

# ROLLING LIABILITY FOR CONTINUOUS BREACHES OF COMMERCIAL LEASES

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Commercial leases often contain covenants of continuous performance; a breach of such a covenant is also continuous. However, a business' decision to enter into, default under, or litigate a commercial lease is made at a distinct moment in time. Businesses can weigh the costs and benefits of such a decision most accurately when obligations and rights can be estimated contemporaneously. Identifying the scope of liability is vital to ensure that such a decision is sufficiently informed. The Ontario Court of Appeal's decision in *Pickering Square Inc. v Trillium College Inc.*<sup>[1]</sup>, sheds light on the limitation of liability in leases when breaches are continuous, specifically, when a claim for a continuing breach of contract will be considered 'discovered' for the purposes of the *Limitations Act, 2002*<sup>[2]</sup>.

## Background

Trillium College Inc. ("Trillium") and Pickering Square Inc. ("Pickering") were parties to a five-year lease. The covenants of the tenant, Trillium, included the payment of rent, occupation of the premises, and operation of its business within the leased premises. In late 2007, Trillium gave notice to its landlord, Pickering, that it was vacating the premises prior to the expiry of the lease. Pickering sued Trillium for arrears of rent in early 2008 and this suit was resolved in the following months when Trillium agreed to pay the arrears in rent and occupy the premises under the terms of the lease. Trillium paid the arrears in rent but did not resume occupation. Trillium continued to pay rent for the full term of the lease until its expiry in May 2011.

In February 2012, Pickering brought a claim for damages allegedly caused by Trillium's failure to occupy the premises and operate its business in accordance with the lease. Trillium brought a motion for summary judgment seeking a dismissal of Pickering's claim on the grounds that the claim was outside the basic two-year limitation period imposed by the *Limitations Act, 2002*. As Pickering was aware that Trillium had ceased its occupation of the premises almost four years prior, Trillium's position was that Pickering's claim had been discovered or was discoverable well beyond the limitation period. The motion judge held that only the portion of Pickering's claim occurring more than two years before the action was brought was barred by the *Limitations Act, 2002*. Trillium appealed this finding to the Ontario Court of Appeal.

## Dispute and Ruling

Trillium submitted that its breach under the lease was complete on the first day it failed to resume the occupation and operation of its business in the premises, characterizing each subsequent day that it failed to do so as an instance of additional damages rather than as a separate breach. The Court rejected this submission, noting that as a consequence of a continuous breach of contract the innocent party is provided the opportunity to either affirm or cancel the lease. As Pickering had never elected to cancel the lease, the lease remained in full effect until the end of its term. Had Trillium chosen to resume its obligations under the lease at any time, Pickering would have been bound to accept Trillium's performance. The Court concluded that in that case, Trillium would have been liable for damages solely from the time it vacated the premises until it resumed occupation, and would not have incurred liability beyond that date. The extent of Trillium's liability could not have been discovered on the first day of its vacancy.

Although the Court accepted Trillium's submission that a cause of action accrues once damage has been incurred, the Court held that the accrual of a cause of action is not determinative for the purposes of establishing the appropriate limitation period in the context of a continuous breach of contract. A fresh cause of action had accrued against Trillium for each day of the continuous breach, and Pickering's discovery of its claim had occurred in parallel. The Court determined that the limitation period applied on a rolling basis for every individual day that Trillium continued to be in breach of its covenants under the lease. Despite the fact that Pickering knew Trillium had ceased to occupy the premises over four years prior, the application of the rolling limitation period resulted in Pickering's ability to seek compensation for the portion of the continuous breach occurring up to two years prior to the day it commenced its action.

## Takeaway for Parties to Commercial Leases

Covenants imposing continuous performance are common. When serious breaches of such covenants occur the innocent party has the privilege of re-evaluating the costs and benefits of affirming or cancelling the lease. As illustrated in *Pickering Square Inc. v Trillium College Inc.*, parties in breach should also conduct this analysis in order to appreciate the consequences of an action or omission on their business. Where a breach is continuous, the relevant limits of liability and discoverability are not fixed at the first date of the breach. *Pickering Square Inc. v Trillium College Inc.* confirms that parties may be entitled to seek a monetary remedy for the segment of a continuous breach that occurs within the statutory limitation period, even where the breach originally began outside this limit.

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[1] *Pickering Square Inc. v Trillium College Inc.*, 2016 ONCA 179, 2016 CarswellOnt 2929.[ps2id id='1' target='']

[2] *Limitations Act, 2002*, SO 2002, c. 24, Sched. B.[ps2id id='2' target='']

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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