



**SUPREME COURT OF CANADA**

**CITATION:** Grant Thornton LLP  
v. New Brunswick, 2021 SCC 31

**APPEAL HEARD:** March 24, 2021  
**JUDGMENT RENDERED:** July 29,  
2021  
**DOCKET:** 39182

**BETWEEN:**

**Grant Thornton LLP and Kent M. Ostridge**  
Appellants

and

**Province of New Brunswick**  
Respondent

**AND BETWEEN:**

**Grant Thornton International Ltd.**  
Appellant

and

**Province of New Brunswick**  
Respondent

- and -

**Chartered Professional Accountants of Canada**  
Intervener

**CORAM:** Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

**REASONS FOR  
JUDGMENT:**  
(paras. 1 to 64)

Moldaver J. (Karakatsanis, Côté, Brown, Rowe, Martin and  
Kasirer JJ. concurring)

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GRANT THORNTON LLP v. NEW BRUNSWICK

**Grant Thornton LLP and  
Kent M. Ostridge**

*Appellants*

v.

**Province of New Brunswick**

*Respondent*

- and -

**Grant Thornton International Ltd.**

*Appellant*

v.

**Province of New Brunswick**

*Respondent*

and

**Chartered Professional Accountants of Canada**

*Intervener*

**Indexed as: Grant Thornton LLP v. New Brunswick**

**2021 SCC 31**

File No.: 39182.

2021: March 24; 2021: July 29.

Present: Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK

*Limitation of actions — Discoverability — Requisite degree of knowledge to discover claim — Negligence — Province delivering loan guarantees to company based on auditor’s report — Company running out of working capital months after receiving loan from bank — Province paying out guarantees — Province commencing negligence claim against auditor — Auditor seeking summary judgment on basis that claim commenced after two-year statutory limitation period — Standard to be applied in determining whether plaintiff has requisite degree of knowledge to discover claim — Whether province discovered negligence claim against auditor — Whether claim statute-barred — Limitation of Actions Act, S.N.B. 2009, c. L-8.5, s. 5(1)(a), (2).*

In 2008, a New Brunswick-based company sought loans from a bank, but it needed loan guarantees from the province. The province agreed to \$50 million in loan guarantees, conditional upon the company subjecting itself to an external review of its assets by its auditor. The auditor opined in a report that the company’s financial statements presented fairly, in all material respects, the company’s financial position in accordance with generally accepted accounting principles. Relying upon that report, the province executed and delivered the loan guarantees, which, in turn, enabled the company to borrow funds from the bank. When the company ran out of working capital

four months after receiving the loan guarantees from the province, the bank called on the province to pay out the loan guarantees, which it did on March 18, 2010. The province then retained another accounting and auditing firm to review the company's financial position. The other firm's report was issued in draft on February 4, 2011, and opined that the company's financial statements had not, in fact, been prepared in conformity with generally accepted accounting principles. Specifically, the other firm estimated that the company's assets and net earnings were overstated by a material amount. Those misstatements had not been identified by the auditor in its report.

On June 23, 2014, the province commenced a claim against the auditor, alleging negligence. The auditor moved for summary judgment to have the claim dismissed as statute-barred by virtue of the limitation period under s. 5(1)(a) of the provincial *Limitation of Actions Act* (“LAA”), which provides that no claim shall be brought after two years from the day on which the claim was discovered. The motions judge held that, properly interpreted, s. 5(2) of the LAA, which sets out when a claim is discovered, required that the province knew or ought to have known that it had *prima facie* grounds to infer that it had a potential cause of action against the auditor. He granted summary judgment and struck the province's action, finding that the province had the requisite knowledge by March 18, 2010, more than two years before it commenced its claim. The Court of Appeal allowed the province's appeal and set aside the motion judge's judgment. It rejected the standard used by the motions judge and held that the governing standard was whether a plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy, which the court

found can only exist if the plaintiff has knowledge of each constituent element of the claim. Applying that standard, it found that the limitation period had not been triggered because the province had not yet discovered its claim.

*Held:* The appeals should be allowed and the motions judge's judgment restored.

The standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2) of the *LAA*, thereby triggering the two-year limitation period in s. 5(1)(a), is whether the 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. Applying this standard in the present case, the province discovered its claim against the auditor on February 4, 2011. By then, it knew or ought to have known that a loss occurred and that the loss was caused in whole or in part by conduct which the auditor had been retained to detect. This was sufficient to draw a plausible inference that the auditor had been negligent. Since the province did not bring its claim until June 23, 2014, more than two years later, its claim is therefore statute-barred.

