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Kennaley Construction Law

The Supreme Court of Canada's New "Plausible Inference" Test: When is a Construction Deficiency Discovered for the Purposes of a Limitation Period?

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In July of this year the Supreme Court of Canada, in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 (CanLII), introduced a new test for the commencement of limitations periods in Canada. It held that the clock starts ticking on a limitation period when a "plausible inference" of liability arises on facts that are, or ought to be, known through the exercise of reasonable diligence. The Court also addressed the extent to which a party might need an expert's report before such an inference arises.

The decision may have significant consequences for the construction industry. This, because the "discoverability" of construction defects has always been difficult to assess. Consider, for example, cracks which appear in a newly poured foundation. These might be attributable to shrinkage, not a deficiency. They might also not be worth suing over. Has the owner, upon noticing the cracks, "discovered" a claim against the contractor, concrete supplier, geotechnical engineer, structural engineer and architect simply because a "plausible inference" can be drawn that the cracks might be attributable to something any one of them might be responsible for? Can the owner take a 'wait-and-see' approach, or must it investigate the cause of the cracking in an effort to figure out what is going on (and who might be responsible)?

In *Grant Thornton*, the Court was dealing with the two-year limitation period set out in New Brunswick's *Limitations of Actions Act*, RSNB 1973 (CanLII). On its facts, New Brunswick had received a report that financial statements prepared for it by *Grant Thornton* (upon which the province had relied to its detriment) had not been completed in accordance with GAAP accounting principles. New Brunswick did not, however, commence an action within two-years of receiving that report. Rather, it waited for a further report which confirmed that the accountants had, in preparing the statements, fell below the applicable standard of care.

At first instance, a motions judge dismissed the action as being out of time, on the basis that the first report gave the province "*prima facie*" grounds to commence an action. New Brunswick's Court of Appeal, however, held that the province only discovered its legally enforceable right to a judicial remedy once it had knowledge of each constituent element of its claim. On further appeal, the Supreme Court of Canada reinstated the motion judge's dismissal. In doing so, the Supreme Court moved away from a "*prima facie*" case test, stating (at para. 45): "Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a 'permissible fact inference'".

At first blush, it appears the Supreme Court has either confirmed or established a low threshold for discoverability: clearly, the mere plausibility of an inference that someone is responsible for damage is a very low bar. However, the citation above makes it clear that the Court found it appropriate to apply the plausible inference test "in the present context". Indeed, the Court confirmed that discoverability is a question of fact to be determined in all of the circumstances, upon the application of the particular limitations legislation. It might be, then, that a change in terminology (from "prima facie case" to "plausible inference of liability") will not result in a drastic, practical, change in the law of limitations. Time will tell.

However, the Court also confirmed that a plaintiff need not know the exact type of harm it has suffered, or the precise cause of its injury, for the limitations clock to start running. In addition, it confirmed the principle that a plaintiff must exercise reasonable diligence in discovering its claim, such that even a suspicion may be enough to trigger an obligation to investigate. It is in how the Court addressed the role of expert reports in the investigation and discovery of claims that, in our view, the *Grant Thornton* decision becomes potentially very significant in the construction industry.

Prior to *Grant Thornton*, it had been held (as recently as January 25, 2021 in Ontario, for example,) that it may in some cases be necessary for an expert's opinion or report to be obtained before a claim can be discovered, particularly where an investigation is required to determine the cause of the damage, where the matter is complex and where establishing liability depends on expert

analysis. See *Taiga Building Products Ltd. v. Classic Fire Protection Inc.*, 2021 ONSC 676, 2021 (CanLII). The Court in *Grant Thornton*, however, held that the "standard cannot be so high as to make it possible for a plaintiff to acquire the requisite knowledge only through discovery or experts." It is unclear whether this statement was intended to address the role of experts in all cases or, rather, only where both damage and causation are already known and a report is required to confirm liability (as was the case in the matter before it).

Only time will tell us what the impact of *Grant Thornton* will be. In the meantime, construction participants who face a potential claim's expiry should anticipate that defendants will closely scrutinize the timing of an action and (increasingly) oppose claims that they believe may be out of time. Also, potential claimants should be cautioned that awaiting a report on causation or liability may not be as permissible as it perhaps once was. Accordingly, once parties become aware of a possible claim, they would be well advised to seek counsel as to how to preserve and protect the possible claim.

There is this to be added: In some provinces, statutory exceptions to the "discovery" principle may play a role. In this regard, the *Limitations Act* in each of British Columbia, Saskatchewan and Manitoba provide that a claim will not arise until "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it". In Nova Scotia, the *Limitation Act* imposes a "sufficiently serious" exception, providing that "A claim is discovered on the day on which the claimant first knew or ought reasonably to have known that the injury, loss or damage is sufficiently serious to warrant a proceeding". Whether or not such exceptions might extend the limitation period in any circumstance is beyond the scope of this article, but it should be noted that such clauses may provide relief where it is found that a claim ought to have been "discovered".

Citations

Grant Thornton LLP v. New Brunswick, 2021 SCC 31 (CanLII)

Limitations of Actions Act, RSNB 1973 (CanLII)

Taiga Building Products Ltd. v. Classic Fire Protection Inc., 2021 ONSC 676, 2021 (CanLII)

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