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PUSHING THE LIMITS OF LIMITATION PERIODS

Under a typical net lease, flow-through amounts of additional rent are paid in provisional instalments, based on estimates that are reconciled at the end of the fiscal period. Similar reconciliation payments can arise under percentage rent regimes and following measurement of rentable areas. Sometimes the tenant is entitled to a refund or credit, and sometimes it owes a top-up amount.

Whenever amounts are payable under a lease, the parties ought to be mindful of the applicable “limitation period”.

LIMITATION PERIODS

A limitation period is a statutory deadline by which, if an amount is unpaid, the party seeking to collect must initiate court proceedings. Otherwise, it loses the right to collect.

The general limitation period in most provinces is 2 years (3 years in Quebec). However, in Ontario, section 17(1) of the *Real Property Limitations Act* (“RPLA”) specifies a 6-year limitation period for rent claims. All Canadian territories and most Atlantic provinces have a similar 6-year limitation period for rent claims.

WHAT IS “RENT”?

In *Pickering Square Inc. v Trillium College Inc.* (“Trillium”), the Ontario Superior Court held that not all amounts payable by a tenant under a lease are “rent” for purposes of the RPLA. The court stated that rent means “the payment due under a lease between a tenant and landlord as compensation for the use of land or premises”. In *Trillium*, the landlord’s claim for liquidated damages (for the tenant’s failure to continuously operate in the premises) fell outside the meaning of “rent” in the RPLA, despite the definition of “Additional Rent” in the Lease. The landlord’s claim was therefore subject to the general 2-year limitation period.

Conventionally, “rent” is perceived as capturing only payments *from* a tenant *to* its landlord. Refunds owed to the tenant are not generally considered to qualify as “rent.” On that basis, the 6-year limitation period would not be available to a tenant claiming a refund. In fact, the Ontario Superior Court held in *914068 Ontario Inc v 713949 Ontario Inc.* that the tenant’s claim for an adjustment of utility charges in its favour was subject to the 2-year limitation period.

CAN A TENANT CLAIM BACK 6 YEARS?

A theory is circulating, to the effect that the recent decision of the Ontario Superior Court of Justice in *Rexall Pharmacies Ltd. v 1178860 Ontario Limited* (“Rexall”) supports the availability of the 6-year period under the RPLA to a tenant claim for an adjustment refund.

In *Rexall*, the lease called for calculation of the tenant’s share of taxes based on area (proportionate share). Since the beginning of the lease, however, the landlord calculated the tenant’s share of taxes based on valuation notes provided by the assessor. This method did not comply with the lease. Nevertheless, for a period of 17 years, the tenant paid in accordance with the landlord’s calculation. In 2017, the tenant started underpaying the taxes charged, and in 2023 it brought an action for: (1) a *declaration* that the tenant’s share of taxes was its proportionate share; and (2) an *accounting* going back to commencement to the lease. The landlord defended the tenant’s claim on the basis that the tenant’s payment history amounted to an acceptance of the landlord’s methodology, and in any case, if that defence failed, the tenant’s right to an *accounting* was limited to only the 2 years prior to the initiation of the court proceedings.

The court granted the tenant’s request for a *declaration*. It ordered the landlord to calculate the tenant’s share of taxes

in accordance with the proportionate share method set out in the lease. The court accepted the tenant's position that this part of its claim was not subject to any limitation period, as it fell within section 16(1)(a) of Ontario's *Limitations Act* (which provides that there is no limitation period "if no consequential relief is sought").

The court then considered whether the applicable limitation period for the *accounting* was the general 2-year period or the 6-year period under the *RPLA*. Relying on the decision in *Trillium*, the court held that taxes constitute "rent" within the meaning of the *RPLA*. Thus, it held that "the claims for determination of the realty taxes" can go back 6 years. On its own, this wording suggests that it is immaterial whether the adjustment to be made is in favour of the landlord or the tenant. However, in the conclusion of the ruling, the court granted the *landlord* the right to collect unpaid property taxes from the tenant (calculated based on the correct method) going back 6 years. The court dismissed the tenant's claim for an accounting.

STARTING THE CLOCK

When dealing with limitation periods, once it is determined whether the 2-year or 6-year period applies, it's critical that the parties turn their mind to the question of: "starting when?". In Ontario and most other Canadian jurisdictions, the general 2-year limitation period starts when the party with the claim "first knew" or "ought to have known" that

they had a claim against the other party. For the 6-year *RPLA* period, the clock starts when the amount had "become due". (This is logically connected to the notion that rent is due on fixed dates.)

Interestingly, on a claim for additional rent adjustments, it may be difficult to ascertain when the limitation period clock began to run. Often, year-end adjustments are carried out very late or over a span of months, as landlords and tenants exchange information in furtherance of the true-up exercise.

The topic gets even more complex when the adjustment yields a "credit" (vs. a refund that is due within a set period of time). Is a credit "taken" by the tenant? Or is it issued by the landlord? When can a credit be taken by the tenant? By when must it be issued by the landlord? Whose job is it to apply the credit? If the lease expresses no set time or is vague as to the mechanism of applying the credit, the limitation period may have an unknown commencement, yielding an unknown expiry.

BOTTOM LINE

It is well established that in certain Canadian jurisdictions, landlords enjoy a 6-year limitation period on claims against their tenants for unpaid rent. Tenants should not assume that they have reciprocal entitlement for refund claims, but they might have a better shot at stretching out the claim period if their lease entitles them to a "credit".

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.



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