SUPREME COURT OF NOVA SCOTIA
Citation: Aucoin v. Murray, 2013 NSSC 37

Date: 20130129
Docket: Hfx No. 407270
Registry: Halifax

Between:

Dola Ann Aucoin

Applicant

v.

Nickolas Richard Murray

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	January 15, 2013 (in Chambers), in Halifax, Nova Scotia
Written Decision:	January 29, 2013
Counsel:	Dillon Trider, for the Applicant Shaun Mac Millan, for the Respondent

By the Court:

[1] Thirty years ago, Dola Ann Aucoin lent money to her friend, Nickolas Murray. These loans were documented by various promissory notes which bore interest. Initially Mr. Murray made payments as agreed; however, during the 1980's and 1990's payments became more sporadic and ultimately stopped.

[2] Ms. Aucoin made a further loan to Mr. Murray in February, 1995 and Mr. Murray made no payments on that debt.

[3] In November, 2008, Mr. Murray sent a letter to Ms. Aucoin which she alleges was an acknowledgment of the debts. In addition, in early 2009, Mr. Murray made three payments of $1,200.00 to Ms. Aucoin which she claims represent payments on the loans.

[4] In this litigation, Ms. Aucoin is seeking repayment of three loans to Mr. Murray, represented by promissory notes dated November, 1979, October, 1980 and February, 1995.

[5] Both Ms. Aucoin and Mr. Murray have made motions for summary judgment which raise the issue of whether collection of the debts is now barred by the provisions of the *Limitation of Actions Act*, R.S.N.S. 1989, c.258.

THE SUMMARY JUDGMENT MOTIONS

[6] The motion by Ms. Aucoin is for summary judgment on evidence, pursuant to *Civil Procedure Rule 13.04*. She is requesting that Mr. Murray's limitation defence be set aside on the basis that his letter of November 11, 2008 and the three payments in 2009 represented acknowledgments of the debts, which would take them outside the operation of the *Limitation of Actions Act*.

[7] Mr. Murray's motion is for summary judgment on pleadings in accordance with *Civil Procedure Rule 13.03*. The motion is based upon the submission that upon expiry of the limitation period, the debts were extinguished and could not be resurrected by subsequent acknowledgment or part payment.

[8] I will deal first with Mr. Murray's motion since, if he is successful, the issues raised by Ms. Aucoin's motion will become moot because I will have concluded that acknowledgment or part payment could not save the statute barred debts.

[9] The test for summary judgment on pleadings is set out in *Civil Procedure Rule 13.03(1)* which provides as follows:

> **Summary judgment on pleadings**
>
> **13.03** (1) A judge must set aside a statement of claim, or a statement of defence, that is deficient in any of the following ways:
>
> (a) it discloses no cause of action or basis for a defence or contest;
>
> (b) it makes a claim based on a cause of action in the exclusive jurisdiction of another court;
>
> (c) it otherwise makes a claim, or sets up a defence or ground of contest, that is clearly unsustainable when the pleading is read on its own.

[10] This proceeding is an application in court and so the grounds set out in the notice of application are treated as a statement of claim for purposes of the motion. Mr. Murray's motion is to be determined solely on the basis of the allegations in the notice and not the evidence contained in the affidavits filed with respect to Ms. Aucoin's motion.

[11] Ms. Aucoin's notice of application included the following factual allegations:

1) She made three loans to Mr. Murray in October, 1980, November, 1979 and February, 1995.

2) Mr. Murray made sporadic payments with respect to the 1979 and 1980 loans which stopped in the 1990's.

3) Mr. Murray made no payments on the loan made in February, 1995.

4) On November 11, 2008, Mr. Murray acknowledged the debts in writing.

5) In 2009, Mr. Murray made three payments of $1,200.00, which were applied to each of the three loans.

[12] For purposes of the summary judgment motion by Mr. Murray, I will accept the allegations as proven. I must then determine whether, as a matter of law, Ms. Aucoin's claims are clearly unsustainable.

[13] The submission made on behalf of Mr. Murray is that the debts were extinguished by the expiry of the limitation period and any subsequent acknowledgment or part payment does not reinstate them. This argument requires me to consider both the effect of the expiry of a limitation period on the underlying cause of action and the mechanism by which an acknowledgment or part payment restarts the running of the limitation period.