In order to properly set the standard, two distinct inquiries are required. The first inquiry asks whether, in determining if a statutory limitation period has been triggered, the plaintiff's state of knowledge is to be assessed in the same manner as the common law rule of discoverability. Under that rule, a cause of action arises for purposes of a limitation period when the material facts on which it is based have been

discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. The common law rule of discoverability does not apply to every statutory limitation period. Rather, it is an interpretive tool for construing limitations statutes and, as such, it can be ousted by clear legislative language. Assessing whether a legislature has codified, limited or ousted the common law rule is a matter of statutory interpretation. Section 5(1)(a) and (2) of the *LAA* does not contain any language ousting or limiting the common law rule; rather, it codifies it. This interpretation is supported by the words of s. 5, read in their entire context and in their grammatical and ordinary sense harmoniously with the *LAA*'s scheme and object, and the intention of the legislature. Accordingly, as established by the rule of discoverability and the *LAA*, the limitation period is triggered when the plaintiff discovers or ought to have discovered, through the exercise of reasonable diligence, the material facts on which the claim is based.

The second inquiry relates to the particular degree of knowledge required to discover a claim. 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. This approach remains faithful to the common law rule of discoverability, which recognizes that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. It also accords with s. 5 of the *LAA*, promotes consistency and ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. At the same time, it ensures the standard does not rise so high as to require certainty of liability or

perfect knowledge. A plausible inference of liability is enough; it strikes the equitable balance of interests that the common law rule of discoverability seeks to achieve.

The material facts that must be actually or constructively known are generally set out in the limitation statute. In the *LAA*, they are listed in s. 5(2)(a) to (c). 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. This list is cumulative. In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. A plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. This means that in a negligence claim, 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. All that is required is actual or constructive knowledge of the material facts from which a plausible inference can be made that the defendant acted negligently.

In the instant case, the province 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 the auditor — when it received the draft report



from the other firm on February 4, 2011. The auditor's act or omission was issuing its report with respect to the company's financial statements, despite those statements not being prepared in accordance with generally accepted accounting principles and not fairly representing, in all material respects, the company's financial position. This act or omission caused or contributed to the province's loss because the province executed the \$50 million in loan guarantees in reliance on the auditor's representations. Nothing more was needed to draw a plausible inference of negligence. The province's claim is therefore statute-barred by s. 5(1)(a) of the *LAA*.

### Cases Cited

**Referred to:** *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549; *Pioneer Corp. v. Godfrey*, 2019 SCC 42; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) 35; *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, 48 Alta. L.R. (4th) 25; *Jardine v. Saskatoon Police Service*, 2017 SKQB 217; *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252; *Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583; *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75; *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217; *Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352; *Hill v. South Alberta Land Registration District* (1993), 8 Alta. L.R. (3d) 379; *HOOPP Realty Inc.*

*v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83; *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 2 S.C.R. 403.

### **Statutes and Regulations Cited**

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

*Limitation of Actions Act*, S.N.B. 2009, c. L-8.5, ss. 1(1) "claim", 5.

### **Authors Cited**

New Brunswick. Legislative Assembly. *Journal of Debates (Hansard)*, 3rd Sess., 56th Assem., June 17, 2009, p. 50.

New Brunswick. Office of the Attorney General. *Commentary on Bill 28: Limitation of Actions Act*, January 2009 (online: <https://www.gnb.ca/legis/bill/pdf/56/3/Limitations-e.pdf>; archived version: [https://www.scc-csc.ca/cso-dce/2021SCC-CSC31\\_1\\_eng.pdf](https://www.scc-csc.ca/cso-dce/2021SCC-CSC31_1_eng.pdf)).

APPEALS from a judgment of the New Brunswick Court of Appeal (Drapeau, Quigg and Green JJ.A.), 2020 NBCA 18, 54 C.P.C. (8th) 271, [2020] N.B.J. No. 70 (QL), 2020 CarswellNB 140 (WL Can.), setting aside a decision of Grant J., 2019 NBQB 36, [2019] N.B.J. No. 76 (QL), 2019 CarswellNB 151 (WL Can.). Appeals allowed.

*Peter Griffin* and *Anthony S. Richardson*, for the appellants Grant Thornton LLP and Kent M. Ostridge.

