Federal Court Cour fédérale

Date: 20171213

Docket: T-807-17

Citation: 2017 FC 1136

Ottawa, Ontario, December 13, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

HENRY LEPAGE

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

JUDGMENT AND REASONS

[1] The Crown makes a motion seeking summary judgment pursuant to rule 215 of the *Federal Courts Rules* (SOR/98-106) [Rules]. It claims that there is no genuine issue for trial because the action launched by the plaintiff is statute-barred. The said action claims exclusively a monetary relief of $50,000.00, which makes it presumptively a simplified action governed by rules 292 to 299 of the Rules.

[2] The limitation issue is the only substantive issue that is before the Court. The Crown is simply asserting that taking the facts as they were pleaded by the plaintiff, his claim came beyond the two-year limitation period which it contends applies in this case.

[3] The Crown also argues that this action ought to be removed from the operation of rules 294 to 299 in order for a summary judgment to be issued, in view of the limitation period applicable.

I. Facts

[4] Some facts are important in this case to ascertain the basic chronology of events. They are not presented for the purpose of establishing liability, or the absence of liability, of Crown agents. They are needed to determine when the limitation period starts; the Court is not concerned here with the merits of the case.

[5] The limitation of actions serves a different purpose whether or not there would otherwise be liability. In their *Liability of the Crown* (Carswell, 3rd Ed.), Peter Hogg and Patrick Monahan describe succinctly the rule and its purpose:

> Statutes of limitation are statutes that impose time limits on the commencement of legal proceedings. If a proceeding is not commenced within the applicable limitation period, the plaintiff's right of action against the defendant is barred. The purpose of statutes of limitation is to ensure that lawsuits are brought within a reasonable time, before evidence has been lost or become unreliable, and so that potential defendants are not subjected indefinitely to the risk of being sued.
>
> (p 70)

Thus, there is an element of public order. There is an advantage to bringing finality to disputes, whether the defendant is the Crown or some private party. Furthermore, plaintiffs are expected to act diligently. Whether the case has merit or not is not relevant.

[6] The action in this case was brought on June 6, 2017, for events that the plaintiff himself situates between January 21, 2015 and April 14, 2015. The plaintiff, Mr. Henry Lepage, is currently an inmate residing at the Drummond Institution, in the Province of Quebec. However, the events that gave rise to the claim occurred in penitentiaries located in Ontario.

[7] While detained in the medium-security institution at Warkworth on January 21, 2015, an incident occurred in the plaintiff's cell between 11:56 and 12:06 which generated the use of force by two correctional officers; whether the use of force was appropriate has not been ascertained by a court of law. As a result of the physical encounter, the plaintiff complained of significant pain in his back. As he put it in his statement of claim, "he complained that it felt like his back was broken and that he could not breathe because of the pain". The same day, he was transferred to the Millhaven Institution [MI], a maximum-security institution.

[8] Placed in segregation at MI, he complained to a nurse about his back issue; that complaint was received according to the plaintiff with the comment that "you seemed to walk OK". According to the plaintiff, the first three weeks following the incident of January 21, 2015 were particularly difficult. He did not see a medical doctor while at MI, but complained to other medical personnel.

[9] The plaintiff was transferred again, on February 19, 2015, to the Collins Bay Institution, another maximum-security penitentiary. It is at the Collins Bay Institution that the plaintiff saw a doctor on April 14, 2015. He saw other medical personnel (nurses) during the period leading to April 14. That doctor ordered X-rays of the plaintiff's wrist. On the record, it is unclear how and when the wrist injury would have occurred.

[10] The record shows that the plaintiff has had significant back issues for some time. X-rays taken in December 2013 (while the plaintiff was detained at the Mission Institution in British Columbia), showed some degenerative changes at L5-S1, with mild decreased disc space height. Dr. Waddell's report of April 15, 2015, records that Mr. Lepage complained of lower back issues, for which he seems to have suggested that he keep active; he also prescribed that the dose of anti-inflammatory medication he was already taking be increased from 7.5 mg to 15 mg. The plaintiff continued to take pain-relief pills. However, there is no expert testimony to inform the Court about the severity of the damage as recorded in the 2013 X-rays. That is, of course, the same for the X-rays taken eventually of the plaintiff's back in September 2015 at the Collins Bay Institution. The plaintiff has seized on the report that "(s)uperior endplate compression fracture at L-2 is age indeterminate with 20% height loss". In the statement of claim, one reads that the doctor "ordered X-rays and the results were they now saw a compression fracture where non [*sic*] was noted before" (statement of claim, para 9). No further explanation about the X-ray reports appears at this stage.

