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"Time is of the Essence" – exercise caution!

Many contracts (including leases and offers to lease) contain a common "boilerplate" clause that simply states "time is of the essence" ("TOE"). Colloquially, this phrase is understood to mean that the applicable timelines are important or that the matter is urgent. However, TOE has a legal meaning with far greater consequence than is immediately evident from the language.

What does TOE mean?

TOE is a form of legal shorthand that means: if a party breaches a provision that requires performance by a certain day or time (no matter how trivial or minor the breach), the innocent party can terminate the contract!

In the absence of a TOE clause, a breach of contract (including failure to meet a deadline) entitles the innocent party to damages arising from the breach, but it does not permit the innocent party to terminate the contract. That is, however, unless the breach is "fundamental", being a breach that deprives the innocent party of "substantially the whole benefit" of the contract. In the case of fundamental breach, the innocent party can terminate the contract (and sue for damages). The TOE clause effectively raises any breach of a time provision to the level of fundamental breach.

"As promptly as practicable"

The Supreme Court of Canada (the "SCC") is set to hear an appeal from the Newfoundland and Labrador Court of Appeal in the case of *Nova Fish Farms Inc. v Cold Ocean Salmon Inc*., 2025 NLCA 28 ("*Nova Fish"*) on the topic of TOE clauses. While not a commercial leasing case, the rulings regarding TOE clauses will apply in the leasing context as well.

The case involved the sale of a fishery, which was conditional on government approval. The contract required that the purchaser make "commercially reasonable efforts" to obtain government approval "as promptly as practicable" following execution of the contract. The closing date was set out in the contract as seven days following satisfaction of several conditions (including obtaining government approval). The purchaser made no efforts to obtain government approval for 16 months (allegedly because of the effects that the COVID-19 pandemic had on its business). A few months later, the purchaser sought and obtained government approval for the sale and told the seller that it was ready to close. The seller refused, arguing that the purchaser breached its obligation to make "commercially reasonable efforts" to obtain government approval "as promptly as practicable". According to the seller, the TOE clause in the contract entitled it to terminate due to the purchaser's breach of the time-related provision.

At trial, the court found that the purchaser had breached the contract by failing to seek government approval "as promptly as practicable" and sided with the seller, confirming that it could terminate on the basis of the TOE clause. On appeal, the court agreed that the purchaser breached its obligation to seek government approval "as promptly as practicable", but ruled that the TOE clause did not allow the seller to terminate. According to the Court of Appeal, "as promptly as practicable" imposes an "indefinite" timeline and TOE clauses do not apply to "indefinite" timelines. The Court of Appeal rationalized this position by stating that the certainty of an innocent party's termination right that is afforded by a TOE clause is undermined where the time provision is indefinite, as there is no certainty as to when the deadline has expired.

TOE and Leases

It is common to find TOE clauses in commercial leases and offers to lease. However, commercial leases also regularly contain provisions requiring default notices and the expiry of cure periods as preconditions to landlord termination. When interpreting conflicting clauses, the more specific clause will trump the more general one. In the context of a lease, that means the TOE clause would be ousted by the default notice and cure regime. For example, if a tenant misses a rent payment and the lease provides for a notice and cure period as a condition to the landlord's termination right, the presence of

a TOE clause ought not entitle the landlord to terminate until the cure period has expired. Furthermore, under section 19(2) of Ontario's *Commercial Tenancies Act*, a tenant is entitled to a "reasonable time" to cure a non-monetary breach (assuming it is capable of being cured) following notice from the landlord, before the landlord can terminate the lease. Manitoba, Saskatchewan, New Brunswick and Prince Edward Island have similar legislation. It is unlikely that a court would permit immediate termination of a lease by a landlord pursuant to a TOE clause without the tenant having been afforded the opportunity to cure within the contractually or statutorily specified timeline.

Accordingly, it appears that TOE clauses will rarely be utilized in commercial leases to permit termination by the landlord. This would not be true if there were no contractual default notice and cure period (such as in many forms of offer to lease) or in provinces where there is no statutorily imposed notice and cure period.

What if the Landlord is late?

If, for example, a landlord fails to sufficiently complete its work by a fixed possession date, a TOE clause would permit the tenant to terminate the lease (as long as the Tenant was ready to take possession and did not expressly or impliedly waive adherence to the applicable timelines). In the absence of a TOE clause, a tenant could only terminate the lease if the landlord's failure amounted to a "fundamental breach". It is far from certain when that threshold is met. In *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92, the landlord anticipated a six-week delay in delivering the premises to the tenant. The Ontario Court of Appeal held that the delay, while "material", was not a fundamental breach. The tenant was not entitled to terminate the lease.

It appears therefore that TOE clauses in leases will generally apply only for the benefit of the tenant. Landlords would be wise to consider whether this boilerplate provision ought to appear in their template offers and leases.

Consider another common scenario of potential landlord delay: the landlord covenants to complete punch-list items of its work within a period of time after the possession date. If the period of time is definite (such as 30 days) and the lease contains a TOE clause, the tenant could terminate the lease if the Landlord misses the deadline (and strict compliance was not waived). However, based on the Court of Appeal's decision in *Nova Fish* discussed above, if the deadline for completion of the punch-list work is indefinite, such as "as soon as reasonably possible", a TOE clause would not permit the tenant to terminate—even if the landlord completely ignored the finishing work. It's not clear whether a TOE clause could support termination if the landlord covenanted to make "commercially reasonable efforts" to complete the work by a specified date. Hopefully, the coming SCC decision in *Nova Fish* provides some guidance on the matter, including clearing up conflicting case law on TOE waiver and whether the distinction between definite and indefinite timelines ought to have any bearing.

It has been speculated that TOE clauses are the most litigated boilerplate provision in Canadian contract law. It's easy to see why, as the seemingly innocuous phrase "time is of the essence" can have significant legal consequences that may run contrary to the expectations of the parties.

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