LIMITATION PERIODS ON DEMAND PROMISSORY NOTES: THE SIGNIFICANCE OF MAKING THE NOTE PAYABLE A FIXED PERIOD AFTER DEMAND

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On December 14, 2011, the B.C. Court of Appeal released its judgment in *Ewachniuk Estate v. Ewachniuk*,[1] bringing clarity to an important but seldom-litigated issue: when does the limitation period begin to run for a promissory note which is payable a fixed period after demand is made? Mr. Ewachniuk sought a ruling that these so-called "delayed-demand" notes be treated like all other demand notes or loans, which become statute barred after six years. The answer the Court of Appeal gave is that, contrary to the situation with a regular demand promissory note, the limitation period for a delayed-demand promissory note does not begin to run until demand has been made and the time given for repayment has elapsed. This result meant that Mr. Ewachniuk was required to make payment to his mother's estate on a non-interest-bearing promissory note made in December of 1980—28 years prior to the demand for payment!

Limitation periods for are governed by provincial legislation. The *Limitation Act* in B.C. provides that, generally speaking, limitation periods commence running on the date that the plaintiff's right to bring the particular action arose.[2]

Until recently, no provincial limitations statute dealt specifically with demand obligations, such as demand loans or demand promissory notes. In British Columbia, the right to sue on such obligations falls within the six-year catch-all limitation period found in s. 3(5). What often surprises laypersons, and even many lawyers, is that the limitation period for demand obligations begins when the obligation is incurred, not on the date of demand. This principle is well settled. Since at least 1837 English courts have held that no actual demand is required before commencing an action on a demand loan or promissory note.[3] The law treated filing the writ as demand enough. It is therefore well understood by commercial lenders, and courts have consistently confirmed, that with a simple demand loan or promissory note payable on demand, the limitation period begins to run the day the money

is lent or the note is made. An action on such demand obligation therefore becomes barred six years after the money is lent or the note is made, regardless of whether a demand was ever made.

The current law has the potential to result in injustice. Promissory notes between non-commercial parties or between family members are often made where payment is not expected for many years. In such circumstances, the parties may take false comfort from signing a promissory note payable on demand and believing that written document will provide security to them for the money lent. In fact the demand promissory note does no more than document the debt. When the note is made, the limitation period begins to toll.

A noteworthy case on point is *Hare v. Hare*, an Ontario case involving a mother who lent her son some money and secured payment by way of a promissory note.[4] She made demand for repayment of the note seven years after it was made. The case was notable because it was the first case that considered the then newly revised Ontario *Limitations Act, 2002*.[5] To many, the new Ontario legislation appeared to require an actual demand to trigger the running of the limitation period.[6] The majority determined that the new legislation did not affect the date on which a cause of action arose on demand loans or demand notes. It ruled that if the legislature had intended to change this fundamental feature of commercial law, it would have used clearer language. In the result, Ms. Hare was barred from collecting on the note. This decision was met with some criticism, and the Ontario legislature quickly moved to amend its legislation again to make it clear that the law was changed so that the limitation period on demand loans and demand notes does not begin to run until a demand has been made and default has occurred.[7] No such reforms have been enacted in British Columbia.

Promissory notes that require payment a specified period after demand have been referred to in the modern cases as "delayed-demand" notes.[8] In the authors' view they are more accurately described as notes payable a fixed period after demand, but the delayed-demand nomenclature was adopted by the BCCA and appears to be here to stay.

Leading legal commentators have consistently expressed the view that the limitation period for a delayed-demand note begins to run only after demand has been made and the time for payment has elapsed.[9] A recent B.C. Supreme Court case, *Zeitler v. Zeitler Estate*, adopted that principle.[10] However, the cases relied on by the legal commentators are all very old; some are over 200 years old. The issue in *Ewachniuk*, on this point, was whether a line of cases beginning in the early 1800s in England had misapplied the law and whether the legal commentators had adopted an erroneous view of the common law as it applies to delayed-demand notes. The defendant argued that

the judge in *Zeitler* had perpetuated this 200-year-old error and that it was wrongly decided.

In 1980 Mr. and Mrs. Ewachniuk sold their son a controlling share in the family business. In return they accepted a promissory note which read:

> For value received, I promise to pay to the order of Roman and Sophia Ewachniuk the sum of Seven Hundred and Fifty Thousand Dollars ($750,000), *payable one (1) year after demand*, without interest. [emphasis added]

No demand was made during the parents' lifetime, but in 2008 the administrator of Mrs. Ewachniuk's estate made demand on the note. Mr. Ewachniuk refused to pay. He asserted both forgiveness of the debt and the limitation period defence. At trial, Russell J. applied *Zeitler* in dismissing the limitations defence, but stated that she did so because she was bound by precedent and commented that the defendant's argument had some logical appeal.[11]

The key issue for the Court of Appeal in *Ewachniuk* was whether *Zeitler* was correctly decided. Only one Canadian case had previously dealt with the discrete issue. In an 1892 case, *Sparham v. Carley*, the Manitoba Court of Appeal suggested that for delayed-demand notes, the demand and the lapse of the specified time are conditions precedent, and the limitation period runs from the time the payment falls due after demand has actually been made.[12]

Muddying the waters further was *Berry v. Page*, where the B.C. Court of Appeal held that the money lent in that case was payable on the happening of a contingent event, and that the limitation period did not commence until the contingent event occurred or a reasonable amount of time had passed.[13] In that case the court also appeared to contrast this type of obligation to demand loans, where limitation periods begin to run immediately. Both sides in *Ewachniuk* claimed that *Berry* supported their position.

