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BRIEFING NOTE

When does a plaintiff "discover" their loss? The SCC examines discoverability in *Grant Thornton LLP* v. *New Brunswick*

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Introduction

When does a limitation clock start ticking? The Supreme Court of Canada shed some light on this frequently contested issue in a judgment published last year in *Grant Thornton LLP* v. *New Brunswick*, 2021 SCC 31 ("*Grant Thornton*"). The application of the decision, however, will vary depending on the limitation statute in each province.

In *Grant Thornton*, the province of New Brunswick (the "Province") brought a negligence action against an auditing firm, Grant Thornton LLP ("Grant Thornton"). The Province relied on a Grant Thornton audit report in providing a loan guarantee for a company, and it paid $50 million to the Bank of Nova Scotia when the company went into receivership. In response, Grant Thornton denied the allegation, saying it was statute-barred. The Court examined ss. 5(1)(a) and (2) of the New Brunswick *Limitation of Actions Act ("LAA")*, to ascertain when the plaintiff Province "discovered" its loss.

In short, the Court determined that a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of the defendant's liability can be drawn. Applying this framework, the Court held that the Province's claim was statute-barred.

Background

In the fall of 2008, the Atcon Group of Companies ("Atcon") sought a loan from the Bank of Nova Scotia, for which the bank required loan guarantees from the Province. The Province agreed to a $50 million loan guarantee conditioned upon Atcon subjecting itself to an external review of its assets by an auditing firm. Grant Thornton performed the review and delivered its report on June 18, 2009, assuring the Province of Atcon's financial position. In reliance, the Province guaranteed the loan for $50 million. Atcon soon ran out of working capital and went into receivership. The bank called upon the Province to pay out the loan guarantees, which it did on March 19, 2010. In June 2010, the Province retained RSM Richter Inc. to review Atcon's financial position in 2009. Richter delivered a draft report on February 4, 2011 which identified material overstatement of assets and net earnings in the Grant Thornton report.

On June 23, 2014, the Province filed a statement of claim against Grant Thornton and other individual defendants seeking damages for negligence.

In response, Grant Thornton denied the allegation saying it was statute-barred by virtue of the two-year limitation period under s. 5(1)(a) and s. 5(2) of the *LAA*, which set out when a claim is discovered. Grant Thornton successfully applied to have the action declared statute-barred, but the New Brunswick Court of Appeal overturned the dismissal, applying a different governing standard for discoverability.

SCC Analysis

To determine if a statutory limitation period was triggered, the SCC made two distinct inquiries: (1) whether the plaintiff's state of knowledge is to be assessed in the same manner as the common law discoverability rule; and (2) the degree of knowledge the plaintiff must have to "discover" a claim. The relevant sections of the *LAA* are as follows:

> 5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered, and
>
> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> 5(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> (a) that the inquiry, loss or damage had occurred,
>
> (b) that the inquiry, loss or damage was caused by or contributed to by an act or omission, and
>
> (c) that the act or omission was that of the defendant.

The first inquiry asks whether s. 5(1)(a) accords with the common law discoverability rule. Under that rule, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence."[1] The common law discoverability rule can be "ousted" by clear legislative language,[2] but the *LAA* is harmonious with the common law and the SCC confirmed that "the limitation period is triggered when the plaintiff discovers or ought to have discovered, through the exercise of reasonable diligence, the material facts on which the claim is based" (par. 40).

The second inquiry asks what degree of knowledge the plaintiff must have in order to "discover" a claim. That is, how much knowledge is sufficient for the limitation clock to begin ticking?

The Court concluded a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of the defendant's liability can be drawn.[3] In a negligence claim, this means a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care. All that is required is actual or constructive knowledge of the material facts from

[1] *Central Trust Co.* v. *Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147, at p. 224, citing *Kamloops (City of)* v. *Nielsen*, 1984 CanLII 21 (SCC), [1984] 2 S.C.R. 2.
[2] *Pioneer Corp* v. *Godfrey*, 2019 SCC 42, at para 32.
[3] Also see paras 42–44 and 47–49 of *Vu* v. *Canada (Attorney General)*, 2021 ONCA 574 as this reasoning is applied to the intentional torts of false arrest and false imprisonment as well as breaches of *Charter* rights.

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which a plausible inference can be made that the defendant acted negligently. The Court held that the Court of Appeal's approach, which required a plaintiff to know facts that confer a legally enforceable right to sue, including knowledge of the constituent elements of a claim, "would move the needle too close to certainty" (para. 47).

Applying this framework to *Grant Thornton*, the Court determined the Province discovered its claim on February 11, 2011 when it received the Richter report. At this point, the Province knew a loss occurred (i.e. the $50 million it paid to the bank) and the Richter report provided sufficient information for it to draw an inference that its loss was caused or contributed to by an act or omission of Grant Thornton.

The Province brought its claim against Grant Thornton on June 23, 2014, more than two years after the date on which the Court determined it discovered its loss. As such the Court ultimately found the claim was statute-barred.

***Limitation Act* Wordings in Other Provinces**

Provinces have different limitation statute language, which must be considered in light of the first inquiry in *Grant Thornton* on how the relevant statute codifies, limits or ousts the common law discoverability rule. A later 2021 Ontario Court of Appeal decision, *Vu* v. *Canada (Attorney General)*, upheld a ruling by a motions judge allowing a false imprisonment action to continue despite being brought more than two years after the false imprisonment. The Court of Appeal approved the lower court's analysis which accepted the arrest was a presumptive date for triggering the limitation period but accepted that a review of "all four parts" of the discoverability test resulted in a rebuttal of the presumption.

The "four parts" mentioned in *Vu* demonstrate that differences in legislation can affect a ruling on discoverability. In *Grant Thornton*, s. 5(2) is a three-part test for discoverability. In *Vu*, the Ontario *Limitations Act* has a four-part test, with the fourth part being "that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it". British Columbia's statute has the same test as Ontario.

Conclusion

The decision in *Grant Thornton* clarifies when a plaintiff is deemed to have sufficient knowledge to discover their loss.

For the limitation clock to begin ticking, the plaintiff's knowledge must be more than mere suspicion, but they need not have knowledge of all the facts of the case. A plaintiff need only have actual or constructive knowledge of the material facts from which they could draw a plausible inference of the defendant's liability. However, the SCC made it clear that discoverability in each province or territory requires consideration of that jurisdiction's legislation, and whether it codifies, limits or ousts common law discoverability. Where, as in Ontario and BC, the legislation differs from New Brunswick, the finding may differ.

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