc.
Tel.: (905) 479-2665
Fax: (905) 479-2826
E-mail: constructionlaw@lexisnexis.ca

Sharon Vogel
Singleton Reynolds LLP

Catherine Gleason-Mercier
Singleton Reynolds LLP

Chris Larkin
Secretariat International

Anthony Meagher
DLA Piper LLP (US)

Stephen Morrison
Stephen Richard Morrison ADR

Patricia Morrison
Borden Ladner

Augusto Patmore
KPMG Canada

Dr. Anamaria Popescu
BRG Services

1. *When is the best time to retain a delay expert? What factors impact timing?*

Ackerley: In most cases, early engagement can be very helpful. Experts can give guidance on the data to be collected and carry out preliminary analyses that help manage expectations and mitigate damages. However, if the expert is too deeply involved too early in the project, true independence might be lost for later witness testimony.

Albert: As early as possible. As soon as litigation over delay is likely, a delay expert can look at critical delay and assess the contribution of each party to delay. It is helpful for trial evidence but also to evaluate the strength or weakness of a case.

Emir: Both contractors and owners should have experienced planners on staff to document, demonstrate and communicate the impacts of changes and delays on the schedule. If such experience is not available, retaining a delay expert should be considered as soon as problems are identified. Without quality documentation, it can be difficult for a delay expert hired late in the project to substantiate the problems and their impacts.

Kirsh: If the role of an expert is as a credible **advisor** to prove technical issues of causation and damages, then the best time to retain him/her would be at the earliest opportunity so as to assist counsel in understanding the nature of the project, the scope of work, and the causes of delay; in formulating and formalizing the claim/defence; and in developing the questions to ask on

both discovery and at a hearing. If the delay expert is expected to act as an **expert witness** at a hearing, it might be more cost-effective to wait until all or most of the testimony and documentary evidence is in evidence. Retaining an expert early allows for more time to seek out and digest the best available evidence, and to provide a realistic determination of the likely causes and extent of delay. On the other hand, retaining an expert later, to testify at the hearing, allows for cost savings in the event that the claim can be settled early.

Kopach: The most significant factor is that the Adjudicator is under strict time limits to get their determination out — the whole process is 46 days. Unfortunately for a respondent, the expert will have to be engaged as soon as there is a hint of a claim. Claimants can take their time to prepare their claims, given that there are few restrictions on when an Adjudication can be commenced. As a result, the Claimant can come in with a fully baked claim, including the delay expert's analysis. The respondent will be up against a time restriction once the adjudication starts. It is generally assumed that the Notice of Adjudication is not the first time the respondent has heard of the dispute, and there is an expectation that they have had some time to marshal their evidence. This all means that once the Claimant has given its documents, there will be little time for the respondent to get its responding material together and be in compliance with the Adjudication timelines.

Lal, Vogel and Gleason-Mercier: The timing depends on the nature of the dispute, but often the earlier you engage an expert the more time you have to develop an understanding of the delay arguments. It is important to engage an expert when they can be provided with meaningful information and documents about the delay events so that the expert can provide useful guidance to assist in navigating the delay issues. One issue to consider is whether the expert is being retained to provide strategic advice in relation to a dispute or, alternatively, to provide an expert report to be tendered in the proceeding. In some cases, there may be benefits to retaining an expert early on, to provide strategic guidance in relation to the delay issues and a separate (truly objective/neutral) expert to actually prepare the report to be tendered. This provides the client with the benefit of the expert's expertise, without raising any concerns about objectivity/neutrality.

Larkin: The factors that impact timing include the dispute resolution procedure in the contract, when the delays occur, the extent of the impacts, the desire for early resolution, availability of project staff and the importance of the expert seeing the impact in real time. Appointing a delay expert soon after the delay occurs can help the party quickly understand the strengths and weaknesses of its position. This can lead to an early resolution. Early appointment can also provide the expert with an opportunity to see the delay impacts directly and advise on the records that should be kept. Care is needed with early appointments, however, to avoid arguments later that the expert is biased and not objective. Appointing the delay expert after the project has finished helps avoid arguments on impartiality. One downside is that the expert will not have an opportunity to observe construction and the delays and may not have access to project staff.

Meagher: Depending on which side of the dispute you are on, retaining a delay expert before the project is over can be important. A contractor experiencing delay probably would benefit from hiring a delay expert while the delay is ongoing to help identify and document owner-caused delay. For the owner, that probably is less important and retaining a delay expert is more a function of having someone on board in sufficient time to perform a delay analysis and issue a report by the deadline in the litigation/arbitration. The main factors influencing timing are the party's role in the project and the deadlines in the dispute.

P. Morrison: The earlier you can retain a delay expert when issues arise, the better. Retaining a delay expert while the project is ongoing allows the expert to have access to the project team, who may not all be available after the project is complete. This is particularly helpful on projects where more complicated technical issues are impacting the project. Also, an early delay analysis (which can take significant time to prepare) assists in framing the claim and strategy. Input from the delay expert is critical for the discovery process. Lastly, retaining your delay expert early helps with avoiding conflicts, especially in multi-party disputes.

