Is the Law Regarding Demand Loans too Demanding? - - A Comment on the Ontario Court of Appeal Decision in *Hare v. Hare*

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SUMMARY

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1. INTRODUCTION

The recent case of *Hare v Hare*[1] (hereinafter referred to as the "**Hare Case**") is a decision of the Ontario Court of Appeal rendered in December, 2006, which is the first time since the enactment of *The Limitations Act 2002 S.O. 2002, c. 24, Sch. B* (hereinafter referred to as the "**New Act**") that the appellate court has interpreted the New Act as it relates to a demand loan evidenced by a promissory note. The majority of the Court of Appeal concluded that despite the provisions in the New Act which specifically pertain to demand loans, the limitation period applicable to a claim or action on a demand promissory note begins to run from the date the demand loan is created, rather than the date of default in repayment or the date of the demand for payment. Regrettably, this decision is counter-intuitive to most creditors and debtors of demand loans, who rightly or wrongly have operated on the premise that the debtor's refusal to repay a demand loan, after a demand for payment has been made by the creditor, triggers the running of the limitation period. The purpose of this paper is to examine how and why the majority of the appellate court came to this conclusion, and to consider whether the minority decision advanced by Justice Juriansz is to be preferred over the majority ruling articulated by Madam Justice Gillese (and concurred by Justice LaForme).

FACTS OF THE CASE

The facts in the Hare Case are relatively simple and straightforward, and involved a demand loan given by Mary Hare (the "**Appellant**") to her son, Brian Hare (the **"Respondent**"). This loan

[1] 83 O.R. (3d) 766.

was evidenced by a promissory note dated February 10, 1997, pursuant to which the Respondent agreed to repay the sum of $150,000 on demand, together with interest accruing thereon at the rate of prime plus 1% per annum (hereinafter referred to as the "**Note**"). The Respondent last made an interest payment to the Appellant on October 26, 1998, but no principal or interest payments in respect of the Note were made by the Respondent subsequent thereto. The Appellant made a demand for repayment of the outstanding indebtedness on November 10, 2004, and when no payment was forthcoming following such demand, the Appellant commenced an action on February 17, 2005, claiming all sums due on account of the Note.

The Respondent brought a motion for summary judgment, and on April 10, 2006 Justice Minden granted the motion, holding that the claim or action on the Note was barred by section 45(1)(g) of *The Limitations Act R.S.O. 1990, c. L. 15* (hereinafter referred to as the "**Former Act**").

The Appellant appealed the motion court's ruling, arguing that the New Act, instead of the Former Act, applied to her claim under the Note, and that her claim was not statute-barred under the New Act because her claim did not arise when the Note was made, but rather arose when the Respondent refused to repay the loan after a demand for payment had been made.

A REVIEW OF THE RELEVANT LIMITATION LEGISLATION

The limitation period with respect to claims or interests involving land, including an action to recover any land or rent, or any interest under a real property mortgage or charge, is governed exclusively by *The Real Property Limitations Act R.S.O. 1990 as amended.* In turn, the limitation period with respect to claims or entitlements under any mortgage or charge of land, including a demand mortgage or charge, is governed by sections 17, 22 and 23 of *The Real Property Limitations Act*, which provisions essentially establish that:

a) for a claim to recover mortgage interest, there is a 6 year limitation period running from the later of the date that such interest amount was due and owing, or the date that the mortgagor last acknowledged in writing that such interest amount is due and owing; and

b) for a claim to assert any mortgage remedies (such as power of sale or foreclosure, or an action on the covenant to repay the principal indebtedness), there is a 10 year limitation period running from the later of the date of the last payment of any part of the principal or interest indebtedness secured by the mortgage, the date that the right to receive payment of the mortgage indebtedness accrued to the mortgagee, and the date that the mortgagor last acknowledged in writing that such principal and interest indebtedness (or any portion thereof) is due and owing.

Moreover, the case of *Canada Permanent Mortgage Corp. v Saynor [1946] O.W.N. 406*, confirms the well-established common law principle that with respect to a demand mortgage, the monies advanced and secured thereunder are deemed to be due and owing from the date that the mortgage was given, irrespective of whether or when any demand for payment has been made by the mortgagee thereunder. Accordingly, the applicable limitation period for any claim, proceeding or remedy under a demand mortgage would be 10 years from the later of the following three dates, namely the date of the mortgage, the date of the last principal or interest payment made under the mortgage, or the date of any separate written acknowledgment of indebtedness under the mortgage by the mortgagor.

