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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).

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Appeal Allowed – *MDS Inc. v. Factory Mutual Insurance Company:* Ambiguity in Insurance Contracts and the Meaning of "Physical Damage"

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On September 3, 2021, the Court of Appeal for Ontario released its widely anticipated decision in *MDS Inc. v. Factory Mutual Insurance Company*[1] (the "**Appeal Decision**"). Counsel for both insurers and insured parties were no doubt eagerly awaiting the release of the Appeal Decision ever since the release of the decision below[2] (the "**Trial Decision**", and together with the Appeal Decision, the "**MDS Decisions**") – and for good reason. The timing of the release of the MDS Decisions and the legal analyses contained therein, coupled with the unprecedented impacts on both insurers and insured parties arising from the global COVID-19 pandemic, made them highly relevant to the insurance industry for three reasons: (i) the Decisions reaffirm and thoroughly canvass cardinal principles of insurance policy interpretation; (ii) the Decisions guide what types of evidence will be relevant to the interpretation of an insurance policy; and (iii) the Decisions may be persuasive in interpreting the term "physical loss or damage" in future COVID-19-related insurance litigation in Canada.

The Trial Decision arose from a claim under an all-risks insurance policy by the insured, MDS Inc. ("**MDS**"), against its insurer, Factory Mutual Insurance Company ("**Factory Mutual**"), for lost profits arising from the shutdown of a nuclear reactor belonging to MDS' principal supplier, Atomic Energy of Canada Limited ("**AECL**"). The nuclear reactor was shut down due to unexpected corrosion on the wall of the reactor, which resulted in leakage of radioactive water. As a result of the shutdown, MDS suffered a loss of profits because it was deprived of the radioisotopes that it normally purchased from AECL, which it would process and sell for medical application.

At trial, MDS and Factory Mutual agreed that coverage had been triggered under the policy. The principal disputed issues were whether the claim for loss of profits was excluded under the policy, and whether an exception to the exclusion clause brought the claim back within coverage under the policy. Among other things, the Trial Judge held that the "Corrosion Exclusion" was inapplicable because only non-fortuitous (*i.e.*, expected) corrosion was excluded under the policy, and that fortuitous corrosion was not excluded.[3] The Trial Judge further held that, in any event, the loss of use of the nuclear reactor was "physical damage" within the meaning of the exception to the Corrosion Exclusion.[4] As such, she held that even if

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1 *MDS Inc. v. Factory Mutual Insurance Company*, 2021 ONCA 594 [*MDS Appeal*].
2 *MDS Inc. v. Factory Mutual Insurance Company*, 2020 ONSC 1924 [*MDS Trial*].
3 *MDS Trial*, *supra* note 2 at paras. 416-17.
4 *MDS Trial*, *supra* note 2 at paras. 516 and 520.

the Corrosion Exclusion applied to fortuitous corrosion, the loss of profits claimed would still be covered under the policy as an exception to the exclusion.[5]

Following its release, the Trial Decision was subjected to intense scrutiny. Could it be right that the Corrosion Exclusion applies only to non-fortuitous corrosion? Put more broadly, does it make sense that an exclusion clause in an insurance policy excludes coverage for events that were never insured to begin with? And, is it correct that "physical damage" can be sustained where an insured only loses the ability to use property?

The Court of Appeal answered both of these critical questions decidedly in favour of the insurer, Factory Mutual. Writing for the Court, Thorburn J.A. held that the Corrosion Exclusion in the insurance policy must apply to fortuitous corrosion because non-fortuitous events do not fall within the scope of coverage under an all-risks insurance policy.[6] The exclusion would therefore be meaningless if it did not apply to fortuitous corrosion.[7] Justice Thorburn further held that economic loss is not a form of "physical damage".[8] The Court held that MDS could not claim for lost profits arising from the shutdown of the nuclear reactor, which was brought about by the need to repair the corrosion.[9]

Given the complex claim at issue in the MDS Decisions, care should be taken in analyzing the conclusions set out in the Decisions, as well as in applying the Decisions to future proceedings that raise similar issues. A deeper dive into the reasoning underpinning these Decisions is set out below.

Facts

One important fact underpinning the claim at issue in the MDS Decisions is that the nuclear reactor that suffered the corrosion was not owned by MDS.[10] The nuclear reactor belonged to AECL – an entity that was not an insured party under the policy between MDS and Factory Mutual.[11] The loss claimed by MDS was therefore not advanced under the general property coverage provisions of its policy with Factory Mutual. It was advanced pursuant to a Contingent Time Element coverage provision (the "**Clause**").[12] That Clause provided coverage for up to US $25 million in lost profits in the event of physical loss or damage to property at a Contingent Time Element Location (*i.e.*, a location other than MDS' premises).[13] MDS and Factory Mutual

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[5] *MDS Trial*, *supra* note 2 at para. 616.
[6] *MDS Appeal*, *supra* note 1 at para. 77.
[7] *MDS Appeal*, *supra* note 1 at para. 77(9).
[8] *MDS Appeal*, *supra* note 1 at para. 93(1).
[9] *MDS Appeal*, *supra* note 1 at paras. 83 and 96.
[10] *MDS Trial*, *supra* note 2 at para. 1.
[11] *MDS Trial*, *supra* note 2 at para. 2.
[12] *MDS Trial*, *supra* note 2 at paras. 4-5.
[13] *MDS Appeal*, *supra* note 1 at para. 34.

agreed that the nuclear reactor was insured property covered under the Clause.[14] As such, there was no dispute as to whether coverage itself had been triggered under the policy.[15]

At trial, the dispute between MDS and Factory Mutual concerned the interpretation and applicability of the following three coverage exclusion clauses:

1. the Corrosion Exclusion, including the exception to the exclusion embedded within the clause;
2. the Idle Period Exclusion; and
3. the Nuclear Radiation Exclusion.[16]

The Trial Judge rejected Factory Mutual's interpretation of all three exclusion clauses, including the embedded exception to exclusion.