[11] Nevertheless, the plaintiff has been explicit that his cause of action is situated between January 21, 2015, and April 14, 2015, when the Crown's agents "[denied] the plaintiff medical

treatment and the opportunity to see a qualified medical practitioner" (statement of claim, para 1). The same is repeated in the reply of August 27, 2017: "The Claim is that I was not allowed to see a doctor from January 21, 2015 till April 15, 2015" (reply, para 5). In fact, the reply insists that the plaintiff did not see a doctor for 84 days (paras 21, 54 and 55).

[12] That same theme is found in the answers to the written examination for discovery. To the question, "Your claim is based on your allegation that you were denied medical treatment and the opportunity to see a doctor from January 21, 2015 to April 14, 2015?", the plaintiff unequivocally confirmed:

> 9) My claim is based on the fact CSC did not let me see a doctor from January 21, 2015 to April 14th, On April 15th, 2015 I seen Dr. John Waddell at Collinsbay institution. This really can't be disputed, seeing as all interviews are documented. [*sic*]

In the same written examination, the plaintiff confirmed yet again that six undated pages had been sent to Crown counsel as an affidavit and that every paragraph of the 28 paragraphs was accurate. The very first paragraph of those 28 paragraphs reads:

> The Plaintiff claims:
>
> 1) That on Jan.21, 2015 the defendant's agents refused me medical care for a back injury that occurred as a result of a use of force by its agents, and continued to refuse to let me see a qualified medical practitioner till April, 14, 2015.

[13] It is obviously not *per incuriam* that the plaintiff has chosen to frame his case as he has chosen to do. But there is even more.

[14] In the material used by the plaintiff to oppose the motion for summary judgment, the plaintiff submitted various letters from the Queen's Law Clinics (Prison Law) signed by law students. Already on March 26, 2015, the plaintiff was contemplating suing the government. The law student reports that "at our March 10th meeting, you asked me to look into a case because you believe that it is the case in which the Supreme Court of Canada determined that inmates could sue Correctional Service staff in small claims court" (letter of March 26, 2015). The thinking seems to crystallize as we read in the letter that seems to conclude the assistance offered by the clinic, on May 19, 2015:

> During our meeting, you also confirmed d [*sic*] me that you have retained the assistance of a lawyer to pursue a Grievance and are considering filing a civil claim regarding inappropriate use-of-force and insufficient post-use-of-force medical examination and treatment. You requested that we provide you with copies of the observation reports and other disclosure related to the use of force incident. It is our understanding that you have requested these documents from the Institution under the *Privacy Act*.

The rest of the paragraph indicates that documents in the possession of the clinic had been transferred to the counsel retained. The meeting with the plaintiff referred to took place on May 7. Indeed, it seems that the health matter was seen to be well in hand as of April 14:

> You told me you saw the Doctor two weeks earlier and at that time, physiotherapy, X-rays, a wrist splint and X-rays for your back were ordered. You also told me that before seeing a Doctor, you were seen by a nurse three times. Therefore, at this time, you are being attended to by Health Care and do not require further assistance with this matter.

To put it differently, it was the period between January 21, 2015 and April 14, 2015 that was considered to be the period during which there was a cause of action.

II. Position of the parties

[15] The Crown's position, in a nutshell, is that the limitation period is two years and that the claim is statute-barred as of January 21, 2017. The statement of claim filed on June 6, 2017 is consequently beyond the period afforded by law to bring the matter before the Court.

[16] Because the cause of action occurred in Ontario, it is the *Limitations Act* of Ontario (S.O. 2002, c. 24, Sched. B) [*Limitations Act*] that governs. The fact that the plaintiff was transferred to, and resides in, the Province of Quebec since November 2016 is irrelevant.