All other limitation periods, involving claims or actions that do not relate or pertain to real property, such as the unsecured demand loan in the Hare Case, are governed by the Former Act or the New Act, depending on when the cause of action is deemed have to arisen. In this regard, section 45(1)(g) of the Former Act provides for a 6 year limitation period with respect to a claim under a

contract or simple debt (but not a "specialty" debt made under seal), and therefore requires any claim or proceeding for the repayment of monies owing in respect of any loan not secured against land to be commenced within six years after the cause of action arose.[2]

The New Act came into force on January 1, 2004, and section 4 thereof provides for a basic limitation period of two years, for all actions where a specific time period is not otherwise expressly established.[3] It is also important to keep in mind that the concept of a claim being "discovered" before the applicable limitation period can begin to run, had previously been a common law principle which was often utilized by the Courts to determine when a statutory limitation period was, in fact, triggered. However, the New Act expressly codifies the "discoverability" principle, and outlines the criteria which must be satisfied before a claim is deemed to be discovered. Specifically, subsection 5(1) of the New Act provides that a claim is discovered on the earlier of:

a) the day on which the person with the claim first knew:

   i) that the injury, loss or damage had occurred;

   ii) that the injury, loss or damage was caused by or contributed to by an act or omission;

   iii) that the act or omission was that of the person against whom the claim is made; and

   iv) that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

In addition, subsection 15(2) of the New Act creates an ultimate overarching limitation period which is 15 years from the date on which the act or omission on which a claim is based took place. Moreover, in the context of demand obligations, subsection 15(6)(c) of the New Act expressly

[2] *Supra* note 2.
[3] *Supra* note 2 at s. 4.

provides that in the case of default in performing a demand obligation, the day an act or omission on which a claim is based takes place shall be deemed to be "the day on which the default occurs".

The Appellant in the Hare Case commenced her action for repayment of the outstanding indebtedness under the Note on February 17th, 2005. Whether or not the limitation period prescribed by the New Act applied to the Appellant's claim under the Note ultimately turned on the Court's interpretation of the transition provisions outlined in subsections 24(2), (3) and (5) of the New Act, which are set out as follows:

> "24(2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.
>
> 24(3) If the former limitation period expired before the effective date, no proceeding shall be commenced in respect of the claim.
>
> 24(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:
>
> 1. If the claim was not discovered before the effective date, this Act applies as if the act or omission had taken place on the effective date.
>
> 2. If the claim was discovered before the effective date, the former limitation period applies."

Finally, although the following legislative amendments had not been promulgated at the time of the Hare Case, and therefore were not at all judicially considered by the Ontario Court of Appeal, nevertheless pursuant to Schedule "D" to the *Access to Justice Act 2006, S.O. 2006 c. 21,* section 22 of the New Act was further amended on the effective date of **October 19, 2006**, and such amendments expressly provide that:

a) any limitation period under the New Act, other than the maximum 15 year limitation period prescribed by section 15 thereof, may be **suspended or extended** by an agreement made on or after the effective date of October 19, 2006;

b) the maximum 15 year limitation period prescribed by section 15 of the New Act may be suspended or extended by an agreement made on or after October 19, 2006, but only if the relevant claim has been discovered;

c) any limitation period under the New Act (except the maximum 15 year limitation period prescribed by section 15 thereof) may, in the context of business agreements only (ie. agreements that are entered into by parties none of whom is a "consumer" as defined in the *Consumer Protection Act 2002)* be **varied** (specifically defined to include being extended, shortened or suspended) **or excluded**, by an agreement made on or after October 19th, 2006; and

d) the maximum 15 year limitation period prescribed by section 15 of the New Act may, only in the context of business agreements, be **varied** (ie. including being extended, shortened or suspended), provided however that such limitation period may only be extended or suspended if the relevant claim has been discovered.

THE MAJORITY COURT'S RULING

Madam Justice Gillese, on behalf of the majority of the Ontario Court of Appeal, remarked at the outset of her decision that if the Former Act applied to the Appellant's claim under the Note, then the 6 year limitation period thereunder would have expired before the action was commenced.[4]

[4] *Ibid*. at para. 11.

In arriving at this conclusion, Justice Gillese agreed with the motions judge who had cited numerous authorities, such as *Royal Bank v Hogg*[5], which confirmed the venerable common law rule that "a demand note matures for all purposes as soon as it is delivered." In other words, at common law, the cause of action on a demand loan arises from the date of the loan, and not from the date of demand. Citing *St. Hillaire et al. v Kravaceket al.*[6], the motions judge found that the effective start date for the limitation period under the Former Act was October 26, 1998, which was the date that the Respondent last made a payment under the Note. Therefore, if the Former Act applied to this action, then the claim would have been statute-barred as of October 26, 2004.