Factory Mutual did not appeal the Trial Judge's conclusions on the Idle Period and Nuclear Radiation Exclusions. The central issues on appeal concerned the interpretation of the Corrosion Exclusion and its embedded exception.

The Corrosion Exclusion states as follows:

> This Policy excludes the following, <u>but, if physical damage not excluded by this Policy results, then only that resulting damage is insured</u>:
>
> […]
>
> 3) deterioration, depletion, rust, corrosion or erosion, wear and tear, inherent vice or latent defect.[17] [emphasis added]

The underlined portion of the above clause is the embedded exception to the Corrosion Exclusion. Neither the word "corrosion" nor the term "physical damage" are defined in the policy.[18]

The evidence at trial demonstrated that the walls of the nuclear reactor suffered two types of corrosion resulting from exposure to water. The first type of corrosion was expected, or "non-fortuitous". This type of corrosion was expected to affect the outer wall of the nuclear reactor. Unfortunately, this expected corrosion also caused the second type of unexpected, or "fortuitous", corrosion on the inner wall of the nuclear reactor. This was so because the water

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[14] *MDS Trial*, *supra* note 2 at para. 4.
[15] *MDS Trial*, *supra* note 2 at para. 185. There was also no dispute as to quantum of loss. The parties agreed that MDS had suffered well lost profits well in excess of the policy limit of US $25 million: see *MDS Trial*, *supra* note 2 at para. 4.
[16] An additional dispute concerning whether MDS should be awarded interest on damages above the rates set out in the *Courts of Justice Act*, R.S.O. 1990, c. C.43 was litigated (see, *e.g.*, *MDS Inc. v. Factory Mutual Insurance Company (FM Global)*, 2020 ONSC 4464), but it is not the focus of this article. Similarly, this article does not address the Trial Judge's analysis of the Idle Period and Nuclear Radiation Exclusions.
[17] *MDS Trial*, *supra* note 2 at para. 234.
[18] *MDS Trial*, *supra* note 2 at paras. 235 and 442.

that corroded and seeped through the outer wall had the effect of corroding the inner wall of the nuclear reactor.[19]

Over time, the unexpected corrosion of the inner wall of the nuclear reactor caused a leak of the radioactive contents of the nuclear reactor.[20] This leak was detected in May 2009 and the nuclear reactor was shut down.[21] MDS submitted a claim for coverage that same month.[22] Factory Mutual delivered a denial of coverage in August 2009.[23] The nuclear reactor was not reopened until August 2010.[24]

It was undisputed that the leak "did not cause actual tangible damage in the interior of the [nuclear reactor]".[25] The nuclear reactor was not shut down because of damage to the functioning of the reactor. It was shut down in order to investigate the leak and to repair the leak.[26]

The Trial Decision

The Trial Judge first held that the meaning of the word "corrosion" as used in the policy was ambiguous.[27] The Trial Judge's conclusion in this regard was based largely upon her view that Factory Mutual's witnesses had conceded in cross-examination that damage resulting from some types of corrosion would be covered under the policy.[28] The Trial Judge then applied the *noscitur a sociis*[29] and *contra proferentum*[30] canons of interpretation to find that "corrosion" as used in the policy must mean non-fortuitous corrosion, instead of fortuitous corrosion.[31] Consequently, she held that the Corrosion Exclusion was inapplicable.

With regard to the exception to the Corrosion Exclusion, the Trial Judge held that the term "physical damage" must be interpreted in light of other provisions in the policy.[32] She found that other provisions of the policy exclude losses for business interruption or loss of use "except to the extent provided by [the policy]".[33] As such, in her view, it would not make sense to include such a proviso unless there were circumstances in which loss of use would be covered under the policy.[34] The Trial Judge also preferred a "broad definition" of the term "physical

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[19] *MDS Trial*, *supra* note 2 at paras. 242-245.
[20] *MDS Trial*, *supra* note 2 at paras. 60-66.
[21] *MDS Appeal*, *supra* note 1 at para. 7.
[22] *MDS Appeal*, *supra* note 1 at para. 8.
[23] *MDS Appeal*, *supra* note 1 at para. 8.
[24] *MDS Trial*, *supra* note 2 at para. 18.
[25] *MDS Trial*, *supra* note 2 at para. 447.
[26] *MDS Appeal*, *supra* note 1 at para. 83.
[27] *MDS Trial*, *supra* note 2 at para. 304.
[28] *MDS Trial*, *supra* note 2 at para. 304.
[29] The meaning of an unclear word or phrase, especially one in a list, should be determined by the words immediately surrounding it: *MDS Trial*, *supra* note 2 at para. 424.
[30] An ambiguity in an agreement should be construed against the party that drafted the agreement: *MDS Trial*, *supra* note 2 at para. 431.
[31] *MDS Trial*, *supra* note 2 at paras. 430 and 434.
[32] *MDS Trial*, *supra* note 2 at para. 452.
[33] *MDS Trial*, *supra* note 2 at para. 454.
[34] *MDS Trial*, *supra* note 2 at para. 462.

damage" because she concluded that to do otherwise would deprive MDS of a significant aspect of the coverage that it purchased.[35]

The Appeal Decision

As stated above, the Court of Appeal reversed the Trial Decision. Justice Thorburn held that the Trial Judge had erred with regard to her interpretation of the Corrosion Exclusion and its embedded exception.

