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Collision Course? Limitation Periods, the Supreme Court of Canada, and the Court of Appeal for Ontario

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What happens when an irresistible force meets an immovable object? That question comes to mind in reading two recent high-level decisions on limitation periods. Certainty that the Court of Appeal for Ontario may have created in its January 2021 decision of *Kaynes v. BP p.l.c.*,[1] may now be clouded by the Supreme Court of Canada's July 2021 decision in *Grant Thornton LLP v. New Brunswick*.[2]

Kaynes is an intricately reasoned landmark analysis by Justice Feldman (for the Court) of the Ontario *Limitations Act, 2002*[3] (***LA2002***) and the fraught issue of when a *claim* — as opposed to a *cause of action* — is *discovered* for limitation purposes, notably under the four subparagraphs of paragraph 5(1)(a).

The Supreme Court's decision in *Grant Thornton* presents Justice Moldaver's pointed and fairly summary reasoning (for the seven Judge panel) of when a claim is *discovered* under the three subsections of subsection 5(2) of New Brunswick's *Limitation of Actions Act*[4] (***LAA***).

The Court of Appeal's analytical granularity in *Kaynes* contrasts with the Supreme Court's sweeping generality in *Grant Thornton*. Only time will tell whether the two decisions are destined to collide, or to endure on parallel paths.

In the following paragraphs, we will look at the two decisions separately. We will then compare them to discern — *try* to discern — if the Ontario limitations landscape has been changed by *Grant Thornton*, or whether (and where) *Kaynes* still rules.

Kaynes v. BP p.l.c.

Facts

Peter Kaynes was aggrieved by the BP Deepwater Horizon explosion of 2010. He started a class action. On behalf of his fellow BP shareholders, Kaynes claimed that BP had made pre-explosion securities misrepresentations about its operational safety and ability to respond to an oil disaster. This, he said, had artificially inflated BP's stock price. After the explosion, Kaynes alleged, BP revised its disclosure documents to correct the misrepresentations, which brought about a significant drop in the share price.

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[1] *Kaynes v. BP p.l.c.*, 2021 ONCA 36 [*Kaynes 2021*].
[2] *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 [*Grant Thornton*].
[3] S.O. 2002, c. 24, Sched B.
[4] S.N.B. 2009, c. L-8.5.

The hapless Mr. Kaynes tried six times to gain redress, five times in Canada and once in the U.S. We'll spare you the long and winding history. Suffice it to say that in November 2012, Kaynes sued for secondary market misrepresentation under section 138.3 of the Ontario *Securities Act*,[5] and common law negligent misrepresentation (the latter allegation was withdrawn soon after). In 2017, Kaynes narrowed his approach to advance the *Securities Act* allegations.

BP responded that the claims were statute-barred under the *Securities Act*'s three-year limitation period.

Then, in 2019, Kaynes delivered another amended statement of claim. For the first time, he alleged fraudulent misrepresentation.

BP moved for an order declaring the fraudulent misrepresentation claim as statute-barred *per* the *LA2002*, under the question of law rule, 21.01(a), of the Ontario *Rules of Civil Procedure*.[6] BP argued that Kaynes had discovered the claim — *i.e.*, that he knew or ought to have known of it — more than two years before making the claim. Kaynes resisted. He argued that when discoverability is in issue, limitations questions are not appropriate for rule 21 motions.

First Instance: 2019 ONSC 6464

Justice Perell granted BP's motion and dismissed Kaynes' action. His Honour found that the two-year limitation period began to run when BP made corrective disclosure in June 2010.[7] This, he said, was when BP's alleged misrepresentations were discoverable.[8]

Justice Perell concluded alternatively that Kaynes would have discovered BP's fraudulent intent by 2010, from U.S. litigation against BP.[9]

Court of Appeal: 2021 ONCA 36

Kaynes appealed. The Court of Appeal upheld Perell J.'s order and agreed that the limitations issue could be determined on a Rule 21 motion.[10] But the Court did not accept his reasoning. Justice Feldman found that BP's fraud was discoverable in July 2015, not in 2010.

