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PUBLICATION

The Court of Appeal Speaks: Claims for Contribution and Indemnity are subject to discoverability

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The Ontario Court of Appeal[1] has now confirmed that claims for contribution and indemnity under section 18 of the *Limitations Act, 2002* are subject to discoverability. In its decision *Mega International Commercial Bank (Canada) v. Yung* released on May 7, 2018, the Court clarified the long-standing conflict in the case law of whether the two year limitation period for contribution and indemnity claims is absolute or subject to discoverability.

In its decision, the Court of Appeal left undisturbed the presumption that the limitation period for contribution and indemnity claims is triggered by the date on which the defendant is served and, as such, such claims are statute barred two years from that date. However, the Court held that the presumption can be displaced if the party with the contribution and indemnity claim "proves that the claim for contribution and indemnity was not discovered and was not capable of being discovered through the exercise of due diligence until some later date." [2]

The case under appeal involved a series of complex financing transactions on a property that was owned by the named defendants. The defendants were being sued on a personal guarantee following the sale of the property by power of sale. The defendants were served with a Statement of Claim in January 2011 and again in April 2013. A claim for contribution and indemnity was not commenced until September 2015. At that juncture, the defendants claimed against their lawyer by way of a third party claim. The defendants alleged their lawyer had acted in conflict during the financing transactions and had failed to properly advise them of their potential liability under the guarantee.

The motion judge granted summary judgment in the third party claim, holding that section 18 of the *Limitations Act, 2002* established an absolute two year limitation period for claims for contribution and indemnity commencing from the time a defendant is served with the plaintiff's

claim. As the defendants had both been served more than two years before the third party claim was commenced, the action was statute-barred.

The Court of Appeal overturned the motions judge holding that the limitation period for contribution and indemnity claims is subject to discoverability. In reaching its decision, the Court of Appeal applied principles of statutory interpretation, reasoning that:

- in other sections of the *Limitations Act, 2002* (such as section 15), where finite limitation periods are established, more clear language is used directing for instance that "no proceeding shall be commenced" after the expiry of some specified time period. However, section 18, "does not use such language or speak in any other terms that can be read as imposing an absolute limitation period, nor does it even identify a time span that could serve as a limitation period"; [3]
- section 18 expressly incorporates section 5(2) and section 15 in its opening phrase " For the purposes of subsection 5(2) and section 15" and thus *cannot be read* as dispensing with those provisions;[4]
- the trigger for the commencement of the limitation period is the same in both section 18 and section 5(2) and are the only two provisions that use that phrasing in the *Limitations Act, 2002*, suggesting they are meant to "intersect and work together";[5] and
- if section 18 established an absolute limitation period of two years, this would contradict the incorporation of the ultimate limitation period in section 15 and make it irrelevant (which is not what appears to be intended by the opening phrasing of section 18 "For the purposes of subsection 5(2) and section 15").[6]

At first instance, the defendants (plaintiffs in the third party claim) also sought to have the limitation period postponed by arguing that the common law doctrine of fraudulent concealment applied: their lawyer had failed to tell them he was acting in conflict on the transaction and that he had made an error with respect to the personal guarantees. To make out fraudulent concealment, a plaintiff must show that (i) it is in a special relationship with the defendant; (ii) that given the special nature of the relationship, the defendant's conduct is unconscionable; and (iii) the defendant conceals the plaintiff's right of action. The motion judge held that the doctrine had not been made out and thus would not operate to postpone the limitation period. Specifically, the motion judge found that there was no fraudulent concealment because the defendants were aware of the essential facts giving rise to a claim against their lawyer.

On appeal, the respondent lawyer argued that the motion judge's findings with respect to fraudulent concealment should resolve the issue of discoverability in his favour. The Court of Appeal rejected this position, holding that discoverability requires knowledge that bringing a claim would be legally appropriate (as required under section 5(1)(a)(iv) of the *Limitations Act, 2002*) as opposed to fraudulent concealment which only requires a party to be aware of the essential facts giving rise to a claim. In this instance, as the motion judge had not appreciated the applicability of discoverability, there was not an appropriate factual basis on which to determine whether the defendants/plaintiffs by third party claim knew that advancing a claim against their lawyer would be legally appropriate.

The Court of Appeal also took the opportunity to comment on whether summary judgment motions are appropriate where discoverability is at issue. The Court noted that, while there is

no outright restriction on the use of summary judgment in the post-*Hryniak* era, motions involving discoverability tend to be contentious and complex and this can affect their suitability for summary judgement. In turn, the Court suggested that claims against one's own lawyer may be particularly complex due to "reliance on the lawyer and the risk of abuse of power [that]can make clients vulnerable to delaying legal action."[7]

With this long-awaited clarity from the Court of Appeal, the defence is no longer faced with a hard and fast two year limitation period from the date of the service of the claim for commencing claims for contribution and indemnity. The presumed expiry of the limitation period does mean that the availability of potential claims against non-parties before the two year period will still need to be explored expeditiously and carefully, as the onus will ultimately be on the party advancing the claim for contribution and indemnity to establish that the claim was not discovered and was *not capable of being discovered* through the *exercise of due diligence* until some later date. What will constitute a reasonable exercise of due diligence in this context will undoubtedly be the subject of some debate in future jurisprudence.

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[1] Decision written by Justice Paciocco on behalf of three judge panel consisting of Justices Doherty, Paciocco and Nordheimer

[2] *Supra* note 1, para 54

[3] *Ibid*, para. 61

[4] *Ibid*, at para. 64

[5] *Ibid*, at para. 65

[6] *Ibid*, at para. 69

[7] *Ibid*, at para. 89