On the meaning of "corrosion", the Court of Appeal reiterated that American authorities may be particularly persuasive where there are few Canadian authorities on point, and where the underlying insurance contract is used in both jurisdictions. The Court held that there was a consistent line of authority from American appellate courts that the meaning of "corrosion" in insurance policies includes both fortuitous and non-fortuitous corrosion.[36]

The Court of Appeal also held that the Trial Judge had erred in concluding that the word "corrosion" as used in the policy was ambiguous.[37] In this regard, the Court held that the Trial Judge had misinterpreted the evidence of Factory Mutual's witnesses. Those witnesses did not concede that some losses from corrosion would fall within the scope of coverage (as the Trial Judge interpreted). Rather, the evidence given by those witnesses indicated that losses flowing from corrosion might be covered if the corrosion itself was caused by some non-excluded physical loss or damage to property. The Court held that these witnesses did not concede that corrosion itself was an insured peril.[38] Moreover, the Court confirmed that the subjective evidence of Factory Mutual's witnesses given years after the policy was entered into was not proper or relevant evidence of the factual matrix that existed at the time the contract was executed.[39]

Ultimately, the Court held that the Trial Judge erred in her interpretation of the word "corrosion" for ten reasons,[40] an important one of which was the fact that the Corrosion Exclusion would be meaningless if it applied only to non-fortuitous corrosion because non-fortuitous events do not fall within the scope of coverage under an all-risks insurance policy.[41]

With regard to the meaning of "physical damage" as used in the exception to the Corrosion Exclusion, the Court held that there is a long line of authority for the proposition that "exclusions for physical damage do *not* include loss of use or pure economic loss" unless otherwise provided.[42] The Court distinguished the cases relied upon by the Trial Judge on the basis that those cases dealt with the issue of "whether loss of *use* was covered by a policy of

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[35] *MDS Trial*, *supra* note 2 at para. 519.
[36] *MDS Appeal*, *supra* note 1 at para. 62.
[37] *MDS Appeal*, *supra* note 1 at para. 78.
[38] *MDS Appeal*, *supra* note 1 at para. 74.
[39] *MDS Appeal*, *supra* note 1 at para. 75.
[40] *MDS Appeal*, *supra* note 1 at para. 77.
[41] *MDS Appeal*, *supra* note 1 at para. 77(9).
[42] *MDS Appeal*, *supra* note 1 at para. 86.

insurance that insured against all risks of 'direct physical loss'".[43] By contrast, the Court held that in the instant case, the loss of profit claimed arose from the need to repair the corrosion, and not from property damage.[44]

The Court therefore distinguished between: (i) coverage for losses flowing from an insured peril in an all-risks insurance policy that causes a loss of use; and (ii) coverage for losses that are themselves "physical damage" in nature. Because the loss of use of the nuclear reactor was not itself "physical damage", it did not fall within the exception to the Corrosion Exclusion.[45]

The Court held that the language of the exception – "but, if physical damage not excluded by this Policy results, then only that resulting damage is insured" – covers the costs of repairing physical damage to insured property.[46] Consequently, the costs to repair the leak in the inner wall of the nuclear reactor would be covered under the policy, but MDS had no claim to such damages because the nuclear reactor belonged to AECL.

Points of Note

The MDS Decisions are important for practitioners of insurance law for at least three reasons.

First, the MDS Decisions reaffirm and thoroughly canvass cardinal principles of insurance policy interpretation. As the Court of Appeal held in the Appeal Decision:

> Standard form contracts of insurance should be interpreted consistently…
>
> Where the language of the disputed clause is unambiguous, effect should be given to the clear language of the policy read in the context of the policy as a whole […] It is unnecessary to consider extrinsic evidence in order to interpret its terms […] However, like all contracts, the policy is examined in light of the surrounding circumstances…
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> […]
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> …where a policy provision is ambiguous, the rules of contract construction may be employed to resolve the ambiguity. A contractual provision is ambiguous if it is reasonably susceptible of more than one meaning […] The goal is to reach a sensible commercial result that reflects the intentions of the parties at the time the agreement was entered into…[47]

The Appeal Decision reminds insurance law practitioners that an ambiguity in policy language should not be manufactured when the plain language of the policy is clear. To attempt to

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[43] *MDS Appeal*, *supra* note 1 at para. 82.
[44] *MDS Appeal*, *supra* note 1 at para. 83.
[45] *MDS Appeal*, *supra* note 1 at para. 96.
[46] *MDS Appeal*, *supra* note 1 at para. 93(2)(c) and 94.
[47] *MDS Appeal*, *supra* note 1 at paras. 39-43.

manufacture an ambiguity based on extrinsic evidence would invite the same error reflected in the Trial Decision's interpretation of the otherwise unambiguous word "corrosion".

Second, the MDS Decisions emphasize that the objective factual matrix that is relevant to interpreting a contract is that which existed at the time of contract formation. The Decisions are a warning against calling subjective evidence of the meaning of an insurance contract, as well as evidence that post-dates the formation of the contract (in this case by many years). As the Court of Appeal held, "the subjective belief of a party long after the standard form policy was entered into, absent other circumstances, is not evidence of the reasonable intention of the parties at the time the contract was entered into".[48]

Indeed, the general principle that a contract be interpreted pursuant to the objective intent of the parties at the time of contract formation – rather than based on evidence that post-dates the formation of the contract – is an important safeguard against ends-based reasoning. As noted above, the Trial Judge effectively concluded that it would be inequitable to interpret the term "physical damage" restrictively because doing so would deprive MDS from coverage it had purchased for corrosion. But this conclusion was premised upon knowledge that corrosion had occurred, and then reasoning back to assume that MDS purchased coverage for the very event that transpired. The Trial Judge did not analyze what circumstances were known to the parties at the time of contract, and whether, objectively, the insurance policy that MDS purchased was intended to cover insured perils other than corrosion.

Third, the precedential value of the Appeal Decision is affected by the issues that were actually in dispute. It is important to recognize (and re-emphasize) that the issue of whether the initial grant of coverage was triggered under the policy was not disputed in the MDS Decisions. Factory Mutual accepted that there had been loss of profit "directly resulting from physical loss or damage" to insured property. The issues in dispute were whether the insured peril (*i.e.*, corrosion) was excluded, and whether the nature of the *loss* was a type of loss covered by the policy (*i.e.*, "physical damage").

