Civil Procedure
Fall Term 2024

LECTURE NOTES NO. 7

IV. LIMITATIONS (cont'd)

"Discoverability"

Of prime importance to the question of limitations is when the facts upon which the claim is based were "discoverable" by the plaintiff. In normal circumstances, we presume the claim was discoverable on the day that the facts supporting it came into being but there are exceptions. Please note: not all statutes that prescribe limitations periods admit of a postponement based on discoverability; i.e. the limitation in question may be strict.

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(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

(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).

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.

M.(K.) v. M.(H.)
[1992] 3 S.C.R. 6 (S.C.C.)

The plaintiff was sexually assaulted from the age of 10 by her father. She brought a claim for assault and breach of fiduciary duty at age 28, after she entered psychological counseling and therapy. The therapists gave evidence that she could not deal rationally with the fact of the incest until she entered therapy. The issue was whether the claim was statute barred. The plaintiff lost at trial and appeal on the point but won in the Supreme Court of Canada. The statute was amended to remove limitations periods for sexual assault litigation; see Section 16, below.

Per LaForest J.:

> **The Limitations Act and Reasonable Discoverability**
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> 21 ... **During the hearing, counsel for the respondent conceded that the doctrine of reasonable discoverability had application to an action grounded in assault and battery for incest. He submitted, however, that the appellant was aware of her cause of action no later than when she reached the age of majority.** In order to determine the time of accrual of the cause of action in a manner consistent with the purposes of the Limitations Act , I believe it is helpful to first examine its underlying rationales. There are three, and they may be described as the certainty, evidentiary, and diligence rationales; see Rosenfeld, "The Statute of Limitations Barrier in Childhood Sexual Abuse Cases: The Equitable Estoppel Remedy" (1989), 12 Harv. Women's L.J. 206, at p. 211.
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> 22 Statutes of limitations have long been said to be statutes of repose; see Doe d. Duroure v. Jones (1791), 4 Term Rep. 300, 100 E.R. 1031 , and A'Court v. Cross (1825), 3 Bing. 329, 130 E.R. 540 . 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. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context.** While there are instances where the public interest is served by granting repose to certain classes of defendants, for example the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetrate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly militates against any guarantee of repose.

23 **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**... However, it should be borne in mind that in childhood incest cases the relevant evidence will often be "stale" under the most expedient trial process. It may be ten or more years before the plaintiff is no longer under a legal disability by virtue of age, and is thus entitled to sue in her own name... In any event, I am not convinced that in this type of case evidence is automatically made stale merely by the passage of time. Moreover, the loss of corroborative evidence over time will not normally be a concern in incest cases, since the typical case will involve direct evidence solely from the parties themselves.

24 **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**... in Cholmondeley (Marquis) v. Clinton (Lord) (1820), 2 Jac. & W. 1, 37 E.R. 527 (Ch.) , the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. Interest reipublicae ut sit finis litium , is a favorite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possessor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. *The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right* ... [Emphasis added.]

There are, however, several reasons why this rationale for a rigorous application of the statute of limitations is particularly inapposite for incest actions.

...

Application of the Discoverability Rule to Incest

30 **In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to**

> **toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes**...

These passages show that the Court may interpret the statute and the discoverability principle in light of its foundational principles – in this case, first principles supporting the position that the limitations period ought not to have 'tolled' based merely on the plaintiff's age.

A claim may also not be discoverable based on the defendant's fraud or deception of the plaintiff. This is the **doctrine of fraudulent concealment** which was explained by LaForest J.:

> 63 The leading modern authority on the meaning of fraudulent concealment is Kitchen v. Royal Air Forces Assn., [1958] 2 All E.R. 241 (C.A.) , where Lord Evershed, M.R., stated, at p. 249:
>
> It is now clear ... that the word "fraud" in s. 26(b) of the Limitation Act, 1939 , is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in Beaman v. A.R.T.S., Ltd., [1949] 1 All E.R. 465 , that **no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that *the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other*.** [Emphasis added.]
>
> While stated in the context of statutory "fraud", I have no doubt that this formulation is drawn from the ancient equitable doctrine and is applicable to today's common law concept of fraudulent concealment. I note also that Lord Evershed's formulation has been adopted by this court; see Guerin v. R., [1984] 2 S.C.R. 335 . **What is clear from Kitchen and Guerin is that "fraud" in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action.**
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> 64 The factual basis for fraudulent concealment is described in Halsbury's , 4th ed., vol. 28, para. 919, at p. 413, in this way:
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> It is not necessary, in order to constitute fraudulent concealment of a right of action, that there should be active concealment of the right of action after it has arisen; the *fraudulent concealment may arise from the*