[17] Once it is established that an action is statute-barred, there is no genuine issue for trial; the test of rule 215 is met and the motion for summary judgment ought to be granted.

[18] In a case where it can be established that a simplified action is statute-barred, the Court can exercise its discretion to remove the simplified action from the operation of rules 294 to 299.

[19] In order to counter, the plaintiff argues that he received the X-ray results in September-October 2015 which, if I understand, signals that the plaintiff did not discover his claim until that date. He seems to try to posit his case as if the issue is that there is a denial of an injury suffered on January 21, 2015. Reading the submissions, it is as if the cause of action repeatedly stated as being the lack of appropriate medical care during the period of January 21 to April 14, 2015, has been forgotten, or evacuated. Thus, all of a sudden, the plaintiff contends that "I did not believe I had an action to be taken to federal court till I received the X-rays in September 2015" (motion

to dismiss defendants [*sic*] motion for summary judgment, para 21). The claim that the defendant did not allow the plaintiff to see a doctor between January 21, 2015 and April 14, 2015, thus morphed into something else which, in the argument made by the plaintiff, meant that the cause of action only crystalized months after June 2015. As he puts it, he was sure he had suffered a fracture, he knew without a doubt that he had a cause of action in the fall of 2015. If that is the proper test, his claim is not statute-barred.

[20] The plaintiff also asserted that his claim has merit and that he grieved the lack of medical attention as early as February 1, 2015, "well within the two year period" (para 9).

III. Analysis

A. *Limitation period*

[21] Section 39 of the *Federal Courts Act* (R.S.C., 1985, c. F-7) and section 32 of the *Crown Liability and Proceedings Act* (R.S.C., 1985, c. C-50) converge to establish the same rule: it is the laws relating to the limitations of actions in the province in which the cause of action occurred that govern:

Prescription and limitation on proceedings	**Prescription — Fait survenu dans une province**
39(1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that	**39(1)** Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette

province.	province.
Prescription and limitation on proceedings in the Court, not in province	**Prescription — Fait non survenu dans la province**
(2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	**(2)** Le délai de prescription est de six ans à compter du fait générateur lorsque celui-ci n’est pas survenu dans une province.
Provincial laws applicable	**Règles applicables**
32 Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	**32** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s’appliquent lors des poursuites auxquelles l’État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier survient ailleurs que dans une province, la procédure se prescrit par six ans.

In our case, the facts generating the alleged cause of action all took place in Ontario.

[22] It follows that it is the *Limitations Act* of Ontario that will find application. The plaintiff does not dispute that the basic limitation period of section 4 applies:

Basic limitation period	**Délai de prescription de base**
4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect	**4** Sauf disposition contraire de la présente loi, aucune instance relative à une réclamation ne

of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.	peut être introduite après le deuxième anniversaire du jour où sont découverts les faits qui ont donné naissance à la réclamation. 2002, chap. 24, annexe B, art. 4.

There are two words that attract attention in section 4: “claim” and “discovered”. “Claim” is defined in section 1 to mean “a claim to remedy an injury, loss or damage that occurred as a result of an act or omission”. The cause of action framed by the plaintiff seems to fall squarely within the parameters of the definition of “claim”. As we shall see from the caselaw in the context of medical malpractice, the Ontario courts have applied the two-year limitation period.

[23] Evidently, the provision requires that a claim be discovered for the limitation period to be computed from the day of the discovery. Section 5 is the provision the parties must rely on in the circumstances:

Discovery	**Découverte**
5(1) A claim is discovered on the earlier of,	**5(1)** Les faits qui ont donné naissance à la réclamation sont découverts celui des jours suivants qui est antérieur aux autres :
(a) the day on which the person with the claim first knew,	**a)** le jour où le titulaire du droit de réclamation a appris les faits suivants :
(i) that the injury, loss or damage had occurred,	**(i)** les préjudices, les pertes ou les dommages sont survenus,
(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,	**(ii)** les préjudices, les pertes ou les dommages ont été causés entièrement ou en partie par un acte ou une omission,
(iii) that the act or omission was that of the person against whom the claim is made, and	**(iii)** l’acte ou l’omission est le fait de la personne contre laquelle est faite la

réclamation.