Notwithstanding the above limitations, the Appeal Decision may have significant persuasive value in future COVID-19-related litigation given the Court's explicit conclusion that specific and explicit language is required to bring claims for economic losses within the scope of coverage of an all-risks insurance policy that is premised upon physical loss or damage as an insured peril.[49]

Conclusion

The Appeal Decision corrects the significant departure in law reflected in the Trial Decision and restores the *status quo* applicable to the interpretation of insurance contracts in Ontario. Although the strict precedential value of the Appeal Decision might be limited given the concession that the initial grant of coverage had been triggered in the circumstances, the Court

[48] *MDS Appeal*, *supra* note 1 at para. 75.
[49] *MDS Appeal*, *supra* note 1 at paras. 85-89.

of Appeal's conclusion that specific and express language is required to bring claims for loss of use within the scope of coverage of an all-risks insurance policy premised upon physical loss or damage may be helpful for parties in future cases.

Toronto Law Journal

Foreign Bribery and Conspiracy: A New Plot Twist

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I have previously written about the *Karigar* case in this Journal under the title of "Foreign Bribery and Conspiracy: A Plot that could be written in Hollywood"[1] and then "Foreign bribery and Conspiracy: The Plot Thickens".[2] The Ontario Court of Appeal affirmed the conviction of Mr. Karigar.[3]

In my previous articles I noted that a very unusual aspect of the case is that Mr. Karigar described the scheme in an e-mail sent under a pseudonym "Buddy" to the Fraud Section (FCPA) of the US Department of Justice stating he had information about US citizens paying bribes to foreign officers and inquired about reporting the matter. Mr. Karigar subsequently admitted that he was "Buddy". The statement, also cited by the Court of Appeal, described the scheme as follows (and I have highlighted the names of the key players):

> *There was a tender put out by Air India (Government of India enterprise) for a biometric security system, Cryptometrics bid on the system.*
>
> *Cryptometrics Paid USD 200,000 to make sure that only 2 companies were technically qualified.*
>
> *They paid $250,000 for the minister to 'bless' the system. There are documents executed to return the funds if the contract is not awarded. There are recordings asking for the money back.*
>
> *The People involved are* ***Mr. Robert Barra, US citizen, CEO of Cryptometrics and Dario Berini, COO of Cryptometrics, also US Citizen****.*
>
> *I am a Canadian Citizen on contract with the Canadian subsidiary of Cryptometrics.*
>
> *What about my immunity?*

The sequel to the Hollywood script in *Karigar* was the conviction of Robert Barra and Shailesh Govindia. But in a new plot twist, the Court of Appeal has just declared a mistrial on appeal and ordered a new trial for both Mr. Barra and Mr. Govindia. Recall that Robert Barra was referred to by name in the email sent by Mr. Karigar to the FBI reprinted above.

To set the stage for this new plot twist, the history is that on January 11, 2019, Mr. Justice Robert J. Smith of the Ontario Superior Court of Justice found Mr. Robert Barra and Mr. Shailesh Govindia guilty of contravening s. 3(1) of the *Corruption of Foreign Public Officials*

[1] Toronto Law Journal February 2014
[2] Toronto Law Journal January 2018
[3] *R. v. Karigar*, 2017 ONCA 576, 350 C.C.C. (3d) 141 (Ont. C.A.).

Act (CFPOA). It was alleged that Mr. Barra and Mr. Govindia had agreed to give a benefit to foreign public officials to ensure Cryptometrics Canada would obtain a contract with Air India. Both Mr. Barra and Mr. Govindia were sentenced to 36 months' imprisonment.

An interesting aspect of the decision by Justice Smith was the acquittal of Barra on separate charges of bribing two Air India employees. Justice Smith concluded that the two Air India employees were indeed "foreign public officials" within the meaning of the CFPOA, consistent with the finding of Justice Hackland in *Karigar*. Central to this conclusion was the fact that Air India was "directly owned by the Indian Government". However, Smith J. also found that the Crown was required to prove that Mr. Barra knew the official character of the two Air India employees. Thus, while there was a conviction on the bribery of the Indian minister of civil aviation, there was also an acquittal on the bribery of the two Air India employees on the basis of Mr. Barra's lack of knowledge of their official status. The uncertainty in this case stems from the fine definitions about the status of crown corporations in foreign jurisdictions, compared to the definition of crown corporations in Canada.

The Court of Appeal upheld a number of aspects of Justice Smith's decision, which have implications for the evolution of substantive law under the CFPOA.[4] It was, however, a mistrial application related to disclosure issues that was the prosecution's undoing. This note will review both the substantive aspects of the decision, as well as analyzing the procedural ruling ordering the mistrial.

(A) BACKGROUND

Mr. Barra was a co-Chief Executive Officer ("CEO") of Cryptometrics U.S. The trial judge found as a fact that he was the "controlling mind" of both Cryptometrics U.S. and Cryptometrics Canada.

Mr. Govindia was the CEO of a company named Emerging Markets Groups Holdings Ltd. ("EMG").

The Court reviewed two phases of the scheme. In Phase One, Mr. Barra, Mr. Berini, Mr. Bell, and Mr. Karigar were alleged to have conspired to bribe Indian foreign officials as follows: they allegedly agreed to pay $200,000 to Air India employees who were in charge of the bidding process for the contract; and they allegedly agreed to pay $250,000 to Praful Patel, the Indian Minister of Civil Aviation, in order to obtain the contract with Air India.

In relation to Phase One, the trial judge concluded that, while Mr. Barra was aware that the $200,000 was in fact transferred for the purpose of bribing various Air India employees, he had a reasonable doubt as to whether Mr. Barra knew that the bribe was being made to "foreign public officials" within the meaning of s. 2 of the CFPOA.