S. Morrison: Ideally, a delay expert should be retained as soon as possible after it becomes clear there is a possibility of a delay being asserted. It is far easier for the expert to monitor the situation, record information, and assess the impact on the critical path as the project is unfolding, rather than trying to reconstruct events after the fact based on the documentary record and imperfect and divergent recollections. If retained at an early stage, the delay expert can also ensure that there is a properly developed critical path schedule that is kept updated for the balance of the project. The lack of such a schedule is often the Achilles' heel of many contractor delay claims. The expert can also monitor the impact of the delay on the various subcontractors and suppliers to be in the best position possible to help the prime contractor defend against their claims.

Patmore: Delay experts are usually not involved until one of the contract parties escalates a dispute to mediation, arbitration, or litigation. However, delay experts can also be retained upfront as "consulting experts" to advise a client on scheduling matters. In such cases, the expert can play a crucial role determining avenues for recovery. It is not advisable that consulting delay experts also act as expert witnesses in litigation as this would create a conflict of interest.

Popescu: The best time to retain a delay expert is early in the disputes process, before a statement of claim has been filed. This assists the expert to understand what types of documents are available —especially causation documents such as daily reports, meeting minutes and schedule data. The expert can also consider the integrity of the schedules, whether they are available in electronic or non-native format and their frequency of updates. Then the expert can determine the type of methodology to use, perform a high-level analysis of the critical path and delays and, determine if there is adequate documentation to tie cause to effect.

2. *What steps should parties take to ensure they are best positioned to efficiently and effectively benefit from the retainer of a delay expert?*

Ackerley: Having all the relevant data organized is critical. Schedule updates, work records, site photos, Requests for Information and Site Instructions are a few examples of the categories of documents to be inevitably reviewed by the expert, in addition to all the emails and other relevant communications. Making the expert sift through boxes of unorganized materials is incredibly inefficient.

Albert: Provide the expert with all the facts (helpful and harmful) as neutrally as possible. The best way for the opponent to discredit your expert is through a faulty factual foundation.

Emir: As delay experts, we rely on factual information, primarily contained in project documents. I cannot emphasize enough the importance of properly documenting delays and other problems in project correspondence, site reports, superintendent agendas, timesheets, equipment reports, as well as keeping regularly updated schedules which incorporate changes and their impacts. Furthermore, providing such documents to the delay expert in an organized and timely manner increases efficiencies.

Kirsh: The expert should be "standing by" and the testimony and documentary evidence should be organized and channeled to him/her, even when

the expert has not as yet been instructed to proceed with any analysis.

Kopach: The output is dictated in large part by the input, so proper contract administration and documentation is of paramount importance. In an adjudication, with the ultra quick statutory timetable, the Respondent doesn't have the luxury of time. It simply cannot have its expert wading through unnecessary documentation.

Lal, Vogel and Gleason-Mercier: It is important to ensure that your client has identified and assembled key information and documents in advance of retaining a delay expert (for instance, all schedules and schedule updates, any key correspondence on claims for delay, any meeting minutes or correspondence on certain key events). Depending on the nature of the dispute and how many issues are at play, it can be helpful to work with the client to prepare "issues" packages with these key documents separated by issue. Delivering these documents to the experts early can ensure the expert is properly set up to engage in his/her analysis.

Larkin: The party should clearly define the role and scope to ensure the expert knows what is expected of them and does not stray outside of the boundaries set. For the delay expert to work effectively, the party should provide complete information concerning the project and delays. The party and the expert should agree on a schedule and budget for the services so the expert can manage their work accordingly, work efficiently and provide deliverables on time.

Meagher: Selection of an effective delay expert is the most important issue. Having someone who is capable of conducting an appropriate delay analysis, writing an effective report and testifying effectively is key. Assembling the documents necessary for the delay analysis is also important, including all schedules in native format, monthly reports or schedule narratives and project documents relating to delays, such as change orders, change order requests and the underlying documents for any time extension requests. A good delay expert will be able to assist counsel in requesting production of documents by the other parties that are necessary for the expert's analysis.

P. Morrison: Proper retainage and organization of the project files that the delay expert will need to review is the most critical way for an efficient and effective start to the retainer. Also, identifying key individuals for the expert to interview for the overview of the project and impacting events will assist the delay expert by providing the context of the claim and focusing their initial review on the key issues.

S. Morrison: I recommend that the expert be retained pursuant to a detailed retainer letter emphasizing the importance of conducting a neutral and independent review of the project delays. Experts should be expressly cautioned that a one-sided or lopsided assessment is likely to do more harm than good should the matter end up before a neutral evaluator.

Patmore: If the parties are looking for a consulting expert, references from previous clients and their counsel are most helpful. A great advisor does not make a great expert, as advisors can at times advocate for their client. Reviewing the expert's field expertise and "on the ground" project management experience is helpful. If the parties are looking for an expert witness, it is important to ensure that the expert is academically qualified to perform numerical assessments (engineering, quantity surveying or accounting) and to review reports and recent cases where the expert has provided testimony.