Justice Feldman disagreed with Perell J. that Kaynes' claim for fraudulent misrepresentation was discovered when BP admitted to making the misrepresentations. Rather, she held, a claim for fraudulent misrepresentation is only discovered under s. 5 of the *LA2002* if the plaintiff knows or ought to have known that the defendant knew that the misrepresentation was false.[11]

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[5] R.S.O. 1990, c. S.5, s. 138.3.
[6] *Courts of Justice Act*, R.S.O. 1990, Reg. 194.
[7] *Kaynes v. BP p.l.c*, 2019 ONSC 6464 at para. 65 [*Kaynes 2019*].
[8] *Ibid.* at paras. 88 – 89.
[9] *Ibid.* at paras. 97 – 98.
[10] *Kaynes 2021, supra* note 1 at para 76.
[11] *Ibid.* at paras. 33, 65.

Further, as a claim necessarily involves a legal remedy, the act or omission that must be discovered is one that will give rise to a legal remedy, *i.e.*, a cause of action.[12] With fraudulent misrepresentation, which Kaynes was advancing, the act or omission that must have been discovered is a misrepresentation "made with knowledge that the representation was false, an absence of belief in its truth or recklessness as to its truth".[13]

To define "discovery" of such a claim as Perell J. did would require a person to commence a fraudulent misrepresentation action without the legal basis for doing so, *i.e.*, without knowledge of the defendant's fraudulent intent, in order to preserve the limitation period.[14]

With this, Feldman J.A. drew a circle around the *LA2002*'s use of "claim" and omission of "cause of action" and explained how that circle was to be squared.[15] More on this below.

Grant Thornton

Facts

The accounting behemoth Grant Thornton audited a New Brunswick corporation's 2009 financial statements. The Province of New Brunswick (the **Province**) relied on the statements to give loan guarantees. The corporation failed. The Province had to pay out $50 million under the guarantees in March 2010.

In February 2011, an auditing firm retained by the Province concluded in a draft report (made final in November 2012) that Grant Thornton's audit (i) had not been in accordance with generally accepted accounting principles, and (ii) had overstated the corporation's assets and earnings. On June 23, 2014, New Brunswick sued two Grant Thornton entities and a Grant Thornton partner in negligence. The defendants moved for summary judgment, arguing that the claim was statute-barred under the *LAA*.

First Instance: 2019 NBQB 36

Justice William T. Grant allowed Grant Thornton's motion and dismissed the action. Justice Grant found that the Province had discovered its claim more than two years before it brought the action.

Court of Appeal: 2020 NBCA 18

The Court of Appeal of New Brunswick allowed the Province's appeal. It held that discovery of a claim requires actual or constructive knowledge of facts that confer a legally enforceable right to a judicial remedy. This includes knowledge of every constituent element of the cause

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[12] *Ibid.* at para. 64.
[13] *Ibid.* at para. 59.
[14] *Ibid.* at para. 63.
[15] *Ibid.* at paras. 37 - 58.

of action being pleaded. The Province only had a potential claim two years before the action, the Court found, not an actual claim.

Supreme Court: 2021 SCC 31

The Supreme Court disagreed, unanimously. It restored Grant J.'s dismissal of the action.

Justice Moldaver found the Province to have discovered its claim in February 2011, when it received the draft report. At that point, the Province had actual or constructive knowledge of the material facts — namely, that a loss had occurred, and that the loss had been caused or contributed to by an act or omission of Grant Thornton. Nothing more was needed to draw what Moldaver J. characterized as the "governing standard" under the New Brunswick statute, namely, a "plausible inference of negligence".[16]

Justice Moldaver rejected the New Brunswick Court of Appeal's view that discovery of a claim requires knowledge of every constituent element of the cause of action.[17] Endorsing that approach, he held, would move the discovery needle too close to certainty.[18]

Instead, Moldaver J. proposed this approach regarding the degree of knowledge required under s. 5(2) of the *LAA* to discover a claim (about which more below):

- 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;[19]
- under s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant.[20]

Therefore, a plaintiff alleging negligence does not need to know that the defendant owed it a duty of care, or that the defendant's act or omission breached the applicable standard of care.[21] Requiring this level of knowledge could lead to the unintended consequence of indefinitely postponing the limitation period. The standard for discoverability cannot be so high that a plaintiff could only acquire the requisite knowledge through discovery or experts.

