

Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

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Forbearance Agreements and Tolling Provisions

By D. Robb English

Recently, we have run into several situations where there was a danger of a limitation period expiring during or shortly after a forbearance period. Sometimes demands are issued and notices of intention to enforce security are delivered at or before the execution of the Forbearance Agreement. Even if no formal demand is made, one might be concerned about a debtor claiming that the declaration of default in the Forbearance Agreement would start the clock on a limitation period.

It also seems that in the current economic climate, forbearance periods sometimes continue on for quite some time. It may be that there is a restructuring, or the debtor may actually be fixing the problem and is rehabilitated. Sometimes a loan gets returned to a branch which is completely unaware of any limitation concerns.

The danger in this situation is that the limitation period for starting an action to recover the debt will be silently running from the date of initial demand, and the present two-year limitation period is much shorter than the previously existing six-year limitation for contracts. However, limitation periods may be suspended, or extended, by agreement in writing, which will avoid any unexpected or intended loss of rights from occurring.

Aird & Berlis LLP recommends that you consider adding to any Forbearance Agreement an additional tolling provision. An extract of the forbearance clause in a typical forbearance agreement, and a sample of a suggested additional tolling provision, are set out below.

3.2 Forbearance

- a. In reliance upon the representations, warranties and covenants of the Borrower and the other parties hereto (Guarantors) as contained in this Agreement and subject to the terms and conditions of this Agreement, and any document or documents executed in connection herewith, the Bank agrees to forbear from exercising its rights and remedies in respect of the Indebtedness set forth on Schedule "A", under the Security granted by the Borrower to the Bank, and pursuant to the Guarantees in accordance with applicable law for a period commencing on the date hereof and ending June 15, 2015 (the "Forbearance Period").
- b. The parties agree that notwithstanding the forbearance herein provided, the Bank shall be entitled to deliver to the Borrower formal demand for repayment of the Indebtedness, and a Notice of Intention to Enforce Security with respect to the General Security Agreement granted by the Borrower to the Bank, provided that the Bank shall take no further steps to enforce such demand or security during the Forbearance Period.
- c. Upon the expiration or termination of the Forbearance Period, the agreement of the Bank to forbear shall automatically and

without further action terminate and be of no further force and effect, it being expressly agreed that the effect of such termination will be to permit the Bank to exercise its rights and remedies immediately, including, without limitation, the private appointment of a Receiver under the security held by the Bank from the Borrower and the right to apply to court to enforce any private or other remedies available to the Bank or to seek the appointment of any permanent or interim receiver or receiver and manager or any trustee in bankruptcy of the Borrower.

Our recommendation is to add the following which can be 3.2(d) and (e) or adapted as necessary, as follows:

- d. As of the date hereof and continuing until the termination of the Forbearance Period and thereafter until the termination of the tolling arrangements hereof in the manner provided for at paragraph 3.2(e), and whether or not demand for payment or a Notice of Intention to Enforce Security has previously been delivered by the Bank, the Bank, the Borrower and all Guarantors hereby agree to toll and suspend the running of the applicable statutes of limitations, laches or other doctrines related to the passage of time in relation to the Indebtedness, the Security, and any entitlements arising from the Indebtedness or the Security and any other related matters, and each of the parties confirms that that this agreement is intended to be an agreement to suspend or extend the basic limitation period, provided by Section 4 of the *Limitations Act, 2002* (Ontario) as well as the ultimate limitation period provided by Section 15 of the *Limitations Act, 2002* (Ontario) in accordance with the provisions of Section 22(2) of the *Limitations Act, 2002* (Ontario) and as a business agreement in
- e. The tolling provisions of this Forbearance Agreement will terminate upon either party providing the other with 60 days written notice of an intention to terminate the tolling provisions hereof, and upon the expiry of such 60 day notice, and any time provided for under the statutes of limitations, laches, or any other doctrine related to the passage of time in relation to the Indebtedness, the Security or any entitlements arising from the Indebtedness or the Security and any other related matters, will recommence running as of the effective date of such notice, and for greater certainty the time during which the limitation period is suspended pursuant to the tolling provisions of this Forbearance Agreement shall not be included in the computation of any limitation period.

The Financial Services Group at Aird & Berlis LLP has extensive experience with advising lenders and borrowers in respect of their rights under forbearance agreements and other lending arrangements. If you have questions please contact a member of the Aird & Berlis LLP Financial Services Group. Details can be found on our [Financial Services, Insolvency and Restructuring web page](#), by clicking on [members](#).

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