> *manner in which the act which gives rise to the right of action is performed*. [Emphasis added.]
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> In my view incest falls within the second category outlined in this passage, i.e., concealment arising at the time the right of action arises. As I have stated, it is the very nature of an incestuous assault that tends to conceal its wrongfulness from the victim.
>
> 65 **There is an important restriction to the scope of fraudulent concealment,** which Halsbury's , 4th ed., vol. 28, para. 919, at p. 413, describes as follows:
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> In order to constitute such a fraudulent concealment as would, in equity, take a case out of the effect of the statute of limitation, it was not enough that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title, while the rightful owner was ignorant of his right; **there had to be some abuse of a confidential position, some intentional imposition, or some deliberate concealment of facts.**

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Brown v. Baum
2016 ONCA 325 (Ont. C.A.)

A surgeon operated to deal with problems experienced in an earlier surgery that he performed. From when does the limitation period run?

The Court of Appeal accepted that section 5(a)(iv) of the statute [“that, having regard to the nature of the injury, loss or damage, a proceeding would be an *appropriate* means to seek to remedy it”] supported the view that the cause of action was not discoverable until it was known that the second surgery was unsuccessful in curing the problem.

Feldman J.A.:

> [15] On this appeal, the appellant challenges the finding by the motion judge that although by July 2009 Ms. Brown knew that an injury, loss or damage had occurred (undergoing breast reduction surgery without having been informed of the risks) and that the injury, loss or damage had been caused or contributed to by an act of Dr. Baum (his failure to inform her), she did not know that bringing a legal action would be an appropriate remedy. The appellant points to the fact that Ms. Brown was

taking photographs of her breasts for months following the initial surgery "just in case [she] ended up in a lawsuit like this one."

[16] The appellant cites two errors it alleges Justice Mew made in his analysis. First, the appellant says that the motion judge erred in his interpretation of s. 5(1)(a)(iv) in stating, at para 50 of his reasons, that the point of the subsection "is to delay the commencement of the limitation period until such time as initiating a proceeding is an appropriate remedy." The appellant argues that the motion judge erred by conflating a claim to a legal right with taking legal proceedings to pursue that right.

[17] I do not agree that the motion judge erred in his interpretation of the section. **I agree with the motion judge that the fourth condition of discoverability under the Act is met at the point when the claimant not only knows the factual circumstances of the loss she has suffered, but also knows that "having regard to the nature of the injury, loss or damage", an action is an appropriate remedy.** Once she knows that, she has two years to initiate that action.

[18] The motion judge's application of the subsection to the facts on this record was particularly apt: he concluded that because the doctor was continuing to treat his patient to try to fix the problems that arose from the initial surgery, that is, to eliminate her damage, it would not have been appropriate for the patient to sue the doctor then, because he might well have been successful in correcting the complications and improving the outcome of the original surgery. On the evidence of Dr. Brown, the specialist who provided Ms. Brown with a second opinion, by September 2010, Dr. Baum in fact was successful in ameliorating Ms. Brown's damage.

[19] Second, the appellant submits that the motion judge gave the term "appropriate" an "evaluative gloss" rather than applying the meaning of "legally appropriate", contrary to this court's decision in Markel. Again I do not agree. The motion judge was entitled to conclude on the facts of the case that Ms. Brown did not know that bringing an action against her doctor would be an appropriate means to remedy the injuries and damage she sustained following her breast reduction surgery until June 16 2010, after Dr. Baum performed the last surgery.

[20] Further, I am satisfied that the test in s. 5(1)(b) is met. A reasonable person in Ms. Brown's circumstances would not consider it legally appropriate to sue her doctor while he was in the process of correcting his error and hopefully correcting or at least reducing her

> damage. Where the damages are minimized, the need for an action may be obviated.
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> …
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> [24] In my view, the motion judge made no error in his approach to this issue. He considered all of the relevant case law, and applied it to the facts. He was entitled to find that Ms. Brown did not know that it was appropriate to sue Dr. Baum until after the last surgery he performed to try to correct the complications and improve the outcome of the original surgery. As the motion judge observed, it is not simply an ongoing treatment relationship that will prevent the discovery of the claim under s. 5. In this case, it was the fact that the doctor was engaging in good faith efforts to remediate the damage and improve the outcome of the initial surgery. This could have avoided the need to sue.