*Steven R. Barnett, Q.C., and J. Charles Foster, Q.C., for the appellant Grant Thornton International Ltd.*

*Josie H. Marks and Frederick C. McElman, Q.C., for the respondent.*

*Guy J. Pratte, for the intervener.*

The judgment of the Court was delivered by

MOLDAVER J. —

I. Overview

[1] On June 23, 2014, the Province of New Brunswick (“Province”) filed a statement of claim against Grant Thornton LLP, Kent M. Ostridge and Grant Thornton International Ltd. (collectively, “Grant Thornton”), seeking damages for negligence. In response, Grant Thornton brought summary judgment motions to have the Province’s claim dismissed as statute-barred by virtue of the two-year limitation period under s. 5(1)(a) of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 (“LAA”).

[2] The motions judge granted summary judgment in favour of Grant Thornton. He found that s. 5(1)(a) barred the claim because the Province knew or ought to have known that it had *prima facie* grounds to infer that it had a potential claim

against Grant Thornton more than two years before commencing its claim. The Court of Appeal overturned that decision. It rejected the “*prima facie* grounds” standard used by the motions judge and held instead that the governing standard is whether a plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy. That right, the court explained, only exists if the plaintiff has knowledge of each constituent element of the claim. Applying this standard, the court held that the two-year limitation period in s. 5(1)(a) had not been triggered because the Province had not yet discovered its claim (even though the Province had issued a 106-paragraph statement of claim almost six years before receiving the reasons of the Court of Appeal). Grant Thornton now appeals to this Court.

[3] This case turns on the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2), thereby triggering the two-year limitation period in s. 5(1)(a). Respectfully, the Court of Appeal adopted too high a standard. In my view, a claim is discovered when the 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. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim.

[4] In the present case, I am satisfied that the Province discovered its claim against Grant Thornton on February 4, 2011. By then, the Province knew or ought to have known that a loss occurred and that the loss was caused in whole or in part by

conduct which Grant Thornton had been retained to detect. This was sufficient to draw a plausible inference that Grant Thornton had been negligent. Although the Province had this knowledge by February 4, 2011, it did not bring its claim until June 23, 2014, more than two years later. The claim is therefore statute-barred by s. 5(1)(a) of the *LAA*. I would accordingly allow the appeal brought by Grant Thornton LLP and Kent M. Ostridge and the appeal brought by Grant Thornton International Ltd., set aside the Court of Appeal’s judgment, and restore the motions judge’s judgment.

## II. Statement of Facts

[5] In the fall of 2008, the Atcon Group of Companies (“Atcon”) — a New Brunswick-based provider of construction, energy, industrial and waste management services — was having difficulties meeting its financial obligations. The company sought loans from the Bank of Nova Scotia, but it needed loan guarantees from the Province to obtain them.

[6] On April 24, 2009, the Province agreed to a total of \$50 million in loan guarantees, conditional upon Atcon subjecting itself to an external review of its assets by an auditing firm. The Province agreed that Atcon’s auditor, Grant Thornton, could perform the external review.

[7] A month later, on May 19, 2009, Grant Thornton delivered a letter to the Province (“Opinion Letter”) detailing the work it had done in performing its audit of Atcon’s consolidated financial statements for the fiscal year ending January 31, 2009

("F2009"). In the letter, Grant Thornton stated that it was carrying out its audit in accordance with Generally Accepted Auditing Standards and that it had some outstanding matters to complete before issuing its audit report ("Unqualified Auditors' Report").

[8] The Unqualified Auditors' Report was delivered to the Province on June 18, 2009. In it, Grant Thornton confirmed that it had reviewed Atcon's financial statements for F2009 in accordance with Generally Accepted Auditing Standards, which among other things, required it to "plan and perform [the] audit to obtain reasonable assurance whether the financial statements [were] free of material misstatement" (R.R., at p. 26). Having done so, Grant Thornton opined that Atcon's statements presented "fairly, in all material respects, the financial position of [Atcon] as at January 31, 2009 and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles" (*ibid.*). Grant Thornton attached Atcon's audited financial statements for F2009 to the report.

[9] That satisfied the Province. On June 30, 2009, relying upon the Opinion Letter, the Unqualified Auditors' Report and the audited financial statements for F2009, the Province executed and delivered the loan guarantees in the amount of \$50 million to Atcon, which, in turn, enabled the company to borrow funds from the Bank of Nova Scotia.

[10] Atcon’s financial difficulties persisted. Operating losses and the shutdown of the company’s Western Canada operations resulted in Atcon running out of working capital by October 2009 — a mere four months after receiving the loan guarantees from the Province.

