

ICSC TORONTO LAW CONFERENCE - BREAKFAST ROUNDTABLES – APRIL 27, 2017

Can I still sue? How far back can I go? Limitation Issues

- **History:**
 - Parts II and III of the former *Limitations Act* were repealed and replaced with the ***Limitations Act, 2002***, S.O. 2002, Chapter 24, Schedule B ("**Limitations Act**"). Part I was renamed the *Real Property Limitations Act*, R.S.O. 1990, Chapter L.15 ("**RPLA**") and continued in its existing form. The new *Limitations Act* was designed to simplify the application of limitation periods by providing, subject to some exceptions, a basic limitation period of two years ***based on a principle of discoverability*** and an ultimate limitation period of 15 years.
 - **Lease Agreements:**
 - Dual nature of commercial leases:
 - a commercial contract (*Highway Properties*) **AND**
 - deals with rights to real property.
 - **Which Act Applies:** Do disputes regarding commercial leases fall under the contractual limitation periods in the new *Limitations Act* or the *RPLA*? The limitation periods set out in the *Limitations Act* do not apply to proceedings to which the *RPLA* applies (See subsection 2(1)(a) *Limitations Act*).
 - **Arrears of Rent/Interest (RPLA):** The limitation on several types of actions related to real property are governed strictly by the *RPLA* (limitation periods ranging from six to 60 years). The actions governed by the *RPLA* relating to commercial leases are primarily actions to recover arrears of rent or interest. Therefore if a dispute relates to ***arrears of rent***, a party has six (6) years from the sum becoming due, or six years following written acknowledgment by the party owing the sum, to formally commence an action.
 - **Breach of Other Commercial Covenants (Limitations Act):** Actions arising out of other contractual obligations set out in commercial leases that are not governed by the *RPLA* will be covered by the limitation periods in the new *Limitations Act*. Any breach of covenant or breach of a clause in a commercial lease that does not pertain to payments that can be classified as arrears of rent will be subject to the basic two-year limitation period under the new *Limitations Act*. Examples: breach of covenant to repair, improper tenant assignments or sublettings, landlord improperly withholding consent to assign or sublet, failure to obtain insurance, and breach of continuous operating covenant or restrictive covenant.
 - **Note:** The *RPLA* does not specifically address issues of **overpayment of rent**. A tenant making a claim for recovery of overpayment of rent is subject to the two-year rule under the *Limitations Act*. Tenant must bring an action to recover overpayment of rent within two years from the time where a reasonable person in the circumstances first ought to have known of the claim in accordance with the discoverability principle.

However, consider result in **Sun Life Trust Co. v. Goodman, (1996)**

 - Tenant overpaid rent over the term of the lease
 - Both Landlord and Tenant mistaken as to the area of the premises
 - Landlord had obligation to measure
 - *Laches* and not *Limitations Act* was pleaded, but Tenant's claim upheld - **Environmental Claims (Limitations Act):** There is no limitation period in respect undiscovered environmental claims (Section 17, *Limitations Act*).
- **Contracting out of the Limitations Act:** In commercial leases, the parties can vary, suspend or extend the limitations (the ultimate limitation period may only be varied if the claim has been discovered).

- Section 22 (5): only in respect of business agreements:
 - 1. Limitation period, other than period under section 15, may be varied or excluded by an agreement made on or after October 19, 2006; and
 - 2. Limitation period under section 15 may be varied by an agreement made on/after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4).
- **Altering Basic 2 Year Limitation Period:**
 - Submitting a matter to independent mediator/arbitrator (LA s. 11);
 - Period runs from date of acknowledgement if certain liabilities are acknowledged in writing (LA s. 13 (1) and (9));
- **Contracting out of the RLPA:** Under the RLPA, there is no explicit prohibition or allowance on varying its statutory limitations, and any right to bring an action is extinguished upon the expiry of the period set out in the RLPA.
- **Cases of Interest:**
 - **Ayerswood Development Corp. v. Western Proresp Inc. (2011):**
 - Action by landlord to recover arrears and damages for tenant's failure to restore premises
 - Landlord delivered reconciliation statement after lease expired
 - Court decides in favour of landlord: "[arrears were] not due in accordance with the terms of lease until they were billed by [landlord]" Based on s. 17(1) of RLPA, landlord had 6 years to claim amounts from the date is claimed the reconciliation amount
 - Lease did not define any specific fiscal "period" or deadline for delivery of reconciliation statement
 - **QUERY:** Would the case be treated differently today in light of the SCC decision in *Bhasin v. Hrynew* (authority for the doctrine that contractual parties must perform their obligations in good faith)?
 - **Pickering Square Inc. v. Trillium College (2014):**
 - Action by landlord for (i) arrears, (ii) damages for breach of continuous operation covenant, and (ii) damages for failure to restore premises. Arrears were paid before hearing and no issue as to limitation regarding failure to restore, so only issue was timeliness of damages re breach of operation covenant.
 - Court held that for the purposes of s. 17 RLPA, "rent" means: "the payment due under a lease between a tenant and a landlord as compensation for the use of land and premises"; court also maintained the LA should be construed broadly, whereas the RLPA should be construed narrowly.
 - Lease deemed all amounts or charges owing to the landlord as "Additional Rent", "whether or not designated as 'Additional Rent' or whether or not payable to the landlord or otherwise
 - Court held that simply designating or deeming something to be "rent" doesn't make it rent for the purposes of the RLPA