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(iv) étant donné la nature des préjudices, des pertes ou des dommages, l'introduction d'une instance serait un moyen approprié de tenter d'obtenir réparation;

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

b) le jour où toute personne raisonnable possédant les mêmes capacités et se trouvant dans la même situation que le titulaire du droit de réclamation aurait dû apprendre les faits visés à l'alinéa a).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Présomption

(2) À moins de preuve du contraire, le titulaire du droit de réclamation est présumé avoir appris les faits visés à l'alinéa (1) a) le jour où a eu lieu l'acte ou l'omission qui a donné naissance à la réclamation.

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

Engagements à vue

(3) Pour l'application du sous-alinéa (1) a) (i), le jour où des préjudices, des pertes ou des dommages surviennent à l'égard d'un engagement à vue correspond au premier jour où il y a défaut d'exécution de l'engagement, une fois qu'une demande formelle d'exécution est présentée.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

Idem

(4) Le paragraphe (3) s'applique à l'égard de chaque engagement à vue créé le 1er janvier 2004 ou par la suite.

[24] The defendant takes the view that the plaintiff discovered his claim as early as January 21, 2015. That seems to be based on the presumption of subsection 5(2) of the *Limitations Act*. According to the alleged facts, the plaintiff suffered significant pain the day the encounter with the guards occurred and his complaining about the pain started the same day.

[25] From that day on, and until he met with a medical doctor on April 15, 2015, the plaintiff argues that the duty of care was not met. In fact, the defendant refers to a complaint made in writing as early as on February 1, 2015:

> My complaint is I am being denied medical care that would be consistent with… [*illegible*] stands [*sic*] for an injured back. This injury occured [*sic*] when 2 guards jumped me in my cell at WI [Warkworth Institution] on January 21, 2015… I keep asking to have it x-rayed, MRI or PET scanned or whatever to deal and see what damaged so it can be properly treated… I want to know why I was denied any type of actual treatment for what feels like a broken or fractured back.

In the alternative, the defendant therefore argues that, at the very least, the complaint about the lack of adequate medical care, according to the manner in which the plaintiff framed his claim, was complete as of April 2015 when he saw a medical practitioner. At the latest, the conditions of subsection 5(1) of the *Limitations Act* were met on that date. Either way the claim was statute-barred when launched on June 6, 2017, more than two years after it had been discovered.

[26] The plaintiff seeks to find refuge behind the fact that he benefited from X-rays only in September 2015, with results communicated to him in October. As he puts it in his written submissions, "it is not till I got the x-rays taken and accessed a copy of the x-ray results from the health care department that I knew for sure that I had a disc fractured in my back" (para 3).

Similarly, the plaintiff asserts that "if we interpret the law as meaning the actual time when I knew my back was broken without a doubt, that would be when I received the x-ray results in October 2015" (para 5).

[27] In essence, the plaintiff argues that he had to wait for X-rays to claim against the Crown. As he puts it in his submissions, he had to know for sure and without a doubt that his back was injured. In fact it is less than clear what measure of certainty was achieved, without medical evidence that the fracture is new, that it was caused by the physical encounter of January 21, or that it is the fracture that caused the pain experienced by the plaintiff. If certainty is the test and the plaintiff can wait until he is sure, without a doubt, that would make the start of the limitation period very much a subjective date. This may not be how the law has been developing in Ontario. Certainty is not required. It is when the cause of action has been discovered that counts.

[28] Given that it is the *Limitations Act* of Ontario that is in play, it stands to reason that guidance may be found in the case law emanating from the courts of that province.

[29] The issue to be disposed of in this case boils down to whether or not the plaintiff had discovered his claim prior to June 6, 2015 in accordance with section 5 of the *Limitations Act*. If so, the limitation period had run out when the claim was filed on June 6, 2017.

