

An Overview of the Discoverability Principles in the *Limitations Act*: When Did the Claimant Know or Should Have Known?

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The *Limitations Act*, R.S.A. 2000 c. L-12 contains the discoverability provisions at s. 3(1), as follows:

- 3(1) Subject to section 11, if a claimant does not seek a remedial order within
- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
 - or
 - (b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

At s. 3(5), the Act sets out the onus on a claimant of proving that it sued within the limitation period:

- 3(5) Under this section,
- (a) the claimant has the burden of proving that a remedial order was sought within the limitation period provided by subsection (1)(a), and
 - (b) the defendant has the burden of proving that a remedial order was not sought within the limitation period provided by subsection (1)(b).

A question therefore arises: when did the claimant know or should have known? This article will provide an overview of the case law setting out the general principles.

The most recent court treatment of s. 3 of the *Act* is by the Supreme Court of Canada in *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 6 W.W.R. 387, 2010 SCC 19, where the Court said:

50 Having determined that Yugraneft’s application for recognition and enforcement is subject to s. 3 of the *Limitations Act*, there remains the question of whether or not the application was time-barred when it was filed on January 27, 2006. As noted above, the two-year limitation period set out in s.3(1)(a) is subject to a discoverability rule. Only if the conditions for discoverability are met will the limitation period begin to run.

...

58 However, s. 3(1)(a)(iii) provides that the limitation period will run only if the claimant knew or ought to have known that the injury “warrants bringing a proceeding”. There may be situations in which an application for recognition and enforcement is not immediately “warranted”, and it will be open to the courts in such cases to delay commencement of the limitation period accordingly.

Beginning at paragraph 59, Rothstein J. for the Supreme Court discussed *Novak v. Bond* [1999], 1 S.C.R. 808 (S.C.C.), in which McLachlin J. (as she then was) discussed discoverability rules generally:

McLachlin J. (as she then was) noted that discoverability rules of this kind are the product of a long-term trend in the law of limitations towards an approach that balances the interests of both plaintiffs and defendants. The traditional rationales for the imposition of a limitation period on actions were centred on the interests of the defendant: a) the need for certainty concerning legal rights and obligations; b) the need to minimize the risk that evidence necessary to defend against a claim would deteriorate over time; and c) a concern for ensuring that defendants not be required to defend themselves against stale claims because a plaintiff has failed to act diligently (para. 64). Over time, however, courts, law reform commissions and legislatures came to realize that this approach was one-sided and that a “more contextual view of the parties’ actual circumstances” was required (para. 65). Accordingly, at para. 66, McLachlin J. wrote:

Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in [Murphy v. Welsh, [1993] 2 S.C.R. 1069], “[a] limitations scheme must attempt to balance the interests of both sides” (p. 1080).

Rothstein J. went on to say of s. 3(1) specifically:

60 **Section 3(1)(a)(iii) provides that the limitation period will commence only once the plaintiff knew or ought to have known that the injury it received warrants bringing a proceeding. Thus s. 3(1)(a) ensures that the scheme created by the *Limitations Act* balances the interests of both plaintiffs and defendants. However, much like its counterpart in the B.C. *Limitation Act* at issue in *Novak v. Bond*, s. 3(1) measures the conduct of the plaintiff against an “objective” standard. Section 6(4) of the B.C. Act provides that the limitation period will not commence until the facts available to the plaintiff are such that a “reasonable person ... would regard those facts as showing” that the plaintiff was a) able to bring a claim, and b) that the claim had a reasonable prospect of success. Section 3(1) of the Alberta Act does not refer to a “reasonable person” and its discoverability criteria are not identical with those in s. 6(4) of the B.C. Act. However, it does subject the knowledge elements of its discoverability rule to an objective test: the plaintiff must know or “ought to have known” the elements that trigger the running of the limitation period. Thus, constructive or imputed knowledge, in addition to actual knowledge, will trigger the limitation period.**

61 Section 3(1)(a)(iii) therefore allows the courts to consider aspects of an arbitral creditor’s circumstances that would lead a reasonable person to conclude that there was no reason for the arbitral creditor to know whether proceedings were warranted in Alberta. [Emphasis added.]

