



## **Thomas G. Heintzman, O.C., Q.C., FCI Arb**

**Heintzman ADR**

**Arbitration Place**

**Toronto, Ontario**

**[www.arbitrationplace.com](http://www.arbitrationplace.com)**

**416-848-0203**

**[tgh@heintzmanadr.com](mailto:tgh@heintzmanadr.com)**

**[www.constructionlawcanada.com](http://www.constructionlawcanada.com)**

**[www.heintzmanadr.com](http://www.heintzmanadr.com)**

Thomas Heintzman specializes in alternative dispute resolution. He acts as an arbitrator and mediator in commercial, financial, construction and franchise disputes.

Prior to 2013, Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of *Heintzman & Goldsmith on Canadian Building Contracts*, 5<sup>th</sup> Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

## **When Does The Limitation Period Start When A Party Repudiates A Contract?**

You might think that there is one answer to this question. But in *Pickering Square Inc. v. Trillium College Inc.*, the Court of Appeal for Ontario recently reminded us that there are two answers, depending on whether the innocent party accepts the repudiation or not. If the repudiation is accepted, then the contract comes to an end and the limitation period starts to run for all claims under the contract. But if the innocent party does not accept the repudiation, then the contract continues and the repudiation may well constitute a continuing breach of

contract. If that is so, then for each day of non-performance, the limitation period runs from that day.

## **Background**

Pickering was the lessor and Trillium was the lessee under a lease of space in a shopping centre. In the lease, Trillium agreed to pay rent, to occupy the premises and to continuously operate its business as a vocational college, and to restore the premises at the expiry of the lease. Trillium gave notice to Pickering that it was vacating the premises and did so in December 2007. In June 2008, Pickering sued the appellant for rent arrears and payment under the lease for its failure to occupy the premises and to conduct its business continuously. The suit was settled in August 2008 and Trillium agreed to resume occupation of the leased premises. Trillium paid the rent for the remainder of the lease but it did not re-occupy the premises, did not conduct its business in those premises, and did not restore the premises at the end of the lease. After the lease expired, Pickering sued Trillium for breach of the lease.

Trillium brought a motion for summary judgment, arguing that Pickering's claim was brought outside the two-year limitation period under s. 4 of the Ontario *Limitations Act, 2002*. The motion judge held that Trillium's breach of the covenant to occupy the premises and operate its business continuously was of a continuing nature, such that each day of the breach gave rise to a fresh cause of action. As a result, only the claim relating to the breach occurring more than two years prior to commencement of the action was barred by the *Limitations Act, 2002*.

The motion judge also held that Pickering's claim for damages for breach of the covenant to restore the premises was not time barred. The obligation to restore arose when the lease expired on May 31, 2011, and Pickering's action in February 16, 2012 was brought within two years of that date. .

## **The Appeal**

Trillium argued that its breach of the covenant to operate its business continuously was complete on October 1, 2008, the first day it failed to resume occupation of the leased premises and operate its business. It submitted that each subsequent day that it failed to operate its business was not a separate breach and that each day of non-occupation did not give rise to a separate cause of action; rather, each such day constituted an instance of additional damages. Trillium submitted that a continuing breach of contract requires a succession or repetition of separate acts. In this case, it argued, there was a single act with continuing consequences and consequently, Pickering's claim became statute-barred on October 1, 2010, two years after October 1, 2008 when Trillium failed to resume occupation and conduct its business, and long before Pickering commenced its action in February 2012.

The Ontario Court of Appeal rejected this submission. In doing so, the court differentiated between a repudiation of a contract which is accepted, in which case the contract comes to an end, and a repudiation of contract which is not accepted, in which case the contract remains in

force. In the latter situation, the continuing failure of the repudiating party may amount to a continuing breach of contract. In that latter situation, the limitation period applies to each day of continuing breach. The limitation period expires on a rolling basis, so that once two years passes from a particular day then the limitation period for that day expires, but it has not yet expired for successive days and breaches.