In order for the Appellant to succeed, the Court of Appeal had to determine that the New Act applied to the Appellant's claim. In order to reach such a determination, the Court first had to discern when the act or omission that gave rise to the action in the Hare Case took place. The Appellant contended that her claim was based on the Respondent's refusal to repay the loan only after a demand for payment was made in November 2004, whereas the Respondent argued that the Appellant's claim under the Note arose on the date of the loan or the date of the Note. In order to confirm which of the transition rules outlined in subsection 24(5) of the New Act applied, Justice Gillese had to determine when the act or omission involving the claim under the Note was discovered. If it was discovered after the effective date of January 1, 2004, then the two-year limitation period would begin to run from January 1, 2004, and the Appellant would therefore not be statute-barred, since she had commenced her action well before January 2006. Conversely, if the claim was discovered before January 1, 2004, as the Respondent had submitted, then the 6 year

[5] [1930] 2 DLR 488.
[6] 26 O.R. (2d) 499 (Ont. C.A.).

limitation period under the Former Act would govern and prevail in such circumstances, and concomitantly the Appellant's claim would be statute-barred.

Ultimately, the majority of the Court in the Hare Case rejected the Appellant's arguments on three main grounds, namely that:

1. the wording of the New Act is not sufficiently clear to evidence an intention on the part of the legislature to overturn many years' worth of jurisprudence;

2. the Appellant's position could result in limitless liability; and

3. there is no need for the discoverability principle with respect to demand loans.

The Wording of the New Act is not Sufficiently Clear

In order to accede to the Appellant's submission that her claim under the Note was discovered or arose only after her demand for payment in November of 2004, rather than from the date of the Note itself (as supported by the prevailing case law involving demand loans), Madam Justice Gillese noted that she would then have to accept the proposition that the legislature had intended to change the law regarding demand notes by means of the New Act, despite the fact that the legislation in question is directed at limitation periods and not at commercial law. Justice Gillese referred to the case of *Goodyear Tire & Rubber Co. of Canada Ltd. v T. Eaton Co.*[7], wherein the Supreme Court of Canada held that "a legislature is not presumed to depart from the general system of the law without expressing its intention to do so with irresistible clearness, failing which the law remains undisturbed." Simply put, Justice Gillese did not find the language of the New Act clear enough to support a change in the established commercial law regarding the date when a claim arises

[7] [1956] SCR 610 (SCC).

on a demand loan, and thereby disturb or disrupt existing common law rights involving demand promissory notes.[8]

The Appellant's Position Could Result in Limitless Liability

The majority of the Court was concerned that if a claim in respect of a demand loan was discovered or arose only upon the date of demand for payment, then if no demand was ever made, the debtor's liability under the promissory note would exist in perpetuity ... this state of affairs was found by Justice Gillese to be contrary to the notions of finality and certainty underlying limitation periods. Even though section 15 of the New Act creates an ultimate 15 year limitation period, running from the date of the act or omission, regardless of whether the claim is discovered, this provision did nothing to alleviate the court's concern about limitless liability.

There is No Need for the Discoverability Principle with Demand Loans

Finally, the majority of the Court acknowledged that the New Act and its codification of the discoverability principle, attempts to address a deficiency in the approach to limitation periods outlined under the Former Act, which had failed to recognize that a person may not know of a cause of action at the time the limitation period commences, and therefore could be unfairly barred from initiating a legitimate claim simply because he or she had no knowledge (or insufficient knowledge) of their cause of action. However, Madam Justice Gillese was of the view that any concerns regarding discoverability simply do not arise in the context of a demand promissory note, because the law is well-established that a lender has the right to immediate repayment of a demand loan. In light of the fact that there is no specified repayment period in a demand note, Madam Justice Gillese confirmed that there is "nothing to be discovered by the lender before he or she becomes

[8] *Supra* note 1 at para. 39.

aware of their claim."[9] Simply put, the claim in respect of a demand loan is known, or ought to be known, immediately upon the lender's receipt of the demand note.