THE EFFECT OF THE EXPIRY OF A LIMITATION PERIOD ON THE UNDERLYING CAUSE OF ACTION

[14] In 1994, the Supreme Court of Canada issued its decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. In that case, the Court concluded that limitation statutes should be treated as substantive rather than procedural in nature. The impact of that decision is the focus of the arguments advanced by counsel in this matter. Mr. Graeme Mew nicely summarized the issue in his text, *The Law of Limitations*, (2 ed.) (Butterworths, 2004) in the following passage found at pp. 64-66:

> **I. WHAT IS EXTINGUISHED - A SUBSTANTIVE RIGHT OR MERELY THE REMEDY TO ENFORCE IT?**
>
> The common law tradition considers statutes of limitation as procedural, as contrasted with the position in most civil law countries, where limitations are regarded as substantive.
>
> As a result, limitation provisions found in Canadian statutes have, for the most part, been interpreted as extinguishing remedies rather than substantive legal rights. Thus, one commonly finds that an action must be commenced "within" or "within and not after" the prescribed period. As a result, although a party is

> barred from enforcing its remedies once that time period has expired, its legal right will survive. The rationale for this approach is explained as follows:
>
> > Extinguishing rights is not an objective of a limitations system. Rather, its objective is to force the timely litigation of disputes if there is to be litigation. Nevertheless, if, pursuant to a limitations statute, a defendant gains immunity from liability to any remedy which the law provides for the enforcement of the right upon which the claim was based, the right, although not extinguished, will become sterile.
>
> Thus, in the absence of a remedy to enforce a right, such right, in and of itself, is of little, if any, value. It is not surprising, therefore, that both case law and legal texts seldom distinguish between whether it is the right or the remedy that is lost upon the expiration of the limitation period.
>
> However, the traditional common law approach is changing. In 1994, the Supreme Court of Canada in *Tolofson v. Jensen* set aside the old common law rule of interpretation. Mr. Justice La Forest, for the majority, expressed the view that the civil law approach was more persuasive, and that the reasons that formed the basis of the common law rule were out of place in the modern context. Mr. Justice La Forest cited other Canadian decisions where courts had begun to undermine the mystique that statutes of limitations are directed at the remedy and not the right, and held that the Saskatchewan limitations statute created an accrued right, specifically, a right in the defendant to plead a time bar and, as such, this was substantive and not procedural. One scholar in particular has interpreted this decision as meaning that technical distinctions between right and remedy are now outdated. This same scholar sees the Supreme Court 's decision in *Tolofson* as "a burst of judicial creativity" which stands for the propositions that statutes of limitation confer substantive rights, and that it is no longer necessary to rely on the language used in the relevant limitations provisions to determine if it extinguishes the right or bars the remedy.

[15] *Tolofson* was a conflict of laws case where the court was called upon to decide which limitation period applied to the claim - the one in the jurisdiction where the claim arose or where the litigation was taking place. Under conflict rules, this issue was determined by whether the law in question was categorized as substantive or procedural in nature.

[16] Historically, limitation periods have been considered to be procedural rules; however, the Supreme Court concluded that they should now be treated as

substantive. The rationale for doing so was outlined by Justice La Forest at pp. 1069-1070.

> The common law traditionally considered statutes of limitation as procedural, as contrasted with the position in most civil law countries where it has traditionally been regarded as substantive. The common law doctrine is usually attributed to the seventeenth century Dutch theorist Ulrich Huber, whose celebrated essay *De conflictu legum diversarum in diversis imperils* (1686), became known in England during the reign of William and Mary *(authorities omitted)*. By the early nineteenth century, the doctrine was firmly established in England and in the United States. From the cases and academic commentary of the time *(authorities omitted)*, one can glean the two main reasons for the ready acceptance of this doctrine in Anglo/American jurisprudence. The first was the view that foreign litigants should not be granted advantages that were not available to forum litigants. This relates to the English preference for the *lex fori* in conflict situations. The second reason was the rather mystical view that a common law cause of action gave the plaintiff a right that endured forever. A statute of limitation merely removed the remedy in the courts of the jurisdiction that had enacted the statute.
>
> Such reasoning mystified continental writers such as M. Jean Michel *(La Prescription Libératoire en Droit International Privé*, Thesis, University of Paris, 1911, paraphrased in Ailes, *supra*, at p. 494), who contended that "the distinction is a specious one, turning upon the language rather than upon the sense of limitation acts . . . ." In the continental view, all statutes of limitation destroy substantive rights.
>
> I must confess to finding this continental approach persuasive. The reasons that formed the basis of the old common law rule seem to me to be out of place in the modern context. ...
>
> Canadian courts have also begun to shatter the mystique of the second reason which rests on the notion that statutes of limitation are directed at the remedy and not the right. This Court has in another context taken cognizance of the right <u>of the defendant</u> to be free from stale claims in *Martin v. Perrie*, [1986] 1 S.C.R. 41.