Popescu: Counsel should be engaged early to maintain confidentiality and privilege of any preliminary analysis and reports developed by the expert. Documents should be already organized by type and saved to a file sharing system so the expert can understand the type and quality of documents available. The client should ask the expert for a Phase 1 analysis with a fixed budget and timeframe which should last no longer than four to

eight weeks. The expert will then be in a position to provide a detailed estimate for carrying through the analysis to a hearing.

3. *What advice do you have for experts on working effectively with counsel?*

Ackerley: Experts need to become very comfortable with their understanding of the case, including what evidence is available. This means not just being passively briefed by counsel, but actively testing and probing what is being shared. Only then can the expert properly be confident about appreciating the underlying facts on which the opinion is to be based.

Albert: Maintain your independence. Be sure to have facts from both parties. Do not accept your client's version of facts at face value. Avoid false hope. Never 'advocate'. Include in your report facts and opinions both helpful and harmful to your client's theory of the case. Where appropriate, explain and diffuse impact negative aspects of your opinion.

Emir: One of the pillars of being a delay expert is remaining independent/objective. Counsel should understand that the expert may not be able to fully support or validate the client's position. On a practical level, differences in deadlines between the expert's and counsel's deliverables can present a challenge. To work effectively, the expert's questions and requests for documents should be addressed in a timely manner.

Kirsh: First, experts should be independent, objective, open and transparent, and should be prepared to tell their clients the "bad news" in the event that the client's early evaluation of causation and of the likely anticipated range of damages might be exaggerated, inflated or unrealistic. Second, experts should explain the futility of developing unsupportable claims which are difficult to prove, are confrontational, and only serve to antagonize the opponents.

Kopach: Be responsive. Especially in the adjudication context, time is limited. Failing to respond to an inquiry can have big implications. If you anticipate opining on more than one issue, consider whether to prepare more than one report. Compartmentalization can help to break the matter down into bite-size pieces. Also, engage in post-mortems on your cases. Whether the client wins or not, get in touch with counsel to find out the good, the bad and the ugly.

Lal, Vogel and Gleason-Mercier: Setting up a user-friendly document sharing platform, immediately prior to or after the kick-off call with the client, can help ensure an efficient and smooth exchange of information. It is important that experts are directed not to engage in direct discussions with the client without counsel present. These direct discussions could lead to questions around the assumptions and information the expert relied upon and whether they have properly and accurately set out all such information in preparing their opinions. It is also helpful to set up appropriate touch points between counsel and the expert so counsel are aware of the status of the expert opinion and can provide any missing factual information in a timely manner. However, it is important that the expert maintain his or her independence in such discussions such that counsel are not directing the expert.

Larkin: It is important for the expert to understand their role in the framework of the dispute. The expert should be an asset to the team rather than a burden that requires a degree of management by counsel. Providing regular updates on the progress of the analysis and preliminary findings can be particularly effective. They can help counsel better understand the issues so they can develop strategies as needed. Timely delivery of work products and fee management is also important.

Meagher: Communicate well regarding timing and expectations concerning your report. Identify information needed early so it can be requested in time. Take great care in preparing written work product. Having someone on the expert team who

is an effective writer is important. Set aside sufficient time for preparing to testify, whether at deposition or hearing/trial.

P. Morrison: Clear communication of the information you need for your analysis is critical. Not all counsel have experience with complex delay claims and may not be familiar with the type or volume of information required, or the time it will take to complete a thorough and defensible analysis. It is important to explain the methodology being used as early as possible, to ensure that counsel understands and is comfortable with the delay expert's plan.

S. Morrison: If the expert has conducted a thorough and independent assessment, do not succumb to pressure from the retaining party or counsel to make the report more favourable to that party's interests than the facts warrant. It will backfire in the end and your credibility will be diminished in the eyes of opposing counsel and a judge or arbitrator. Stick to your guns!

Patmore: It is important to leave any assessment of contractual entitlement and overall legal strategy with counsel. The construction cost or delay expert should provide unbiased and brief opinions based on data, experience and facts provided to the expert. The expert is not there to demonstrate knowledge, but rather to help the courts resolve a matter. Listening carefully and taking notes addressing concerns from counsel to improve report structure and style are useful tips. The relationship between counsel and expert should be professional and the expert should push back when required to establish independence, mutual respect and credibility.

Popescu: Be transparent. Clients hate surprises, especially budget overruns. Have a running checklist of tasks to be completed of which the client is aware. Base your budget on these tasks and promptly bring to the client's attention to any overrun on certain tasks and the reason why, before starting the work. In addition, the budget for any out-of-scope work requested by the client that was not in the original budget must be promptly conveyed to the client before work begins.

4. *What are the characteristics of an effective expert report? Conversely, what makes an expert report ineffective?*

Ackerley: A good report is clear, objective, and unbiased. One that can be easily understood with conclusions that logically follow from the assumed facts. An ineffective report is an advocacy piece that argues for a position, as though the expert were co-counsel, with conclusions that try to *dictate* to the trier of fact what the result should be.