The majority of the Court ultimately disagreed with the Appellant's argument that the claim under the Note arose on November 10, 2004, when repayment was demanded, and held that the limitation period actually arose on October 26, 1998, being the date of the last payment made by the Respondent under the Note. Accordingly, the 6 year limitation period under the Former Act applied, thereby rendering the action commenced by the Appellant on February 17th, 2005 as statute-barred.

THE MINORITY DECISION

In a well-reasoned dissenting decision, Justice Juriansz provided a very different interpretation of the New Act in the course of answering the question as to whether the New Act changed the commencement date of the limitation period applicable to demand loans generally, to the date of default following a demand, as opposed to the date that the loan was made. At the outset, Justice Juriansz began the process of interpreting the New Act by employing the modern approach to statutory interpretation, pursuant to which the words of the legislation in question are read and construed in their entire context, in their ordinary and grammatical sense, and in accordance with the scheme, object and intent of the legislation.[10]

Justice Juriansz noted that the common law authorities had reasoned that since a demand loan is fully mature and repayable when it is made, a cause of action to collect on a demand note accrues as soon as the note is delivered.[11] In fact, the case law supported the proposition that no actual

[9] *Ibid*. at para. 50.
[10] *Ibid*. at para. 59; see also *Bell ExpressVu Ltd. Partnership v Rex*[2002] 2 SCR 559 (SCC) at para. 26.
[11] Royal Bank v. Hogg [1930] 2 D.L.R. 488 (Ont. C.A.)

request for payment is necessary on a demand promissory note, and that the bringing of the action itself constituted a demand for payment. Therefore, while the common law came into play in identifying the date on which the "cause of action arose", it was statute law that prescribed that the limitation period began to run when a cause of action arose. Justice Juriansz confirmed that the Former Act never contemplated demand loans specifically, and that the general 6 year limitation period for actions on a simple contract or debt, outlined in section 45(1)(g) of the Former Act, was the same provision that applied to demand loans (with the 6 year limitation period commencing to run immediately upon the delivery of the demand note at common law). However, all of the judicial authorities regarding the commencement of the limitation period for a demand loan pre-dated the development of the discoverability principle. In contrast, section 15(6)(c) of the New Act explicitly addresses demand loans.[12] Justice Juriansz pointed out that section 4 of the New Act, which applies the general two-year limitation period, stipulates that the limitation period begins to run not when the cause of action has arisen, but rather on the day "on which the claim was discovered".[13] Based on his interpretation of the New Act, Justice Juriansz was of the view that "the earliest a plaintiff can discover a claim based on a demand loan is the date on which default in making repayment following a demand occurs…and not the date on which the demand loan is made." Justice Juriansz referred to an excellent article written by Brian Bucknall entitled "*Limitations Act 2000 and Real Property Limitations Act: Some Notes on Interpretative Issues" (2004) 29 Advocates Quarterly*, which strongly suggested that without a default following the lender's demand for payment, one cannot truly describe the lender of a demand loan as suffering from an "injury, loss or damage", which are integral components of the key elements that define the day on which a claim is discovered pursuant to section 5 of the New Act.

[12] *Ibid*. at para. 72.
[13] *Ibid*. at para. 75.

Justice Juriansz arrived at this conclusion by looking at the specific criteria for determining when a claim is discovered, as outlined in subsection 5(1)(a) of the New Act. He noted that even if one employs the logic of the common law authorities that have held that the lender of a demand loan has suffered some sort of legally recognizable damage on the day the loan is made, without the requirement for any subsequent demand for payment (so that the creditor is entitled to bring an action to enforce payment without formal demand), only subparagraphs 5(1)(a) (i), (ii), and (iii) of the New Act are satisfied on the date that the demand loan is made, but section 5(1)(a)(iv) is not.[14] This last-mentioned subparagraph requires the claimant to know that an action is the appropriate means to remedy the loss, injury or damage. According to the analysis of Justice Juriansz, section 5(1)(a)(iv) of the New Act imposes a completely new requirement, and there is nothing analogous to it under the Former Act, and the common law authorities are unhelpful in understanding same, inasmuch as the old case law only addressed when a lender is "entitled" to bring a proceeding, as opposed to when it is "appropriate" to do so.[15] Justice Juriansz concluded that this new requirement meant something more than just knowing that a cause of action was available, otherwise subparagraph 5(1)(a)(iv) of the New Act would have no purpose.[16] Accordingly, in the context of a demand loan, the creditor must simply know more than the bare fact that a cause of action has accrued.