[17] After noting that the British parliament had enacted legislation to declare foreign limitation periods to be substantive, Justice La Forest made the following comments at p. 1071-1072:

> I do not think it is necessary to await legislation to do away with the rule in conflict of laws cases. The principle justification for the rule, preferring the *lex fori* over the *lex loci delicti*, we saw, has been displaced by this case. So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field where, as I stated earlier, the purpose of substantive/procedural classification is to determine which rules will make the machinery of the forum court run smoothly as distinguished from those determinative of the rights of both parties.

[18] It is clear from these passages that the implication of treating a limitation period as substantive is that expiry will destroy the underlying rights of the party. This was a change from the historic view that a procedural limitation period simply eliminated the remedy with the cause of action continuing to exist. If the remedy were ever restored, the cause of action could be pursued.

[19] Over the last decade, some jurisdictions in Canada have amended their limitation statutes to specifically provide for substantive extinguishment of a claim upon expiry of the limitation period. One example is s. 9(1) of the British Columbia *Limitation Act*, R.S.B.C. 1996, c. 266.

[20] In Nova Scotia, there is no express statutory provision and so the effect of the expiry of a limitation period falls to be determined on the principles arising out of *Tolofson* and subsequent cases.

[21] In *Heuman v. Andrews*, 2005 ABQB 832, Justice Rowbotham was considering the constitutionality of a provision in the Alberta *Limitation of Actions Act* which bound an infant to the same limitation provisions as an adult plaintiff in some circumstances. In order to consider the applicability of the *Canadian Charter of Rights and Freedoms*, the Court needed to determine the status of the infant plaintiff's potential claim on the date that the *Charter* came into effect (i.e. April 17, 1985).

[22] The limitation period had expired prior to April,1985 and the plaintiff argued that his claim still existed despite the absence of an avenue for redress. The defendant said that under the *Tolofson* rationale, the claim had been extinguished and therefore did not exist on the effective date.

[23] Justice Rowbotham reviewed Justice La Forest's analysis from *Tolofson* and set out her views with respect to the implications of that decision at para. 33:

> [33] Post-*Tolofson*, the traditional common law approach to statutory limitation provisions has been evolving into something akin to the civil law approach, if it has not yet been abandoned in favour of the civil law approach. In *The Law of Limitations*, 2nd ed. (Toronto: Butterworths, 2004), Graeme Mew observes at 66:
>
> > [T]he traditional common law approach is changing. In 1994, the Supreme Court of Canada in *Tolofson v. Jensen* set aside the old common law rule of interpretation. Mr. Justice La Forest, for the majority, expressed the view that the civil law approach was more persuasive, and that the reasons that formed the basis of the common law rule were out of place in the modern context. Mr. Justice La Forest cited other Canadian decisions where courts had begun to undermine the mystique that statutes of limitation are directed at the remedy and not the right, and held that the Saskatchewan limitations statute created an accrued right, specifically, a right in the defendant to plead a time bar and, as such, was substantive and not procedural. One scholar in particular Jean-Gabriel Castel, "Back to the Future! Is the 'New' Rigid Choice of Law Rule for Interprovincial Torts Constitutionally Mandated?" (1995) 33 Osgoode Hall L.J. 35-77 has interpreted this decision as meaning that technical distinctions between right and remedy are now outdated. This same scholar sees the Supreme Court's decision in *Tolofson* as "a burst of judicial creativity" which stands for the propositions that statutes of limitation confer substantive rights, and that it is no longer necessary to rely on the language used in the relevant limitations provision to determine if it extinguishes the right or bars the remedy. [Footnotes omitted.]
>
> and at 67, footnote 13:
>
> > The classification of a provision as substantive rather than procedural may be of some (but diminishing) significance.
>
> Since *Tolofson*, the Alberta Court of Appeal has consistently characterized statutes of limitation as substantive law in conflict of laws cases. See *Brill v. Korpaach Estate* (1997) 200 A.R. 161 at paras. 7, 23 (C.A.), leave to appeal refused [1997] 3 S.C.R. vi: *Banque Nationale de Paris (Canada) v. Opiola* (2001), 277 A.R. 80 at para. 44, 2001 ABCA 25, and *Castillo v. Castillo* (2004), 357 A.R. 288, 2004 ABCA 158, leave to appeal granted (2005, [2004] S.C.C.A. No. 433. Other Canadian appellate courts have done the same. See, for example, *Stewart v. Stewart* (1997), 145 D.L.R. (4th) 228 at paras. 3, 16 (B.C.C.A.);