Albert: Effective: A clear recitation of factual foundation upon which the report is based. Where complex technical issues are involved provide a summery in plain English. Avoid advocating.

Ineffective: Advocating for the party retaining you. Omitting or glossing over key harmful facts. Incomprehensible overly technical opinions.

Emir: Delay analysis is complex!

Clear, concise, factual and independent expert reports are generally more effective. Graphical illustrations to communicate the essential conclusions are extremely useful and generally well received by triers of fact.

Conversely, an expert report replete with errors, contradictions, arguments and unsupported conclusions undermines the credibility of the expert.

Kirsh: Typically, a witness' opinion is inadmissible, unless that witness has been properly qualified as an expert. Such qualification provides credibility to the opinion and to the expert witness since it would have the hallmark of objectivity and would presumably be based on expertise and years of experience.

An expert's report would be ineffective if (i) it were to be articulated in painfully obtuse technical jargon, and (ii) it were to base its findings and

conclusions on facts or documents which were ambiguous, unclear, in dispute or contentious.

Kopach: A report that overstates or oversteps is ineffective. When an expert comes to a conclusion without clear evidentiary foundation, it sticks out like a sore thumb. Know your role; read and understand the certificate you sign. You are there to provide independent assistance to the decision-maker on an area that is outside of their expertise. You are not there to advocate for the party paying you. The decision-maker may not be a subject matter expert, but they have an understanding of your expertise, and they can spot advocacy.

Lal, Vogel and Gleason-Mercier: Effective expert reports are clear, concise and deal with tricky or complex issues directly and completely in a simple and readable format.

An ineffective expert report lacks clarity and contains unexplained or unfounded assumptions. In addition, an expert report which delves too far into the legal issues, or which relies on client positions without any expert analysis to support such a position, risks being dismissed outright by a decision-maker.

Larkin: An effective report should be well-organized and written in a clear, concise manner, so it is easy to follow and understand. It must be objective, relevant, precise, complete and explain how the opinions are supported by the evidence. Accuracy is crucial; errors can quickly undermine the expert's credibility.

Ineffective reports are often deficient in one or more these characteristics. The most common failings I have seen are where the report is incomplete, biased and the conclusions are unsupported.

Meagher: Good writing, clear conclusions, reasonable length. Poorly written expert reports that are repetitive and excessive in length are not helpful. Some jurisdictions limit expert testimony to what is in the report, however, so in those jurisdictions it is particularly important to include everything on which the expert may need to testify.

P. Morrison: Organization and readability of an expert report are critical to assist the judge or arbitrator to understand the analysis and opinion. Delay expert reports are dense with factual information (which needs to be accurate) and analysis. If not organized and clearly written, the report will be difficult to follow, which will greatly diminish the persuasiveness of the opinion. Proper reference to evidence and documentary support is imperative. Delay experts should avoid opining on other aspects of the case, such as entitlement issues, which the trier of fact needs to determine.

S. Morrison: It should be clear to the reader that the expert has adopted a neutral and balanced attitude in assessing the situation. Lopsided reports (which make up the overwhelming majority of reports that I have read and evaluated) probably do more harm than good. A knowledgeable, neutral judge or arbitrator will usually see right through the bias, often even without the need for an effective cross-examination by opposing counsel.

Patmore: Narrowing the root causes of the dispute is the most important and difficult task. Understanding the history and timeline of the project is essential even in a broader context than the matters in dispute. Reports should be quantitative in nature versus generic or qualitative. They should contain useful data such as benchmarks and examples of past cost, schedule or productivity trends for construction activities. Calculations should be explained step-by-step to assist the non-technical or non-engineering audience.

Popescu: Objectivity. A delay report that pins 100 per cent of the blame on one party immediately loses credibility. In addition, detailed footnotes that correlate causation documentation to the critical path delay makes it easier for the trier of fact to understand the assignment of responsibility and give credibility to the report. Finally, simplified tables and graphics that roll up the analysis to an easy to comprehend manner are key.

What makes an expert report ineffective? Reports that ramble. A report that reads as a long-winded book report rehashing timelines with no clear correlation to the critical path delay will quickly be dismissed and possibly ignored by the trier of fact.

5. *What are some of the common missteps you have seen during expert testimony in a hearing? What advice would you give to avoid those errors?*

Ackerley: Rushing to the conclusions without laying the appropriate groundwork, methodology, and carefully setting out the assumptions. The expert needs to ensure that each next step towards reaching the opinion builds upon the previous. Credibility also comes from conceding obvious points of disagreement or weakness but then explaining why they're not fatal to the conclusion.

Albert: Refusing to admit a problematic fact or opinion in answer to a question. Being argumentative on cross-examination. Conceding a point is more effective and maintains your credibility more than defending an indefensible position.

Emir: Not being sufficiently prepared; having not asked for or reviewed all the available documents; relying on or appearing partial to the interpretation/position of the client without verification; getting lost in details; not communicating clearly with the judge; becoming argumentative during cross-examination; usurping the judge's role in deciding overall responsibility; expressing opinions on matters not fully studied or beyond one's area of expertise. Do your homework and know your role!

