

**LIMITATIONS UPDATE: COURT OF APPEAL FOR ONTARIO CONFIRMS THAT DISCOVERABILITY PRINCIPLES APPLY TO CLAIMS FOR CONTRIBUTION AND INDEMNITY**

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On May 7, 2018, the Court of Appeal for Ontario released its decision in *Mega International Commercial Bank (Canada) v. Yung*<sup>1</sup>

The court confirmed that discoverability principles set out in the *Limitations Act, 2002*<sup>2</sup> apply equally to claims for contribution and indemnity. The court held that the limitation period is presumed to begin to run when the party is served with a claim. However, that presumption can be rebutted, and the limitation period can be extended beyond two years, by the discoverability principles set out in the Act.

The *Mega International* decision offers an important clarification to the law of limitations in Ontario. Previously, decisions from both the Ontario Superior Court of Justice and the Court of Appeal for Ontario were split on whether the discoverability principles in the Act applied to claims for contribution and indemnity or whether those claims were subject to an absolute two-year limitation period.

**The Motion for Summary Judgment**

When Mega International Commercial Bank (Canada) sold a development property as mortgagee under its power of sale, it suffered a \$1.1 million shortfall<sup>3</sup>. As a result, Mega International sued Tony Man Tung Yung and Yvonne Pui Ling Lai, a married couple, on personal guarantees they had given as security for Mega International's loan<sup>4</sup>.

In January 2011, Lai was served with the Statement of Claim. Yung, who was living outside of Canada at the time, was not served<sup>5</sup>.

In March 2011, Lai filed a Statement of Defence and a crossclaim against Yung<sup>6</sup>.

<sup>1</sup> 2018 ONCA 429 ("**Mega International**")

<sup>2</sup> S.O. 2002, c 24, Sch B (the "**Limitations Act, 2002**")

<sup>3</sup> *Mega International*, para. 34

<sup>4</sup> *Ibid*, para. 35

<sup>5</sup> *Ibid*, para. 36

<sup>6</sup> *Ibid*, para. 39

After serving Yung with the Statement of Claim by substituted service, Mega International obtained default judgment against him in 2015<sup>7</sup>. However, Yung later managed to have the default judgment set aside. He claimed that he was not aware that he'd been served in the first place<sup>8</sup>.

On September 1, 2015, Yung and Lai commenced third party claims against their former lawyer, Jimmy Sun and his law firm for contribution and indemnity. In their third party claims, Yung and Lai alleged that Sun had, among other things, acted in a conflict and had failed to replace or cancel their personal guarantees to Mega International's predecessor, International Commercial, as he had allegedly promised to do<sup>9</sup>.

Sun and his firm moved for summary judgment. They claimed that Yung and Lai's third party claims had been commenced outside of the two-year limitation period for claims for contribution and indemnity provided by ss. 4 and 18 of the Act.

The motions judge granted Sun's motion and dismissed Yung and Lai's third party claims. In finding that the claims for contribution and indemnity were statute-barred, the motions judge held that s.18 of the Act provided for an absolute two-year limitation period that began to run when the Statement of Claim was first served on Yung and Lai. The motions judge wrote:

Section 18 of the Act sets out an absolute two year limitation period in respect of Yung and Lai's Third Party Claim which begins to run from the time the defendants were served with the Statement of Claim in the action. As both Lai and Yung were served with the Statement of Claim more than two years before the Third Party Claim was commenced, the Third Party Claim was commenced after the limitation period had expired and cannot succeed.

...

The Statement of Claim was served on Lai sometime in early 2011, more than four years before the Third Party Claim was issued. It was served on Yung effective April 29, 2013, more than two years, four months prior to the Third Party Claim being issued. While, in my view, s. 18 provides that the date when the time begins to run is from the date of service of the Statement of Claim on Lai (the first wrongdoer), in either case the Third Party Claim was commenced more than two years from service of the Statement of Claim and is accordingly statute barred<sup>10</sup>.

## The Appeal

Yung and Lai appealed the dismissal of their third party claims to the Court of Appeal for Ontario. The appeal required the court to interpret s. 18 of the Act and to decide whether:

- (a) s. 18 in fact establishes an absolute two-year limitation period for claim for contribution and indemnity, or

<sup>7</sup> Ibid, paras. 40 and 42

<sup>8</sup> Ibid, paras. 42 and 43

<sup>9</sup> Ibid, para. 45

<sup>10</sup> *Mega International v. Yung*, 2017 ONCA 1005, paras. 2 and 49

(b) the discoverability principles set out in the Act apply to claims for contribution and indemnity.

The court held that the motions judge erred in deciding that the Act creates an absolute two-year limitation period for claims for contribution and indemnity. According to the court, s.18 works with the other provisions of the Act, including the discoverability principles. S. 18 creates a presumed start date for the running of the limitation period. The claim for contribution and indemnity will be statute-barred two years from service of the Statement of Claim unless the party making a claim for contribution and indemnity can demonstrate that the claim could not be discovered through reasonable diligence until some later date<sup>11</sup>.