In any event, the trial Judge held that the $250,000 bribe was another story in this Hollywood plot. The trial judge concluded beyond a reasonable doubt that Mr. Barra not only knew that this amount was being paid to Mr. Patel, but he also knew that Mr. Patel was in fact a foreign

[4] Fairburn A.C.J.O., Watt and Zarnett JJ.A. Reasons were from The Court.

public official and that the money was being used as a bribe to obtain the contract with Air India.[5]

Phase Two allegedly involved a further plan by Mr. Barra, Mr. Berini, and Mr. Govindia to pay Mr. Patel a $500,000 bribe to further ensure the award of the Air India contract. In Phase Two, Mr. Govindia replaced Mr. Karigar as a member of the conspiracy.[6]

Mr. Barra elected not to call any evidence in defence. Mr. Govindia testified at trial. He acknowledged that he was present for the discussions undergirding Phase Two, discussions that took place in New York City. Mr. Govindia's testimony advanced a double cross theory that is yet another twist in the plot. He maintained at trial that his agreement to participate in the bribe, which was caught on audiotape, was a façade and that he never intended to actually pay the bribe. Rather, Mr. Govindia testified at trial that he "agreed" only so that he would be more likely to obtain the consulting contract that was on the table, having no intention of actually paying a bribe in the end. While Mr. Govindia acknowledged that it was a serious error of professional judgment on his part to have pretended to be willing to bribe Mr. Patel, he said that he cleared things up with Mr. Barra the morning following the recorded meeting, saying that he would not be involved in this type of conduct.[7]

(B) SECTION 11(B) RULING

Mr. Barra and Mr. Govindia brought a s. 11(b) application prior to the outset of trial, seeking a stay of proceedings. Section 11(b) rulings are typically very fact specific and in this case involved factors such as that, when the charges were laid, Mr. Barra was living in the United States, while Mr. Govindia was living in the United Kingdom. Therefore, the Crown was required to seek their extraditions to Canada.

The Court of Appeal found no error in the application judge's ruling. The *net* delay for both appellants is below the 30-month ceiling. There is no suggestion that the appellants' s. 11(b) rights were infringed if the net delay falls below that ceiling.

In *obiter*, the Court noted agreement with the application judge's reasons as they relate to the complexity in this case and how it could have factored in the s. 11(b) analysis. An interesting comment by the Court is that the provision under which the appellants were prosecuted is "a rarely used one and, therefore, there is little case law amplifying the correct legal course."[8] Critics may point to this observation as an example of Canada's poor track record in enforcing foreign bribery laws,[9] but this state of affairs will change going forward.

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[5] *R. v. Barra*, 2021 ONCA 568 at paras. 14- 16 [*Barra*].
[6] *Barra*, *ibid.*, at para. 14.
[7] *Barra*, *ibid.* at para. 18.
[8] *Barra*, *ibid.* at para. 41. Therefore, the Court states that even if they were of the view that this matter fell a distance above the 30-month ceiling, like the application judge, the Court would not have determined that it constituted unreasonable delay (at para. 42).
[9] Christopher Nardi, "Canada's efforts to fight foreign bribery are 'shockingly low,' new report says" (Oct 14, 2020). Canada is considered to be a country with 'limited' enforcement since 2016, putting us on par with Costa Rica, Argentina, Colombia, and well below other major allies, citing a report from Transparency International Canada.

(C) JURISDICTION

The CFPOA has since been amended to deem acts or omissions occurring elsewhere to have taken place in Canada if the perpetrator is a citizen or permanent resident of Canada or is present in Canada after the offence. None of those amended provisions applied to Mr. Barra and Mr. Karigar given the timing of the case.

In my previous articles about the *Karigar* case in this Journal, I reviewed the jurisdictional challenge made by Mr. Karigar which was rejected at his trial and by the Court of Appeal. Mr. Barra and Mr. Govindia argued that their situation is distinguishable.

The Court of Appeal confirmed that the alleged conspiracy had a substantial link — a real and substantial connection — to Canada. It was, after all, Cryptometrics Canada, a Canadian company, attempting to obtain a contract to supply its biometrics recognition system to Air India, through the unlawful means of paying bribes.

Mr. Barra and Mr. Govindia argued that the Crown's case conflates the individuals with Cryptometrics Canada, contrary to the principle of corporate separateness. The Court of Appeal held that there is no merit to that submission. "The conspiracy the appellants are alleged to have entered was to obtain a contract for Cryptometrics Canada, of which the appellant Mr. Barra was the controlling mind. No conduct of the company is being attributed to the appellants."[10]

This raises a separate question, discussed later in this note, as to why Cryptometrics was not charged in this case.

Mr. Govindia argued as well that the trial judge erred in failing to find that Count 1 of the indictment against him violated the principle of specialty, which prevents the Crown from prosecuting an extradited accused for an offence other than that for which he was extradited. The Court of Appeal found that the trial judge was entitled to find that the application for extradition included the actual wording of the conspiracy charge that ultimately appeared in the preferred indictment.

(D) THE *MENS REA* REQUIREMENTS FOR A CFPOA OFFENCE

The *mens rea* requirements for a CFPOA offence is a critical issue, particularly given the paucity of cases decided under this section, as noted by the Court of Appeal.

With respect to the *mens rea* of the offence set out in s. 3 of the *CFPOA*, the Department of Justice Guide to the *CFPOA* Guide states:

> No particular mental element (*mens rea*) is expressly set out in the offence since it is intended that the offence will be interpreted in accordance with common

[10] *Barra, supra* note 5 at para. 56.

> law principles of criminal culpability. The courts will be expected to read in the *mens rea* of intention and knowledge.[11]

In *Barra*, the trial judge held that s. 3(1) of the CFPOA, like bribery, is a specific intent offence. He relied on *R. v. Smith*[12] for the proposition that "knowledge by the accused of the official character of the person to whom the bribe is offered is an essential element of bribery".