Kirsh: Some expert witnesses, when giving their testimony, deviate from the clearly defined narrative script set out in their expert's report, which could affect the credibility of either the report, or the witness, or both.

Kopach: The nature of adjudication proceedings means that the experts' evidence goes in through their report, so the missteps I've seen are contained in the report.

Lal, Vogel and Gleason-Mercier: It cannot be understated — a well-prepared expert who knows his/her opinion and findings cold will be an effective testifying expert. There is no substitute to adequate preparation. Further, experts who are neither defensive nor arrogant, but who recognize their role as an aid to the decision-maker are often viewed by the decision-maker as credible and helpful.

Larkin: One common misstep is inadequate preparation. I have seen experts not fully understand the facts of the case and not being familiar with their own report. Another misstep is providing vague and confusing answers to questions. I have seen one expert argue with counsel and the tribunal, which clearly was not helpful. The expert must remember that their duty is to the trier of fact. They must thoroughly understand the facts and their report and opinions. They must remain calm and focused on providing clear and concise answers.

Meagher: Evasiveness in answering questions. Arguing with counsel. Not answering questions from the arbitrator/judge directly. Using legal terms and coming off as an advocate. It is important to listen to the question and answer it directly before explaining your answer so as not to appear evasive or argumentative. Experts who will never concede anything, even where appropriate, lose credibility. Take on the role of a teacher rather than an advocate.

P. Morrison: Effective expert direct testimony is one that is organized, easily understandable and avoids overly technical explanations. Knowledge of the facts and documents is crucial for a delay expert to prevent challenges during cross-examination. Experts should avoid overstating their position and need to be responsive to questions asked during cross-examination, to maintain credibility. Maintaining composure and not appearing to be

defensive, while difficult, is also important to being an effective expert.

S. Morrison: The most common error that I see are experts who come to the hearing unprepared. It often becomes apparent that the expert has not carefully reviewed his/her own report after it was prepared, in many cases months earlier. The second common mistake occurs when the expert steadfastly refuses to acknowledge, under cross-examination, any error, deficiency, or methodological weakness in his/her own report. Even worse, when the issue is addressed by the judge or arbitrator directly and the expert refuses to yield.

Patmore: Some experts seem more focused in disallowing the counter-party's argument, than in performing their own individual "bottom-up" calculation or assessment of the claim. I believe that triers of cases appreciate when experts focus on their own calculation, rather than simply focusing on criticizing the counter-party's calculation. In addition, I often see professionals with deep accounting backgrounds but not much project management experience. This leads to technically weak reports that are less credible. These professionals at times get too involved in construction cost schedule matters where their accounting experience is less relevant. The reverse is also true. The mix of engineering (delay/cost/project performance) and accounting professionals (damages/loss of profit/financial modelling) is ideal.

Popescu: Experts being arrogant and argumentative, fidgeting in their seats or exhibiting nervousness and not addressing the tribunal directly but looking at opposing counsel the entire time. Experts not understanding their reports and basically "reading" them back to counsel.

To avoid these errors, practice your presentation skills in a "mock arbitration" setting with your peers. Spend a few weeks if not more reviewing your reports, the other side's reports, the footnotes to your report and your exhibits. Pretend you are opposing counsel and evaluate what are the "sticky" points in your report that you may be attacked on. Rehearse how you will respond.

6. *Are you in favour of "hot-tubbing" or joint conferences for delay experts? When do you think that process is most effective — before or during the hearing?*

Ackerley: Having experts meet in advance to find common ground on the findings and correct analytical, technical, or scientific approaches to be used, while identifying the areas where they must "agree to disagree", can help make for a more efficient hearing. The trier of fact can focus more closely on those specific differences and on what needs to be decided.

Albert: Hot-tubbing is excellent in theory. In practice it is relatively rare. It works well in mediation. In a hearing it can be difficult to coordinate.

Emir: Revay and Associates Ltd. has been involved in "hot-tubbing", both before and during the hearing. If several meetings occur over time before the hearing, experts may be able to effectively arrive at a consensus on areas of agreement and disagreement. However, if limited to a single meeting between experts, there is insufficient time to articulate one's own opinion and consider the other side's position. During the hearing, it is unlikely that an expert will change their analysis (unless to correct errors). In order for hot-tubbing to yield any results, both parties must buy into the process.

Kirsh: If the opponent's expert witness is more articulate and impressive than your own witness, you might want to avoid the embarrassment and possible prejudice of putting both witnesses in a "hot tub" together and asking questions which would allow the trier of fact to compare their performance. In that case, singular testimonies might be better. Any hot-tubbing process would be most effective during (not before) the hearing, after the relevant testimony and documents have been introduced into evidence.

Kopach: Hot-tubbing has the potential to be effective, as it can significantly narrow down the issues. In adjudication, given the very tight timelines, this probably has to take place before the adjudication commences.