[11] Shortly thereafter, the Bank of Nova Scotia applied for a receivership order with respect to Atcon under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and sought relief under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36. On March 1, 2010, the New Brunswick Court of Queen’s Bench granted the Bank’s applications. A few days later, the Bank called on the Province to pay out the loan guarantees. On March 18, 2010, the Province did — all \$50 million.

[12] The proceedings against Atcon and the Bank’s call on the loan guarantees concerned the Province. Accordingly, in June 2010, it retained RSM Richter Inc. (“Richter”), an accounting and auditing firm, to review Atcon’s financial position for F2009, and to issue a report on its findings (“Richter Report”).

[13] The Richter Report was issued in draft on February 4, 2011, and finalized on November 30, 2012. Save for some grammatical corrections, the final report was identical to the draft report.

[14] The findings in the Richter Report differed from those in the Unqualified Auditors’ Report produced by Grant Thornton. Importantly, unlike Grant Thornton, Richter opined that Atcon’s financial statements for F2009 had not, in fact, been

prepared in conformity with Generally Accepted Accounting Principles. Richter formed this opinion based on what it described to be a “systematic approach” by Atcon’s management to “overstate assets, revenues and profits, [and] understate liabilities, expenses and losses” (A.R., vol. II, at p. 207). Specifically, the report identified various errors in the financial statements, which were considered to be “material” because it is “probable” that the errors would have influenced the decision of the person relying on the financial statements (*ibid.*, at p. 136 (emphasis deleted)). In that regard, Richter estimated that Atcon’s F2009 assets and net earnings were overstated by a material amount, ranging between \$28.3 million and \$35.4 million. Notably, in Grant Thornton’s audit of Atcon, materiality was set at \$1.2 million, which placed the misstatements identified by Richter far in excess of the materiality set by Grant Thornton for its audit. Those misstatements, however, had not been identified by Grant Thornton in the Unqualified Auditors’ Report.

[15] This information triggered a response from the Deputy Minister of Economic Development. In a letter to the New Brunswick Institute of Chartered Accountants dated December 21, 2012, the Deputy Minister advised the Institute that the Province was proceeding with a formal complaint against Grant Thornton. A copy of the Richter Report was attached.

[16] A year and a half later, on June 23, 2014, the Province commenced its claim alleging negligence against Grant Thornton. In its defence, Grant Thornton denied the



allegations. Further, it moved to have the Province’s claim summarily dismissed on the basis that it was barred by the two-year limitation period under s. 5(1)(a) of the *LAA*.

### III. Relevant Statutory Provisions

[17] The relevant provisions of the *LAA* are:

#### **Definitions and interpretation**

1(1) The following definitions apply in this Act.

“claim” means a claim to remedy the injury, loss or damage that occurred as a result of an act or omission.

...

#### **General limitation periods**

5(1) Unless otherwise provided in this Act, no claim shall be brought after the earlier of

- (a) two years from the day on which the claim is discovered, and
- (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

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.

### IV. Proceedings Below

A. *Court of Queen’s Bench of New Brunswick, 2019 NBQB 36 (Grant J.)*

[18] The main issue before the motions judge was when, if ever, the Province discovered its claim against Grant Thornton under s. 5 of the *LAA*. The answer, in his view, lay in the proper interpretation of s. 5(2).

[19] Under s. 5(2), the question, as he saw it, was whether the Province “knew or ought to have known that it had *prima facie* grounds to infer that it had a potential cause of action against the defendants” (para. 108 (CanLII)). If the Province had this knowledge more than two years before commencing its claim on June 23, 2014, then the claim was statute-barred by operation of the two-year limitation period applicable under s. 5(1)(a).

[20] In the opinion of the motions judge, the Province had the requisite knowledge by March 18, 2010. By then, it had suffered a loss by paying \$50 million to the Bank of Nova Scotia and it could reasonably have inferred that Grant Thornton caused or contributed to the act or omission giving rise to this loss. This, in the motions judge’s view, gave the Province *prima facie* grounds to infer the existence of a potential claim against Grant Thornton. In the alternative, he found that the Province had the requisite knowledge after it received the draft Richter Report on February 4, 2011. Either way, he concluded that the Province had failed to commence its claim within the two-year limitation period applicable under s. 5(1)(a). Hence, the claim was statute-barred.

[21] In the result, the motions judge granted summary judgment in favour of Grant Thornton and dismissed the Province’s claim.