The trial judge was not satisfied beyond a reasonable doubt that Mr. Barra nor Mr. Berini knew that the Air India officials who received bribes were foreign public officials as defined in the CFPOA. He found that Mr. Bell and Mr. Berini, but not Mr. Barra, reasonably but incorrectly believed that Air India was a Crown corporation; in fact, however, it was owned directly by the Government of India, making the Air India employees foreign public officials as defined in the CFPOA.

On appeal, the Crown argued that if Mr. Barra knew the bribes were going to Air India employees, the scope of their responsibilities, and their ability to influence the awarding of a contract by Air India, then he had the necessary *mens rea*. The Crown argued that question of how those facts fit within the definition of a foreign public official in s. 2 of the CFPOA is a question of law. An erroneous view of the law is not a defence.[13]

The Court of Appeal held that the trial judge did not err in his conclusion on *mens rea*. In order to have the necessary *mens rea* for an offence under s. 3(1) of the CFPOA, an accused must know that the person bribed or offered a bribe has the characteristics described in the definition of "foreign public official" by ss. 2(a)-(c) of the CFPOA. The Court then set out the test that should apply where the person bribed or offered a bribe is employed by a corporation:

> In a case where the person bribed or offered a bribe is employed by a corporation, to have the necessary *mens rea*, the accused must know not only that the person was employed by the corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. The accused need not know that this is how the CFPOA defines a foreign public official, nor that bribing the person is illegal.[14]

As applied to the facts in *Barra*, the Court of Appeal observed that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country:

> The trial judge did not find that Mr. Barra knew that Air India was established to perform a duty or function on behalf of the state of India. A corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. Although the trial judge referred to the belief of Mr. Berini and Mr. Bell that Air India was a Crown corporation, he also noted that their belief was inaccurate. Importantly, however, he did not draw the inference that Mr. Barra shared that belief and, in our view, he was not

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[11] Department of Justice, "The Corruption of Foreign Public Officials Act: A Guide" (May 1999): http://publications.gc.ca/collections/collection/J2-161-199E.pdf (CFPOA Guide), footnote 183 at p. 3.
[12] *R. v. Smith* (1921), 67 D.L.R. 273, at p. 275 (Ont. C.A.).
[13] *Criminal Code of Canada*, R.S.C., 1985, c. C-49, s. 19.
[14] *Barra, supra* note 5 at para. 80.

> obliged to. In light of that, it is unnecessary to consider whether that belief, if shared by Mr. Barra, would have been tantamount to knowledge that Air India was formed to fulfill a duty or function of the state of India.[15]

It is true that a corporation that has the name of a country in it is not necessarily one formed to carry out a duty or function of the government of that country. A classic example of this is Air Canada, which of course is not a government entity.

As a practical matter, it may be a high evidentiary bar for the prosecution to prove that the accused knew not only that the person bribed was employed by a corporation, but that the corporation was established to perform a duty or function on behalf of a foreign state, or is performing such a duty or function. Short of documentation such as e-mails that show knowledge, the prosecution may have to rely on testimony from associates that a given person was aware of the governmental status of an entity.

The high bar to prove such knowledge leads to a discussion of a sometimes forgotten aspect of *mens rea,* willful blindness, discussed in the next section.

(E) POTENTIAL APPLICATION OF THE DOCTRINE OF WILLFUL BLINDNESS

In my view, at the new trial, the doctrine of willful blindness should be explored as it potentially applies to the facts in *Barra*. The concept of *mens rea* includes the doctrine of willful blindness, which has been reviewed by the Supreme Court of Canada in the *Briscoe*[16] decision. Justice Charron for the Court observed that: "The doctrine of willful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries."[17]

In *Barra*, in relation to Phase One, the trial judge concluded that, while Mr. Barra was aware that the $200,000 was in fact transferred for the purpose of bribing various Air India employees, he had a reasonable doubt as to whether Mr. Barra knew that the bribe was being made to "foreign public officials" within the meaning of s. 2 of the CFPOA.[18] Given the size of this bribe, and the knowledge that a bribe was being paid at all, it is arguable that Mr. Barra should have made inquiries about the status of Air India. The question is whether this knowledge of the $200,000 bribe created a suspicion to the point where Mr. Barra saw the need for further inquiries, but deliberately choose not to make those inquiries.

The concept of willful blindness has a U.S. parallel in the doctrine of conscious avoidance or the "head in the sand" approach.[19] This concept has been developed in the anti-corruption area in cases such as the colourful *Bourke* case involving the "Pirate of Prague".[20] Tapes of phone

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[15] *Barra, ibid.* at para. 81.
[16] *R. v. Briscoe*, [2010] 1 S.C.R. 411, 253 C.C.C. (3d) 140.
[17] *Briscoe*, *ibid.*, at para. 21.
[18] *Barra, supra* note 5 at para. 15.
[19] Robert Tarun, ed., *The Foreign Corrupt Practices Act Handbook*, 3rd ed. (Chicago: American Bar Association, 2013) at pp. 9-10 ("Tarun, *Handbook*").
[20] *U.S. v. Kozeny*, 667 F.3d 122 (2d Cir., 2011).

conversations in this case are illustrative of the type of discussions that constitute conscious avoidance or deliberate ignorance. The following passage is a transcript of Bourke's words:

> What happens if they break a law in … Kazakhstan, or they bribe somebody in Kazakhstan and we're at dinner and … one of the guys says, 'Well, you know, we paid some guy ten million bucks to get this now.' I don't know, you know, if somebody says that to you, I'm not part of it … I didn't endorse it. But let's say … they tell you that. You got knowledge of it. What do you do with that? … I'm just saying to you in general … do you think business is done at arm's length in this part of the world.[21]

The United States Court of Appeals for the Second Circuit concluded that the above type of comments could permit a rational juror to conclude that Bourke deliberately avoided confirming his suspicions that his business associate and his cohorts may be paying bribes.

