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“Time is of the Essence” Clauses are Incompatible with Indefinite Time Provisions

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Case Commented On: *Nova Fish Farms Inc v Cold Ocean Salmon Inc*, [2025 NLCA 28 \(CanLII\)](#)

A “time is of the essence” (TOE) clause is a boilerplate contract clause that renders a time limit or deadline in a contract to be a fundamental term of the agreement, entitling the other party to terminate the agreement if that term is breached, even in a minor way.

In *Nova Fish Farms Inc v Cold Ocean Salmon Inc*, [2025 NLCA 28 \(CanLII\)](#), the Court of Appeal of Newfoundland and Labrador decided that a TOE clause does not apply to an indefinite time provision in a contract. On January 22, 2026, the [Supreme Court granted leave to appeal](#) this decision.

Facts

The facts in this case are relatively simple. The Respondent, Cold Ocean Salmon Inc (Cold Ocean) contracted to sell trout farms to the Appellant, Nova Fish Farms Inc (Nova Fish) under an Agreement of Purchase and Sale (the Agreement), which they signed in February 2020. As these farms were located on property leased from the provincial government, and licensed and regulated by the federal and provincial governments, their sale was conditional upon government approval. The Agreement did not specify a closing date. It set out several conditions precedent, including government approval, and said that the closing date would occur seven days after the completion of these conditions.

Under the Agreement, each party was required to take the steps necessary to obtain government approval “as promptly as practicable” after the signing and to use “commercially reasonable efforts” to obtain that approval before closing (at para 5).

Specifically, the provisions provided as follows. Section 8.1 of the Agreement said, “Each party shall as promptly as practicable after the execution of this Agreement, make, or cause to be made, all such filings and submissions” necessary to obtain government approval to sell the trout farms (at para 24). Under section 8.4, the parties had an obligation “to use commercially reasonable efforts to obtain government approval for the sale of the farms” (at para 25).

The Agreement also contained a TOE clause, which said “Time shall be of the essence of this agreement” (at para 6).

Neither party took steps to obtain government approval until 16 months (in June 2021) after the Agreement was signed. The government approved the applications in October 2021. Although the parties communicated with each other several times through their lawyers in the spring of 2022, in May 2022, Cold Ocean told Nova Fish that it would not be proceeding with the transaction.

Nova Fish sued Cold Ocean for specific performance of the Agreement. In its defence, Cold Ocean argued that Nova Fish’s delay in obtaining government approval had amounted to a breach of the Agreement, entitling Cold Ocean to terminate the Agreement (at para 8).

Court of Appeal for Newfoundland and Labrador

The trial decision in this case is not available.

The Court of Appeal dealt with three issues on appeal.

First, the summary trial judge had found that Nova Fish, by not taking any steps to obtain government approval for 16 months after the Agreement had been executed, had breached sections 8.1 and 8.4 of the Agreement (at para 20). Specifically, he found that Nova Fish had breached its obligations to use “reasonably commercial efforts” and to “act promptly as practicable” to obtain government approval (at paras 24, 25). He went on to find that the 16 month period was “more than three times longer than the time it took [the government] to approve the consents” and therefore, that a period of this length had not been in the contemplation of the parties (at para 33). The Court of Appeal upheld this finding (at para 38).

Second, the summary trial judge found that the TOE clause applied to sections 8.1 and 8.4, which were “indefinite time” provisions (at para 48, quoting the summary trial decision at para 70). This finding entitled Cold Ocean to terminate the Agreement. The Court of Appeal overturned this finding.

On this issue, the Court of Appeal held, first, that the application of TOE clauses to indefinite time provisions is a question of law; second, that TOE clauses do not apply to clauses that do not contemplate time limits (at para 71); and third, that the summary trial judge erred in law by applying the TOE clause to an indefinite time provision (at para 80).

After indicating that parties use TOE provisions to inject certainty into their agreements, the Court noted that “no certainty can result where the time in question is indefinite... [as] no party can be clear whether it is in compliance or whether the other party considers it in breach” (at para 67).