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Collins v. Cortez
2014 ONCA 685 (Ont. C.A.)

This case dealt with the application of the *Limitations Act 2002* within the context of the new summary judgment motion regime under the 2010 amendments to the *Rules of Civil Procedure*.

Here the plaintiff discovered serious injuries that would allow her to sue for damages outside the statutory benefits regime two weeks after the original injury was sustained. The action itself was brought two years and two days after the accident and dismissed based on limitations on a summary judgment motion.

In allowing the appeal, van Rensburg J.A. held for the Court of Appeal:

> [9] This motion was for summary judgment dismissing a claim against an existing defendant, and not a motion to amend a claim after the expiry of a limitation period. It was a motion for judgment, not a pleadings motion.
>
> **[10] In the normal course, if a limitations defence is raised, as here, in a statement of defence, and the plaintiff relies on the discoverability principle, the material facts relevant to discoverability should be pleaded in reply. I disagree with the conclusion of the motion judge that the appellant was required to plead the facts relevant to discoverability in her statement of claim.** The expiry of a limitation period is a defence to an action that must be pleaded in a statement of defence... As such, discoverability, which is relevant to the limitations defence, need not be anticipated by a plaintiff and addressed in her statement of claim…

Independence Plaza 1 Associates, L.L.C. v. Figliolini
2017 ONCA 44 (Ont. C.A.)

STRATHY C.J.O.: —

[1] This appeal raises two questions:

(a) what limitation period applies to a proceeding on a foreign judgment in Ontario; and

(b) when does that limitation period begin to run?

[2] The motion judge found that the limitation period was the two-year "basic limitation period" specified in s. 4 of the Limitations Act, 2002, S.O. 2002, c. 24, Sch. B. It began to run when the appeal of the foreign judgment was dismissed.

[3] For the reasons that follow, I would dismiss the appeal and answer the questions it raises as follows:

(a) a two-year limitation period applies to a proceeding on a foreign judgment; and

(b) the limitation period begins to run, at the earliest, when the time to appeal the foreign judgment has expired or, if an appeal is taken, the date of the appeal decision. The time may be longer if the claim was not "discovered" within the meaning of s. 5 of the Limitations Act, 2002, until a date later than the appeal decision.

…

D. Analysis

[17] The correct approach to resolving the two questions raised by this appeal begins and ends with the provisions of the Limitations Act, 2002, which is a comprehensive and exhaustive scheme for dealing with limitation periods: Intact Insurance Co. of Canada v. Lombard General Insurance Co. of Canada (2015), 128 O.R. (3d) 658, [2015] O.J. No. 6954, 2015 ONCA 764, at paras. 53-56, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 10 and [2016] S.C.C.A. No. 11.

[18] Accordingly, I will begin my analysis by explaining the purpose of statutes of limitation. I will then examine the relevant provisions of the former Ontario Limitations Act, R.S.O. 1990, c. L.15 and their interpretation in the case law. Finally, I will discuss the legislative history of the Limitations Act, 2002 [page209] and the relevant provisions of the

statute. Against this background, I will address the two questions raised by this appeal.

(1) Discussion

(i) The purposes of statutes of limitation

[**19] Limitations statutes reflect public policy about efficiency and fairness in the justice system. There are three broad policy justifications for limitation statutes:** Manitoba Metis Federation Inc. v. Canada (Attorney General), [2013] 1 S.C.R. 623, [2013] S.C.J. No. 14, 2013 SCC 14, at paras. 231-34.

[20] First, they promote finality and certainty in legal affairs by ensuring that potential defendants are not exposed to indefinite liability for past acts: Hare v. Hare (2006), 2006 CanLII 41650 (ON CA), 83 O.R. (3d) 766, [2006] O.J. No. 4955 (C.A.), at para. 41. **They reflect a policy that, after a reasonable time, people should be entitled to put their business and personal pasts behind them and should not be troubled by the possibility of "stale" claims emerging from the woodwork.**

[21] **Second, they ensure the reliability of evidence. It is inefficient and unfair to try old claims because evidence becomes unreliable with the passage of time. Memories fade, witnesses die and evidence gets lost. After a reasonable time, people should not have to worry about the preservation of evidence**: M. (K.) v. M. (H.), 1992 CanLII 31 (SCC), [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, at p. 30 S.C.R.