B. *Court of Appeal of New Brunswick, 2020 NBCA 18, 54 C.P.C. (8th) 271 (Drapeau, Quigg and Green J.J.A.)*

[22] The Court of Appeal unanimously allowed the appeal. It held that the motions judge “applied the wrong legal test for s. 5(1)(a) purposes” and “made a palpable and overriding error in finding the Province discovered its claim more than two years before proceedings were commenced” (paras. 81 and 127).

[23] Regarding the legal test, the court rejected the motions judge’s test — “*prima facie* grounds to infer . . . a potential cause of action” — on the basis that it was not stringent enough (paras. 6-7 (emphasis deleted), quoting trial reasons, at para. 108). Instead, the court set out what it believed to be the correct and “more exacting” test, namely that “the two-year limitation period begins to run the day after the plaintiff knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy” (para. 7). In claims for negligence, the court explained, “that right only exists if the defendant was under a relevant duty of care and its loss-causing act or omission fell below the applicable standard of care” (para. 7).

[24] Applying that test, the court found that the two-year limitation period under s. 5(1)(a) had not been triggered because the Province had not yet discovered its claim. Specifically, the Province could not know whether Grant Thornton’s audit of Atcon’s

financial statements for F2009 fell below the applicable standard of care by failing to comply with Generally Accepted Auditing Standards. According to the court, this essential component of the Province’s negligence claim could not be known unless and until Grant Thornton produced its audit-related files for the Province’s inspection — something it had consistently refused to do. Without those files, “the Province may suspect and allege, but it does not know, actually or constructively, the F2009 audit was non-compliant with Generally Accepted Auditing Standards” (para. 8). The motions judge’s failure to consider the absence of evidence on that issue constituted a “palpable and overriding error in the assessment of the evidential record” (*ibid.*). This accounted for his erroneous finding that the Province discovered its claim on either March 18, 2010, or February 4, 2011.

[25] On this basis, the court allowed the appeal and set aside the summary judgment order.

#### V. Issues

[26] I would state the main issues in this case as follows:

- (1) What is the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2), so as to trigger the limitation period in s. 5(1)(a)?

(2) When, if ever, did the Province discover its negligence claim against Grant Thornton?

## VI. Analysis

### A. *The Applicable Standard*

[27] Section 5(1)(a) of the *LAA* sets out the limitation period that controls this case: a claim must be commenced two years from the day on which the claim is discovered. As the text of s. 5(2) makes plain, a claim is discovered when a plaintiff knows or ought reasonably to have known that an injury, loss or damage occurred, which was caused or contributed to by an act or omission of the defendant.

[28] This case turns on the standard to be applied in determining whether and when a plaintiff has the requisite degree of knowledge to discover a claim under s. 5(2), thereby triggering the two-year limitation period under s. 5(1)(a). In order to properly set the standard, two distinct inquiries are required. First, in assessing if the limitation period in s. 5(1)(a) has been triggered, is the plaintiff's state of knowledge to be assessed in the same manner as the common law rule of discoverability? Second, what is the particular degree of knowledge required to discover a claim under s. 5(2)?

#### (1) Codification of the Common Law Rule of Discoverability

[29] Section 5 of the *LAA* operates against the backdrop of a common law discoverability rule that is well-established. Under that rule, “a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence” (*Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224, citing *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; see also *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, at paras. 2 and 22). This rule has its origins in equity. In particular, it seeks to balance the three rationales for imposing limitation periods — the guarantee of repose, the desire to foreclose claims based on stale evidence and the expectation that a plaintiff will start a claim in a timely manner (*M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-30) — with the need to avoid the injustice of precluding a claim before the plaintiff even has knowledge of its existence (*Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 36).

[30] Though a “general rule”, the common law rule does not apply to every statutory limitation period (*Ryan*, at para. 23, quoting *Rafuse*, at p. 224). Rather, it is an interpretive tool for construing limitations statutes and, as such, it can be ousted by clear legislative language (*Pioneer Corp. v. Godfrey*, 2019 SCC 42, at para. 32). In that regard, “many provincial legislatures have chosen to enact statutory limitation periods that codify, limit or oust entirely discoverability’s application” (*ibid.*). Assessing whether a provincial legislature has codified, limited or ousted the common law rule is a matter of statutory interpretation (*ibid.*, at para. 42, citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21).

[31] In this case, Grant Thornton argues that s. 5(1)(a) and (2) ousts or, at least, limits the common law discoverability rule. In its view, the New Brunswick legislature provided for the limitation period set out in s. 5(1)(a) to begin running when a plaintiff has a lower degree of knowledge than the common law rule requires, namely “a sufficient basis, including by making reasonable inferences based on their knowledge of having suffered a loss, to plead an action against the defendant and start the civil litigation process” (A.F., Grant Thornton LLP and Kent M. Ostridge, at para. 87).

