States. With its milestone judgment in *Pancharevo*, the CJEU has played its own part in facilitating EU-wide recognition of same-sex parenthood and further paved the way for the Commission proposals.

DAFNI LIMA

Address for Correspondence: Gonville and Caius College, Cambridge, CB2 1TA, UK. Email: dl488@cam.ac.uk

DISCOVERABILITY DEMYSTIFIED

THE Supreme Court of Canada's judgment in *Grant Thornton LLP v New Brunswick*, 2021 S.C.C. 31 provides a welcome affirmation and clarification of the limitation principle of discoverability. This principle has been expressed in many forms in statute and case law around the world though its essence remains consistent. Whereas a traditional limitation period commences on the date that a cause of action accrued, under the principle of discoverability limitation runs from when a plaintiff discovered, or could with reasonable diligence have discovered, their right of action. While in England and Wales discoverability is confined to prescribed contexts (such as personal injury, latent defects, fraud, and mistake: Limitation Act 1980, c.58, ss. 11, 14, 14A, 32), since the 1980s Canadian courts have adopted a general interpretive principle of discoverability (*Central Trust Co. v Rafuse* [1986] 2 S.C.R. 147, 224). In more recent decades most provinces have enacted new limitation statutes explicitly premised on the discoverability principle. These limitation reforms have influenced similar reforms in other common law jurisdictions (see Law Reform Commission of Ireland, *Limitation of Actions* (Report 104, 2011), 28–37). As such, this latest judgment on the subject is of general significance. It also has particular significance being the second apex common law court decision this decade to grapple with contrasting interpretations of a statutory discoverability provision. The United Kingdom Supreme Court in *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47 (*FII*) resolved four contrasting interpretations that had emerged concerning the discoverability of mistakes of law. In *Grant Thornton*, the Supreme Court of Canada departed from two contrasting lower court interpretations concerning the discoverability of a claim in negligence – articulating in their place a more principled interpretation that complements the reasoning in *FII*.

The facts of the case are simple. In April 2009, the Province of New Brunswick agreed to provide a struggling local construction and utility services company $50 million in loan guarantees, conditional upon an external financial audit. Grant Thornton LLP performed the audit. It represented to the Province that it had done so in accordance with Generally Accepted

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Auditing Standards (GAAS) and conferred a copy of the company's most recent consolidated financial statements. Relying upon Grant Thornton's report, the Province executed the loan guarantees. Four months later, the company became insolvent and defaulted on its loans. The Province repaid the lending bank under the guarantees in March 2010. The Province then sought a second opinion on the company's 2009 financial outlook from another auditing firm, which in a February 2011 draft report opined that the company's 2009 financial statements had not been prepared in accordance with GAAS. The firm's report identified several material errors, including assets and net earnings being overstated by around $30 million. The firm delivered its (largely identical) final report in November 2012. As a result of this second audit, the Province complained to the New Brunswick Institute of Charted Accountants in December 2012 and commenced legal proceedings alleging negligence by Grant Thornton in June 2014.

Grant Thornton sought summary judgment on the basis that the Province's negligence claim was time-barred. New Brunswick's Limitation of Actions Act, S.N.B. 2009, c L-8.5, s. 5 provides:

(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.
(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 motions judge granted summary judgment in favour of Grant Thornton. He considered that limitation commenced once the Province "knew or ought to have known that it had *prima facie* grounds to infer that it had a potential cause of action against the defendants" (2019 NBQB 36, at [108]). He held that the Province had the requisite knowledge in March 2010 when it incurred loss by paying out on its guarantees.

The New Brunswick Court of Appeal overturned, departing from the motions judge's legal test. The Court of Appeal considered that "the two-year limitation period begins to run the day after the plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy" (2020 NBCA 18, at [7]). It held that because the Province had not received disclosure of audit-related files that would enable it to identify an element of the claim in negligence – namely, whether Grant

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Thornton had breached its duty of care by failing to comply with GAAS – time had not begun to run against the Province's claim.