> *Pearson v. Boliden Ltd.* (2002), 222 D.L.R. (4th) 453 at para. 52, 2002 BCCA 624, leave to appeal refused [2003] 2 S.C.R. ix; *Caspian Construction Inc. v. Drake Surveys Ltd.* (2004), 184 Man. R. (2d) 284 at para. 19, 2004 MBCA 71; and *Wong v. Lee* (2002), 58 O.R. (3d) 398 at para. 20 (C.A.). In *Michalski v. Olson* (1997), 123 Man. R. (2d) 101 (C.A.), leave to appeal refused [1998] 1 S.C.R. xii, the court, per Huband J.A., ruled at paras. 15 and 24:
>
> > [T]he Court [in *Tolofson*] accepted the proposition that limitation provisions destroy substantive rights and therefore constitute substantive law. ...
> >
> > ... [T]he determination in the *Tolofson* case that limitation laws are substantive, rather than procedural, cannot have come as a surprise. To say that a limitation provision is procedural because it bars a remedy rather than extinguishing a right is an exercise of semantic gymnastics that would baffle any rational observer outside the legal profession. The decision in the *Tolofson* case was foreshadowed by an earlier decision by the Supreme Court itself (though in a different context) in *Perrie v. Martin*, [1986] 1 S.C.R. 41, 64 N.R. 195, and by the judgment of Stratton, C.J.N.B., in the case of *Clark v. Naqvi* (1989), 99 N.B.R. (2d) 271; 250 A.P.R. 271 (C.A.). In the latter case, Stratton, C.J.N.B., held that a limitation provision which was worded in a manner indicating that it was extinguishing a remedy rather than a right was nevertheless substantive, rather than procedural, because it conferred a right in the defendant to plead that the action was barred by time.

[24] Justice Rowbotham found that characterization of limitation periods as substantive should not be limited to conflicts of laws cases for the reasons set out in para. 36 of her decision:

> [36] In my view where, as here, we are dealing with a limitation period in a limitations statute, the provision is substantive. This ought to be so whether or not the case involves the conflict of laws. I agree with the observation of Huband J.A. in *Michalski* that the notion that a limitation provision bars the remedy rather than extinguishing a right "is an exercise of semantic gymnastics". An individual who has been "wronged" may have a cause of action in tort. But if she fails to commence an action in time, she no longer has that tort action. The "wrong" may be answerable in another forum, criminally or before an administrative tribunal, but her right to seek a remedy in tort is extinguished.

[25] She then concluded that the plaintiff's claim had been extinguished by the passing of the limitation period and therefore ceased to exist prior to the implementation of the *Charter* in April, 1985.

[26] In 2011, Justice Clark of the Albert Court of Queen's Bench considered the effect of an expired limitation period in *Re Moody Estate*, 2011 ABQB 222. The dispute in that case related to whether loans made by the deceased to her son during her lifetime could be claimed by her executors on behalf of her estate even though the limitation period had expired. This involved a consideration of the application of the rule in *Cherry v. Boultbee* which was described by Justice Clark at para. 16 of his decision:

> [16] This brings me to the novel question of the rule in *Cherry v. Boultbee*. In *Leeper Estate v. Leeper*, [1996] Y.J. No. 6 (C.A.), the Court set out the rule as follows at paras. 27-8:
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> > [The rule in *Cherry v. Boultbee*] was succinctly stated in Williams, Mortimer and Sunnucks on Executors, Administrators & Probate, 17th ed. (London: Stevens & Sons, 1993) at 646:
> >
> > > The principle of *Cherry v. Boultbee* has been stated as follows: "Where a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute."
>
> In *Re Akerman, Akerman v. Akerman*, [1891] 3 Ch. 212 Kekewich J. stated at 221 that the circumstance that a debt owing to a testator was statute barred at the date of death of the testator did not prevent the application of the rule in *Cherry v. Boultbee (supra)* from being applied.