Lal, Vogel and Gleason-Mercier: Depending on the issues, there can be a concrete benefit for a decision-maker to hear where there are points of agreement as between experts from the experts themselves. This reduces the risk of confusion as between positions and can also reduce or narrow the issues in dispute. However, in order to have an effective "hot-tubbing" of experts, there must be complete and comprehensive reports, tendered well in advance, so that the experts can meaningfully engage with each other. In the same vein, the decision-maker must also be able to engage with the materials sufficiently in advance.

Larkin: I am in favour of "hot-tubbing" and joint conferences. Joint conferences can be useful to narrow the issues by identifying areas of agreement and disagreement between the experts. They are best held before the hearing so that testimony focuses on the areas of disagreement. It helps the hearing to be focused and saves time and money.

Hot-tubbing is useful as it provides an opportunity for the experts to explain to the trier of fact why they disagree with their opposing expert. In my experience, hot-tubbing is held after the experts have testified so the trier of fact can account for answers given during testimony when they put questions to the experts.

Meagher: I am generally not in favour of this and have never seen it used effectively. I have heard arbitrators talk about doing it, but seldom have seen it done.

P. Morrison: In my experience in Alberta, while counsel have offered hot-tubbing as part of the arbitration process, it has not received a lot of interest from arbitrators in domestic, *ad hoc* arbitrations. However, when used during a hearing, it has been an effective way to narrow the issues of disagreement between the experts and for the tribunal to assess their credibility. When the experts are able to respond directly to each other's answers, this allows them to address flawed logic or inconsistent statements made by their counterpart. This can sometimes be more helpful to the trier of fact than a traditional cross-examination.

S. Morrison: It depends on the integrity of the experts. If their mutual intention is to assist the parties in resolving the dispute without a trial or arbitration, or at least narrow the issues, a joint conference can be helpful. I have also participated in arbitrations where the panel has asked the experts to go into conference on one or more issues during the hearing, and this has sometimes been helpful, because the experts are aware that the degree of reasonableness and compromise on the issues that they display may be very important. I am a strong believer in concurrent expert testimony during the course of the hearing.

Patmore: I agree with the "hot-tubbing" or joint conference concept. For that process to work effectively it is important for the experts to be open-minded and transparent. Listening skills are essential. Small agreements between experts can go a long way towards demonstrating independence and avoiding bias. The character and maturity of the expert is critical.

Popescu: Yes, I am since I have participated in at least three in my career to date.

Before or during the hearing? Both. Hot-tubbing ahead of the hearing can allow experts to agree on fundamental issues such as: methodology, definition of critical path and concurrency, schedules to rely upon and if any modifications need to be made to those schedules, they can agree on what those are ahead of time. This will eliminate a massive divergence between the expert results. Then at the hearing, the only things that are truly being argued

are causation of and responsibility for delay, saving the tribunal the difficult "all or nothing" choice of analysis between delay experts.

7. *Are there instances where in your view the advancement or defence of a delay claim does not require an expert report?*

Ackerley: A critical aspect of the test for admissibility of expert evidence is necessity. The damages incurred resulting from a delay may not call for an expert report, if the claimed damages consist of costs for the extended duration, such as site trailer and equipment rentals, superintendent costs, etc. Those can be provable through documentary evidence without analysis.

Albert: Delay claims almost always require a delay expert. Such claims are usually advanced in large cases involving multiple trades and sequencing. Critical path analysis is needed. An expert may not be required in a simple case where there are only two parties (general and sub).

Emir: In straightforward situations of suspension/delay, or when records are clear as to the causes and quantification of the delay. Also, if a party has their own experienced and credible planners that have lived through the project and are good communicators. (Their impartiality may, however, be questioned by the opposing party.)

Kirsh: Yes. Sometimes an articulate witness, expert or otherwise, could provide more compelling testimony without the benefit of an expert report, particularly where the issues are not very technical, or where the delay aspect of the claim/defence is less significant than, and overshadowed by, other aspects of the claim/defence.

Kopach: I have not seen a situation where a delay claim had a superfluous expert's report. I could imagine a situation where a claimant's expert's report is so flawed as to not require an expert's response, and I've read one or two reports that would qualify in this regard, but I've not seen that in an adjudication.

Lal, Vogel and Gleason-Mercier: There may be straightforward instances where one event appears to have caused a discernable delay, perhaps even where occurrence of delay is not at issue, just the liability for the delay. In that case, a delay expert may not be necessary.

However, in most cases where there are likely to be disputes in relation to both the responsibility for and the impact of a delay event or where issues relating to apportionment of delay or concurrent delay are in play, or where there are multiple events which may have caused different delays during the project, it will be difficult to escape the need for expert evidence.

Larkin: Yes, where the facts are clear and there is little room for disagreement on the cause of the delay and its impact. This could occur, for example, where an owner has suspended the work and there are no concurrent contractor delays, such as concerning offsite procurement or mobilization of resources. Another instance would be where the amounts in dispute do not warrant the expense of appointing experts.

Meagher: No.

