

“Plausible inference” test affirms that plaintiffs must exercise reasonable diligence to discover claims

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In *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 (CanLII), the Supreme Court of Canada determined that a claim by the Province of New Brunswick against Grant Thornton LLP was statute-barred as the government had discovered or ought to have discovered the material facts giving rise to the claim before the two-year limitation period expired. The decision affirmed two cornerstones of limitations periods:

1. A 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 (para. 40); and
2. A claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn (para. 42).

The claim stemmed back to 2009 when the Province agreed to guarantee a total of \$50 million in loans from the Bank of Nova Scotia to a company providing construction, industrial and waste management services. A condition of the guarantees was that the company be subjected to an external review of their assets by an auditing firm, which was conducted by Grant Thornton.

Grant Thornton prepared an unqualified auditors' report in which it confirmed that it had reviewed the borrowers' financial statements in accordance with "Generally Accepted Auditing Standards." Grant Thornton opined that the company's financial statements presented fairly, in all material respects, the financial position of the company and its operations and cash flows as of 31 January 2009. The Province was satisfied with Grant Thornton's report and it executed and delivered the loan guarantees in the amount of \$50 million to enable the company to borrow funds from the Bank.

Four months later, the company shut down its operations in western Canada and ran out of working capital. The Bank obtained a receivership order and called upon the Province to make good on its loan guarantees. On 18 March 2010, the Province repaid the \$50 million in loans to the Bank.

Understandably concerned with these developments, the Province retained RSM Richter Inc. to review the borrower company's financial position for 2009. Richter reported to the Province on its findings in a draft report dated 4 February 2011. The report was not finalized until 30 November 2012, but save for some grammatical corrections, the final version was identical to the draft report.

Richter opined that the company's financial statements for fiscal 2009 had not, in fact, been prepared in conformity with Canadian Generally Accepted Accounting Principles. Richter identified various errors in the financial statements, which were considered to be "material" because it is "probable" that the errors would have influenced the decision of the person relying on the financial statements. Richter estimated that the company's assets and net earnings were overstated by a material amount, ranging between \$28.3 million and \$35.4 million, which differed substantially from Grant Thornton's audit where materiality was set at \$1.2 million. The misstatements reported by Richter had not been identified by Grant Thornton.

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In a letter to the New Brunswick Institute of Chartered Accountants dated December 21, 2012, the Deputy Minister of Economic Development advised the Institute that the Province was proceeding with a formal complaint against Grant Thornton based on Richter’s report.

On 23 June 2014, a year and a half later, the Province commenced a civil claim for professional negligence against Grant Thornton. In its defence, Grant Thornton denied the allegations.

In 2019, Grant Thornton successfully moved to have the Province’s claim summarily dismissed on the basis that it was barred by the two-year limitation period under s. 5(1)(a) of the New Brunswick *Limitation of Actions Act* (“LAA”). The New Brunswick Court of Appeal allowed the Province’s appeal, and the dispute went to the Supreme Court of Canada.

In July 2021, the Supreme Court of Canada unanimously allowed Grant Thornton’s appeal and reinstated the motion judge’s dismissal of the Province’s action as being statute-barred.

The relevant provisions of s. 5 of the LAA provide 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 injury, loss or damage had occurred,
- (b) that the injury, 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 Supreme Court disagreed with the approaches of the courts below as neither accurately described the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a).

In the Supreme Court’s view, a claim is discovered when a plaintiff has knowledge—actual or constructive—of “the material facts upon which a plausible inference of liability on the defendant’s part can be drawn.” This means that the material facts listed in s. 5(2) must be actually or constructively known, namely that a claim is “discovered” when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. In assessing a plaintiff’s state of knowledge, both direct and circumstantial evidence can be used and a plaintiff will have “constructive knowledge” when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. “Suspicion may trigger that exercise” (para. 44).

The Supreme Court described the test in new terminology, specifically that a plaintiff must be in a position to be able to draw “a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known” (para. 45).

Whether a “plausible inference of liability” can be drawn from the material facts is the same assessment used in Ontario to determine whether a plaintiff “had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]” (para. 45, citing *Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30).

Unfortunately for the Province of New Brunswick, the Supreme Court determined that the Province had sufficient knowledge to draw a “plausible inference” that Grant Thornton had been negligent by 4 February 2011, when it received the draft Richter report. As the Province waited until 23 June 2014 to commence the claim, it was statute-barred by s. 5(1)(a) of the LAA.

The decision affirms that plaintiffs must conduct reasonable due diligence when they have information upon which they could draw a reasonable inference that a defendant is liable to them. Undoubtedly, the issue of when this has occurred will continue to generate copious amounts of litigation.

One difference that will continue in Ontario is section 5(1)(iv) of the *Limitations Act, 2002*, which adds an additional “appropriate means” test to the factors shared with s. 5(2) of the LAA. Specifically, that “having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy



it”. In certain circumstances, this factor has been held by Ontario courts to extend a limitation period, particularly when a plaintiff has relied on the “superior knowledge” and expertise of the defendant, or where a legal action would not be appropriate because an alternative dispute resolution process offered an adequate legal remedy that had not run its course: *Vu v. Attorney General of Canada*, 2020 ONSC 2447 (CanLII), citing *Presidential MSH Corporation v. Marr, Foster & Co. LLP*, 2017 ONCA 325, 135 O.R. (3d) 321 (“*Presidential MSH Corporation*”), at paras. 26-29; and *Nasr Hospitality Services v Intact Insurance*, 2018 ONCA 725, 142 O.R. (3d) 561, at para. 50.

The Supreme Court of Canada has yet to consider what Ontario’s “appropriate means” test actually means. A PDF version is available to download [here](#).

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