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When Does the Clock Start: Limitation Periods in Contractual Claims for Indemnification

The hardest mistake to fix in litigation may be missing the limitation period. Almost every other mistake can be fixed, but missing that critical window for bringing a claim can be catastrophic.

In *CIT Financial Ltd v Canadian Imperial Bank of Commerce*, the parties had competing theories of when the limitation clock began to tick based on their interpretation of a share purchase agreement. Like all good limitation period disagreements, this one comes with a complex timeline.

In 1997, Newcourt Credit Group Inc. (“Newcourt”) bought almost all of the shares of Commcorp Financial Services Inc. under a share purchase agreement. Newcourt was later succeeded by the plaintiff, CIT Financial Ltd. (“CIT”).

The share purchase agreement included tax representations from the vendors in respect of pre-closing tax years, as well as a right of indemnity for damages resulting from a breach of any representation or warranty. The threshold to invoke the indemnity was set at $5 million dollars.

In March of 1998, Revenue Canada advised Newcourt that they were reassessing pre-closing tax filings of Commcorp. Newcourt received official notice of reassessment from Revenue Canada on June 18, 1998. Revenue Canada sought $80 million in taxes, interest and penalties.

Newcourt advised the vendors of the reassessment, noting that they would be required to remit to Revenue Canada half of the amount assessed immediately. Newcourt invoked the indemnity provision of the share purchase agreement on August 26, 1999. The vendors responded by raising questions in respect of their liability to indemnify. In the intervening period, Newcourt was purchased by CIT. CIT responded to the vendors in April of 2000 suggesting that all parties focus on the Revenue Canada litigation and deal with issues as between the parties at a later date.

The vendors never indemnified the plaintiff, who had paid $103 million to Revenue Canada. After significant litigation and a negotiated agreement, Revenue Canada returned to the plaintiff

$112 million dollars, inclusive of interest.

The plaintiff filed an action against the plaintiff seeking indemnity for the breach of the tax representation in the share purchase agreement and loss of use of funds paid into Revenue Canada.

The vendors brought a motion for summary judgment on the basis that the claim was statute barred. The dispute fell under the old *Limitations Act*, which gave the parties a six year window from when the material facts were discovered or ought to have been discovered.

The vendors argued that the limitations clock started to tick once they received official notice of the reassessment from Revenue Canada on July 27, 1998. The plaintiff argued that it was only when they specifically demanded indemnification from the vendors or when the vendors refused to provide an indemnity period that the limitations period began.

The Court held that when the limitations period starts depends on the basis of the plaintiff's claim: if the basis is a breach of the tax representation in the share purchase agreement, the limitation period starts when Revenue Canada notified of reassessment. But if the basis is a breach of the indemnity provision itself, the limitation period does not start until the vendors breach their obligation to indemnify.

Ultimately, the Court held that the indemnity provision could not be free standing. The claim was grounded in a breach of a representation and, therefore, indemnification was irrevocably tied to that underlying breach and consequent damage. The indemnity served as a contractual remedy, similar in function to damages.

If the plaintiff's theory was correct, they would control when the limitations period began by controlling when they requested indemnification. The Court held this would be commercially unreasonable and inconsistent with contractual survivability clauses designed to give parties certainty.

In finding that the clock started to run on the plaintiff's claim for indemnity when they received official notice of reassessment from Revenue Canada, the Court found that the claim was statute-barred.

The Court's decision reaffirms the significance of knowing your limitation period and, therefore, knowing the basis of your claim. Where a breach of an underlying contractual term starts the clock, it is important to be aware of the way in which indemnification provisions operate. While it seems obvious that a limitation period begins to run when the breach occurs, the

key is to know what breach you are looking for. The limitation clock may start ticking sooner than you expected.