P. Morrison: It has not yet been my experience to advance or defend a delay claim without an expert report. Generally, delay claims are too complex to be addressed only by fact witnesses. While clients sometimes conduct their own delay analysis with project schedulers, often during the project, the use of such analyses is limited in disputes as they would be given little weight for lacking impartiality. In the defence of a delay claim, an expert report is important in assisting the trier of fact by identifying weaknesses and inconsistencies in the assertive report. These are not generally issues which counsel can address in cross-examination alone, and require a responsive report to provide the trier of fact with an alternate opinion to consider.

S. Morrison: Delay experts should not be necessary in cases that involve a single delay event. It is not beyond the ability of most decision-makers,

even those that do not have specialized knowledge, to evaluate the impact of a single delay event and to assess the evidence in support of the quantum of that claim. Where there are multiple delay events in a complex project, especially when they are both owner- and contractor-caused, it will be difficult if not impossible for even a knowledgeable neutral to evaluate the impact of the concurrent or parallel events on the critical path.

Patmore: Contractors (and occasionally owners) sometimes advance inflated claims that have been produced by their in-house planning/scheduling professionals. However, these claims may be biased. The notion of "claiming higher because only a fraction of the claim will be approved" is a problem in the industry. The introduction of the expert removes the bias of the parties and allows claims to be challenged and reduced when required, to bring the parties closer to a solution. An expert report should always be required before a matter goes to mediation, arbitration or litigation, as it helps "filter out" inflated or unrealistic assumptions in the parties' claims/counterclaims.

Popescu: If the claim originates as a change order request during the project and an expert is brought in to help evaluate it, the resultant findings can be presented in a PowerPoint slide pack with "without prejudice" footnoted on the slides. Other than that, due to the analysis and causation requirements of a delay claim, a written report is the best medium to logically lay out the analysis and the findings, especially on projects with large delays that span many years.

8. *What are the most critical pieces of advice you would give to a party retaining a delay expert?*

Ackerley: Find an expert who has been previously qualified and has ideally been favourably considered. Usually that involves not only someone who is a clean communicator but also someone who demonstrates good judgment in determining what is relevant and makes sense, and what is unhelpful and should be discarded. Do you feel you can trust their opinion?

Albert: An expert must look at facts from perspective of both parties. Credibility — must maintain neutrality and not come across as advocate for the party that retained you. Concede a point that is indefensible. This often happens when a fact was not considered (sometimes because the client did not give you that fact). The expert must be very insistent that the client provide all the facts however unimportant the client might think they are.

Emir: The client must provide full access to all available project documents, including those that may be detrimental. Understand that a delay analysis is time-consuming. Understand that the expert, and the available documents, may not be sufficient to support or validate a party's position.

Kirsh: Create and observe a protocol to protect confidentiality and privilege.

The electronic copy of the draft expert's report should be created and maintained on the computer hard drive of the principal lawyer acting on the matter and should not reside on the firm's computer network or on the hard drive of any other member of the firm.

Every hard copy of a draft report must be numbered and recorded and must clearly be marked as having been "Prepared for the Purpose of Litigation".

Kopach: If you have the time (and you should make the time), do your homework on your expert. Have a look at their track record in preparing reports that have been relied on by the court, and where the court has accepted them as an expert in the area.

Lal, Vogel and Gleason-Mercier: Think carefully about what you need and interview possible candidates. There is a benefit to hearing from an expert directly on how the findings will be presented, even in a general sense. There is no "one-size-fits all" for experts and the right expert will

depend largely on the nature of the case and the parties and decision-maker involved. In addition, although many cases do not ever get to a trial or hearing stage, it is important to ensure that the expert you select "presents" well and will be able to verbalize their position, if required to provide oral evidence capably.

Larkin: Review the expert's experience, training and qualifications. The expert should be well-respected and have a good reputation for impartiality and accuracy. Ensure there are no conflicts of interest and that the expert is committed to being unbiased and objective. The party, counsel and the expert should regularly communicate so all are kept up-to-date with the latest developments. The party must ensure that the information it provides to the expert is clear, complete and relevant so the expert can work efficiently and effectively.

Meagher: Selection of the expert is critical. Avoid using someone with whom you have never worked or for whom you do not have a very reliable endorsement. I like to receive endorsements from counsel who have been on the opposite side of the expert before. If the opposing counsel thinks an expert was effective, that is a credible endorsement. Also avoid someone who is inexperienced at testifying. You never know how someone will react under the pressure of testifying and I would rather not be the one who takes that risk.

P. Morrison: It is important for you and your client to meet with more than one firm or candidate, including the testifying expert, to ensure you are comfortable with whom you retain. Learn about their experience on similar types of projects or industries in similar climates, their testifying experience, the members of their team, and their methodology. Determine if they have had negative decisions as an expert at trial. Be clear about timing, deliverable expectations and budget.

S. Morrison: Do not interfere with their independence. Make sure they have all the relevant documents and information, even those that may not favour your position, as they will likely emerge at some point and damage the credibility of the expert.

Patmore: First, seek a technical expert with deep understanding of project management (technical engineering and construction) on the ground and in the field. Second, add a damages (accounting) expert where required. Third, ensure the experts have the ability to communicate in a simple, humble, firm, and concise way via an interview. Look for soft skills such as listening and adapting. Strong binary personalities typically do not make good experts. Look for deep technical knowledge and flexibility.

