“Time is of the essence” in contracts: What the SCC may decide in Cold Ocean Salmon

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On Oct.14, 2026, the Supreme Court of Canada (SCC) will hear *Cold Ocean Salmon Inc. v. Nova Fish Farms Inc.*, a commercial contract appeal about when delayed performance permits termination. The SCC will consider whether a standard “time is of the essence” clause can make an open-ended obligation, such as acting “as promptly as practicable,” essential to a commercial bargain. The appeal has practical implications for contract termination, specific performance, conditions precedent, and the drafting of commercial agreements across Canada.

The central issue is whether that standard contractual language can make an open-ended timing obligation, such as an obligation to act “as promptly as practicable,” essential to the commercial bargain. If it can, delayed performance may permit the innocent party to terminate the agreement. If it cannot, parties seeking a clear termination right may need to connect the “time is of the essence” clause to a fixed performance deadline or state the termination consequence expressly.

The appeal therefore places two competing commercial values in tension: flexibility in the performance of open-ended contractual obligations and certainty about when delayed performance permits termination.

Key takeaways for commercial parties and contract drafters

- A “time is of the essence” clause does not usually create a performance deadline. Instead, it addresses the consequences of missing a timing obligation. Where it applies, delayed performance may entitle the innocent party to terminate the agreement.
- The courts below agreed that Nova Fish failed to meet its contractual obligation to act “as promptly as practicable.” They disagreed about the consequence. The chambers judge held that the “time is of the essence” clause allowed Cold Ocean to terminate the agreement. The appellate court held that the “time is of the essence” clause did not apply to performance of an obligation expressed without a fixed deadline and, therefore, termination was not allowed.

- The main issue on appeal to the SCC boils down to whether the “time is of the essence” clause needs to be attached to fixed-time obligations. Cold Ocean says that the entire agreement and its commercial context show that the open-ended timing obligations were essential. Nova Fish says that a standard “time is of the essence” clause applies only to fixed deadlines unless the agreement clearly provides otherwise.
- The SCC’s decision may reshape both the drafting of commercial agreements and the interpretation and remedies available for breaches of “time is of the essence” clauses.
- A decision either way will affect contractual drafting practices nationally. The outcome will likely influence how parties draft deadlines, conditions precedent, approval obligations, notice and cure provisions, and termination rights.

Cold Ocean Salmon v. Nova Fish Farms: Facts and procedural history

The underlying dispute arose from an agreement whereby Cold Ocean agreed to sell Nova Fish its interests in trout-farming sites in Newfoundland and Labrador. Because the sites were located on provincially leased property, the transaction required regulatory approval before the assets could be transferred.

The agreement did not set a specific deadline for obtaining regulatory approval. Instead, it required Nova Fish to submit the necessary applications “as promptly as practicable” after signing and to use “commercially reasonable efforts” to obtain the required approvals. Closing was to occur seven days after the required approvals were obtained. The agreement also contained the boilerplate clause: “Time shall be of the essence of this Agreement.”

Nova Fish did not submit the approval applications until approximately 16 months after the agreement was signed. When Nova Fish obtained approval months later, it advised Cold Ocean that it wished to proceed with closing the transaction. However, Cold Ocean refused to complete, arguing that Nova Fish’s delay breached an essential timing obligation, thereby entitling Cold Ocean to terminate the agreement.

Nova Fish commenced an action seeking specific performance of the agreement (a Court-ordered remedy requiring Cold Ocean to complete) or, in the alternative, damages. On an application for summary trial of the action, the chambers judge found that Nova Fish was in breach of its obligation to proceed “as promptly as practicable” which was “of the essence”. Based on that finding, the Court held that Cold Ocean was entitled to terminate the agreement and dismissed the application for specific performance.

The Court of Appeal of Newfoundland and Labrador upheld the chambers judge’s finding that Nova Fish breached its timing obligations under the agreement. It nevertheless held that the “time is of the essence” clause did not apply to a contractual obligation expressed without a fixed deadline (i.e., “as promptly as practicable” instead of by a specific date). That being the case, Cold Ocean was not entitled to terminate the agreement, and Nova Fish was granted an order for specific performance. Cold Ocean appealed to the SCC.

What the parties say about “time is of the essence” clauses

Cold Ocean: Context and freedom of contract control the analysis

In the materials filed in the SCC, Cold Ocean’s core argument is that the Court of Appeal erred by interpreting the “time is of the essence” clause in isolation from the rest of the agreement. In its submission, even standard contractual language must be read with the agreement as a whole and the commercial circumstances to determine the parties’ objective intention.

Cold Ocean’s argument emphasizes the specific transaction’s performance structure. Nova Fish controlled the regulatory applications needed to trigger the closing date. The agreement required Nova Fish to proceed “as promptly as practicable”, closing was to follow seven days after approvals were obtained, and time was expressly made of the essence.