McLachlin J., writing for the majority of the Supreme Court in *Novak v. Bond*, in which the Court was considering B.C.’s limitations legislation, stated at paragraph 39:

39 ... Leaving aside the requirement that the identity of the defendant must be known to the plaintiff and that the provisions of s. 6(4)(a) must also be satisfied before the running of time is postponed, it is my view that the proper interpretation of s. 6(4)(b) may be summarized as follows:

Section 6(4)(b) requires the court to adopt the perspective of a reasonable person who knows the facts that are within the plaintiff’s knowledge and has taken the appropriate advice a reasonable person would seek on those facts. Time does not begin to run until this reasonable person would conclude that someone in the plaintiff’s position could, acting reasonably in light of his or her own circumstances and interests, bring an action. The question posed by s. 6(4)(b) therefore becomes: “in light of his or her own particular circumstances and interests, at what point could the plaintiff reasonably have brought an

action?” The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff’s own interests and circumstances were serious, significant, and compelling. Purely tactical concerns have no place in this analysis.

40 This approach recognizes the special problems injured persons may encounter and the intense stresses and strains involved in litigation. It recognizes that in some cases, the plaintiff’s own circumstances and interests may be so compelling that it cannot be reasonably said that he or she *could* bring an action within the prescribed limitation period. Finally, it makes practical sense. People ought to be encouraged to take steps short of litigation to deal with their problems. They should not be compelled to sue when to do so runs counter to a vital interest, such as the need to maintain their health in the face of a life-threatening disease. [Emphasis added.]

De Shazo v. Nations Energy Co. (2005), 367 A.R. 267, 2005 ABCA 241 is an oft-quoted decision of our Court of Appeal dealing with the discoverability rule. In it, the limitations issue came down to when the plaintiff knew or ought to have known of the evidence of fraud and oppression. The Court found, based on the uncontroverted facts in the pleadings, that the plaintiff had had enough evidence – that is, had been “put on enquiry” well before the key date (two years before the action was brought) to bring an action.

The Court of Appeal reviewed the principles relating to discoverability beginning at paragraph 26. It said that s. 3 of Alberta’s *Limitations Act* codifies the common law discoverability rule and that it applies it to all actions for remedial orders.

The common law rule was described by the Supreme Court of Canada in *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 224: “[A] cause of action arises for purposes of a limitation period when the material facts on which it [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff **by the exercise of reasonable diligence.**” [Emphasis added.]

At paragraph 27, the Court of Appeal cited the Supreme Court’s decision in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), where it emphasized the concept of *reasonable* discoverability:

“In balancing the defendant’s legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration”: *Peixeiro* at 565.

Alberta’s *Act*, as the Court pointed out, while based on the common law discoverability principle, also lists three criteria, or types of knowledge, that must be available to a claimant before the limitation period is triggered. They are:

The claimant must know or have been reasonably able to discover that: (i) the injury occurred; (ii) the injury was attributable to the conduct of the defendant; and (iii) the injury warrants bringing a proceeding.

Here, although conceding the principles that mere “suspicion” or “speculation” does not trigger the limitation period, the Court of Appeal found, at paragraph 30, that the plaintiff had more than suspicion when he received documentary evidence relating to a potential claim.

At paragraph 31, the Court of Appeal in *DeShazo* cited its decision in *Hill v. South Alberta Land Registration District* (1993), 135 A.R. 266, (C.A.), leave to appeal refused at 162 A.R. 159 (note), decided under the old limitations legislation. The facts revolved around the fraudulent registration of a mortgage by a husband against property owned by his wife. The wife had no notice of the mortgage until she found some documentation referencing it some years after the registration. The mortgagee ultimately brought a foreclosure action when no payments were made on the new mortgage. The issue for the Court surrounded the discoverability rule. Cote J.A., writing for the Court of Appeal, found that the Law Society had written to the Plaintiff years before she brought her action against the Fund, advising her there was a mortgage on her title which should not be there, and that she should consult a lawyer as to what to do about that.

At paragraph 4, Cote J.A. noted that:

Any lawyer (and maybe a lay person) could have verified those facts with a few simple land titles searches, even if perchance Mrs. Hill had not yet grasped the facts. She got that letter from the Law Society. And by March, 1982 she *had* copies of the relevant Land Titles Office documents; where she got them is irrelevant. So she knew the relevant facts more than six years before she sued the Fund. [Emphasis added.]