Popescu: Ask to read a sample of their reports to make sure they do not take an advocate stance and that their reports are understandable. Ask the expert how many engagements they have concurrently to ensure they will not be overwhelmed. Ensure the expert is well-versed in multiple delay analysis methodologies and understands and uses scheduling software to perform complex analysis. Also, if they have written any publications, request a copy to understand if and how such publications may be used to attack the expert in cross.

9. *What are the most critical pieces of advice you would give to a delay expert to ensure that their report and testimony provide the most value to the trier of fact?*

Ackerley: Remember that you are testifying to assist the trier of fact in understanding a complicated situation and its implications and consequences. You are not there to make submissions and arguments to help the case. Giving a well-prepared, open, honest, neutral and professional opinion is what is required to enhance the chances of having the opinion be accepted.

Albert: Most experts genuinely try to be helpful to the judge/tribunal. Best advice is to write the report in as straightforward and clear and concise a manner as possible, with the technical support in the body of the report or appendices. Address problematic issues head-on and diffuse them with an explanation. If responding to another expert, explain clearly where the other expert got it wrong. In cross-examination do not be defensive or argumentative. Do not be an advocate. Answer in a straightforward manner. Maintain professionalism and impartiality.

Emir: We, at Revay and Associates Ltd., not only strive to "bring clarity to complex issues" but we are "guided by professionalism and integrity". I believe that one of the most important aspects of an expert report and testimony is presenting the results of a comprehensive analysis in a clear, concise and easy to understand fashion. More importantly, an honest and impartial opinion will provide the most value to the trier of fact.

Kirsh: Observe a protocol to protect confidentiality and privilege.

Ensure that the Report accurately reflects the expert's findings, opinions and conclusions.

Kopach: Your credibility has to be what matters most. Your opinion, even if "correct", is worthless if you're not able to maintain impartiality. Keep the hyperbole out of your evidence. Consider whether a "decision tree" is required, so that the report addresses what happens if sets of assumed facts in a report are not consistent with the decision-maker's findings.

Lal, Vogel and Gleason-Mercier: It is often the most obvious and simple things which elevate an expert report and testimony. For example, ensuring that the report is clear with headings and embedded graphics is key in assisting the decision-maker follow a complex delay analysis.

Dealing with tricky or unhelpful facts and issues directly is important so that a complete and unbiased report is being presented. Making concessions, where appropriate, will assist in establishing the neutrality and objectivity of the expert.

Finally, experts must always keep in mind not to overstep — they are not being tendered to give opinions on legal issues such as liability, and doing so risks undermining the entirety of the report or even a refusal to qualify the expert.

Larkin: The expert must remain independent and impartial. If the trier of fact believes the expert is biased, they may attach little weight to the expert's evidence or disregard it entirely. The expert's opinions and basis for them must be easily understood. If the trier of fact cannot understand the expert's report, then it is of little assistance and the expert has not fulfilled their duty.

Meagher: The points above about writing, clarity and appropriate brevity. Also, the same points above for testimony concerning not being evasive or coming off as an advocate and taking a posture of a teacher, attempting to help the trier of fact understand the issues and come to an appropriate decision. All triers of fact, whether a judge, arbitrator or jury are trying to do the right thing from a normative standpoint. Therefore it is essential for counsel and the expert to explain to the trier of fact why deciding the matter in their favour is the right thing to do.

P. Morrison: Keep it simple. Use understandable terms and explain anything technical. Headings, photos and other visual aides or graphics in the report help provide context to the reader. The delay report is often one of the first opportunities for the trier of fact to read a narrative of the project overview and timeline, including a description of the work and the technical issues that are relevant to the delay claim. This is an important foundation for the report and opinion, which can set the tone and influence the expert's credibility.

S. Morrison: Take your statement of independence seriously. Remember that you are there to

assist the trier of fact in assessing the validity of the claim and not an advocate for the party that has retained you. If you keep this front and centre when assessing the delay, in preparing your report, and in giving testimony, you will advance the cause of your client most effectively and earn the appreciation of the decision-maker.

Patmore: Use empirical methods where possible to calculate delays and apply established guidelines and approaches (AACE 52R- 06 and AACE 29R-03). Highlight the assumptions made by the expert where data was incomplete or missing. Read the report several times to remove narrative that is unessential and provide the trier with clear step-by-step calculations or summary tables.

Popescu: Ensure your report does not read as advocacy. It needs to be long enough to explain the quantum side of the analysis and the causation side (correlate the critical path activities to the objective causation documentation to explain why the delay occurred) but cannot be long-winded and unorganized or the trier will lose interest in reading it and wait for testimony. Also, provide spreadsheets like a toolkit that the trier of fact can use to move the delay quantum in different categories based on their ultimate decisions on responsibility. Do not force them to have to choose between the two experts. The testimony needs to be as clear as the report. Do not give rambling answers to confuse opposing counsel since you are also confusing and irritating the tribunal.