



I Promise To Pay ... Unless I Don't Have To...

A promissory note normally provides that, at a certain point in time, the borrower will repay the money borrowed from the lender. The note is a form of security requested by the lender, a safety net. Often, the money borrowed is payable on demand ("Demand Note").

A recent decision from the Ontario Court of Appeal (the "Court") (*Hare v. Hare* [2006] O.J. No. 4955) has set a new precedent to the question of when a Demand Note becomes unenforceable at law. The Court has ruled that, generally in Ontario, a lender has two years from the date the Demand Note is issued to start a legal action for repayment of the loan. After two years, the lender will be statute-barred from starting a legal action because time will have expired under the new *Limitations Act* (Ontario), which came into force on January 1, 2004.

It is no longer correct to take the position that the limitation period for a Demand Note starts to run when the borrower fails to pay after a demand for payment is made. The limitation period starts to run when the Demand Note is issued. The Court ruled that discovery of a claim under the Demand Note is effective on the date that the Demand Note is issued, since on that date, the lender has the right to immediate payment of the loan.

There is, of course, an exception to the rule. The Court ruled that any payment of principal or interest made under the Demand Note is considered an acknowledgment of debt, which in turn restarts the limitation period. Loans between related parties do not always provide for the partial payment of principal or interest before the demand for repayment is made. In these situations, it is very important to be mindful of the two-year limitation period. For example, a lender issuing a Demand Note without interest on December 14, 2007 will be barred from starting a legal action against the borrower for repayment of the loan after December 14, 2009. If a partial payment of principal was made on January 5, 2008 then the limitation period will be extended from December 14, 2009 to January 5, 2010 and so on.

Under the former *Limitations Act* (Ontario) the limitation period was six years. A Demand Note issued on or prior to January 1, 2004 enjoys a longer limitation period. The lender will be statute-barred from starting a legal action under the Demand Note six years after it is issued as opposed to two years. For any Demand Note issued after January 1, 2004, the two-year limitation period applies.

The Ontario Bar Association has written to the Attorney General of Ontario requesting that an amendment be made to the new *Limitations Act* so that the two-year limitation period not start until a default following a demand for payment occurs. Until such time that the proposed amendment is enacted, and there is currently no indication that it will be, it is suggested that individuals seek the help of legal professionals to prepare a Demand Note that is drafted in view of the new *Limitations Act* and either excludes limitation periods when applicable or is payable a certain number of days after demand.