Cote J.A. in *Hill* referenced a case comment relating to this case and the trial judge's findings that the time to sue had not begun until the end of the foreclosure process. The commentator, Mr. Hurlburt Q.C., had said that "The result did not offend limitations policy. [Mrs. Hill] had not slept on her rights (and indeed had vigorously, if in the result, mistakenly, asserted them)."

Cote J.A. disagreed, as follows:

Unfortunately, that is not my understanding of the facts. Six and a half more years elapsed after Mrs. Hill found correspondence showing that there was a four-and-a-half-year-old unauthorized mortgage on her home, and realized that it should not be there, and complained to the Law Society. Only after that further six and a half years did she sue the Fund. (The events complained of occurred over 15 years ago.) As noted above, the Law Society promptly told her that they could not get the mortgage off her title, and that she should consult a lawyer on that subject. Yet it was another 6 years and 4 months after that before she sued the Fund. In September, 1982 the new mortgagee showed that it was going to try to enforce the impugned mortgage, by suing to foreclose on it. Mrs. Hill's counterclaim of December, 1982 specifically alleges that the defendants fraudulently "deprived [her] of the title to her property". Yet Mrs. Hill did not sue the Fund for about five and a half years after that. For most of that time the suit by the mortgagee was moving ahead to trial.

6 In no sense was the litigation between Mrs. Hill and the mortgagee an assertion of her rights against the Fund. Nor was it a condition precedent to suing the Fund.

7 The case comment also suggests (on p. 1375) that a very material fact was that the transferee was an innocent dupe, and that Mrs. Hill only discovered that when Queen's Bench gave judgment in July, 1985. I do not agree. When the new mortgagee sued on the mortgage to foreclose, Mrs. Hill counterclaimed against the transferee (among others). The transferee filed defences asserting his innocence on November 4, 1983 and again on April 4, 1984. Mrs. Hill had a chance to examine him for discovery. I do not know whether she did, but she certainly examined other parties for discovery; the transcripts are on the court file. In April, 1985 the transferee filed an affidavit of documents listing many documents and correspondence. The trial was held in May, 1985, and the transferee testified.

8 Even if the discoverability rule of limitations applies to this case (which I need not decide), it does not call for perfect certainty. It does not require discovery at all: it says something else will do instead. It suffices that "the material facts on which [the cause of action] is based ... ought to have been

discovered by the plaintiff by the exercise of reasonable diligence ...”: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 , 224. If the plaintiff is told a fact by someone who is likely to know, surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty. [Emphasis added.]

At paragraph 9, still discussing the case comment, Cote J.A. said:

Discoverability refers to facts, not law. Error or ignorance of law, or uncertainty of the law, does not postpone any limitation period. [Emphasis added.]

Relating to the principle that perfect knowledge is unnecessary, at paragraph 32, the Court of Appeal in *DeShazo* also cited Clackson J’s decision in *Owners: Condominium Plan 9421549 v. Main Street Developments Ltd.*, 2004 ABQB 962, 39 C.L.R. (3d) 235 (Alta. Q.B.), where Clackson J. summarily dismissed the plaintiff’s claim. At paragraph 55 Clackson J. said:

I am satisfied that these facts establish, beyond a reasonable doubt, that the Plaintiff knew that the buildings suffered from moisture problems and knew of the potential sequella if the problems were not rectified. This knowledge existed well before May 25, 1999. **While I accept that it is possible the Plaintiff did not have perfect knowledge of the injury, that level of knowledge is not required: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Hill v. Alberta (South Alberta Land Registration District)*, (1993) 135 A.R. 266 (C.A.), leave to appeal to S.C.C. refused [1994] 1 S.C.R. viii; *Ward v. Taubner*, 2004 ABQB 565, 9 E.T.R. (3d) 275 (QB).**

What was obvious was that there was a problem and that there was damage or at least the real potential for damage if the problem was not addressed. In my view, that is enough. [Emphasis added.]