[30] We find in *Lawless v Anderson*, 2011 ONCA 102 the principles applied in Ontario with regard to the issue of when a claim has been discovered. Thus, the Court of Appeal states that it is a fact-based analysis that will answer the question "whether the prospective plaintiff knows

enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run: see *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.) and *McSween v. Louis* (2000), 132 O.A.C. 304 (C.A.)" (para 23). The idea is to ascertain when the cause of action arises, that is "the fact or facts which give a person a right to judicial redress or relief against another" (*Aguonie v Galion Solid Waste Material Inc.*, 38 OR (3d) 161, at p 170 (CA)).

[31] *Lawless v Anderson* also stands for the proposition that we cannot conflate the discoverability principle and making a claim "winnable". In that case, the plaintiff's argument was that the statute of limitation was not running before a medical opinion had been given. That, the Court of Appeal found, "confuses the issue of when a claim is discovered with the process of assembling the necessary evidentiary support to make the claim 'winnable' " (para 36). It suffices that there be sufficient facts to support alleged negligence. The Court quoted directly from another Court of Appeal decision in *McSween v Louis* (*supra*):

> To say that a plaintiff must know the precise cause of her injury before the limitation period starts to run, in my view places the bar too high. Both the one year limitation period itself, as well as the production and discovery process and obtaining expert reports after acquiring knowledge through that process, are litigation procedures commonly used by a plaintiff to learn the details of how the injury was caused, or even about the existence of other possible causes and other potential defendants. In order to come within s. 17 of the [*Health Disciplines' Act*], it is sufficient if the plaintiff knows enough facts to base her *allegation* of negligence against the defendant. [Emphasis added]
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> (p 19)

[32] Following *Lawless v Anderson*, the Court of Appeal continued to require that there be knowledge of the material facts needed to support a cause of action for the limitation period to be triggered; reasonable diligence is expected (*Ferrara v Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851). Recently, in *Liu v Wong*, 2016 ONCA 366 [*Liu*], the Court of Appeal seems to have been satisfied with the fact that the plaintiff was fully aware of problems with his knee immediately following the performance of a medical procedure; the plaintiff said the job had been botched, that he experienced sharp pain. He told an attending physician at a follow-up appointment that the doctor had caused the injury to his knee. That was enough for the claim to have been discovered.

[33] That resembles closely the facts which were known by this plaintiff. He asserts that he knew right away, on January 21, 2015, that he had suffered an injury in the scuffle with the guards. On February 1, 2015, he stated that his injury was caused by the guards and he requested to know why he did not receive the level of care appropriate to his situation. We find corroboration in the accounts of conversations with law students at Queen's Law Clinics that occurred on March 26 and May 7, 2015 in which the plaintiff was "considering filing a civil claim regarding inappropriate use-of-force and insufficient post-use-of-force medical examination and treatment" (letter of May 19, 2015 submitted by the plaintiff).

[34] The plaintiff's argument to counter is that he only knew <u>for sure</u>, and <u>without a doubt</u>, that he suffered from a fracture when he received the results of an X-ray in October 2015. This information does not have an effect on the start of the limitation period. This is no more than gathering evidence, which does not even include causation, and it constitutes an element to help

confirm, at least in the plaintiff's mind, that there is an injury. In other words, that may assist in making the case more "winnable", but the cause of action had been discovered before. Knowledge of the extent of the damage or its type is not necessary. In *Peixeiro v Haberman*, [1997] 3 SCR 549 [*Peixeiro*], the Supreme Court of Canada found:

> [18] It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.
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> (my emphasis)

Mr. Lepage knew about the damage he had suffered and had identified his alleged the tortfeasor on or around January 21, 2015. He had even articulated his cause of action on February 1, 2015.

[35] That is precisely the finding made by D.M. Brown J., then of the Superior Court of Justice, in *Ng v Bank of Montreal*, 2010 ONSC 5692:

> [20] As to Ms. Ng's claims sounding in negligence against BMO, again it is well established that a plaintiff need not know the precise cause of her injury before the limitation period for a negligence claims begins to run; it is sufficient if the plaintiff knows enough facts to base her allegation of negligence against the defendant: *McSween v. Louis*, 2000 CanLII 5744 (ON C.A.), para. 51. In section H of her Complaint Registration form dated January 24, 2007, Ms. Ng provided the following "details of complaint": "I was not placed on probation when I assumed my position in