Justice Juriansz then considered subsection 5(1)(b) of the New Act, which deems a claim to be discovered if it ought to have been discovered by a reasonable person in the circumstances. The common law authorities clearly confirm that an action arises for a demand loan on the date of the loan or the date of the promissory note evidencing the loan, rather than on the date of demand, but

[14] *Ibid*. at para. 80.
[15] *Ibid*. at para. 80
[16] *Ibid*. at para. 81.

Justice Juriansz did not consider that to mean that a lender of a demand loan ought to know that a proceeding was appropriate on the date of the loan.[17] Pertinent to the analysis of Justice Juriansz is the "nature" of the damages ... in assessing whether a claimant should know a proceeding is appropriate, the claimant must be cognizant of the character or extent of the loss or damage so incurred. In the context of a demand loan, the nature of the damage that flows therefrom (in terms of the extent of the damage suffered) is arguably latent or potential, until the debtor defaults in making repayment. Until that time, the lender of a demand loan has really suffered no detriment, loss or damage, because the lender quite rightly expects to be repaid sometime in the future, and pending demand is precisely in the situation that he or she expected to be in. Simply put, no lender would advance a demand loan if they honestly believed that the loan would not be repaid following demand, and therefore from a practical and logical perspective, it is only when the lender becomes aware that it is not going to be repaid, consequent upon the lender's demand for payment from the debtor, that damages can be considered actual, rather than potential.[18] Justice Juriansz observed that it would be highly inappropriate and unusual for a lender of a demand loan to institute an action for the repayment of the indebtedness before a demand is made upon the debtor.[19] For the foregoing reasons, Section 5(1)(a)(iv) of the New Act does not identify the date that the demand loan was made as "the day on which the claim was discovered". Since section 5(1)(a)(iv) is part of the statutory definition of the commencement date of the limitation period under the New Act, it should be construed without the influence of the old common law presumption that the creditor knows that the limitation period begins upon the date of the demand loan. The New Act now clearly confirms that the limitation period begins to run only when the creditor knows both that he or she is entitled to

[17] *Ibid*. at para. 84.
[18] *Ibid*. at para. 83.
[19] *Ibid*. at paras. 85-88.

bring an action, and that it's also appropriate to do so ... and accordingly in the context of a demand loan, the limitation period commences to accrue from the date of demand for payment.[20]

Justice Juriansz also carefully reviewed the substance and effect of subsection 15(6)(c) of the New Act, and considered this to be pivotal in understanding the legislature's intent regarding limitation periods for demand loans, as it is the only provision of the New Act that deals with demand loans expressly.[21] Subsection 15(6)(c) states that in the case of default on a demand obligation, the day an act or omission on which a claim is based shall be deemed to be the day on which the default occurs. In the view of Justice Juriansz, subsection 15(6)(c) would be devoid of any meaning unless it was implying that the day a default occurs must be some day other than the day the loan was made, as recognized by the common law .[22] Moreover, the words "default" and "in performing", referred to in subsection 15(6)(c) of the New Act, do not properly or accurately describe the passive state of being subject to a demand obligation that is in good standing.[23]

Justice Juriansz' dissent also spoke to Justice Gillese's concern about interpreting the New Act so that the limitation period for a demand loan will not be triggered unless a demand is made, thereby resulting in the potential for limitless liability in the context of a demand indebtedness. Justice Juriansz did not share the concerns of the majority of the Court regarding limitless liability under a demand note, because of the express language in subsection 15(6)(c) of the New Act, which clearly "reflects a legislative intent to allow the potential for indefinitely existing liability for demand obligations where no demand is made."[24] He also pointed out that subsections 15(6)(a) and (b) of

[20] *Ibid*. at para. 90.
[21] *Ibid*. at para. 94.
[22] *Ibid*. at para. 95.
[23] *Ibid*. at para. 96.
[24] *Ibid*. at para. 97.

the New Act also create the possibility for indefinite limitation periods where there is a continuous act or omission, or a series of acts or omissions, thereby adding credence to the argument that the legislature specifically included subsection 15(6)(c) in the New Act in order to permit demand loans to have the potential for limitless liability where no demand has been made, and no corresponding default has arisen therefrom.[25]