The Court of Appeal cited *DeShazo* in *James H. Meek Trust v. San Juan Resources Inc.*, 376 A.R. 202, 2005 ABCA 448 (C.A.), where it found (at paragraph 7) that the trial judge had applied the wrong test for discoverability. He had held that if something had occurred which would place them on inquiry and they did not follow through, then the plaintiffs “ought to have known”. It set out the correct test as follows:

21 ...The common law discovery principles have been ousted by statute and it is the factors in s. 3(1)(a) which apply to a s. 2(2) analysis: *N. (J.) v. Kozens* (2004), 361 A.R. 177, 2004 ABCA 394 (Alta. C.A.), at para. 30. **The test for “ought to**

have known” is that of “reasonable diligence” analyzed in the light of the three s. 3(1)(a) factors: *De Shazo v. Nations Energy Co.* (2005), 256 D.L.R. (4th) 502, 2005 ABCA 241 (Alta. C.A.), at para. 28. Accordingly, the facts that the trial judge found must be reviewed in the light of the correct test (i.e. the s. 3(1)(a) factors) to determine when the Meeks ought to have known of their claim. [Emphasis added.]

In *Mohr v. 477470 Alberta Ltd.*, 2003 ABQB 294, [2003] A.J. No. 408, cited by the Court of Appeal in *N. (J.) v. Kozens*, the Plaintiff was injured when the plane in which he was travelling crashed. He sued for damages more than four years after the accident but less than two years after Transportation and Safety Board Canada posted on its website a report on the causes of the accident. The Defendant successfully applied for summary judgment on basis that the two-year limitation period had expired. The Court of Appeal dismissed the Plaintiff’s appeal, finding that the limitation period had begun when the Plaintiff recognized the potential tortfeasor. It was not necessary that the Plaintiff know with certainty the particulars of the negligence. The Court concluded that the Plaintiff had not established that he had acted diligently. In particular, the Court noted that the Plaintiff apparently had failed to consult a lawyer within the limitation period.

Marceau J. said this about the onus on the Plaintiff in this case (at paragraph 7):

I am of the opinion that there is an onus on the Plaintiff to make reasonable inquiries as to facts which are easily ascertainable. In this case the failure to inquire of anyone about the identity of the pilot is fatal to the Plaintiff’s contention that he did not know the name of the pilot and therefore did not discover he had a cause of action against the named pilot. [Emphasis added.]

Related to whether the Plaintiff “knew or ought to have known” of his claim for the purposes of s. 3 of the *Limitations Act*, Marceau J. used phrases like “minimal effort” and “a reasonable person” in this context:

8 The substantial issue joined by the parties to this action is what efforts are required to be made by the Plaintiff to discover a cause of action. The Defendants’ position is that the Plaintiff knew on the day of the crash that he had been in a plane which crashed shortly after takeoff. He knew the identity of the carrier; he knew who had sold him the ticket; he knew the plane had a pilot; he knew the airport from which the plane had taken off. **Minimal effort would have**

been required to find the identity of the pilot and the exact name of the airport authority. A reasonable person would have concluded that the accident did not occur without someone's negligence unless there were atmospheric conditions that caused the crash without the negligence of anyone. [Emphasis added.]

At paragraph 24, Marceau J. cited *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.) where, at paragraph 34, Major J. set out the rationale for short limitation periods:

Short limitation periods indicate that the legislature put a premium on their function as a statute of repose. This is one of the three rationales which serve society and the courts' continued interest in maintaining the respect of these statutes. Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action: *Murphy v. Welsh, supra*; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289. All the rationales were set out in *M. (K.) v. M. (H.)*, where this Court considered the *Limitations Act*, R.S.O. 1980, c. 240 (now R.S.O. 1990, c L.15) in order to determine the time of accrual of the cause of action in a manner consistent with its purposes (at pp.29-30):

There are three, and they may be described as the certainty, evidentiary, and diligence rationales...

Statutes of limitations have long been said to be statutes of repose... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations...

The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim...