[32] With respect, I disagree. In my view, the New Brunswick legislature chose to codify the common law rule in s. 5(1)(a) and (2) of the *LAA*. This interpretation is supported by the words of s. 5, read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *LAA*, the object of the *LAA*, and the intention of the legislature (see *Rizzo & Rizzo*, at para. 21).

[33] As set out at para. 17 above, the text of s. 5 of the *LAA* reads as follows :

**General limitation periods**

**5(1)** Unless otherwise provided in this Act, no claim shall be brought after the earlier of

- (a) two years from the day on which the claim is discovered, and
- (b) fifteen years from the day on which the act or omission on which the claim is based occurred.

**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.

[34] The plain words of this provision are unambiguous. Section 5(1)(a) provides that no claim shall be brought after two years from the day on which the claim is “discovered”. Section 5(2) further specifies that a claim is discovered on the day that a claimant knew or ought reasonably to have known the facts that are material, namely the occurrence of an injury, loss or damage that was caused or contributed to by an act or omission of the defendant. As evidenced by the words of the provision, there is no clear legislative language ousting or limiting the common law rule; in fact, quite the opposite. The event triggering the limitation period in s. 5(1)(a) is linked to the state of the plaintiff’s knowledge in the same manner as the common law rule.

[35] Moreover, there is nothing in the legislative scheme or the object of the LAA that alters the governing principles set out in the common law rule. The New Brunswick legislature enacted the general limitation period scheme in s. 5 to simplify the law of limitation periods. In doing so, it expressly modeled s. 5 on similar limitation provisions found in Ontario, Saskatchewan and Alberta (New Brunswick, Office of the Attorney General, *Commentary on Bill 28: Limitation of Actions Act*, January 2009 (online), at pp. 1 and 4), all of which have been found to codify the common law rule of discoverability (see, e.g., *Galota v. Festival Hall Developments Ltd.*, 2016 ONCA 585, 133 O.R. (3d) 35, at para. 15; *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, 48 Alta. L.R. (4th) 25, at para. 26; *Jardine v. Saskatoon Police*



*Service*, 2017 SKQB 217, at para. 36 (CanLII)). The legislature’s express intention to replicate provisions that codify the common law rule is compelling evidence that New Brunswick intended to follow suit.

[36] In arguing that the legislature ousted the common law rule, Grant Thornton points to some linguistic differences between the common law rule and s. 5. It emphasizes the fact that the common law rule uses the term “cause of action”, whereas s. 5 uses the term “claim”. According to Grant Thornton, these concepts are distinct: the former refers to a set of facts entitling a plaintiff to a remedy from the court, while the latter is “purely a limitations concept” with “only two factual components (wrongful conduct and resulting damage)” (A.F., Grant Thornton LLP and Kent M. Ostridge, at para. 65, quoting D. Zacks, “Claims, Not Causes of Action: The Misapprehension of Limitations Principles” (2018), 48 *Advocates’ Q.* 165, at p. 165).

[37] I recognize that the distinction between “claim” and “cause of action” could be meaningful in some circumstances; but in my view, it is not so here. In fact, the LAA’s own wording shows that the use of “claim” does not rule out a shared meaning with “cause of action”. Section 1(1) defines a claim as a “claim to remedy the injury, loss or damage that occurred as a result of an act or omission”. In short, s. 1(1) indicates that the legislature’s use of the term “claim” focuses on a set of facts giving rise to a remedy, which is the same meaning that Grant Thornton attributes to the term “cause of action”.

[38] This interpretation is supported by the French text of s. 5(2) of the *LAA*, which reads in part as follows: “[l]es faits ayant donné naissance à la réclamation sont découverts le jour où le réclamant a appris ou aurait dû normalement apprendre”. In addition, the French text of s. 1(1) defines “réclamation” as “[r]éclamation pour obtenir réparation de préjudices, de pertes ou de dommages survenus par suite d’un acte ou d’une omission”. As is apparent, 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.

[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:

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.

[40] In sum, I am satisfied that s. 5(1)(a) and (2) codifies the common law rule of discoverability. As established by that rule and the *LAA*, the limitation period is triggered when the plaintiff discovers or ought to have discovered through the exercise of reasonable diligence the material facts on which the claim is based. Having so found, I turn now to ascertaining the particular degree of knowledge required to discover a claim under s. 5.