Justice Juriansz also addressed the concern of the majority of the Court regarding the significant and detrimental impact on commercial practice that would arise from a different interpretation of the New Act, namely a decision confirming that the limitation period commences to run from the date of demand, rather than the date of the demand loan or the date of the demand note.[26] Justice Juriansz observed that the interpretation of the legislation as sought by the Appellant would not depart from established commercial practice or the common law, because there would be no interference with the common law's determination of when a cause of action accrues under a demand loan. The only thing that would change is the limitation period, and such a change is brought about simply because of the change in Ontario's statute of limitations. No one can really argue against the proposition that commercial practice must reflect (or be geared to) the applicable statutory limitation period outlined in the governing legislation. Justice Juriansz commented on the fact that most people involved in commercial practice would be more deleteriously affected by the position or interpretation adopted by the majority of the Court, which requires all lenders of demand loans to recover their respective outstanding loans within a two year limitation period commencing on the respective dates of the loans, with the corresponding inconvenience of having to renew or refresh the demand notes or obtain new acknowledgments of indebtedness executed by their

[25] *Ibid*. at para. 98.
[26] *Ibid*. at para. 101.

respective debtors every two years, even if the lenders were prepared to refrain from demanding repayment during such two year period. Several other jurisdictions, such as Alberta and the United Kingdom, have adopted a limitation period for demand loans that commences only after a demand for repayment has been made.

Justice Juriansz therefore confirmed that under the New Act, a claim based on a demand loan cannot be discovered until the debtor defaults following a demand for repayment, and only at that point in time will both the basic two year limitation period and the ultimate fifteen year limitation period commence to run[27].

Finally, Justice Juriansz reviewed the transition provisions outlined in section 24 of the New Act to determine whether the New Act or the Former Act applied to the Appellant's claim under the Note. He concluded that the six year limitation period under the Former Act had not expired on the effective date of the New Act, namely January 1st, 2004. He also confirmed that the "act" referred to in subsection 24(2) of the New Act must mean the act of delivering the Note (which occurred in February 1997), and not the act of default, inasmuch as the default is only deemed to be "the act or omission" for the purposes of section 15 of the New Act. Since the Appellant's claim was based on an act that took place before the effective date and no proceeding was commenced before such date, the transition provisions of the New Act would apply, so that the basic two year limitation period would begin to run upon the Respondent's default immediately following the Appellant's demand for payment made on November 10th, 2004. Therefore, according to Justice Juriansz, the Appellant's claim was not statute barred when civil proceedings were initiated in 2005.

[27] *Ibid* at para. 107

Critique of the Majority Court's Decision

In the writer's respectful opinion, the minority decision of Justice Juriansz is far more preferable than Justice Gillese's decision on behalf of the majority of the Court, for the following three major reasons:

1. *The wording of the new Act was not sufficiently clear to evidence an intention on the part of the legislature to overturn many years' worth of jurisprudence.*

Firstly, Justice Gillese rejected the Appellant's submission because she was unwilling to accept the fact that the Provincial legislature, by enacting the New Act, had specifically intended to change the commercial law relating to demand loans in a significant way (ie. by commencing the limitation period with respect to a claim on a demand loan or a demand promissory note from the date of the demand, rather than the date of the loan or the date of the note). However, a limitations act, by its very nature, is directed at a wide range of possible claims and a myriad of legal proceedings, regardless of whether same are grounded or linked to commercial law, tort law, family law or otherwise. Since such legislation deals specifically with the commencement and corresponding termination of applicable limitation periods, the writer respectfully submits that it is not unreasonable to think that the legislature clearly intended the impact of the New Act on demand loans, as articulated by the Appellant, particularly in light of the express wording of section 15(6)(c) of the New Act which speaks directly to a default in performing a demand obligation. If the legislature was not expressing its intent to change the law on when an action is discovered in the context of a demand loan, then why did it include subsection 5(1)(a)(iv) in the New Act? While the courts are justifiably hesitant to disturb well-settled case law that could potentially impair or alter existing rights, in the absence of clear legislative authority warranting same, nevertheless Chief

Justice Lamer of the Supreme Court of Canada, in the case of *Ontario v CP Ltd.,* expressly confirmed that "the best way for the courts to complete the task of giving effect to legislative intention is usually to assume that the legislature means what it says, when this can be clearly ascertained.[28]"

From the writer's perspective, subsection 5(1)(a)(iv) of the New Act confirms the legislature's irresistibly clear intention to make knowledge of the appropriateness of a proceeding a necessary element of discovering a claim, and thereby changed the starting point for the commencement of the limitation period, particularly in the context of a demand loan, where, on any objective basis, it would not be appropriate or commercially reasonable to commence civil proceedings forthwith following the date of the demand loan or the date of the demand note, but rather only when repayment was not immediately forthcoming upon the lender's demand for payment. In the writer's view, the decision of the majority of the Court will unquestionably encourage or foster unnecessary litigation in the context of demand loans, which is a highly questionable and problematic position to justify, in terms of reflecting a proper and legitimate legislative intent. The Supreme Court of Canada had occasion to consider the applicable limitation period in the case of *Nielson v the City of Kamloops*[29], and the Court proceeded to import the discoverability principle in determining the commencement of the limitation period, where it was not even mentioned in the applicable legislation under review, in order to avoid the injustice that would have resulted from a strict reading of the law. The majority of the Court in the Hare Case should arguably have been guided by this same approach, in an effort to avoid unnecessary litigation between creditors and debtors of demand loans.