Statutory References

Summary Chart*

	Limitations Act, 1990 ("Old Act")	Limitations Act, 2002 ("New Act")	Real Property Limitations Act, 1990 ("RPLA")
What?	<ul style="list-style-type: none"> Governed <u>both</u> real property limitation periods and standard contractual limitation periods until December 31, 2003 	<ul style="list-style-type: none"> Came into force January 1, 2004 Adopted Parts II and III of Old Act <u>Does not apply</u> to proceedings to which RPLA applies (S. 2(1)) 	<ul style="list-style-type: none"> Adopted Part I of Old Act as RPLA Applies to proceedings concerning real property
Limitation Periods	<ul style="list-style-type: none"> 6 months to 20 years 	<ul style="list-style-type: none"> 2 years from discovery (S. 4) 15 years from discovery (S.15) 	<ul style="list-style-type: none"> Various periods Ex: 6 years, 10 years
Commercial Lease	<ul style="list-style-type: none"> Not specifically addressed under this statute 	<ul style="list-style-type: none"> Not specifically addressed under this statute 	<ul style="list-style-type: none"> Not specifically addressed under this statute
"Rent"	<ul style="list-style-type: none"> "Includes all annuities and periodical sums of money charged upon or payable out of land." 	<ul style="list-style-type: none"> Not defined 	<ul style="list-style-type: none"> Same as Old Act (S. 1) = "<u>Includes all annuities and periodical sums of money charged upon or payable out of land.</u>"
Rental Arrears	<ul style="list-style-type: none"> 6 years after it has become due 	<ul style="list-style-type: none"> Not defined 	<ul style="list-style-type: none"> S. 17 (Same as Old Act) 6 years from when due
Result	<ul style="list-style-type: none"> Dual limitation periods regime in Ontario Intended to simplify, but in some instances may have further complicated 		

* Summary chart courtesy of Richard Manias of Borden Ladner Gervais LLP

Limitations Act, 2002, S.O. 2002, Chapter 24:

Basic limitation period: Section 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**.

Discovery: Section 5.

- (1) A claim is discovered on the earlier of,
- the day on which the person with the claim first knew,
 - that the injury, loss or damage had occurred,
 - that the injury, loss or damage was caused by or contributed to by an act or omission,
 - that the act or omission was that of the person against whom the claim is made, and
 - 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
 - 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).

Ultimate limitation periods: Section 15.

- Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section. 2002, c. 24, Sched. B, s. 15 (1).
- (Ultimate Limitation) No proceeding shall be commenced in respect of any claim after the **15th anniversary** of the day on which the act or omission on which the claim is based took place.
- (Purchasers for value) Despite subsection (2), no proceeding against a purchaser of personal property for value acting in good faith shall be commenced in respect of conversion of the property after the second anniversary of the day on which the property was converted.
- (Suspension of running of period) The limitation period established by subsection (2) does not run during any time in which,

- (a) the person with the claim,
 - (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
 - (ii) is not represented by a litigation guardian in relation to the claim;
- (b) the person with the claim is a minor and is not represented by a litigation guardian in relation to the claim; or
- (c) the person against whom the claim is made,
 - (i) wilfully conceals from the person with the claim the fact that injury, loss or damage has occurred, that it was caused by or contributed to by an act or omission or that the act or omission was that of the person against whom the claim is made, or
 - (ii) wilfully misleads the person with the claim as to the appropriateness of a proceeding as a means of remedying the injury, loss or damage.

Limitation periods apply despite agreements: Section 22.

(1) A limitation period under this Act applies despite any agreement to vary or exclude it, subject only to the exceptions in subsections (2) to (6). 2006, c. 21, Sched. D, s. 2.

Exceptions:

(2) A limitation period under this Act may be varied or excluded by an agreement made before January 1, 2004. 2006, c. 21, Sched. D, s. 2.

(3) A limitation period under this Act, other than one established by section 15, may be suspended or extended by an agreement made on or after October 19, 2006. (2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1)).

(4) A limitation period established by section 15 may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered. (2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1))

(5) The following exceptions apply only in respect of business agreements:

1. A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006.
2. A limitation period established by section 15 may be varied by an agreement made on or after October 19, 2006, except that it may be suspended or extended only in accordance with subsection (4). (2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (1))

(6) In this section,
 “business agreement” means an agreement made by parties none of whom is a consumer as defined in the *Consumer Protection Act, 2002*; (“accord commercial”)

“vary” includes extend, shorten and suspend. (“modifier”) 2006, c. 21, Sched. D, s. 2; 2008, c. 19, Sched. L, s. 4 (2).

Real Property Limitations Act, R.S.O. 1990, Chapter L.15:

Rent/Interest Arrears: Section 17.

(1) No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, whether it is or is not charged upon land, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress or action but within six years next after the same respectively has become due, or next after any acknowledgment in writing of the same has been given to the person entitled thereto or the person’s agent, signed by the person by whom the same was payable or that person’s agent.