

# NATIONAL CREDITOR DEBTOR REVIEW

**General Editor: Steven J. Weisz  
Blake, Cassels & Graydon LLP**

VOLUME 30, NUMBER 4

Cited as 30 N.C.D. Rev.

DECEMBER 2015

## • TOLLING PROVISIONS WITHIN FORBEARANCE AGREEMENTS •

D. Robb English  
Aird & Berlis LLP

The use of Forbearance Agreement by lenders has become fairly ubiquitous. Where possible, following the breach of a covenant or other default by a borrower, a lender may prefer to work with that borrower in order to rehabilitate the business enterprise and to retain the loan, while not waiving contractual rights in the interim.

Recently, we have run into several situations where there was the 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 date of execution of the Forbearance Agreement. This starts the clock on the limitation period to commence legal

action to collect the underlying indebtedness. 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 can sometimes continue on or be extended for quite some time, perhaps years. It may be that there is a restructuring or that the debtor actually fixes the problem and becomes rehabilitated in the eyes of the lender. Sometimes, a loan gets returned to a branch or another business unit by a lender's special loans group, and the branch may be 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.<sup>1</sup> However, limitation periods in respect of business agreements may be suspended or extended by agreement in writing, which will avoid any unexpected or intended loss of rights from occurring.<sup>2</sup>

The writer recommends that counsel to lenders should consider adding to any Forbearance Agreement a tolling provision that would meet the criteria for suspending the running of a limitation period within the applicable jurisdiction. The wording of a forbearance clause may differ depending on whether demand was made prior to the forbearance or is expected to be issued during the Forbearance Period, and may vary by individual precedent, but a typical forbearance clause for a bank loan and a sample of a suggested additional tolling provision would be as follows:

### 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 and 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, 2016 (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 the 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.

The writer's recommendation is to add an additional tolling provision that in this example would fall as ss. 3.2(d) and (e) and would be similar to the following:

(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 or has subsequently delivered in accordance with Section 3.2(b) hereof 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 s. 4 of the *Limitations Act, 2002* (Ontario) as well as the ultimate limitation period provided by s. 15 of the *Limitations Act*,

2002 (Ontario) in accordance with the provisions of s. 22(3) of the *Limitations Act, 2002* (Ontario) and as a business agreement in accordance with the provisions of s. 22(5) of the *Limitations Act, 2002* (Ontario) and any contractual time limitations on the commencement of proceedings, any claims or defences based upon the application of any statute of limitations, contractual limitations, or any time related doctrine including waiver, estoppel or laches are hereby suspended.

(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, or upon the delivery by the Lender to the Borrower of a fresh demand following the expiry of the Forbearance Period (and for greater certainty the tolling provisions shall not automatically expire upon the expiry or termination of the Forbearance Period) and upon termination of the tolling provisions, and the time provided for under any statutes of limitations, laches, or any other doctrines 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 the termination of these tolling provisions, 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.

It is important that the tolling provisions continue past the termination of the Forbearance Agreement, since demands are seldom formally withdrawn. Loans are more often simply rehabilitated and will continue. The additional tolling provisions suggested above will permit a lender to work with a borrower constructively for a longer period, without the risk of inadvertently losing its right to recover the underlying indebtedness. Conversely, the failure to include a tolling provision could leave a ticking time bomb for counsel in a file, which may be quite inactive. The fix is simple but should not be missed.

© Aird & Berlis LLP

[*Editor's note:* **Robb English** is a partner and is practice group leader for the Financial Services and Insolvency Group at Aird & Berlis LLP in Toronto and is well known for his representation of financial institutions. You may contact him at <renglish@airdberlis.com> or (416) 865-4748.]

---

<sup>1</sup> *Limitations Act* (Ontario), S.O. c. 24, s. 4.

<sup>2</sup> *Ibid.*, s. 22(5).