In the *Karigar* case, Justice Feldman cites a meeting with the Consulate General for Canada in Mumbai where corruption in general in India was discussed and specifically how government figures would get up to eight percent of the value of a contract as a bribe payment:

> On May 15, 2007, the appellant and Berini met with Annie Dubé at the Consulate General for Canada in Mumbai. During the meeting, the appellant stated that Cryptometrics had paid a bribe to Praful Patel (Minister of Civil Aviation—India) through an agent in order to clear the process and obtain the Air India contract. The appellant also stated that their agent confirmed the bribe money had been received by Patel. The appellant did not disclose the identity of the agent, nor the amount of money that was paid. The appellant also talked about corruption in general in India and specifically how government figures would get up to eight percent of the value of a contract as a bribe payment. The appellant stated "but we know he received the money" and "you didn't hear that from us". He continued that "we went to an agent and he received something. And we got information from the agent that the Minister received it." Dubé testified that she was shocked and expressed that they could be prosecuted (or sued).[22]

It may be an issue in the retrial of Mr. Barra whether he was party to any general discussions about how government figures would get up to eight percent of the value of a contract as a bribe payment. If he was a party to such discussions, this could raise the issue as to whether or not he was willfully blind to the issue of whether or not the Air India officials who he knew were being bribed were government officials.

(F) THE MISTRIAL

The facts that justify the declaration of a mistrial are complex, and this short article can only summarize the highlights. Crown counsel proposed to adduce reply evidence from their principal witness, Mr. Berini, about the authenticity of a document allegedly bearing his signature, introduced by counsel for Mr. Govindia during his cross-examination of Mr. Berini.

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[21] *Kozeny*, *ibid.*, at p. 15.
[22] *Karigar*, *supra* note 3, at para. 43.

Counsel for the appellants sought an order declaring a mistrial on the basis that the Crown had failed in its disclosure obligations.

The key to understanding the mistrial is the advice provided by the Crown to defence counsel that that there was no deal, written or unwritten, in place for Mr. Berini. Yet, in the final set of disclosure, Crown counsel disclosed an email sent by Mr. Berini's counsel to the Crown confirming the terms of the witness preparation meeting. That email confirmed the agreement that anything communicated by Mr. Berini during the meeting could not be tendered by the Crown in any future proceedings against him. Thus, it could not be said, as the Crown had previously advised, that there was no deal in place for Mr. Berini. The Court of Appeal eloquently describes this arrangement whereby Mr. Berini was not a mere witness, but rather "a team player":

> In determining the nature and extent of their cross-examination of the critical Crown witness Mr. Berini, the appellants were entitled to know, contrary to what they had been advised by senior Crown counsel, that there was, in fact, an agreement with Mr. Berini about the future use of what he said during preparation. While s. 13 of the Charter would protect Mr. Berini's compelled testimony from being used against him at a subsequent trial, no similar protection would be offered for the content of the Crown interviews, to the extent they went beyond that to which was testified in court. The appellants were entitled to know that Mr. Berini's involvement in the case with the Crown extended well beyond what he said in the witness box. No mere witness, he. A team player.[23]

In the result, the Court of Appeal was persuaded of the reasonable possibility that the delayed disclosure affected the overall fairness of the trial process.

(G) THE ROLE OF CONSPIRACY

The trial was conducted on the basis that the offence alleged was a conspiracy and that proof of guilt could be made through application of the co-conspirator's exception to the hearsay rule. The appellants objected to the way in which the Trial Judge treated the first and second phases of the alleged conspiracy. Since the Court of Appeal decided to order a new trial on other grounds, the Court restricted their reasons on this issue to what is necessary to assist the judge presiding at the new trial.

The Court observed that, as a matter of criminal pleading, the count as framed did not allege conspiracy in the traditional sense, nor does s. 3(1) of the CFPOA, the offence-creating provision. The important point made in the following passage is that none could deny the availability of the co-conspirators' (common unlawful design) exception to the hearsay rule:

> It may be open to question whether, as a matter of criminal pleading, the count with which we are concerned alleges the inchoate or preliminary crime of conspiracy, as opposed to a count charging joint commission of a substantive offence whose external circumstances may include an agreement. However, as a means of proof, none could gainsay the availability of the co-conspirators'

[23] *Barra, supra* note 5 at para. 163.

> (common unlawful design) exception to the hearsay rule: *R. v. Koufis*, [1941] S.C.R. 481; *R. v. Cloutier*, [1940] S.C.R. 131.[24]

In this case, there was a common agreement that continued throughout — to obtain the Air India contract for Cryptometrics Canada. There was a common means to achieve that goal. "In a word, bribery."[25] Given the common agreement, the Court carves out some granular details that the Crown need not prove: "It was not necessary for the Crown to prove that the parties to the agreement were in direct communication with one another, that each was aware of the identity of the other alleged co-conspirators, nor that each was aware of all of the details. Provided each, as in this case Mr. Govindia, was aware of the general nature of the common design and intended to adhere to it, liability is established: Longworth, at pp. 565-66."[26]

(H) CORPORATE CRIMINAL LIABILITY

The company Cryptometrics was never charged as part of what I have referred to as this Hollywood saga. Mr. Barra was a co-Chief Executive Officer ("CEO") of Cryptometrics U.S. The trial judge found as a fact that he was the "controlling mind" of both Cryptometrics U.S. and Cryptometrics Canada.

In light of the allegations against Barra, it is an interesting question as to why the company was not also charged. This is a complex area, and there may have been issues with respect to Mr. Barra's scope of authority.[27] Perhaps one explanation relates to the fact that Cryptometrics was not successful in obtaining the Air India contract.[28]

CONCLUSION

The *Karigar* case ended with a Hollywood ending. That ending contained a message to the Canadian business community that anti-corruption compliance ought not to be relegated to the back row. The *Barra* decision adds several new plot twists and a sequel in the form of a new trial.