[28] [1995] 2 SCR 1028 at 1049-50.
[29] [1984] 2 S.C.R. 2.

Another significant change in the New Act, which clearly expresses the intention of the legislature to change the limitation period with respect to demand loans, is the concept of a "claim", which is defined in the New Act to mean "a claim to remedy an injury, loss or damage". Brian Bucknall, in his excellent commentary referred to earlier in this paper, pointed out that there's a clear distinction between a "cause of action" and a "claim": "A "cause of action" might theoretically be in place from and after the date of a specific event, but a "claim" will come into existence only when a party discovers, or should have discovered, "injury, loss or damage"."[30] Parenthetically, Brian Bucknall also contemplated how a court would decide the applicable limitation period with respect to demand loans, and he had faith that the Ontario courts would interpret the New Act sensibly, as evidenced by the following passage:

> "My own view is that the court would not attempt to determine that a demand promissory note was not a "present debt", but the simple existence of a present debt would not, in accordance with the interpretative principles set out here, be construed to occasion "injury, loss or damage" to the creditor until a demand was made and refused. Similarly, it is difficult to imagine that a court would see the agreement of a debtor to accept a loan from a creditor as an "act or omission" which occasioned "injury, loss or damage". I rather think that a court…would regard that as an "absurd consequence"."[31]

It is unfortunate, for both creditors and debtors of demand loans, that the Ontario Court of Appeal did not live up to Brian Bucknall's expectations. It is notable that Justice Gillese acknowledged Bucknall's paper in her judgment, but regrettably was not persuaded by his opinion or interpretation of the New Act.[32]

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[30] Brian Bucknall. "The Limitations Act, 2002 and the Real Property Limitations Act: Some Notes on Interpretive Issues." (2004) 29 Advocates' Q. 1 at 4.
[31] *Ibid.* at 21.
[32] *Supra* note 1 at para. 32.

2. The Appellant's position could result in limitless liability

Madam Justice Gillese also rejected the Appellant's submission because she believed it would result in limitless liability, notwithstanding the fact that subsection 15(6)(c) of the New Act clearly creates an ultimate 15-year limitation period with respect to demand loans, which begins on the date of default of the demand obligation. The only way that "limitless liability" could exist and prevail is if the lender never demands repayment of the loan, which could very well be the case with respect to loans made by parents to children, or loans between other family members, or other non-arms' length loan transactions. The foregoing naturally begs the question regarding the Court's concern over limitless liability ... what is so wrong with that? Why should there be an expiration date on demand loans, in the absence of a demand for repayment? Section 16 of the New Act expressly recites a long list of various proceedings in respect of which no limitation period is applicable, and accordingly the concept that the legislature contemplated or intended unlimited liability in certain circumstances is therefore already clearly established. Even the term "limitless liability" is arguably misleading in the context of a demand loan, because no injury, loss or damage has really occurred for which the debtor ought to be liable to the lender, until the debtor has failed to repay the loan following the lender's demand for payment. In any event, it is somewhat disingenuous for the majority of the Court to allege that the Appellant's submission would create unlimited liability with respect to demand loans ... rather, it is overwhelmingly clear from Justice Juriansz' interpretation of the New Act that there is a two year limitation period on a demand loan evidenced by a promissory note, which will begin to run from and after the date of the lender's demand for payment thereunder.