[22] **Third, and related to this, limitation periods promote diligence because they encourage litigants to pursue claims with reasonable dispatch.**

[23] Other justifications have been given, including the interest in the efficient use of public resources through the expeditious resolution of disputes and the desirability of adjudicating disputes on the basis of contemporary values and standards: see Graeme Mew, The Law of Limitations, 3rd ed. (Toronto: LexisNexis, 2016), at pp. 16-18.

…

[No limitation period

16(1) There is no limitation period in respect of,

. . .

(b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court.]

…

[**42] It falls to this court, as a matter of first impression, to interpret whether s. 16(1)(b) applies to a proceeding on a foreign judgment. The words of s. 16(1)(b) are to be read in light of the language of the provision as a whole, their context within the statutory scheme, and the purposes of the Limitations Act, 2002:** see R. v. Hajivasilis (2013), 114 O.R. (3d) 337, [2013] O.J. No. 253, 2013 ONCA 27, at para. 23; and Ayr Farmers Mutual Insurance Co. v. Wright (2016), 134 O.R. (3d) 427, [2016] O.J. No. 5556, 2016 ONCA 789, at paras. 26, 28-29, 31-32.

[43] First, therefore, I consider the language of s. 16(1)(b) as a whole.

[44] Phrases serving parallel functions and associated by the disjunction "or" in a statutory provision influence each other's meaning. The parallelism "invites the reader to look for a common feature among the terms" to resolve any ambiguities: Ruth Sullivan, Sullivan on the Construction of Statutes, 6th ed. (Markham, Ont.: LexisNexis, 2014), at p. 230. The Supreme Court has stated that "a term or an expression should not be interpreted without taking the surrounding terms into account" in order to identify a "common thread": Opitz v. Wrzesnewskyj, [2012] 3 S.C.R. 76, [2012] S.C.J. No. 55, 2012 SCC 55, at paras. 40, 43.

[45] In my view, the term "order of a court" in s. 16(1)(b) takes its meaning, in part, from the parallel phrase immediately associated with it -- namely, "any other order that may be enforced in the same way as an order of a court" (emphasis added). I observe that a similar parallel phrase is found in s. 19(1) of the Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, which provides that "[a] certified copy of a tribunal's decision or order in a proceeding may be filed in the Superior Court of Justice by the tribunal or by a party and on filing shall be deemed to be an order of that court and is enforceable as such" (emphasis added).

[46] The "common feature" or "common thread" linking these parallelisms is the concept of enforceability. Section 16(1)(b) of the Limitations Act, 2002 applies to court orders and to other orders, such as those of persons exercising a statutory power of decision, that are enforceable in the same way as a court order.

[47] This common thread within s. 16(1)(b) does not extend to foreign judgments. The domestic judgments contemplated by the

provision are directly enforceable in Ontario by means of the execution procedures in Rule 60 of the Rules of Civil Procedure, including writs of seizure and sale, garnishment or the appointment of a receiver: Lax, at para. 21. By contrast, like an order of a foreign arbitral tribunal, the debt obligation created by a foreign judgment cannot be directly enforced in Ontario in the absence of reciprocal enforcement legislation such as REJA or REJUKA. A proceeding in Ontario must be brought first: see Lax, at paras. 11-13; Yugraneft, at para. 45; Chevron Corp. v. Yaiguaje, [2015] 3 S.C.R. 69, [2015] S.C.J. No. 42, 2015 SCC 42, at para. 43. [page216] That proceeding may result in a judgment or order of the Ontario court. The resulting order may be enforced as an order of the court, with no applicable limitation period.

[48] Thus, the judgment of a foreign court is one step removed from being an order of a court for the purpose of s. 16(1)(b) of the Limitations Act, 2002. It is not on the same level as an order of an Ontario court or any other order, such as an order of an Ontario statutory decision maker, which may be enforced as an order of a domestic court. This was adverted to by Feldman J.A. in Lax, at para. 31, in explaining why she did not agree with the approach taken by Cumming J. in Girsberger:

As long as only domestic judgments can be enforced by execution and the other methods discussed above, and therefore foreign judgments must be transformed into domestic judgments or registered before they are enforceable as domestic judgments, there is not parity of treatment.

…

[50] Thus, while a domestic judgment can be enforced as of right in Ontario, it is necessary to bring a proceeding on a foreign judgment. If that proceeding is successful, it will give rise to an Ontario judgment which can be directly enforced in the province.