Cold Ocean contends that there is no legal reason why sophisticated parties cannot agree that breach of an open-ended timing obligation will carry termination consequences. If the agreement as a whole demonstrates that the parties considered prompt performance essential, as they did by expressly qualifying an obligation to be performed promptly, the absence of a fixed deadline for performance should not prevent the Court from giving effect to that intention.

Nova Fish Farms: Settled boilerplate language promotes contractual certainty

Nova Fish argues that a “time is of the essence” clause has an established legal function and should be interpreted consistently. It says the clause addresses the consequences of missing a stipulated deadline but does not make an open-ended standard, such as “as promptly as practicable”, subject to automatic termination consequences.

Nova Fish’s argument emphasizes that a clause intended to provide certainty should not expose a party to termination based on a deadline that cannot be identified in advance. For example, if missing an open-ended performance obligation can trigger termination, a party may not know when it has breached its performance obligation and be subject to termination. The other party may likewise be uncertain about when it acquires a right to terminate.

In Nova Fish’s submission, parties who want a “time is of the essence” clause to apply to an open-ended obligation can say so directly by connecting the clause expressly to that obligation or by stating the termination right in clear terms.

Two possible outcomes at the SCC

The appeal presents the SCC with two competing approaches to interpreting the agreement:

1. “Time is of the essence” clauses apply to open-ended timing obligations: The SCC allows the appeal and affirms that a “time is of the essence” clause may apply to an open-ended timing obligation where the agreement as a whole demonstrates that it was the parties’ intention.
2. “Time is of the essence” clauses only apply to fixed-time obligations: The SCC upholds the Court of Appeal’s order and clarifies that a standard “time is of the essence” clause applies only to fixed performance deadlines unless the parties clearly extend it to an open-ended obligation.

Practical implications for commercial contracts, termination rights, and specific performance

Whatever the outcome, this dispute offers an immediate drafting lesson: parties should not rely on general boilerplate to carry a commercially critical termination right if they can state the intended result directly.

1. “Time is of the essence” clauses apply to open-ended timing obligations

If the SCC accepts Cold Ocean’s position, the decision would confirm that the effect of a “time is of the essence” clause depends on the agreement as a whole and is not necessarily limited to obligations containing a fixed calendar deadline:

- Parties could rely on a “time is of the essence” clause as applying to open-ended timing obligations. There would be continued use of language such as “as promptly as practicable” or “commercially reasonable efforts”.
- Breach of contract claims would be centred on: (i) how open-ended timing obligations should be interpreted in the circumstances; and (ii) whether one party’s contractual performance was completed by the non-specified time.
- Disputes would likely focus on what the standard of performance required in the particular commercial circumstances, whether the performing party met that standard, and whether the delay justified termination rather than another contractual remedy.
- The decision would reinforce freedom of contract by allowing the parties to define the consequences of delayed performance through the overall structure and context of their agreement.

2. “Time is of the essence” clauses only apply to fixed-time obligations

If the SCC sides with Nova Fish and holds that a “time is of the essence” clause will only apply to fixed-time obligations:

- “Time is of the essence” clauses would not give rise to a termination right unless the clause was connected to a specific timeline for performance of an obligation or a stated termination right.
- Greater certainty would exist regarding when delayed contractual performance constitutes a breach and triggers the right to terminate.
- Parties would need to devote more attention to negotiating and drafting express deadlines and conditions precedent to ensure the intended consequences are captured.

Practical Contract Drafting Checklist

- Identify which timing obligations are essential, rather than relying only on a general boilerplate clause.
- Use a fixed outside date where commercial certainty is more important than flexibility.
- State whether a missed deadline permits termination, triggers a cure period, or gives rise only to damages.
- Connect conditions precedent, third-party approvals and “commercially reasonable efforts” or “best efforts” obligations to clear notice and escalation mechanisms.
- Address waiver, extensions, and the steps required to restore time as an essential term after a deadline is extended or tolerated.
- Align the termination clause, specific-performance provisions, and dispute-resolution process with the agreement’s timing structure.

Why this commercial contract appeal matters

Parties to commercial agreements frequently use boilerplate contractual terms to leave obligations open-ended. Those terms can be useful where regulatory approval, third-party consent, or another uncertain event makes a calendar deadline impractical. The trade-off is that flexibility can make it harder to determine when delay becomes a breach of contract and when a breach permits termination. The SCC’s decision will help determine whether standard “time is of the essence” clauses can convert those flexible obligations into grounds for termination.

We are monitoring the appeal and will publish a further update after the SCC releases its decision. In the meantime, businesses entering, performing, or seeking to exit a commercial agreement should review whether their timing provisions clearly identify the obligation, the deadline or performance standard, and the consequence of delay. If a live transaction or dispute turns on those questions, early advice can help preserve termination rights, avoid an unintended waiver, and shape the evidentiary record before positions harden.

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