[27] He then went on to observe that this rule appeared to be inconsistent with the modern principles of limitation of actions. At para. 22 of his decision, Justice Clark said:

> [22] It appears, then, that *Cherry v. Boultbee* has been an accepted part of Canadian law. It also seems to have been accepted that the rule applies notwithstanding the expiration of the applicable limitation period. I find this most curious, as it seems to me to be anathema to the application limitation periods, namely to prevent claimants from sitting on their rights and to provide repose to defendants after a reasonable period. I also find it exceedingly strange that the

> rule permits an executor to recoup the amount owing, even though the deceased would have been unable to do so. The reason for this anomaly, I believe, has to do with the distinction between rights and remedies.

[28] After quoting with approval from pp. 65 and 66 of Mr. Mew's text and adopting the analysis of Justice Rowbotham in the *Heuman* case, the Court came to the following conclusions with respect to the effect of an expired limitation period:

> [30] As noted by Justice Rowbotham in *Heuman*, the effect of the expiration of a substantive statutory limitation period is to extinguish not just the remedy, but the underlying right. It follows, in my view, that the application of the rule in *Cherry v. Boultbee* beyond the expiration of a limitation period no longer has a place in Canadian law. Once the limitation period in respect of a debt owed to a deceased person has expired, the right to collect the debt is extinguished. If such be the case, then what *Cherry v. Boultbee* refers as "the right to pay out of the fund in hand" is also extinguished. The debt is no longer collectible and cannot be taken into account in making a distribution to the debtor beneficiary.

[29] In *Dyck v. Sellmeyer*, 2012 SKQB 463, the Saskatchewan Court of Queen's Bench also considered the effect of the expiry of a limitation period. That case involved the interpretation of a will, where the testatrix directed that bequests to her children should be reduced by any money they might owe to her.

[30] There was evidence of loans from the deceased to her children for which the limitation period had expired. The Court adopted the approach of Justice Clark in *Re Moody Estate* and concluded that the debts had been extinguished by the passing of the limitation period. The Court's analysis is set out in the following passage from the decision:

> [12] In the context of statutory limitation provisions, a distinction has long been recognized between the loss of the right to sue and the continued existence of the underlying claim. Traditionally, a statutory limitation provision was seen as procedural only, barring the commencement of action but not affecting the continued existence of the debt or other claim underlying the action. That distinction has changed.
>
> [13] The development of that change was discussed by Justice Clark in *Moody v. Moody*, 2011 ABQB 222, [2011] 12 W.W.R. 740, at paragraphs 16-33. The discussion applies equally in Saskatchewan, even though there are some

differences in the wording of the statutes. The Alberta statute describes the operation of the limitation period in terms of the defendant being "entitled to immunity from liability in respect of the claim", whereas the Saskatchewan statute describes the operation of the limitation period by providing that "no proceedings shall be commenced with respect to a claim". Nonetheless, the evolution of statutory limitation provisions from procedural to substantive has occurred irrespective of the precise wording of the statutes.

[14] The evolution has occurred, not based on the particular wording of statutory limitation provisions, but by way of adoption in principle of civil law approach in which the extinguishment of the right to sue has become the extinguishment of the underlying debt or other cause of action. Indeed, the Supreme Court of Canada's earliest express recognition of the shift appeared in a case addressing the predecessor of the current Saskatchewan statute, that predecessor bearing wording similar to that in the current statute: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, [1994] S.C.J. No. 110 (QL).

[15] In *Tolofson* Justice La Forest examined the historical reasons for holding that a statutory limitation provision is procedural and he rejected those reasons, concluding that the Saskatchewan limitation provision under consideration was substantive. *Tolofson* was a conflict of laws case, but there is no reason for thinking that Justice La Forest's analysis would differ in any other context. No reason is apparent for limitation periods being substantive in a conflict of laws context but being procedural in other contexts. To the contrary, Justice La Forest's analysis was not tied to the conflict of laws context. Rather, it was concerned with the logic and practicality of statutory limitation provisions generally being substantive rather than procedural.