> May/06. I received no guidance and no training. Employer enforced unfair and arbitrary standards." In the previous section G, Ms. Ng had written: "Employer unfairly harassed me." Ms. Ng's claims of negligence in paragraphs 6 and 7 of her Statement of Claim, and her claim of bad faith conduct pleaded in paragraph 9 of her Claim, simply tracked the "details of complaint" and section G of her January 24, 2007 Complaint Registration form.
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> [21] It is clear on the evidence filed that Ms. Ng had discovered her negligence claims no later than January 24, 2007. That she believed she secured evidence to support those claims during the course of the examination of BMO witnesses before Adjudicator Cooper is neither here nor there. For the purposes of the commencement of a limitation period the question is not when did a person amass all the evidence she required to support a claim, but when did she discover her claim?

[36] In *Dale v Frank*, 2017 ONCA 32, the Court of Appeal opined that "(t)o require a plaintiff to know with certainty that her injuries were caused by the fault of the defendant would require her to have come to a legal conclusion as to the defendant's liability to her. This is too high a bar for a plaintiff to have to meet" (para 7). The court concludes by referring to para 23 in *Lawless v Anderson* (*supra*, para 30). The test remains whether the "plaintiff knows enough facts on which to base an allegation of negligence". The X-ray results were merely in the nature of some confirmation that a fracture is now present ("Superior endplate compression fracture at L2 is age indeterminate with 20% height loss") without even knowing how old it is. With the assistance of expert evidence, it is possible that the X-ray results could assist in putting a "winnable" case together. But that conflates discoverability and the gathering of evidence to support the claim.

[37] I find in *Markel Insurance Co. of Canada v ING Insurance Co. of Canada*, 2012 ONCA 218; 109 OR (3d) 652, confirmation that a claim is not discovered only when a prospective

plaintiff finds it appropriate, for instance once he is sure, without a doubt, that he has suffered an injury or some damage:

> [34] This brings me to the question of when it would be "appropriate" to bring a proceeding within the meaning of s. 5(1)(a)(iv) of the Limitations Act. Here as well, I fully accept that parties should be discouraged from rushing to litigation or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1)(a)(iv) states that a claim is "discovered" only when "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it", the word "appropriate" must mean legally appropriate. To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

[38] The presumption that the claim is discovered on the day the act or the omission on which the claim is based may also kick in. That in fact supports the main argument of the Crown. In *Hawthorne v Markham Stouffville Hospital*, 2016 ONCA 10, the Court found that without proper evidence to rebut the presumption, it is fatal.

[39] Therefore, the plaintiff had enough facts on which to base his allegation of negligence. In the words of Major J. in *Peixeiro*, “(o)nce the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has occurred ”. The evidence of the X-rays of September 2015 was not needed to have a cause of action. The plaintiff acknowledged that much as early as February 1st, 2015. For what it is worth, that evidence may have brought the plaintiff some element to make his case more “winnable” and bring a measure of confirmation to a cause of action that was already discovered. The law does not require certainty about damages

before a statement of claim is filed (*Liu*, supra). It is the knowledge of the material facts necessary to support the cause of action that matters.

[40] I would add that, in the case at bar, the plaintiff chose to frame his case as being a lack of appropriate care during a very specific period of time. As of April 15, 2015 at the latest, he had discovered his claim: the Crown had not provided the care he was entitled to during that period of time. The exact nature of the damages was irrelevant to the framing of the claim. The material facts, which were probably known on January 21, or on February 1, 2015, were certainly known at the latest on April 15, 2015. The claim, even in that construction, had been discovered before June 2015. The limitation period had begun to run. The claim was filed on June 6, 2017, more than two years after the limitation period had started to run. Accordingly, it is statute-barred.

[41] The discoverability of the claim was the most important argument raised by the plaintiff concerning the start date of the limitation period. Another argument raised is that he had to wait until his grievance of February 1, 2015 had been dealt with before a claim in Federal Court could be filed.