Third, the summary trial judge had denied Nova Fish’s claim for specific performance. The Court of Appeal determined that this decision was based on the finding that Cold Ocean had been entitled to terminate the Agreement, a finding that the Court of Appeal determined was based on an error in law. Accordingly, the Court overturned the finding and determined that Nova Fish was entitled to an order for specific performance of the Agreement (at para 85).

Commentary

Several findings are notable in this decision.

First, the Court of Appeal stated that TOE clauses are engaged where a contract stipulates a time limit or deadline. It went on to say that such clauses allow an innocent party to terminate the contract if the other party fails to comply with the time requirement (at para 61, citing *Di Millo v 2099232 Ontario*, [2018 ONCA 1051 \(CanLII\)](#) at paras 24, 31). Referring to the jurisprudence, the Court further noted that TOE clauses have not been applied to provisions that contain indefinite time limits (at para 65).

The Court of Appeal emphasized that TOE clauses promote contractual certainty and observed that this purpose would be undermined if such clauses were applied to provisions with indefinite time limits. In these circumstances, the Court noted, parties would have “no certainty as to when conduct will be evaluated to determine if it amounts to waiver” (at para 69).

Second, the Court found the application of a TOE clause to a particular type of provision to be a question of law and not of mixed fact and law (at paras 50, 51).

Contract interpretation generally involves issues of mixed fact and law, “as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix” (*Sattva Capital Corp v Creston Moly Corp*, [2014 SCC 53 \(CanLII\)](#) (*Sattva*) at para 50). However, issues of law can arise if legal errors are made while interpreting a contract; legal errors can include “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor” (*Sattva* at para 53, quoting *King v Operating Engineers Training Institute of Manitoba Inc.*, [2011 MBCA 80 \(CanLII\)](#) at para 21).

On this point, the Court of Appeal commented on two of the findings made by the summary trial judge: that Nova Fish breached provisions 8.1 and 8.4 of the Agreement, and that the TOE clause applied to those two provisions. On the first issue, the judge was found to have appropriately concentrated on the context of the Agreement before him; he considered it as a whole, as well as its surrounding circumstances, in order to determine the parties’ intent (at para 32). On the second issue, the judge was found to have made an error of law by applying the TOE clause to provisions not containing specific timelines or deadlines (at para 80). Here, the relevant provisions contained indefinite terms such as “promptly as practicable” and “commercially reasonable efforts”.

Third, the Court of Appeal granted the equitable and discretionary remedy of specific performance, which forces a contractual party to fulfill its obligations under the contract. Commercial disputes typically result in damages, but specific performance will be granted when damages are found to be an inadequate remedy.

Fourth, TOE clauses have given rise to harsh consequences in contractual disputes, though that does not necessarily translate to unfair or wrongful consequences, particularly if the contract is between two sophisticated parties. Rather, TOE clauses provide parties with certainty about the consequences of particular contractual breaches.

In *3 Gill Homes Inc v 5009796 Ontario Inc*, [2024 ONCA 6 \(CanLII\)](#) (*Gill Homes*), the Ontario Court of Appeal allowed the vendor to terminate the agreement because the purchaser was 35 minutes late in delivering the closing funds. The Court admitted that the outcome for the respondent was “harsh” but held that it was “not unconscionable or unfair” because the contract wording was clear (*Gill Homes* at para 17).

In *Correa v Valstar Homes (Oakville Sixth Line) Inc*, [2025 ONCA 156 \(CanLII\)](#) (*Valstar*), a vendor was allowed to terminate an agreement when the purchasers’ funds arrived nine minutes late. On appeal from the motion judge’s decision, the Court of Appeal found that the motion judge had not been “unreasonable, unfair or unjust” (*Valstar* at para 20). The motion judge had determined that the vendor could have been more lenient, but that it had not “acted wrongly by insisting on compliance with a contractual term to which the parties agreed” (*Valstar* at para 22). If the contract is not between two sophisticated parties, however, or the contract is a standard form agreement, TOE clauses could allow one party to take advantage of minor breaches and terminate the contract. These circumstances might give rise to equitable relief.

It will be interesting to see whether, and if so how, the Supreme Court addresses these issues on appeal, particularly whether it revisits the narrow interpretation that TOE clauses cannot be applied to provisions that contain indefinite time limits.

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