[16] Indeed, at paragraph 85 Justice La Forest adopted the "substantive" view in broad terms, then remarked on its particular - but not exclusive - application in the conflict of laws context:

> ... So far as the technical distinction between right and remedy, Canadian courts have been chipping away at it for some time on the basis of relevant policy considerations. I think this Court should continue the trend. It seems to be particularly appropriate to do so in the conflict of laws field .... [Emphasis added]

[17] Since *Tolofson* the Supreme Court has repeated its view that limitation provisions are substantive, as represented by its remarks in *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94, at paragraph 41, and in *Castillo v. Castillo,* 2005 SCC 83, [2005] 3 S.C.R. 870, at paragraph 7.

> [18] For these reasons I adopt Justice Clark's analysis and conclusions of law as set out in *Moody*. The expiration of the limitation period served not only to bar a court action but also to extinguish the debt to which the limitation period applied. This result is not affected by the rule in *Cherry v. Boultbee* (1839), 4 My & Cr 442 (prohibiting a beneficiary who owes money to an estate from participating in the estate unless the beneficiary pays the debt), a rule whose application has been superseded by the development of the law relating to statutory limitation provisions.
>
> [19] The result in this case is that, at the time of Ms. Neudorf's death, none of her children owed money to her. Therefore, I direct the executor to distribute the estate on the basis that none of the beneficiaries owed Ms. Neudorf money at the time of her death.

[31] I have not been referred to any other authorities which specifically address the question of the effect of expiry of a limitation period in the post *Tolofson* era. Despite this, I am satisfied that the rationale of Justice La Forest, as adopted by the Alberta and Saskatchewan Courts, represents the current state of the law in Canada. Once a limitation period has expired, the underlying claim is extinguished.

THE MECHANISM FOR RENEWAL OF A LIMITATION PERIOD BY ACKNOWLEDGMENT OR PART PAYMENT

[32] Historically acknowledgment of a debt would restart the running of the limitation period no matter when it was made. Part payment was considered to be a form of acknowledgment. An example of this is the Manitoba Court of Appeal decision in *Weingarden v. Moss*, (1955) 63 Man.R. 243 where payments made on two debts after the expiry of the limitation period were effective to restart the clock and take the debts out of the application of the statute.

[33] Counsel for Mr. Murray argues that this approach was based upon the distinction between right and remedy that existed prior to the Supreme Court decision in *Tolofson*. Since the underlying claim was not extinguished and continued to exist, the elimination of the limitation defence by acknowledgment meant that the plaintiff was again free to pursue it. This is consistent with the language used by the Ontario Court of Appeal in *Mehr v. Primrose Club Ltd.*

(1958), 13 D.L.R. (2d) 121 when it says that an acknowledgment will "rescue a claim from the operation of the *Statute of Limitations*" (para. 5).

[34] The English House of Lords considered the effect of acknowledgment under the *Statute of Limitations* in *Spencer v. Hemmerde*, [1922] 91 L.J.K.B. 941. Lord Sumner concluded that the acknowledgment did not create a new cause of action, as illustrated by his comments in the following passage from p. 950-951:

> It is quite impossible that so many Judges should have spoken of the old debt being the consideration for the new promise without their being fully aware that if a new cause of action is meant this is contrary to long settled rules of law as to consideration. They must have spoken of the new promise as something different from a new contract, binding in law as such. Sir William Anson does, it is true, say (*Contracts* (14th ed.), p. 128), that the case is an exception to the general rule as to past executed consideration and, while expressly disclaiming reliance on any moral obligation to pay, suggests that in consideration of the creditor's having given everything that the debtor could get out of the contract and being unable, owing to the statute, to get anything which the contract was to have given to him, a promise by the debtor to remove the bar and pay is legally binding. I confess that I do not follow this. It is not a consideration which moves to the debtor; it is a matter of honour, if it is anything, as to which one may say that the creditor has only his own good nature to thank for his loss, and in any case it is a consideration inapplicable when the debt is not yet barred, though the doctrine which it purports to explain applies equally to acknowledgments given before the six years have run as to those given afterwards. I find that the great preponderance of the cases is against regarding the new promise as a new cause of action and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgment and "continues" or "renews" or "establishes" the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise. This alone seems to accord with the language used in *Tanner v. Smart* as reproduced in *Hart v. Prendergast* (15 L.J. Ex., at p. 225; 14 M. & W., at p. 743), where, after counsel had said in argument, "The questions are, first, does the letter taken altogether amount to a promise to pay, and second, does it support the promise laid in the declaration to pay on request." the Judges, Parke, B., Alderson, B., and Rolfe, B., said, respectively, that the promise must "fit," or must "maintain," or must "support" the promise declared upon. If so, there is no question of any fresh cause of action.

