

# “Working on it”: Court of Appeal confirms promises to pay can toll limitation periods

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The Court of Appeal for Ontario’s recent decision in *Thermal Exchange Service Inc. v. Metropolitan Toronto Condominium Corporation No. 1289*<sup>1</sup> opens the door to the tolling of a limitation period where a debtor advises a creditor that it is “working on” paying an outstanding debt until the debtor subsequently advises that it is the wrong debtor or will not pay.

## What you need to know

- The Court held that, in some cases, a debtor’s promise that it is working on paying a debt may toll the creditor’s limitation period until the debtor either refuses to pay or disclaims responsibility for payment because the creditor has not discovered that a claim exists.
- The decision confirms that the question of when the limitation clock for a claim for outstanding debt begins to run will depend on the specific facts of the parties’ business relationship.

## The details

### Key issue

In a dispute over unpaid invoices, will a defendant’s promise that it is “working on” paying a debt toll the two-year basic limitation period until the defendant refuses to pay or claims it is not responsible for payment?

### The decision

Though the plaintiff, Thermal Exchange, regularly invoiced the defendant condominium corporation for its services, the corporation was habitually late in paying the invoices. The corporation’s property manager, Helen Da Ponte, typically advised Thermal Exchange that, while she was “terribly busy” and unable to tend to the invoices immediately, she was “working on” getting them paid<sup>2</sup>.

By October 2015, Thermal Exchange had sent a demand letter to Ms. Da Ponte, in an effort to push her to pay the invoices. In 2016, Ms. Da Ponte wrote to Thermal Exchange, communicating for the first time her position that the individual unit owners—not the condominium corporation—were responsible for paying the invoices.

The Court of Appeal found that the two-year limitation clock for Thermal Exchange's claim began to run on the date Ms. Da Ponte first advised Thermal Exchange that the condominium corporation was not responsible for paying the invoices. This was when Thermal Exchange realized that a proceeding would be an "appropriate means" to remedy its loss, one of the elements required for a claim to be "discovered" and for the limitation clock to start running.

Prior to Ms. Da Ponte's response to the demand letter, the Court found Thermal Exchange had relied on her repeated representations that the outstanding invoices would be paid. The Court held that it was only when Ms. Da Ponte expressly informed Thermal Exchange that the corporation was not responsible for payment, contrary to Thermal Exchange's understanding, that Thermal Exchange became aware of the nature of the problem it was facing and realized that a proceeding would be an appropriate means to remedy its loss.

## Implications

*Thermal Exchange* confirms that, in some cases, a party's promise that it is working on paying a debt may be sufficient to toll the creditor's limitation period. Parties should keep this in mind and exercise caution when making representations to creditors about the status of outstanding debts.

## FOOTNOTES

*To discuss these issues, please contact the author(s).*

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