

Litigation Bulletin

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Tight Limitation Periods for Demand Notes

Demand notes which are more than two years old may not be worth the paper they are printed on. In the recent decision of *Hare v. Hare*, the Ontario Court of Appeal confirmed that an action for payment of money due under a demand note which fails to specify a repayment plan, or incorporate additional terms, must always be commenced within two (2) years of the date of the note.

The facts of the case are straightforward. In February 1997, A loaned her son, B, \$150,000.00 by way of a promissory note dated February 10, 1997 (the "Note"). The Note required B to pay A on demand. A made no demand for payment until November, 2004. When no payment was made, A commenced an action in February, 2005.

In order to determine whether or not A had commenced the action within the relevant limitation period, and as a result of transitional provisions contained in the new *Limitations Act, 2002* (the "Act"), it was first necessary for the court to determine when the claim was discovered.

The court found that because the Note failed to specify a repayment period, A was entitled to immediate repayment. This meant that there was nothing to be discovered by A, and A therefore knew of the claim immediately upon receipt of the promissory note.

This has important implications for all loans payable on demand. As the lender knows of the claim upon receipt of the promissory note, the basic limitation period begins to run immediately, and will expire two (2) years after the date of the note.

Fortunately, the Act does contain a number of mechanisms which lenders may utilize in order to avoid a possible limitations problem.

Possible Solutions

The Act states that a written acknowledgment of a debt starts the limitation period running fresh. The written acknowledgment need not take any specific form, but it must be provided to the creditor before the expiration of the two (2) year limitation period. As such, lenders should consider monitoring demand notes in order to ensure that every two (2) years an acknowledgment of the debt is received.

The Act also allows parties to a contract (i.e. a demand note) to suspend, extend, vary, or exclude the limitation period, provided that the agreement was made on or after October 19th, 2006.

Only parties acting for business purposes and not for consumer purposes (i.e. family or personal loans) may shorten or exclude a limitation period. Agreements for consumer purposes may still extend a limitation period.

If the parties agree, a demand note made after October 19th, 2006 can always include a term extending the limitation period. Including such a term will reduce the risk of running a foul of the Act, without the necessity of obtaining an acknowledgment every two (2) years.

Pallett Valo LLP Commercial Litigation Law Group

Our firm has the largest Litigation Department in Peel Region. We have the depth and expertise to provide legal advice and representation in complex litigation matters. Collectively, we apply a business approach to commercial disputes recognizing the benefits of litigation avoidance and early extraction strategies.

Our advice is designed to minimize and avoid risks through the use of negotiation and alternative dispute resolution mechanisms to resolve commercial disputes with a minimum of business interruption to our clients. However, there are times when our clients' interests are best served by knowledgeable and strategic advice coupled with decisive and aggressive action in the Courts. Our litigators have extensive trial and appellate experience and have fought numerous motions over injunctive remedies such as Mareva and Anton Piller Orders. We work closely with clients to develop and implement sound strategies geared toward achieving identifiable objectives while providing timely advice as to issues and options.

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