GOWLING WLG

ANOTHER STEP CLOSER TO A COMMON CROSS-COUNTRY POSITION ON LIMITATION PERIODS FOR DEMAND OBLIGATIONS

01 December 2015

A friendly lender loans money that is payable on demand, evidenced by a promissory note. The funds are advanced, no payments are made, and after more than six uneventful years have passed, the lender makes a demand for payment. The borrower then responds by stating that the lender is statute-barred from making any claim and cannot ever obtain the loaned amount back. The lender sues and to its horror finds out in court that the borrower is correct.

For many years, variations of this scenario played out in British Columbia and in other parts of Canada, providing unpleasant surprises to both lenders and lawyers who lacked a detailed understanding of the limitation periods applicable to demand loans. At common law, the limitation period on a demand loan began running as of the date the obligation was created, and not from the date of a demand for repayment. A demand for repayment was not necessary to “start the clock”.

In British Columbia and most other common law provinces, this common law rule was paired with a limitations statute that originally imposed a six year general limitation period. The effect was that if no claim was started within six years of the demand loan being made, and the debt had not been acknowledged by payments or otherwise, the lender no longer had a legal basis for claiming repayment against the borrower (though depending upon the circumstances, a cause of action might still be possible against the guarantors, if any).

The law was straightforward. It was also counterintuitive and harsh. This was particularly so when friends or family acted as lenders. For example, in the case of Kong v. Saunders[1], the Kong parents loaned money to their son. When the son’s marriage broke down years later the parents demanded repayment. It was held on appeal that the parents’ claim was statute-barred.

From approximately the beginning of the millennium, many common law provinces began to substantially reform their limitation statutes. One of the biggest changes adopted by many provinces was to reduce their general limitation period from six years to two years. Since this could cause even greater unfairness to lenders in the context of demand loans, the reforming provinces added a provision to their respective statutes stipulating that the limitation period for a demand loan would only start running on the first day that there was a failure to perform the obligation <u>after a demand for the performance had been made</u>. That is now the case in British Columbia, Alberta, Ontario, New Brunswick, Saskatchewan, and most recently, Nova Scotia. The changes in Nova Scotia took effect on Sept. 1, 2015. In these provinces, the common law has been trumped by statute.

We are now very close to a common cross-country position on limitation periods for demand obligations. The most recent change in Nova Scotia should be greeted with enthusiasm. A lender can now structure demand obligations over the long term without being caught by the expiry of a limitation period. However, a lender must be aware of the fact that not all provinces have made the change. Manitoba, Newfoundland, and Prince Edward Island still provide that the limitation period for a demand loan begins running without the need for a demand to be made first. In addition, certain provincial statutes may provide for different limitation periods where the demand loan is secured by real property. Finally, lenders must be aware of the different transitional provisions in each province where changes have been made. For example, in British Columbia a claim will be statute-barred if a former limitation period applied to that claim and expired before June 1, 2013.

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[1] 2014 BCCA 508

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