[51] Furthermore, a judgment creditor who brings an Ontario proceeding on a foreign judgment must show that the foreign court had jurisdiction and that the judgment is final and for the payment of money (or that it would be appropriate for the Ontario court to recognize it as enforceable within the province even if it is interlocutory or non-monetary): see Pro Swing; Chevron; and Cavell Insurance Co. (Re) (2006), 2006 CanLII 16529 (ON CA), 80 O.R. (3d) 500, [2006] O.J. No. 1998 (C.A.), at para. 41. [page217]

[52] The foreign judgment debtor is entitled to raise defences to the proceeding, such as fraud, denial of natural justice and public policy: see Beals. These defences "distinguish foreign judgments from local judgments, against which the sole recourse is an appeal": Janet Walker and Jean-Gabriel Castel, Canadian Conflict of Laws, looseleaf (Rel. 54-3/2016 Pub.5911), 6th ed. (Toronto: LexisNexis, 2005), at para. 14.3.

[53] I conclude that the language of s. 16(1)(b) of the Limitations Act, 2002 suggests that the term "order of a court" refers to an order of a domestic court.

…

[63] Third, and finally, I consider s. 16(1)(b) in light of the purposes of limitations statutes.

[64] It would be contrary to the purposes of limitations statutes to interpret s. 16(1)(b) as exempting foreign judgments from any limitation period. If it were always possible to bring a proceeding on a foreign judgment in Ontario without time limitation, no matter when and where it was obtained, the debtor would be indefinitely exposed to the prospect of defending such proceedings in Ontario. As was pointed out in the Ontario Law Reform Commission's report, at p. 50, problems associated with the preservation and reliability of evidence are especially pronounced for foreign judgment debtors. This militates in favour of having some limitation period apply to proceedings on foreign judgments. As well, exempting such proceedings from a limitation period would not encourage diligence or reasonable dispatch on the part of the foreign judgment creditor, who, unlike domestic judgment creditors, has not already surmounted an Ontario limitations hurdle.

…

(3) When does time begin to run on a proceeding on a foreign judgment in Ontario?

…

[71] I acknowledge the point made by Newbould J. in PT ATPK that, in the context of s. 5(1) of the Limitations Act, 2002, **a proceeding on a foreign judgment does not fall particularly neatly into the definition of "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". However, the statute**

was meant to be comprehensive and exhaustive. Section 2(1) provides that it applies to "claims pursued in court proceedings", and s. 4 provides that the basic two-year limitation period applies "unless this Act provides otherwise".

[72] The words "injury, loss or damage" in s. 5(1) can reasonably refer to the debt obligation created by a foreign judgment and owed by the foreign judgment debtor to the creditor. The "act or omission" can reasonably refer to the debtor's failure to discharge the obligation once it became final. Viewed in this light, s. 5(1) can reasonably be viewed as applying to a proceeding on a foreign judgment.

…

[77] In the usual case, it will not be legally appropriate to commence a legal proceeding on a foreign judgment in Ontario until the time to appeal the judgment in the foreign jurisdiction has expired or all appeal remedies have been exhausted. The foreign appeal process has the potential to resolve the dispute between the parties. If the judgment is overturned, the debt obligation underlying the judgment creditor's proceeding on the foreign judgment disappears.

[78] This approach is consistent with the decision of the Alberta Court of Appeal in Laasch v. Turenne, [2012] A.J. No. 75, 2012 ABCA 32, 522 A.R. 168. In that case, the court determined that the statutory limitation period to commence a proceeding on a Montana judgment began to run even while the creditor sought to register the judgment under Alberta's reciprocal enforcement legislation. The existence of the reciprocal enforcement statute did not displace the common law process for a proceeding on a foreign judgment. Therefore, the proceeding was "warranted" within the meaning of the discoverability provision of Alberta's Limitations Act even while the creditor sought registration.

[79] To regard a claim based on the foreign judgment as discoverable and appropriate only when all appeals have been exhausted is also consistent with the observations of Rothstein J. in Yugraneft. He stated, at para. 57, that the limitation period to enforce a foreign arbitral judgment under Alberta's Limitations Act starts to run when the time to appeal the judgment has expired or, where an appeal is taken, the date of the appeal decision.

[80] Finally, as the application judge noted, this approach avoids the risk of multiplicity of proceedings by not requiring the

judgment creditor to commence a proceeding on a foreign judgment in Ontario before all proceedings in the foreign jurisdiction have run their course. It furthers the purpose of s. 5(1)(a)(iv) of the Limitations Act, 2002 by deterring the unnecessary litigation that may result from commencing an Ontario proceeding on a foreign judgment that is subsequently overturned.