Mr. Ewachniuk argued that the comments in *Sparham* should be dismissed as *obiter*. There was no reason to treat delayed-demand notes differently from regular demand promissory notes. The common principle, he argued, is that with both kinds of promissory notes the limitation period commences on the first day that demand could have been made. The appellant also argued that it would be odd for the limitation period to begin immediately for a demand note, but allow a demand note payable "10 days after demand" to have potentially unlimited duration. The appellant's position was that, because his parents *could* have made demand payment right away, the limitation period began running exactly one year after the note was made (1981) and expired in 1987.

The Court of Appeal rejected these arguments. Finch C.J. held that *Sparham* was sound authority. The comments in that case relating to delayed-demand notes were taken *verbatim* from the famous English text *Byles on Bills*

of Exchange,[14] which in turn cited even older case authorities.[15] His Lordship found that there was no obvious flaw in those authorities, or in Byles's articulation of the principle derived from them.[16] For delayed-demand notes, demand and the lapse of the specified period of time are a contingency that must occur before the limitation period begins. The court also dismissed the appellant's concerns about commercial uncertainty and indeterminate liability. Those concerns did not prevail over what Finch C.J. referred to as "settled case law".[17] Moreover, the court alluded to equitable defences based on inexcusable delay which remain available to parties who receive a very stale demand.[18]

The court refused to answer any questions of a delayed-demand note's validity as a negotiable instrument under the *Bills of Exchange Act* ("BEA").[19] The appellant had raised the issue that, as a bill of exchange under the BEA, certainty requires that promissory notes be assigned to one of two categories: payable on demand, or payable at a determinable future time. A delayed-demand note must fall into the "payable on demand" category and therefore ought to be treated like other demand notes, said the appellant. The court did not consider that questions related to certainty or negotiability needed to be answered. It was not a bills of exchange case.

As a result of *Ewachniuk*, lawyers in B.C. advising clients who are considering making long-term loans, either to family members or otherwise, can preserve the cause of action by utilizing a promissory note with a delayed-demand feature. However, this should not be viewed as a trick for the sharp practitioner. The delay feature is important, especially to the promisor because it provides a period of time for the promisor to marshal funds to meet the obligation—a benefit not afforded the maker of a simple demand note. Arguably, this justifies a different limitation treatment.

As is always the case, courts will consider each new case on its specific facts. In future a court may have difficulty following this decision if the delay period is very short and put in solely for the purpose of taking advantage of this wrinkle in limitations law. In our view, in order for the delay to have value, it must be reasonable and, if possible, proportional in relation to the amount of money and the persons involved.

In September 2010 the B.C. government issued a white paper on *Limitation Act* reform, addressing demand obligations. [20] Discussing the surprisingly harsh and unfair situation that can occur and citing the *Hare* decision as an example, it recommends a new section to the *Limitations Act* that would deem the demand obligation to be "discovered" on the date of default. This legislative amendment would ensure that all demand promissory notes are treated the same from a limitations standpoint, but until new legislation is passed the common law continues to govern. Unless, and until, the proposed

amendments to the B.C. *Limitation Act* are enacted, it appears that the use of a promissory note with a delayed-demand feature will remain a useful tool to ensure collectability of demand obligations over the long-term.

ENDNOTES

1. 2011 BCCA 510 [*Ewachniuk*].
2. *Limitation Act*, RSBC 1996, c 266. This is also phrased as "when the cause of action is complete", and this approach is still used by the limitations statutes in British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador. Although common law developed the "discoverability" principle, the principle has had no application to promissory notes. Ontario and Saskatchewan now use a "when the claim is discovered" approach, and Alberta has now taken the approach of beginning limitation periods "when known injury warrants proceeding". These different approaches are summarized nicely in Crawford, *The Law of Banking and Payment in Canada*, loose-leaf ed (Toronto: Canada Law Book, 2010) at §28:110.
3. *Norton v Ellam*, (1837) 2 M&W 461; *Barclay Const Corp v Bank of Montreal* (1988), 28 BCLR (2d) 376, 6 WWR 707 (SC), aff'd (1989), 41 BCLR (2d) 239 (CA).
4. (2006), 83 OR (3d) 766, 277 DLR (4th) 236 (Ont CA).
5. SO 2002, c 24, Schedule B.
6. (2006), 83 OR (3d) 766, 277 DLR (4th) 236.
7. *Budget Measures and Interim Appropriations Act 2009 (No 2)*, SO 2008, c 19, Schedule L, s 1.
8. 2008 BCSC 775 [*Zeitler*].
9. See G Mew, *The Law of Limitations*, 2nd ed (Toronto: LexisNexis Butterworths, 2004) at 175.
10. *Zeitler*, *supra* note 8.
11. *Ewachniuk Estate v Ewachniuk*, [2011] BCJ No 580 at paras 53 & 56.
12. (1892), 8 Man R 246 (CA).
13. (1989), 38 BCLR (2d) 244 (CA).
14. Sir John Barnard Byles, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques*, 15th ed (London: Sweet & Maxwell, 1891).
15. *Thorpe v Booth* (1826), Ry & M 388 (which relied on *Holmes v Kerrison* (1810), 2 Taunt 323).
16. *Ewachniuk*, *supra* note 1 at paras 47–63.
17. *Ibid* at para 78.
18. *Ibid* at para 81.
19. *Bills of Exchange Act*, RSC 1985, c B-4 ("BEA").
20. *White Paper on Limitation Act Reform: Finding the Balance* (Ministry of Attorney General, September 2010), online: <www.ag.gov.bc.ca>.