Kaynes and Grant Thornton: Does the Twain Meet?

The two decisions approach the legal dilemma of discoverability in highly similar, but crucially distinct, legislative contexts, from opposing perspectives:

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[16] *Ibid.* at para. 45.
[17] *Grant Thornton, supra* note 2 at para. 40.
[18] *Ibid.* at para. 47.
[19] *Ibid.* at para. 42.
[20] *Ibid.* at para. 43.
[21] *Ibid.* at para. 48.

- ***Kaynes*** adopts a bottom-up perspective: if the standard for the discovery of a claim is too low it will be non-compliant with the rules of pleading and the common law principle that a proceeding requires a legally viable claim.[22]

- ***Grant Thornton*** looks top-down: if the standard is too high it will have the unintended consequence of indefinitely postponing the limitation period.[23]

Two different perspectives. Does this mean two different tests, in which case *Grant Thornton* would prevail by virtue of its Supreme Court provenance?

The case for 'yes' to this question lies in the *claim* versus *cause of action* dichotomy. Justice Feldman in *Kaynes* sees the two as distinct, and requires a plaintiff to have knowledge of both. By contrast, Moldaver J. in *Grant Thornton* briefly raises, then dismisses the topic, concluding that the terms are considered interchangeable. These two facially different analyses appear to lead to two different discoverability tests:

- ***Kaynes*****:** Whether the plaintiff knows, or ought to know, the facts to substantiate each element of the particular cause of action that confers a legally enforceable right to a judicial remedy.[24]

- ***Grant Thornton*****:** Whether the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's party can be drawn.[25]

The case for answering 'no' to our question above lies in the concurrence of Feldman J.A. and Moldaver J. on two points: (1) the material facts that must be actually or constructively known are generally set out in the limitations statute, and (2) certainty or "perfect knowledge" is too high a standard. On the latter point, the Justices' language is noticeably convergent:

Kaynes v. BP p.l.c	*Grant Thornton LLP v. New Brunswick*
[56] …Of course, it is always a question of fact at what point a claimant had or ought to have had sufficient knowledge of each of the factors to trigger the commencement of the limitation period. **The claimant need not know to a certainty that the defendant will be found liable** – that is the issue to be determined by the trier of fact.[26] [Emphasis added.]	[46] **The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation**. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability

[22] *Kaynes, supra* note 1 at para. 57.
[23] *Grant Thornton, supra* note 2 at para. 48.
[24] *Kaynes, supra* note 1 at para. 44, 47.
[25] *Grant Thornton, supra* note 2 at para. 48.
[26] *Kaynes, supra* note 1 at para. 56.

	ensures the standard does not rise so high as to require certainty of liability or "perfect knowledge".[27] [Bold/ underscored emphasis added.]

"Cause of Action" versus "Claim"

As noted, *Kaynes* distinguishes between *cause of action* and *claim*. Justice Feldman defines *cause of action* as the "legal elements to support a claim",[28] whereas s. 1 of the *LA2002* defines *claim* (tautologically) as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission".[29]

According to Feldman J.A., a cause of action requires an additional evidentiary burden over and above the one for a claim: the act or omission that constitute the claim, must be wrongful. That is the distinguishing element:

> […] the *Limitation Act*'s introduction of discovery of a "claim" as the triggering mechanism for the commencement of the limitation period has not done away with any role for causes of action. As I will explain, under paragraph 5(1)(a)(ii) of the *Limitations Act*, one of the matters that is required for the discovery of a "claim" is: "that the injury, loss or damage was caused by or contributed to by an act or omission" (emphasis added). **Because a claim necessarily involves seeking a legal remedy in a court proceeding, the act or omission that must be discovered is one that will give rise to a legal remedy, i.e., a cause of action**. […]
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> […] **Because only a wrongful act or omission gives the affected person the right to a remedy in a court proceeding, discovery of the act or omission must include discovery of the wrongful aspect of it that gives rise to the legal right to the particular remedy being claimed**. And under paragraph 5(1)(a)(iv), for the limitation period to commence, a proceeding must be an appropriate means to seek a remedy. That will only be the case when the claimant is able to plead a cause of action that gives rise to a remedy.[30]
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> [Bold/ underscored emphasis added.]

Justice Feldman continues with inexorable logic, which we have distilled into this syllogism:

- only a wrongful act or omission gives rise to a remedy in a court proceeding, *thus*
- the discovery of the act or omission must include discovery of the wrongful aspect of the particular remedy being claimed, *and since*

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[27] *Grant Thornton, supra* note 2 at para. 46.
[28] *Kaynes, supra* note 1 at para. 46.
[29] *Ibid.* at para. 35; *LAA2*, *supra* note 3.
[30] *Ibid.* at paras. 40 and 48.

- under paragraph 5(1)(a)(iv), for the limitation period to commence, a proceeding must be an appropriate means to seek a remedy, *discovery only occurs*
- "when the claimant is able to plead a cause of action that gives rise to a remedy."[31]

(Note the importance of the "appropriate means" provision of paragraph 5(1)(a)(iv) to Feldman J.A.'s analysis. It is here that reconciliation between *Kaynes* and *Grant Thornton* may lie. More on this below.)

Justice Feldman finds confirmation in s. 18(1) of the *LA2002* for the centrality of wrongfulness in the cause of action / claim distinction. That section deals with contribution and indemnity and refers to the defendant as an "alleged wrongdoer", as follows"

> 18(1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.[32]

By contrast to Justice Feldman's analysis, Moldaver J. in *Grant Thornton* concludes that *cause of action* and *claim* are interchangeable. He cites the French version of the *LAA*:

> […] the wording of the French text supports my interpretation of the English text, and confirms that "claim" in s. 5 means "cause of action", namely: discovering the facts giving rise to a claim to obtain relief for the injury, loss or damage that resulted from an act or omission. This is the legal equivalent of "a set of facts entitling a plaintiff to a remedy", the definition of a "cause of action" put forward by Grant Thornton.[33]

In their contrasting views about the putative distinction between *claim* and *cause of action*, both Feldman J.A. and Moldaver J. invoke foundational statements that informed the work of the Ontario and New Brunswick Legislatures when they adopted their – then new – limitations statutes in 2002 and 2009 respectively:

Kaynes v. BP p.l.c	***Grant Thornton LLP v. New Brunswick***
[42] Ontario's new *Limitations Act* makes discoverability a statutory requirement. It incorporates discoverability into the date for commencement of the limitation period, but refers to the discoverability of a "claim" rather than a cause of action, based on the	[39] More probative are the Hansard Debates preceding the enactment of the *LAA*. When asked why the statute uses the term "claim" instead of "cause of action", the Minister of Justice explained:

[31] *Ibid.* at para. 48.
[32] *Ibid.* at para. 49; *LAA*, *supra* note 6 at s. 18(1).
[33] *Grant Thornton, supra* note 2 at para. 38.