On further appeal, the Supreme Court restored the motions judge's holding but articulated a different legal test. Significantly (from the perspective of comparative coherence), the court considered that New Brunswick's limitation statute codified the common law principle of discoverability (at [29]–[40]). Its judgment is therefore relevant to jurisdictions beyond the Maritimes. The Supreme Court interpreted the statute (and the common law principle) as meaning that *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"* (at [3], [42], emphasis added). This interpretation strikes a mid-ground between the interpretations adopted by the lower courts. The motions judge's interpretation had been too strict on plaintiffs in that the two-year limitation period could commence on the basis of "mere suspicion or speculation", before a plaintiff could reasonably be expected to know the claim exists (at [46]). The Court of Appeal's interpretation, meanwhile, was too generous to plaintiffs: elevating the standard to one of certainty of a defendant's liability meant the limitation period could remain paused even after a claim had commenced. This standard generated the potential "unintended consequence of indefinitely postponing the limitation period" (at [48]) and had been rejected by the Supreme Court of Canada in *K.L.B. v British Columbia*, 2003 S.C.C. 5, at [55] (as well as by the United Kingdom Supreme Court in *AB v Ministry of Defence* [2012] UKSC 9, at [3], [6], [67], [71], [84]; and *FII*, at [172]–[214], [250]–[253]). Applying the discoverability principle to the case at hand, the Supreme Court held that the Province had knowledge of the material facts by February 2011 when it received the second auditing firm's draft report. On the basis of that report the Province could have drawn a plausible inference that Grant Thornton had been negligent. Time started to run from that point and the Province's claim – filed substantially more than two years later – was time-barred.

The Supreme Court of Canada's interpretation encapsulates the purpose of discoverability: to ensure that time runs only once a claim can reasonably be brought. It is consistent with *FII*, at [178]–[213], which held (by a majority) that limitation begins to run once a reasonably diligent person in the position of the claimant could have known that there was a real possibility that a mistake of law had been made. Given the shared roots of limitation law in common law countries, it is unfortunate that the Canadian court did not venture to bolster its reasoning by reference to comparative precedent. Had it considered *FII*, the court might have taken the opportunity to opine on the doctrinal consistency (or inconsistency) of an error-of-law "exception" to discoverability that has emerged at the provincial level in Canada: *Lauesen v. Silverman*, 2016

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ONCA 327, [37]. Engagement with comparative precedent might also engender comity leading other jurisdictions to engage with, and benefit from, the apex courts' considered analyses in these two cases.

Grant Thornton throws up two big picture questions. First, should the Province have fought this case? Given how often governments and local authorities find themselves as defendants in negligence claims, one might think that a more restrictive understanding of discoverability would benefit the Province in the long run. Maybe it was a battle worth losing. Certainly, it is in no defendant's interest to be subject to the Court of Appeal's potentially indefinite limitation postponement. Second, is a two-year limitation period following discoverability too short? Considering the delays that plaintiffs invariably face (digesting information, internal bureaucracy, instructing counsel, etcetera), two years can fly by. Perhaps a three-year post-discoverability period, such as applies in New Zealand (Limitation Act 2010, No.110, s. 11(3)(a)), would strike a better balance. Of course, the question of when time should cease to run is solely a matter of legislative policy. *Grant Thornton* provides valuable guidance on when time begins to run.

SAMUEL BESWICK

Address for Correspondence: Peter A. Allard School of Law, The University of British Columbia, Allard Hall, 1822 East Mall, Vancouver BC, Canada. Email: beswick@allard.ubc.ca

MAINTAINING THE ELEGANT FAÇADE OF THE ACTS–OMISSIONS DISTINCTION

The distinction between acts and omissions runs deep in the common law of torts. At one stage in danger of being overlooked or elided, it is today more prominent than ever before. Defendants are not usually liable for failing to assist, protect or otherwise make claimants better off. Under *Michael v Chief Constable of South Wales* [2015] A.C. 1732, as explained by *Robinson v Chief Constable of West Yorkshire* [2018] A.C. 736, this usually entails that public authorities will not be liable in negligence. The sordid business of weighing competing policy concerns is unnecessary. The omissions principle, when it applies, is sufficient to deny liability.

But it is neither universal nor unqualified. First, of course, is the question whether a situation properly concerns an "omission" rather than positive misconduct. If so, liability may still exceptionally arise from the defendant's control over the situation (*Dorset Yacht Co. Ltd. v Home Office* [1970] A.C. 1004); or, a much further-reaching exception, when the defendant assumed a positive responsibility towards the claimant.

These principles have again been considered in *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25, [2022] R.T.R. 16. A driver, one Kendall, skidded on a patch of black ice. While awaiting

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