[42] The Court can dispose quickly of the argument. It has no merit. There is no requirement that the grievance process be completed before an action is filed. The claim and the grievance are two different things. The defendant is right to point out that section 81 of the *Corrections and Conditional Release Regulations* (SOR/92-620) suspends the grievance process if a legal remedy is sought. It is not the other way around:

81(1) Where an offender decides to pursue a legal	**81(1)** Lorsque le délinquant décide de prendre un recours

remedy for the offender's complaint or grievance in addition to the complaint and grievance procedure referred to in these Regulations, the review of the complaint or grievance pursuant to these Regulations shall be deferred until a decision on the alternate remedy is rendered or the offender decides to abandon the alternate remedy.	judiciaire concernant sa plainte ou son grief, en plus de présenter une plainte ou un grief selon la procédure prévue dans le présent règlement, l'examen de la plainte ou du grief conformément au présent règlement est suspendu jusqu'à ce qu'une décision ait été rendue dans le recours judiciaire ou que le détenu s'en désiste.
(2) Where the review of a complaint or grievance is deferred pursuant to subsection (1), the person who is reviewing the complaint or grievance shall give the offender written notice of the decision to defer the review.	**(2)** Lorsque l'examen de la plainte ou au grief est suspend conformément au paragraphe (1), la personne chargée de cet examen doit en informer le délinquant par écrit.

That does not constitute in any way a bar to launch a legal remedy. The statute of limitation continues to run.

[43] Is also of no assistance to the plaintiff section 11 of the *Limitations Act* which provides that the limitation period does not run while an independent third party attempts to resolve the claim, once the parties have agreed to such process. There has not been any such process or agreement among the parties. The adjudication of a grievance certainly does not qualify.

B. *Procedural issue*

[44] There remains the issue of the procedural vehicle to raise this matter in the context of a simplified action pursuant to rules 292 to 299. The issue was not raised by the plaintiff but it

should be addressed nevertheless since the plaintiff, who is not represented by counsel, cannot be faulted for not being familiar with arcane procedural issues.

[45] There is no doubt that courts have been invited to consider the use of summary judgment motions as a tool in the effort to use resources, judicial and others, more efficiently. Although decided with respect to the rules of court of Ontario, *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*], it is undoubtedly in the context of the need to ensure access to justice that the use of summary judgments was studied in that case:

> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[46] The Supreme Court went on to comment:

> [4] […] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.
>
> [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Indeed, the Court emphasized the shift in culture that is needed:

> [32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[47] I am, of course, mindful of the admonition of our Federal Court of Appeal in *Manitoba v Canada*, 2015 FCA 57 that *Hryniak* was decided in the context of the Ontario rules of practice which are worded differently than the *Federal Courts Rules*. Yet it remains that the Supreme Court invites a broad interpretation in order to favour proportionately between a full trial and a summary trial, and fair access without the need to consume considerable resources.

[48] Here, there is evidently no point in expending resources, time as well as money, to move to a trial if the action is statute-barred. A record will have to be built, cross-examinations on affidavits will have to be performed, possibly experts may have to be retained, motions may have to be heard. That can be avoided if a decision is made as part of a summary judgment. If the Court is satisfied that there is no genuine issue for trial with respect to the claim, summary judgment shall issue (rule 215). It is the very purpose of the summary judgment to dispense with cases that ought not to proceed to trial (*Granville Shipping Co. v Pegasus Lines Ltd.*, [1996] 2 FCR 853). Indeed, a motion for summary judgment may be for only some of the issues raised in the pleadings (rule 213). The summary judgment would appear to be perfectly suited to the circumstances of this case.

[49] The difficulty is with rule 297 of the *Rules*:

Motion for summary judgment or summary trial	**Requête en jugement sommaire ou en procès Sommaire**
297 No motion for summary judgment or summary trial may be brought in a simplified action.	**297** Aucune requête en jugement sommaire ou en procès sommaire ne peut être présentée dans une action simplifiée.

This case qualifies as a simplified action.