(2) The Requisite Degree of Knowledge

[41] As noted, the Court of Appeal disagreed with the motions judge on the extent of knowledge required to discover a claim under s. 5. The motions judge held that a plaintiff needs to know only enough facts to have *prima facie* grounds to infer the existence of a potential claim. The Court of Appeal, on the other hand, held that discovery of a claim requires actual or constructive knowledge of facts that confer a legally enforceable right to a judicial remedy, which includes knowledge of every constituent element of the cause of action being pled. Thus, on the Court of Appeal’s interpretation, in addition to knowledge of a loss and causation, a claim in negligence

would include knowledge of a duty of care as well as knowledge of a breach of the standard of care.

[42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: 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. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.

[43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to 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. This list is cumulative, not disjunctive. For instance, knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise

(*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff “had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]” (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff’s knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

As noted in *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]

Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a “permissible fact inference”.

[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 ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or “perfect knowledge” (*De Shazo*, at para. 31; see also the concept of “perfect certainty” in *Hill v. South Alberta Land Registration District* (1993), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

[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] 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.]

Although the Court in *K.L.B.* was dealing with discoverability in a different context, 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.

B. *Application to the Facts*

[49] With this approach in mind, I turn to the question of determining when, if ever, the Province discovered its claim against Grant Thornton.

[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 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.

(1) The Province Had Knowledge of the Material Facts

[51] The first aspect of the governing standard requires an assessment of the Province's knowledge of the material facts. It is undisputable that by February 4, 2011, the Province knew that it had suffered a loss. In fact, it knew on March 18, 2010, when it paid out the loan guarantees to the Bank of Nova Scotia — all \$50 million. Moreover, based on the record, I am able to conclude that on February 4, 2011, the Province knew or, at least, ought reasonably to have known, that the loss was caused or contributed to by an act or omission of Grant Thornton.

[52] The Province's willingness to go along with Atcon's request for loan guarantees totalling \$50 million was conditional on Grant Thornton's external audit of Atcon's consolidated financial statements for F2009. After completing its audit, Grant



Thornton represented to the Province in the Unqualified Auditors' Report that it had audited Atcon's financial statements in accordance with Generally Accepted Auditing Standards and that, having done so, it was of the opinion that they presented "fairly, in all material respects, the financial position of [Atcon] as at January 31, 2009 and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles" (R.R., at p. 26). The Province relied on those representations to execute the loan guarantees.

[53] Just over four months after receiving the loan guarantees, Atcon ran out of working capital, which led the Bank of Nova Scotia to commence bankruptcy and insolvency proceedings against it. Counsel for the Attorney General of New Brunswick attended some of the hearings and, as a result, the Province became privy to those proceedings. Indeed, the Province was aware that on March 1, 2010, the court granted the Bank's applications and placed Atcon into receivership.

[54] Shortly thereafter, on March 18, 2010, the Bank called upon the Province to pay out on the loan guarantees. This raised alarm bells for the Province about the true state of Atcon's financial affairs because a few months later, it retained Richter to review and comment on Atcon's financial position for F2009.

[55] Richter undertook this review and on February 4, 2011, issued the 88-page draft Richter Report. In my view, the Province's knowledge about its potential claim crystallized at this point.

[56] In this report, Richter opined that Atcon’s financial statements for F2009 had not been prepared in conformity with Generally Accepted Accounting Principles in all material respects. Richter formed this opinion based on what it described to be a “systematic approach” by Atcon’s management to “overstate assets, revenues and profits, [and] understate liabilities, expenses and losses” (A.R., vol. II, at p. 207). Specifically, Richter identified various errors in the financial statements, which, as Richter explained, were considered to be “material” because they would likely have influenced the decision of the person relying on the financial statements. In that regard, Richter estimated that Atcon’s F2009 assets and net earnings were overstated by an amount ranging between \$28.3 million and \$35.4 million. Since Richter set the materiality for Atcon’s financial statements in the range of \$1.3 million to \$2.6 million, this placed the misstatements approximately 14 to 22 times greater than the acceptable materiality that was set. For Grant Thornton’s audit of Atcon, materiality was set at \$1.2 million, which also clearly placed the misstatements well in excess of materiality.

