



Supreme Court of Canada Clarifies When Limitations Periods Are Triggered

November 2021 Litigation Alert

In most provinces across Canada, individuals have two years to start a civil action. If an individual has not commenced their action within the two-year limitation period, they will be barred from doing so. This two-year limitation period is triggered the moment the plaintiff has “discovered” its claim. Over the past couple of decades, there has been considerable judicial debate on when a claim is discovered and when the limitations clock starts ticking.

Recently, in the matter of *Grant Thornton LLP v. New Brunswick*, the auditors attempted to challenge a negligence claim on the basis that the province was aware of the claim more than two years before they commenced the action. Fortunately for the auditors, the Supreme Court of Canada (the “SCC”) agreed and held that the action was statute barred, as the province had discovered its claim more than two years before the action was commenced. In this case, the province relied on a positive financial report by the auditors when agreeing to guarantee \$50 million in loans for a company, only to have the company run out of money four months later. After being required to pay out the loan guarantees, the province hired a different accounting firm, Richter, to review the company’s financial position. Richter provided a draft report on February 4, 2011, and a finalized report on November 30, 2012 (which only corrected a few grammatical errors). The Richter report indicated that the financial statements of the company had overstated their assets and net earnings

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between \$28 million and \$35 million – something the auditors apparently did not catch. Almost 3 years later, in 2014, the province commenced an action against the auditors claiming negligence.

The auditors brought a motion to have the province's action dismissed as being beyond the two-year limitation period. The motion judge held that the action was statute-barred, however the Court of Appeal disagreed, and the decision was then appealed to the SCC. The SCC upheld the appeal and stated that the province had knowledge of a claim against the auditors as early as February 4, 2011, when it reviewed the draft Richter report. The SCC stated 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. The SCC further confirmed the degree of knowledge needed to discover a claim is more than mere suspicion or speculation, but does not rise so high as to require certainty of liability or perfect knowledge.

Given the above, if clients believe that they have a potential claim, they must be careful to ensure that their opportunity to commence an action is not inadvertently missed. Sitting on a potential claim to determine the extent of harm that has been caused, may increase the risk of a successful limitation period defense. If you believe you may have a potential claim, **consult with one of our lawyers** to learn if/when you should commence an action.

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