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[24] *Barra, ibid.* at para. 174.
[25] *Barra, ibid.* at para. 178.
[26] *Barra, ibid.* at para. 181.
[27] See Todd L. Archibald and Kenneth E. Jull *Profiting from Risk Management and Compliance* | Chapter 10. The Changing Face of Corporate and Organizational Criminal Liability § 10:23. Senior Officer Level — Acting Within the Scope of their Authority.
[28] https://www.theglobeandmail.com/news/national/executive-convicted-in-indian-bribery-conspiracy/article13804839/

Toronto Law Journal

The Balancing of Interests and The Tilting of Scales

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On October 5th and 6th, 2021, the Supreme Court will hear arguments in *R. v. J.J.* challenging the constitutionality of the new "reverse disclosure" legislation created by Bill C-51 in 2018.

The entire records screening regime is the subject of the appeal and cross-appeal, primarily focusing on the treatment of non-sexual records in the possession of the accused.

The legislation has largely been seen as a response to the trial of Jian Ghomeshi, in which each complainant was confronted with emails and other correspondences that dramatically undermined their credibility.

The Attorneys General often argue that the legislation is a response to the Supreme Court's decision in *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33 which dealt with privacy interests in a complainant's diary which had lawfully fallen into the possession of the accused.

The debate about what comprises a "record" with an expectation of privacy looms large at the heart of the legislation. The Courts have come to different conclusions on privacy interests, particularly where the evidence is electronic communications between the complainant and accused.

Complainants have always been free to provide police with text messages or other electronic communications to support their allegations without need for a warrant. In *R. v. Marakah*, 2017 SCC 59 (CanLII), [2017] 2 SCR 608, Justice Moldaver wrote in dissent that a finding of privacy interests in text messages could interfere with the reporting of sexual assaults.

If electronic communications in sexual assault cases are found to carry an expectation of privacy, it would have an impact on both the defence and prosecution of all charges enumerated in these sections of the Criminal Code.

Counsel for J.J. argues that the new sections 278.92 to 278.94 "represent Parliament's legislative choice to protect complainants' interest, not their constitutionally protected rights." They submit that in this attempt to balance the interests of a complainant against the constitutionally protected fair trial rights of an accused, the new legislation is ineffective, harmful, and ultimately unsalvageable.

An important consideration is that the presumptive inadmissibility of non-sexual evidence under s. 278.92 is not based on the nature of the evidence. Unlike sexual history evidence there is nothing inherently prejudicial about the type of non-sexual evidence in the accused's possession and it is only inadmissible because of who possesses the evidence.

One of the issues which is not as commonly addressed is an access to justice concern. With the new regime an accused must pay for extended evidentiary hearings and the time delays that go along with it. Meanwhile, complainants are provided with free legal counsel regardless of their ability to pay for their own representation. No complainant is denied "legal aid."

Many of the problems with the new legislation arise from the lack of precision or guidance regarding how the new rules are to be applied. There have been diverse rulings about whether or not a complainant should be given access to the full application record, whether or not they have standing at stage one to determine if a hearing should even be granted and, of course, which unlisted types of evidence attract a reasonable expectation of privacy.

Where an accused brings a motion for directions to find out if the evidence in their possession constitutes a "record" which requires an application, complainants have sometimes been granted standing to determine the status of the evidence and whether or not the complainant should be permitted to see the evidence or it should be sealed until a ruling is made.

This type of uncertainty and unequal outcomes in pre-trial applications lends to the argument that the legislation cannot survive proper scrutiny.

The most obvious concern with the changes for both evidence of a sexual and non-sexual nature is the complainant's standing and ability to know which evidence the defence plans to cross-examine her on.

Legitimate arguments have been made by the Crown that there are other situations which have the same effect. In the case of a re-trial, the defence will already have the earlier testimony to address any changes in the complainant's evidence. In a third party records application the complainant already has constitutional standing at the hearing but the application record is limited to arguing potential relevance only of the records the defence seeks to acquire.

The new regime requires that the defence lay out much more detail of their anticipated theory and trial strategy. The presumptive inadmissibility of all evidence in the accused's possession practically assumes that there is no legitimate defence to a sexual assault allegation.

Pre-trial applications cannot substitute for a trial and with the elimination of most preliminary inquiries it is unrealistic to expect the defence to know which evidence they will need to call at trial before capturing the complainant's accusation under oath in a proper court of law.

While counsel for J.J. and intervenors for criminal defence lawyers have largely based their written submissions on foundational principles of our legal system, the facta for the Attorneys General and groups who advocate for complainants focus more on emotional arguments and public faith in the legal system.

The Attorney General of Ontario argues in her factum that complainants are harmed by the trial itself, without explaining how to prevent a complainant from having to be involved in a trial.

One of the claimed traumas is described as being that "the rituals of the courtroom, such as its physical layout and the robing of those educated in the law, make clear that the complainant plays a subordinate role that often mirrors the gender, race and socio-economic status-based societal hierarchies in which the problem of sexual violence is rooted."

While it is a noble goal to address the problems specific to sexual assault trials, this particular point is repugnant and fails to recognize the importance of the process bringing home to any witness, including complainants, the solemnity of the trial. In addition, it is offensive to the presumption of innocence which must remain intact. Complainants are not the only people traumatized by the trial process, especially where the accusation is false. An accused and complainant both have their privacy violated by having to speak about their sexual lives in a public courtroom, never mind the harm done to an individual falsely charged with such an offence. These arguments presuppose the allegation is true and are harmful to trial fairness.

Hence these are unsolvable problems. Accused people must have trials and those trials will be difficult for all involved. While it would be nice if everyone could retain their dignity and privacy in a sexual assault trial, the legal system is not capable of tilting the scales so far that innocent people are at risk of wrongful convictions due to a presumption that any evidence in their defence is inadmissible.

The Supreme Court has overwhelmingly ruled in favour of the Crown in the majority of sexual assault appeals over the last year. They have deferred to the decisions of trial judges who were in the position to view all the evidence. Now is their chance to make sure all the relevant evidence is permitted into the trial.