[50] However, there exists discretion left in the motions judge to hear a summary judgment motion in spite of rule 297. First, rule 292(a) provides that an action that would qualify to be dealt as a simplified action not be treated as such:

Where mandatory	**Application**
292 Unless the Court orders otherwise, rules 294 to 299 apply to any action in which	**292** Sauf ordonnance contraire de la Cour, les règles 294 à 299 s'appliquent à toute action dans laquelle :
(a) each claim is exclusively for monetary relief in an amount not exceeding $50,000, exclusive of interest and costs;	**a)** chaque réclamation vise exclusivement une réparation pécuniaire d'au plus 50 000 $, intérêts et dépens non compris;

Furthermore, rule 298(3) would afford the Court broad discretion in removing a "simplified action" from the operation of the rule 297:

298 (3) A motion may be brought at any time	**298 (3)** Peuvent être présentées à tout moment :
(a) to remove an action from the operation of rules 294 to 299;	**a)** une requête visant à exclure l'action de l'application des règles 294 à 299;

[51] In my view, these are apposite circumstances in which the discretion ought to be exercised. That was the conclusion reached by my colleague Madam Justice Mactavish in *Source Enterprises Ltd. v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 966. I share the view of my colleague that it may be appropriate to exercise the discretion where the matter can be resolved through a ruling that the claim is statute-barred. I am strengthened in the necessity to interpret the discretion generously by the *Hryniak* strong invitation to favour access to justice at a reasonable price. I share the views expressed at paragraphs 37 to 40 by Mactavish J.:

> [37] The purpose of the simplified action rules is to allow for claims worth less that [*sic*] $50,000 to be dealt with quickly, through a less cumbersome and expensive process than that associated with traditional civil litigation. To this end, the Rules limit the ability of parties to bring motions, including motions for summary judgment.
>
> [38] The Court does, however, retain the discretion to remove an action from the operation of the rules governing simplified actions: see Rule 298(3)(a). This is an appropriate case for the Court to exercise that discretion.
>
> [39] The key facts giving rise to the Defendants' limitations argument are not in dispute, and the limitation question is determinative of this action. The Plaintiff did not even respond to the Defendants' arguments relating to the claim against the Minister of National Revenue, and no genuine issue for issue has been identified in relation to the Defendant.
>
> [40] In these circumstances, removing the action from the operation of the simplified action rules and deciding the summary judgment motion achieves a result that is consistent with the goal of promoting speedy and cost-effective justice in smaller claims that underlies the simplified action rules.

[52] In my view, it is perfectly appropriate, indeed needed, that the action be removed from the operation of rules 294 to 299 of the Rules.

[53] As indicated earlier, a motion for summary judgment will be granted if there is no genuine issue for trial. There is evidently no genuine issue for trial if the claim is statute-barred. In *Canada (Attorney General) v Lameman*, 2008 SCC 14; [2008] 1 SCR 372, the importance of summary judgments was spelled out:

> [10] This appeal is from an application for summary judgment. The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

The Court found that once it is established that the claim is statute-barred, there is no genuine issue for trial:

> [12] We are of the view that, assuming that the claims disclosed triable issues and that standing could be established, the claims are barred by operation of the *Limitation of Actions Act*. There is "no genuine issue" for trial. Were the action allowed to proceed to trial, it would surely fail on this ground. Accordingly, we agree with the chambers judge that it must be struck out, except for the claim for an accounting of the proceeds of sale, which is a continuing claim and not caught by the *Limitation of Actions Act*.

[54] It follows that the motion for summary judgment must be granted as the plaintiff's claim is statute-barred.

[55] The defendant sought costs in the amount of $700.00. In the circumstances, I would fix the costs at $250.00, including disbursements and taxes.

JUDGMENT in T-807-17

THIS COURT'S JUDGMENT is that:

1. The action is removed from the operation of rules 294 to 299 of the *Federal Courts Rules*;

2. The defendant's motion for summary judgment is granted as the statement of claim was filed beyond the statutory time limitation and hence is statute-barred;

3. The action is dismissed;

4. Costs in the amount of $250.00, all-inclusive, are ordered in favour of the defendant.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-807-17
STYLE OF CAUSE:	HENRY LEPAGE v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES*

JUDGMENT AND REASONS:	ROY J.
DATED:	DECEMBER 13, 2017

WRITTEN REPRESENTATIONS BY:

Henry Lepage	FOR THE APPLICANT (SELF-REPRESENTED)
Joshua Wilner	FOR THE RESPONDENT

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