And also at p. 955:

> ... I think the effect is this; the new promise revives the old debt, but does not create a new one; it revives it, however, not simpliciter, but subject to any conditions attached to the words, which operate the revival - *Philips v. Philips*, and it may be inferred or not inferred according as it is or is not attended by other words, which leave it standing and unqualified or limit or destroy its effect. ...

[35] In *Alberta Treasury Branches v. Jarvis Engineering,* [1998] A.J. No. 285, Master Funduk accepted that an acknowledgment did not create a new cause of action as indicated by the following comments:

> 52. In *Busch v. Stevens* (1962), [1963] 1 Q.B. 1 (Eng. Q.B.) Lawton J. rightly says that the cause of action is based on the original contract, not the acknowledgment, p. 6:
>
> > It seems to me as a matter of syntax that the right which shall be deemed to have accrued is a right of action to recover any debt or any other liquidated pecuniary claim. The subsection does not change the nature of the right; it provides that in the specific circumstances of an acknowledgment or payment the right shall be given a notional birthday and on that day, like the phoenix of fable, it rises again in renewed youth - and also like the phoenix, it is still itself. I am fortified in this view by the speech of Lord Sumner in *Spencer v. Hemmerde.*
>
> 53. J. S. Williams, Limitation of Actions in Canada (2nd ed.) says, p. 218-19:
>
> > An acknowledgment, to be effective, should relate to a debt or other liquidated sum of money. It will not, on principle, matter whether the cause of action is already statute-barred except in the cases where the right and title is extinguished, in which cases the acknowledgment or part payment is imply ineffective. ...
> >
> > The effect of an acknowledgement or part payment is simply to start time running afresh. The acknowledgment or part payment is a new point of origin of a limitation period which is in all other respects the same as the first limitation period. That first limitation period may or may not have expired at the time of the beginning of the second. ...
>
> 54. I agree.

[36] Justice Charron, as she then was, followed the approach of the Ontario Court of Appeal in *Mehr v. Primrose Club Ltd.* in concluding that an

acknowledgment served to "rescue the claim" from the operation of the limitation statute (see *Canada (Attorney General) v. Simpson* (1995), 26 O.R. (3d) 317).

[37] In *Lukenda v. Campbell* (2003), 67 O.R. (3d) 688 Justice O'Neill concluded that a letter sent by the defendant constituted a written acknowledgment sufficient to defeat the operation of the *Limitations Act*. He described the impact of the acknowledgment at para. 29:

> 29 In my view, the effect of the October 26th, 1983 letter was to acknowledge the continuing contract or obligation of the defendant to pay monies under the outstanding guarantee so as to extend the expiration of the limitation period to October 26th, 1989, well within the period during which the statement of claim was issued.

[38] On the basis of these authorities, I am satisfied that the effect of an acknowledgment is to permit a claim to be made on the original cause of action and not to create a new one. In the case of a debt, there is no new contract to pay created by payment or acknowledgment.

[39] The logical result of the *Tolofson* decision is that the underlying debt is extinguished and therefore nothing remains to be revived by an acknowledgment. Prior to *Tolofson* an acknowledgment would remove the procedural bar created by the limitation statute which permitted a claim on the original debt. That is no longer the situation in Canada.

[40] The following passage from Mew, *The Law of Limitations* supports my conclusion (p. 115):

> An acknowledgment or part payment cannot revive a right that has been extinguished. It does, however, provide an additional limitation period for the pursuit of a remedy where a right still exists.

[41] In 2005, the Uniform Law Conference of Canada approved a *Uniform Limitations Act* which included a section codifying rules with respect to acknowledgments and part payments. Section 11(10) of the proposed legislation provided that an acknowledgment would only be effective if made before the expiry of the limitation period:

> (10) This section does not apply unless the acknowledgment is made to the person with the claim, the person's agent or an official receiver or trustee acting under the *Bankruptcy and Insolvency Act* (Canada) before the expiry of the limitation period applicable to the claim.

