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2025

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# Insights from Arbitrators and Advocates on Providing Alternative Delay and Damages Quantum

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## To Provide or Not to Provide...

- Construction disputes typically include competing expert opinions
- Should respondent provide its own view?
- Is the answer different for delay and quantum opinions?
- How much should you trust the decision maker to evaluate the outcome?

*Walsh Construction Company of  
Canada v. Toronto Transit Commission  
(2024 ONSC 2782)*

*For the Arbitrators:*

**Do you find it helpful to have the parties provide you with a selection of “tools” to aid your decision-making process?**

## Case Study: The “Infrastructure Mega-Project”

**Situation:** In a public highway expansion, Claimant alleges \$200M in cumulative delay/disruption. Respondent presents its own competing analysis, showing only \$40M in legitimate delay costs.

**Outcome:** The tribunal finds both experts “overstated” positions and essentially crafts its own middle ground: \$90M.

*Did the respondent’s alternative actually help anchor the tribunal lower? Or did it expose them to credibility risks because their numbers were also “inflated”?*

## Case Study: The “Small Job, Big Claim”

**Situation:** Subcontractor files a \$5M delay claim on a \$20M commercial project. Claimant’s expert produces a \$150K report with detailed delay analysis. Respondent debates whether to spend a similar amount for an alternative. They opt not to and only cross-examine.

**Outcome:** Tribunal dismisses 70% of the claim on entitlement grounds but still awards \$1.5M, essentially defaulting to claimant’s expert for quantum.

*Should respondent have spent on an alternative analysis given the disproportionality of costs? What’s the right “threshold” for investing in a competing analysis?*

## Case Study: Unreliable Schedules?

**Situation:** Contractor is claiming that owner caused 400 days of critical path delay and presents a CPM expert analysis based on the project schedules. Owner does not like what the project schedules show and considers them to be unreliable and not reflect what actually occurred on the job. Owner opts not to present its own CPM analysis and instead undermine the Contractor's analysis by attacking the reliability of the schedules.

*What would you do in the Owner's shoes? Present your own analysis, and perhaps implicitly validate that the schedules are fit to use for analysis, or take this riskier approach?*

*For the Arbitrators:*

**Does a party or expert providing an alternative quantum influence your view of their credibility?**

## Case Study: The “Arbitration Split”

**Situation:** Claimant submits an expert delay model claiming 300 days. Respondent provides no alternative, arguing Claimant failed to meet burden. Tribunal ultimately picks 200 days as “reasonable.”

*Is this an example of a tribunal improperly “doing its own analysis,” or is it acceptable for arbitrators to interpolate without a competing model?*

## **Case Study: Arbitrator as Damages Expert**

**Situation:** In a subcontractor's claim against contractor, both sides present schedule delay analysis, as well as opinions on damages for delay. Contractor quantum expert also presented its opinion on subcontractor's delay damages (i.e., an "alternate").

**Outcome:** Arbitrator does not use either expert's analysis. Instead, develops own quantum.

*Is this level of arbitrator autonomy appropriate? Why bother presenting alternative at all?*

*For the Advocates:*

**Are there any general guidelines you consider when strategizing on whether or not to provide an alternative?**

*For Everyone:*

**Are there other factors you recommend for consideration when contemplating whether or not to provide an alternative?**

*For the Arbitrators:*

**Have you ever asked the parties to prepare alternatives, or asked for expert analysis based on specific “what if” scenarios?**