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

25 The rationale that applies here is the Defendant says the Plaintiff "slept on his rights".

At paragraph 26, Marceau J. concluded that the Plaintiff had not established that he had acted diligently, based on the fact that:

There is no evidence that the Plaintiff consulted a lawyer within the limitation period. Counsel for the Plaintiff says that had he consulted a lawyer the lawyer would not have known who to sue without the Transportation Safety Board report. The lawyer would have to speculate that fault may lie with any of the number of entities earlier referred to. It is my view that given the circumstances of the crash which were known to the Plaintiff there was a strong indication the pilot or the company was at fault and at the very least should have been sued within the limitation period. As in *Mahan v. Hindes* a lawyer, out of an abundance of caution, would probably have included the airport authority, the Government of Canada vicariously liable for its controllers and perhaps a pseudonym A.B.C. Company as manufacturer of components which may have failed and perhaps another pseudonym for the persons supplying engineering services to the aircraft. That would have been standard, acceptable civil procedure practice. A plaintiff is not required to know and sue only those against whom he will be successful B that is for the trial. But he must sue, in a timely manner, those who he can reasonably ascertain may be potential tortfeasors.

More recently, Nation J. discussed the discoverability principles in *Waap v. Alberta*, [2009] 1 W.W.R. 722, 2008 ABQB 544 (Q.B.). At paragraph 126, she cited *Hill v. SALRD*:

126 Error, ignorance or uncertainty of the law, which may require a potential claimant to diligently obtain legal or other expertise to interpret the facts, does not postpone any limitation period. Thus, a plaintiff is taken to know the law and cannot raise ignorance as a reason for the delay: *Hill v. South Alberta Land Registration District* (1993), 135 A.R. 266 (Alta. C.A.), leave to appeal refused, (S.C.C.) (Feb 10, 1994).

Then, based on documentary evidence of the Plaintiff's knowledge of the claim, in the form of a letter he wrote in February, 2003, Nation J. found that the limitation period began to run as at the date of that letter. She said:

131 When I look at all the facts, it is clear the plaintiffs knew of the alleged damages from 2001. Mr. Waap's letter of February 18, 2003, when considered with the other facts of this case, and against the backdrop of him having legal counsel and already suing the Crown and other doctors in relation to his treatment, leads me to find that at the time he wrote that letter, he knew that any information he received that the CT investigations (and thus, in his belief the surgery) would take four to eight months was erroneous, or known to be

erroneous to Dr. Heine. As Mr. Waap's evidence was clear that in his mind he went to Germany for earlier treatment only due to information from Dr. Heine's office about how long it would take to get the CT scan and thus surgery in Alberta, he ought to have known, in his circumstances of having counsel and already involved in an action, that assuming liability on the defendant, it warranted bringing an action.

132 The plaintiffs argued that the cause of action would not run until September 1, 2005, when they received a complete copy of the chart of Dr. Heine, and in particular the copy of the CT requisition forms. In the context of determining a cause of action, I do not agree. There is nothing special in those forms and the basis of the claim was known in 2003.

133 The limitation period against Dr. Heine would start to run from February 18, 2003.

Based on these cases, the following conclusions are suggested:

1. The Alberta *Limitations Act* codifies the common law principles of discovery, but enlists three criteria, as set out in s. 3(1)(a): *DeShazo* (Alta. C.A.);
2. Section 3(1)(a) of the Alberta *Limitations Act* measures the conduct of a Plaintiff against an objective standard: *Yugraneft Corp. v. Rexx Managmenet Corp*, (S.C.C.);
3. Mere suspicion or speculation does not trigger the limitation period: *DeShazo*. However, a Plaintiff is obliged to exercise reasonable diligence to inform him or herself. Per our Court of Appeal: "The test for "ought to have known" is that of "reasonable diligence" analyzed in the light of the three factors" in s. 3(1)(1): *James H. Meek Trust* (Alta. C.A.);
4. Plaintiffs may not "sleep on their rights". Objective knowledge will be attributed to them where the reasonable exercise of diligence would have yielded the required information, for instance, where a few simple searches could have informed. That was found to be the case in *Hill v. SALRD*;

5. Our Court of Appeal has also said: “If the plaintiff is told a fact by someone who is likely to know surely that makes the fact known or discoverable, even if someone else disputes the fact. Very few people who sue have perfect certainty”: ***Hill v. South Alberta Land Registration District*** (Alta. C.A.);

6. It would seem that it is enough that it is obvious there is a problem and that there was damage or at least the potential for damage if the problem is not addressed: ***Owners: Condominium Plan 9421549*** (Alta. Q.B.).

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