recommendation of the Limitations Act Consultation Group to the Attorney General contained in *Recommendations for a New Limitations Act* (Toronto: Ministry of the Attorney General of Ontario, 1991). The report explains the proposed change as follows, at p. 17: > The term claim is used throughout the recommendations in place of "cause of action" primarily to mark the departure from a limitations system where different causes of action are subject to different starting points and periods of different duration. **Otherwise, "claim" is not substantially different from "cause of action"**. [43] Accordingly, there is nothing in the Consultation Group's report that demands treating "claim" for limitations purposes as unconnected to a plaintiff's particular cause of action. Indeed, attempting to do so would fit uncomfortably with basic civil procedure, as causes of action have not become extinct for pleading purposes. A pleading may be struck out if it discloses "no reasonable cause of action": r. 21.01(1)(b).[34] [Emphasis added.]	> In a sense, it is really just semantics. Tim Rattenbury, who works for the Office of the Attorney General, and I had a good discussion. The word "claim" is just another way to characterize bringing forward your matter for purposes of litigation. "Cause of action" is the same thing. **The standardization of these particular ways of characterizing an action before the courts is simply semantics**. > New Brunswick, Legislative Assembly, *Journal of Debates (Hansard)*, 3rd Sess., 56th Assem., June 17, 2009, at p. 50 (Hon. Mr. Burke) In other words, according to the Minister, using "claim" instead of "cause of action" amounts to a distinction without a difference. While not in itself determinative, the Minister's statement can hardly be taken as evidencing the "clear legislative language" needed to oust or limit the common law rule (see *Godfrey*, at para. 32). If anything, it demonstrates the opposite.[35] [Emphasis added.]

And so, for Moldaver J., there is nothing to be gained from a focus on the *claim* versus *cause of action* dichotomy, as far as discovery under the New Brunswick statute is concerned. The outcome would be the same regardless of the distinction; requiring knowledge of the legal elements of a claim would be too high a standard. "A plausible inference of liability is enough […]".[36]

For Feldman J.A., however, one cannot ignore the dichotomy under the Ontario statute, and guidance is to be found in the Ontario *Rules of Civil Procedure*.

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[34] *Kaynes, supra* note 1 at paras. 42 - 43.
[35] *Grant Thornton, supra* note 2 at para. 39.
[36] *Ibid.* at para. 47.

New Brunswick 'Rules of Court' versus Ontario's 'Rules of Civil Procedure'

Key to Feldman J.A.'s analysis in *Kaynes* is the interpretive guidance from Ontario *Rules of Civil Procedure* Rules 21 and 25:

> […] treating "claim" for limitations purposes as unconnected to a plaintiff's particular cause of action […] would fit uncomfortably with basic civil procedure, as **causes of action have not become extinct for pleading purposes. A pleading may be struck out if it discloses "no reasonable cause of action": r. 21.01(1)(b)**. […]
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> Instead of using cause of action as in r. 21.01(1)(b), r. 25.06 uses "claim", a term not defined in the Rules of Civil Procedure, and defence. Rule 25.06(1) requires a pleading to contain "the material facts on which the party relies for the claim or defence". And, where conditions of mind such as fraud and misrepresentation are alleged, r. 25.06(8) requires that full particulars must be pleaded except that knowledge may be alleged as a fact.
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> Therefore, **while the rule uses the term claim, the contents of a proper initiating pleading asserting a claim for a remedy contemplated by the rule will include the legal elements to support a claim, i.e., a cause of action**.[37] [Bold/ underscored emphasis added.]

While the logic of this analytical dovetailing of Ontario's *Rules of Civil Procedure* with the *LA2002* seems unassailable, *Grant Thornton* makes no similar attempt to harmonize the New Brunswick *Rules of Court* with its *LAA*. Yet, the two provinces' civil procedure rules are all but word-for-word identical. Both Ontario's rule 21.01(1)(b) and New Brunswick's rule 23.01(b) allow a party to move to strike out a pleading that does not disclose a "reasonable cause of action or defence". And both sets of rules — 25.06(1) in Ontario, 27.06(1) in New Brunswick — require that every pleading contain "the material facts on which the party pleading relies for his claim or defence".

So, if *Kaynes* is to be distinguished from *Grant Thornton*, it will not be through any difference in their rules. It is in their respective limitations statutes that the difference lies, specifically Ontario's "appropriate means" provision that is not to be found in the *LAA*.