3. There is no issue of discoverability with demand loans, as the lender becomes aware of their claim upon delivery of the note

Finally, in rejecting the Appellant's submission, Madam Justice Gillese completely discounted the discoverability principle in the context of demand loans, by affirming that a lender of a demand loan becomes aware of his or her claim immediately upon the delivery of the demand promissory note. Considering that Justice Gillese insisted on "irresistible clearness" for a legislative intent to alter the common law rule regarding the limitation period in respect of a demand loan, it is curious that Justice Gillese would interpret or construe section 5 of the New Act (which deals with the discovery of claims) as being wholly inapplicable to demand loans, even though there is nothing in the New Act which would indicate such an intention, or require such a directive. From a practical perspective, it is highly unlikely that a lender of a demand loan that is evidenced or secured by a demand promissory note or charge, is really cognizant of his or her "claim" and the lender's corresponding entitlement to forthwith commence civil proceedings, consequent upon the mere execution and delivery of the demand promissory note or charge, without any requirement to demand payment. The writer respectfully submits that Justice Gillese's dismissal of the discoverability requirement in the context of demand loans runs totally counter to the concept of a claimant knowing when it's appropriate to institute proceedings to remedy an injury, loss or damage, as expressly contemplated in subsection 5(1)(a)(iv) of the New Act, and there is nothing in the New Act which would indicate that subsection 5(1)(a)(iv) is inapplicable to demand loans. Moreover, section 15 of the New Act was created to give some level of finality and certainty to a whole host of claims, even where claims have not yet been discovered. However, the fact that demand obligations are specifically mentioned in section 15(6)(c) of the New Act implicitly confirms that claims involving demand loans could very well remain undiscovered (in terms of the concept of knowing when it's

appropriate to institute proceedings to remedy the injury, loss or damage) unless and until a default in performing the demand obligation has occurred.

CONCLUSION

In the aftermath of the Hare Case, lenders of demand loans may be obliged to demand payment earlier than they would otherwise be inclined to do, and debtors of demand loans may correspondingly be called upon to make a payment earlier than they would otherwise expect to do or choose to do, or alternatively may be obliged to execute a separate further acknowledgment of indebtedness in order to re-start the limitation period alarm clock. The decision of the majority of the Court of Appeal will impose impractical time constraints upon creditors and debtors of demand loans, inasmuch as the Court's questionable interpretation of the New Act (and its determination of the commencement of the limitation period in the context of demand loans) is really counter-intuitive to the commercial realities of the marketplace. While it may be plausible to argue that a debtor of a demand loan has, by merely accepting the loan proceeds, created an injury, loss or damage that has been suffered or incurred by the lender, it nevertheless defies all logic and reason to assume that a reasonable person in the shoes of a demand lender would ever think that it is appropriate to institute proceedings to collect payment under a demand promissory note, in the absence of a demand for payment having been made with no corresponding payment by the debtor. In the context of a demand loan, commercial reasonableness and common sense dictate that a demand for payment should always be made before commencing legal proceedings, to ensure that unnecessary litigation is not pursued, and of equal importance, to ensure that unnecessary costs are not incurred and added to the outstanding indebtedness.

The inequitable consequence of the Hare decision is that debtors of unsecured demand loans who have failed to repay any portion of the principal or interest indebtedness within two years from the date of the loan will, in the absence of any intermediate written acknowledgment of the debt, be totally relieved and absolved from their repayment obligations, in their entirety, by operation of the limitation period, if the lender has not already commenced civil proceedings under the promissory note to realize on the debt. In the real world, where demand loans are frequently used amongst family members and in non-arms' length transactions for a variety of legitimate reasons, unwary lenders who are not cognizant of the Hare decision will suffer a very rude awakening.

The foregoing was of such concern to the Ontario Bar Association's business law section that the July 30th 2007 edition of the Law Times reported that the OBA has made a formal recommendation to the Ministry of the Attorney General to specifically legislate away the effect of the Ontario Court of Appeal's decision in the Hare Case. However, as has already been pointed out in this paper, pursuant to Schedule "D" to the *Access to Justice Act 2006, S.O. 2006 c. 21,* section 22 of the New Act was amended on October 19, 2006 (but was not considered by the Court of Appeal in the Hare Case), and expressly provides for suspending or extending the limitation periods applicable under the New Act, by way of an agreement entered into on or after the effective date of October 19th. In light of such recent amendments, the writer believes that it may now be possible to insert express language in a demand promissory note that is specifically signed by both parties (even though it is customarily only the debtor that executes a promissory note), or alternatively have a written agreement separate and apart from the promissory note that is executed by both parties, confirming the parties' mutual intention and agreement to suspend or extend the 2 year limitation period that would otherwise be applicable. Pending the enactment of specific legislation that

addresses the limitation period for demand loans as propounded by the Hare Case, one may question whether the recent amendments to section 22 of the New Act would allow the lender and the debtor of a demand loan to expressly agree to suspend the limitation period until a demand for payment has been made . . . the answer to such question may ultimately have to be judicially determined, but only time will tell.

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