[57] While Richter’s mandate did not include commenting on whether Grant Thornton’s audit had been performed in accordance with Generally Accepted Auditing Standards, its mandate was similar to Grant Thornton’s: both were retained by the Province to determine whether Atcon’s financial statements had been prepared in accordance with Generally Accepted Accounting Principles. Grant Thornton’s conclusion that the statements had been prepared in conformity with Generally Accepted Accounting Principles, which indicated its belief that they were not materially misstated, stands in stark contrast to Richter’s findings that not only were

the financial statements misstated, those misstatements significantly exceeded the materiality threshold established for the audit. The magnitude of the misstatements — assets and net earnings were overstated by an amount ranging between \$28.3 million and \$35.4 million — is even more striking when they are considered in the context of loan guarantees totalling \$50 million.

[58] It stands to reason from the findings made in the Richter Report, considered in light of all the surrounding circumstances, that the Province knew or ought to have known that Grant Thornton's act or omission caused or contributed to its loss. Specifically, Grant Thornton's act or omission was issuing the Unqualified Auditors' Report with respect to Atcon's financial statements for F2009, despite those statements not being prepared in accordance with Generally Accepted Accounting Principles and not fairly representing, in all material respects, Atcon's financial position for F2009. This act or omission caused or contributed to the Province's loss because the Province executed the \$50 million loan guarantees in reliance on Grant Thornton's representations.

(2) The Province Could Have Drawn a Plausible Inference of Negligence

[59] Based on all of the material facts that the Province knew or ought to have known, I am able to conclude that by February 4, 2011, the Province had sufficient knowledge to draw a plausible inference that Grant Thornton had been negligent.

[60] The Province maintains that the limitation period did not begin to run on February 4, 2011. It contends that, to this day, the limitation period has not yet started to run because it does not have access to Grant Thornton’s audit-related files and thus, it cannot know whether Grant Thornton breached the applicable standard of care by failing to conduct the audit in accordance with Generally Accepted Auditing Standards. This, despite the fact that the Province went ahead and filed its claim many years ago, on June 23, 2014, and despite its concession that it did so without learning any new information about Grant Thornton’s conduct between that date and February 4, 2011, the date it received the draft Richter Report.

[61] With respect, I disagree with the Province’s position. As I have explained, a plaintiff does not need knowledge of all the constituent elements of negligence to discover its claim. All that is required is knowledge of the material facts, as set out in the *LAA*, from which a plausible inference of liability can be drawn. Contrary to its assertions, the Province did not need access to Grant Thornton’s audit-related files to plausibly infer that Grant Thornton had breached the applicable standard of care by failing to conduct the audit in accordance with Generally Accepted Auditing Standards. In particular, from the material misstatements identified in the Richter Report, referred to above at paras. 56-57, the Province could have inferred that the loss was the fruit of an audit that fell below the applicable standards, which require auditors to “plan and perform an audit to obtain reasonable assurance whether the financial statements are free of material misstatement” (R.R., at p. 26).

[62] In sum, having regard to the material facts that I have identified, which the Province knew or ought to have known, the Province had ample knowledge as of February 4, 2011, to draw a plausible inference that Grant Thornton had acted negligently. This does not mean that Grant Thornton was in fact negligent. That question would have been for trial, had the Province brought its claim within the limitation period.

## VII. Conclusion

[63] In conclusion, I am satisfied that the Province discovered its claim on February 4, 2011, more than two years before commencing it on June 23, 2014. The Province's claim is therefore statute-barred by s. 5(1)(a) of the *LAA*.

[64] Accordingly, the appeal brought by Grant Thornton LLP and Kent M. Ostridge and the appeal brought by Grant Thornton International Ltd. are both allowed. The judgment of the Court of Appeal is set aside and the judgment of the motions judge in the Court of Queen's Bench is restored.<sup>1</sup> The appellants are entitled to their costs throughout.

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<sup>1</sup> Since I am disposing of these appeals on the basis of evidence that was properly before the motions judge, I decline to consider the Province's proposed disposition (see R.F., at para. 145), to remit the matter back to the Court of Appeal to address the alternative grounds of appeal relating to the motions judge's evidentiary rulings, which were raised before that court but not decided (see C.A. reasons, at paras. 80-81).

*Appeals allowed with costs throughout.*

*Solicitors for the appellants Grant Thornton LLP and Kent M. Ostridge: Lenczner Slaght Royce Smith Griffin, Toronto; McInnes Cooper, Fredericton.*

*Solicitors for the appellant Grant Thornton International Ltd.: Foster & Company, Fredericton.*

*Solicitors for the respondent: Stewart McKelvey, Fredericton.*

*Solicitors for the intervener: Borden Ladner Gervais, Toronto.*