The Ontario Court of Appeal explained the repudiation principle as follows:

“The election to cancel a contract as a result of a serious breach or repudiation brings a contract to an end and relieves the parties of any further obligations under it. The contract is not void *ab initio*: the innocent party may sue for damages for breach of the contract....By contrast, if the innocent party elects to affirm the contract despite the serious breach or repudiation, the contract remains in effect and the parties are required to perform their obligations under it. The innocent party retains the right to sue for past and future breaches...Pickering elected not to cancel the lease following Trillium’s October 1, 2008 breach. It affirmed the lease and, as a result, the parties were required to perform their obligations under it as they fell due...Trillium could have resumed performance of its obligations at any time prior to the end of the term of the lease by carrying on its business at the leased premises in accordance with the terms of the covenant. Had it done so, Pickering would have been required to accept Trillium’s performance and would have been unable to terminate the lease in the absence of a further serious breach or repudiation. Trillium would have been liable for damages from the date of its October 1, 2008 breach until the date it resumed the performance of its covenant obligations, but would not have incurred liability for breach of the lease beyond that date. Trillium chose not to resume its obligations at any point prior to the expiry of the lease.”

The Ontario Court of Appeal then explained the applicable limitations principle:

“In these circumstances, when did the two-year limitation period begin to run? It is clear that a cause of action accrues once damage has been incurred, even if the nature or the extent of the damages is not known....But accrual of a cause of action is not determinative for limitation purposes in the context of a continuing breach of contract and an election by the innocent party to affirm the contract. The motion judge properly concluded that a fresh cause of action accrued every day that breach continued – every day that Trillium failed to carry on its business in accordance with the covenant.....The accrual of fresh causes of action has consequences for the innocent party as well as the party in breach of the contract. It sets the clock running for a new two-year limitation period. Pickering’s election to affirm rather than cancel the lease does not have the effect of postponing the date for discovery of the breach until expiry of the lease.....The limitation period in this case applied on a “rolling” basis.....The two-year limitation period commenced each day a fresh cause of action accrued and ran two years from that date. Thus, Pickering was entitled to claim damages for breach of the covenant for the period going back two years from the commencement of its action on February 16,

2012 – the period that ran from February 16, 2010 until the lease expired on May 31, 2011.”

The Court of Appeal also upheld Pickering’s claim for repairs to be done at the end of the lease. Pickering was only claiming for breach of this covenant at the end of the lease, and not before. Accordingly, the limitation period for that breach arose in May 2011 when the lease expired, not in October 2008 when Trillium failed to resume occupation.

## **Discussion**

This decision is a useful reminder of the distinction between an accepted and unaccepted repudiation of contract. The former brings the contract to an end. The latter does not, and as such has been described as something “writ upon water”. The fact that the contract remains in place is obviously important for the ongoing performance of the contract, as the obligation of performance remains in place on both sides of the contract. But as importantly, the limitation period continues to apply, on a rolling basis, to the breaches that occur after the unaccepted repudiation. And the Court of Appeal has held in this case that it does not require separate and positive acts by the defaulting party to occur for there to be continuing breaches of the contract. Rather, the failure to act and the omission of performance amount to continuing breaches of the contract.

There may be other implications of an unaccepted repudiation of the contract. It is not just the obligation of performance that continues. In addition, the parties remain entitled to exercise positive rights under the contract. Also, the performance of contracts with subcontractors and consultants, and the coverage and reporting obligations under insurance contracts and bonds, may be affected.

**See *Heintzman and Goldsmith on Canadian Building Contracts*, 5<sup>th</sup> ed., chapter 8 part 8(b) and chapter 9 part 3.**

***Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179**

**Contracts – repudiation – non-acceptance of repudiation – limitation period**

**Thomas G. Heintzman O.C., Q.C., FCI Arb**

**April 17, 2016**

**[www.heintzmanadr.com](http://www.heintzmanadr.com)**

**[www.constructionlawcanada.com](http://www.constructionlawcanada.com)**