[42] Many provinces in Canada have now enacted similar provisions. In those provinces, it is unnecessary to resort to the interpretation of *Tolofson* and subsequent jurisprudence in order to conclude that statute barred claims cannot be reinstated by acknowledgment or part payment. Nova Scotia has not yet adopted a statutory approach to this issue.

[43] A number of the cases relied upon by Ms. Aucoin to show that post limitation acknowledgments were sufficient to reinstate claims were decided after the Supreme Court released the *Tolofson* decision in 1994. Examples are the *Alberta Treasury Branches v. Jarvis Engineering* and *Canada (Attorney General) v. Simpson* decisions. In none of those cases was there any discussion of the *Tolofson* decision or its implications. I conclude that the issue was simply not raised in those cases and, therefore, those decisions are not of great assistance.

[44] My conclusion that an acknowledgment will not revive a claim which has been extinguished by the passage of a limitation period is consistent with the law related to adverse possession of real property. Such claims are based upon the expiry of statutory limitation periods. In Nova Scotia, s. 10 of the *Limitation of Actions Act* sets out a twenty year period for an owner to bring action to recover land from a person in possession. Section 22 of the *Act* provides as follows:

> **Delay caused by defendant**
>
> **22** If the relevant limitation period established by this Act has expired, but the actions taken or assurances given by the defendant or the defendant's agent in relation to the resolution of the claim before the expiry of the limitation period caused the claimant to reasonably believe that the claim would be resolved by agreement and therefore to delay bringing the claim, the claimant may bring the claim within 6 months after the date on which the claimant first knows or ought reasonably to know that the belief was unfounded.

[45] This clearly indicates that upon expiry of the limitation period, the owner's title to the property is extinguished. It is well established that once this occurs , an acknowledgment of the prior owner's title is of no effect (see *Hamilton et al. v. R.*,

[1917] 54 S.C.R. 331; *Pflug v. Collins*, [1952] O.R. 519 and, *Shannan v. Raymond* [1998] O.J. 666 (Ont. Gen. Div.)).

[46] For actions in debt, the extinguishment of the underlying claim upon expiry of the limitation is by operation of the legal principles arising out of *Tolofson* and not statute, but the result should be the same. A subsequent acknowledgment is ineffective to revive the lost rights in both circumstances.

[47] The only remaining issue to consider in Nova Scotia is the effect of the authority granted in s. 3 of the *Limitation of Actions Act* to disallow a limitation defence in certain circumstances. The relief granted is based upon equitable principles and the application for relief must be made no later than four years after the expiry of the limitation period. The result of the order is not to extend the limitation period, but to disallow the defence. This provision does not change my conclusions with respect to the effect of the expiry of a limitation period and the inability to reinstate the claim by acknowledgment.

[48] An acknowledgment or part payment made during the four year discretionary period set out in s. 3 of the legislation would not automatically renew the claim, but it would be a relevant circumstance for the court to consider in exercising its equitable discretion.

ANALYSIS AND CONCLUSION

[49] According to the allegations in the notice of application, Mr. Murray never made a payment on the 1995 loan and, as a result, this was extinguished in 2001 and could not be resurrected by any subsequent acknowledgment or part payment.

[50] Mr. Murray is alleged to have made some payments on the 1979 and 1980 loans during the 1980's and 1990's. There are no dates specified; however, for purposes of this summary judgment motion, I will assume that a payment was made at the latest possible date, ie. December 31st, 1999. If this is the case, the limitation period would have expired on December 31st, 2005. As of that date, the loans were extinguished and so the alleged acknowledgment in 2008 and part payments in 2009 could not have been effective to reinstate them.

[51] As a result of my conclusions, it is obvious that all of the claims made by Ms. Aucoin in this proceeding are unsustainable and must fail. I will grant Mr. Murray's motion for summary judgment on the pleadings and strike out the entire notice of application.

[52] In light of my decision on Mr. Murray's motion for summary judgment, it is not necessary to deal with Ms. Aucoin's summary judgment motion alleging the existence of a 2008 acknowledgment and part payments in 2009 sufficient to restart the limitation period.

[53] If the parties cannot agree on the issue of costs, I will receive written submissions on or before February 15, 2013.

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Wood, J.