In Yung and Lai's case, the evidence before the motions judge was conflicting and required credibility findings. The court held that it was not open to the motions judge to resolve those evidentiary conflicts in the context of a motion for summary judgment, given the facts of the case and the nature of the evidence before him<sup>12</sup>.

### **The Court of Appeal's Interpretation of S. 18 of the Limitations Act, 2002**

In order to appreciate the court's interpretation of s. 18, it is helpful to review the discoverability scheme provided for in the Act.

S. 4 of the Act establishes a "basic" two-year limitation period from when the claim is "discovered":

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered<sup>13</sup>.

S.5(1) defines when a claim is "discovered" as follows:

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew, (i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

<sup>11</sup> *Mega International*, para. 54

<sup>12</sup> *Ibid*, para. 85

<sup>13</sup> *Limitations Act, 2002*, s. 4

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)<sup>14</sup>.

Importantly, s.5(2) imposes a rebuttable presumption of knowledge on the person asserting the claim:

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved<sup>15</sup>

Section 15 of the Act establishes an ultimate limitation period. If a claim is not commenced within 15 years of the date on which the wrong occurred, it will be statute-barred<sup>16</sup>.

S. 18, which was directly at issue in the appeal, applies to claims for contribution and indemnity and provides as follows:

18(1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place<sup>17</sup>.

In finding that s. 18 does not create an absolute two-year limitation period and is subject to discoverability principles, the court reasoned as follows:

a. s. 18, on its own, does not create a limitation period. It deems a fact. The date on which a claim is served is deemed to be the date on which a wrong took place for which contribution and indemnity is sought<sup>18</sup>.

b. s. 18 is expressly linked to the Act's discoverability scheme, including the rebuttable presumption of knowledge established in s. 5(2). One need only look at the opening phrase of s. 18 "For the purposes of subsection 5(2) and section 15...". According to the court, s. 18 takes on meaning when it is read in conjunction with the Act's discoverability principles<sup>19</sup>.

c. If s. 18 created an absolute two-year limitation period, then the reference to the ultimate limitation period in s. 15 would not make sense, as the ultimate 15 year limitation period would not be relevant. To the court, the more logical interpretation is that s. 18 was designed to work harmoniously with s. 15<sup>20</sup>.

<sup>14</sup> Ibid, s. 5(1)

<sup>15</sup> Ibid, s. 5(2)

<sup>16</sup> Ibid, s. 15

<sup>17</sup> Ibid, s. 18

<sup>18</sup> *Mega International*, para. 62

<sup>19</sup> Ibid, paras. 63 - 64

<sup>20</sup> Ibid, paras. 69 — 70

The court pointed to its previous decision in *Canaccord Capital Corp. v. Roscoe*<sup>21</sup> where Sharpe J.A. wrote that the reform of Ontario's limitations scheme was "aimed at creating a clear and cohesive scheme for addressing limitation issues, one that balances the plaintiff's right to sue with the defendant's need for certainty and finality". In *Mega International*, the court concluded that this balance was achieved by finding that s. 18 and the discoverability scheme of the Act worked "hand in glove".<sup>22</sup>

Further, the court noted the potential injustice that could result if s. 18 were interpreted to provide an absolute two-year limitation period. With an absolute two-year limitation period, a defendant could automatically have her claim for contribution and indemnity dismissed even if that claim was not discoverable within the two-year period<sup>23</sup>.

In concluding its analysis of the interpretation of s. 18, the court wrote:

I would therefore hold that the motion judge erred in his interpretation of s. 18. The two-year limitation period prescribed by ss. 4, 5(2), and 18 for contribution and indemnity claims presumptively begins on the date of service of a claim in respect of which contribution and indemnity is sought. That presumptive limitation period start date, however, can be rebutted by the discoverability principles prescribed in s. 5 of the *Limitations Act, 2002*<sup>24</sup>.

The court set aside the dismissal of Yung and Lai's third party claims and ordered that the matter proceed.

## Conclusions

With the *Mega International* decision, parties do not need to fear that undiscoverable claims for contribution and indemnity will be automatically statute-barred two years from when they are served with a Statement of Claim. However, parties still need to exercise reasonable diligence in deciding when to commence claims for contribution and indemnity. The limitations clock is presumed to start running when the claim is first served. The party making the claim for contribution and indemnity will bear the onus of rebutting that presumption if they assert their claim more than two years later.

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<sup>21</sup> 2013 ONCA 378

<sup>22</sup> *Mega International*, paras. 67 and 72

<sup>23</sup> *Ibid*, para. 73

<sup>24</sup> *Ibid*, para. 74