Appropriate Means

Subsections 5(1) of the *LA2002* and 5(2) of the *LAA* detail the parameters for the discovery of a claim. The obvious — and crucial — difference between the two is the fourth subparagraph, 5(1)(a)(iv), in the Ontario statute, which has no equivalent in New Brunswick's three-part provision.

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[37] *Kaynes, supra* note 1 at paras. 43, 45-46.

Ontario: LA2002	New Brunswick: LAA
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). [Emphasis added.]	**5**(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.

Another distinction between the two provisions is the "abilities and circumstances" qualifier in paragraph 5(1)(b) of the *LA2002*. The *LAA* makes no such allowance for differences between claimants. However, such differences could be said to be subsumed by "reasonably" in subsection 5(2) of the *LAA*. Thus, without dismissing the absence of "abilities and circumstances" from the *LAA* as a point for distinguishing *Kaynes* and *Grant Thornton*, we propose to focus on the more significant "appropriate means" factor.

It is via this factor that the analyses of Feldman J.A. in *Kaynes* and Moldaver J. in *Grant Thornton* most noticeably diverge:

Kaynes v. BP p.l.c	*Grant Thornton LLP v. New Brunswick*
[44] […] Does a person who seeks to commence a timely proceeding for a claim to obtain a remedy based on a legal right to seek that remedy, *i.e.* a cause of action, **need to have discovered facts to substantiate each element of the particular cause of action in order to have discovered their claim to a remedy, within the meaning of the *Limitations Act*? In my view, the answer is yes.** [47] Similarly, while the *Limitations Act* no longer uses the term cause of action, for the reason explained by the Attorney General's Consultation Group, both the definition of claim and the components listed in paragraph 5(1)(a) that have to be discovered before the limitation period commences to run in respect of a claim, **still require the discovery of the elements of a cause of action that will give rise to a legal remedy.** [57] […] Discovery of a claim includes components that may not be requirements of any particular cause of action, such as injury, loss or damage (paragraph 5(1)(a)(i)), and that having regard to the nature of the injury loss or damage, **a proceeding would be an appropriate means to remedy** it (paragraph 5(1)(a)(iv)). [58] However, the second component, that the injury loss or damage was caused by an act or omission (paragraph 5(1)(a)(ii)), read together with the definition of claim, which is a claim to remedy the injury, loss or damage that occurred as a result of the act or omission (s. 1), and with the requirement that the claim must be pursued in a court proceeding (s.	[47] In my respectful view, endorsing the Court of Appeal's approach that to discover a claim, **a plaintiff needs knowledge of facts that confer a legally enforceable right to a judicial remedy, including knowledge of the constituent elements of a claim, would move the needle too close to certainty.** A plausible inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve. [48] […] the basic principle is relevant here. **The standard cannot be so high as to make it possible for a plaintiff to acquire the requisite knowledge only through discovery or experts**. And yet, that is precisely the standard endorsed by the Court of Appeal in the instant case. With respect, that standard sets the bar too high. **By the same token, the standard is not as low as the standard needed to ward off an application to strike a claim.** What is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently.[39] [Emphasis added.]

[39] *Grant Thornton, supra* note 2 at paras. 48-49.

2(1)), **incorporates the requirement for a legally recognized basis to make the claim, known as a cause of action**.[38] [Emphasis added.]	

The divergent analyses of the two Justices lead to seemingly different results:

Kaynes v. BP p.l.c	*Grant Thornton LLP v. New Brunswick*
[63] …In my view, **the defendant's knowledge that the misrepresentation was false, or at a minimum, its recklessness as to whether the misrepresentation was false, is a relevant material fact underlying any claim for fraudulent misrepresentation**. If the motion judge's approach were correct, it would mean in the case of a misrepresentation, that the claimant would be required to commence an action alleging fraud within two years of the misrepresentation, whether or not he knew or ought reasonably to have known of the defendant's fraudulent intent, in order to preserve the limitation period for fraudulent misrepresentation. Of course, **as well as being non-compliant with the pleadings rule, such a requirement would fly in the face of the well-established common law principle that a party must only plead fraud when they can substantiate the claim, or risk an award of substantial indemnity costs**: *Unisys Canada Inc. v. York Three Associates Inc.* (2001), 2001 CanLII 7276 (ON CA), 150 O.A.C. 49 (C.A.), at para. 15; *Catford v. Catford*, 2013 ONCA 58, at para. 4. [65] Therefore, in the case of a fraudulent misrepresentation, the act or omission is a	[48] It follows that in a claim alleging negligence, **a plaintiff does not need knowledge that the defendant owed it a duty of care or that the defendant's act or omission breached the applicable standard of care**. Finding otherwise could have the unintended consequence of indefinitely postponing the limitation period. After all, **knowledge that the defendant breached the standard of care is often only discernable through the document discovery process or the exchange of expert reports, both of which typically occur after the plaintiff has commenced a claim**. As the Court stated in *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403, at para. 55: > Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. [Emphasis added.] [50] Grant Thornton submits that the Province discovered its claim on February 4, 2011, when it received the draft Richter Report. I agree. At that point, the Province

[38] *Kaynes, supra* note 1 at paras. 44, 47, 57-58.

knowing misrepresentation. **It would make no sense to require a person to commence an action for fraudulent misrepresentation without the legal basis for doing so**, in order to preserve the limitation period. That is neither the intent nor the effect of the Limitations Act. The motion judge erred by concluding otherwise.[40] [Emphasis added.]	had actual or constructive knowledge of the material facts — namely, that a **loss occurred and that the loss was caused or contributed to by an act or omission of Grant Thornton. Nothing more was needed to draw a plausible inference of negligence**.[41] [Bold/ underscored emphasis added.]

In sum, without specifying that – or whether – his *ratio* applies exclusively to the *LAA* or to all limitations legislation, Moldaver J. strongly rejects as a requirement for discoverability that there be both a claim and a cause of action. Feldman J.A. strongly embraces the need for both under the *LA2002*.

Conclusion: Kaynes, Grant Thornton and Where LA2002 Discoverability Stands

And so, are *Kaynes* and *Grant Thornton* on an irresistible-force-meets-immovable-object collision course? In our view, no. Our analysis leads us to conclude that *Grant Thornton* does not alter the *LA2002* discoverability criteria defined in *Kaynes*.

Both decisions seek a balance between discoverability extremes. *Grant Thornton* is a generalized perspective: too high a standard — "certainty of liability" — runs the risk of indefinitely postponed limitation periods; too low a standard entails the risk of never-ending applications to strike actions, not to mention depriving plaintiffs' of their claims. Justice Moldaver's reasoning seeks to strike the balance by eliminating cause of action as a separate element of discoverability.

By contrast, Feldman J.A. in *Kaynes* takes a more detailed approach, not only breaking down section 5 of the *LA2002* into its elements, but also harmonizing it with Ontario's *Rules of Civil Procedure*. The obvious, and significant, distinguishing factor in her analysis is the "appropriate means" provision of subparagraph 5(1)(a)(iv) that the *LAA* lacks. This difference, together with the "abilities and circumstances" criterion in paragraph 5(1)(b) of the Ontario statute, mean that *Kaynes* and *Grant Thornton* address two different statutes. Discoverability under the former is, and must be, different under the latter.

Our conclusion is reinforced by the fact that *Grant Thornton* only mentions the Ontario statute once, and only in reference to the codification of common law discoverability in *LA2002*

[40] *Kaynes, supra* note 1 at paras. 63, 65.
[41] *Grant Thornton, supra* note 2 at paras. 48, 50.

paragraph 5(1)(b).[42] The *LA2002* in general, and paragraph 5(1)(a) in particular, are nowhere to be found in the decision.

So, until further notice, Ontario litigators running up against a limitation defence will want to examine not only when the claim was discovered, but also whether a cause of action existed at the time.

[42] *Grant Thornton, supra* note 2 at para. 35. Justice Moldaver cites *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) 35, at para. 15, which expressly deals only with paragraph 5(1)(b).