SUPREME COURT OF NOVA SCOTIA

Citation: *Atlantic Baptist Senior Citizens' Homes Inc. v. Redden Brothers Development Limited*, 2023 NSSC 327

Date: 20231026
Docket: 467675
Registry: Halifax

Between:

Atlantic Baptist Senior Citizens' Homes Inc.

Plaintiff

v.

Redden Brothers Development Limited, BMR Structural Engineering Limited , Peter Cochrane Architects Limited , The Town of Bridgewater

Defendants

Decision on Summary Judgment

Judge: The Honourable Justice Glen McDougall

Heard: April 4, 2023, in Halifax, Nova Scotia

Counsel: Shawn Harmon, for the Defendant (Redden)
Roderick Rogers, K.C. and Adam Downie, for the Defendant (Town of Bridgewater)

By the Court:

Background

[1] This is a motion for summary judgment on the evidence. Atlantic Baptist Senior Homes Inc., (the Plaintiff) has started an action against Redden Brothers Development Ltd. (Redden), BMR Structural Engineering Ltd. (BMR), Peter Cochrane Architects Ltd. (Cochrane), and the Town of Bridgewater (the Town). This motion concerns only Redden and the Town.

[2] The Plaintiff company hired Redden to construct a 96-Unit seniors' residential home in Bridgewater (the Property). On August 22, 2007, the Plaintiff submitted a permit application to the Town. Redden commenced construction in September 2007 and completed the project in or around March 2010, when the occupancy permit was approved by the Town. The Town completed an inspection of the property in March 2010. The Plaintiff subsequently discovered a number of deficiencies in the Property, such as defective windows, cracked flooring, water damage, and a lack of structural support in various areas.

[3] In September 2015, the Plaintiff and Redden executed an "Agreement and Release" (the "Remediation Agreement") in which the Plaintiff agreed not to make

any claim against Redden. The Remediation Agreement also stipulated that Redden would perform remedial work at no cost to the Plaintiff and would pay compensation of $51,974.08 to reimburse the Plaintiff for the cost of remediating other deficiencies in the Property (Exhibit 12 of the Affidavit of Kyla Russell).

[4] The Plaintiff filed a claim against Redden and the Town on August 21, 2017, alleging that Redden failed to carry out the construction in accordance with regulatory requirements and reasonable and prudent construction practices.

[5] The Plaintiff alleges that the Town failed to carry out its inspection duties in accordance with the "regulatory requirements, industry standards and reasonable and prudent construction practices" (Statement of Claim at para. 35). Redden filed a cross-claim against the Town on February 10, 2021. The Town has cross-claimed against the other defendants.

[6] The Town has brought a motion for summary judgment on the evidence to dismiss the Plaintiff's claim and Redden's crossclaim. The Plaintiff has consented to the dismissal of the claim against the Town. Redden has not consented to the dismissal of their crossclaim.

[7] The Town has submitted the affidavits of Graham Hopkins and Adam Downie, a brief in support of its motion for summary judgment, and a rebuttal

brief. Redden has submitted the affidavits of Kyla Russell and Greg Redden, and a brief supporting its argument against summary judgment. The affiants were cross-examined on the contents of their respective affidavits during the hearing on April 4, 2023.

Issues

1. Should portions of the Affidavits of Mr. Redden and Ms. Russell be struck pursuant to rule 39.04?
    a) Do the affidavits of Kyla Russell and Greg Redden contain inadmissible hearsay and opinion evidence?
2. Should the Town's motion for summary judgment be granted?
    a) Did the Town owe Redden a duty of care? If so, what is the appropriate limitation period for bringing a claim against the Town?
    b) Does section 504(3) of the *Municipal Government Act* shield the Town from liability based on an expired limitation period?

Positions of the Parties

The Plaintiff

[8] The Plaintiff has consented to the dismissal of the Plaintiff's claim against the Town. The Plaintiff is therefore not involved in this proceeding other than to

provide its agreement for me to order a consent dismissal of its action against the Town.

The Town

[9] The Town relies on Section 504 of the *Municipal Government Act*, RSNS 1998, c 18 (*MGA*), which exempts the Town from liability for losses that are the result of the Town's inspection if the claim is made more than six years after the application for the permit that required the inspection. In this case, the Plaintiff applied for a permit in 2007 which is ten years before the Plaintiff's action was commenced. The Town argues that Redden's crossclaim "constitutes an inspection claim" and is therefore covered by section 504(3) (Town's Brief at para. 62).

[10] The Town relies on *Yarmouth (District) v. Nickerson*, 2017 NSCA 21, where the court examined section 504 of the *MGA* and affirmed that the trigger date for the six-year limitation period was the date that the permit was applied for. The Town also relies on *Halifax (Regional Municiaplity) v. WHW Architects Inc*., 2014 NSCA 75, where Bryson JA, writing for the court, held that the discoverability principle outlined in the *Limitation of Actions Act*, RSNS 2015 c. 22, did not apply because the statute explicitly states that "notwithstanding the *Limitation of Actions*

Act" there will be no liability after six years from the date that the permit was applied for (paras. 6 and 12).

[11] In response to Redden's negligence claims, the Town argues that it owed Redden no duty of care because Redden never had a proprietary interest in the Property, and that Redden will only suffer economic losses if the Plaintiff is successful in its claim against it, making their losses a step removed from the "property damage" which grounds the Plaintiff's claim.

[12] The Town says that the test for summary judgment on the evidence, outlined in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, [2016] NSJ No 505, is made out in this case. The Town argues that there are no material facts in dispute, and that the question of law, "does section 504(3) of the *MGA* preclude liability against the Town?" is a question that should be answered by this court. The Town claims that Redden's crossclaim has no real chance of success because section 504(3) precludes liability.

Redden

[13] Redden relies on the Remediation Agreement signed in September 2015. They claim that this agreement precludes the Plaintiff from making a claim against them. Redden's crossclaim alleges that any loss or damages suffered by the

Plaintiff were not caused by Redden but by the negligence or breach of duty of the other Defendants, including the Town. Redden claims for contribution and indemnity against the Town (and other defendants) if they are held liable for the Plaintiff's losses.

[14] Redden argues against the motion for summary judgment claiming there are material issues of fact that cannot be determined without complete disclosure and discovery. Grounding that claim is the argument that the Town had approved many permit applications after the initial construction of the Property, up until 2017. Redden claims that this court's interpretation of the *MGA* should account for these permits and that the six-year time limit should not begin to run until the last permit was closed.

[15] Redden also argues that the Town owed it common law duty of care when it approved the building plans and as a result of its correspondence with Redden during the course of the construction process. Redden argues that the no liability provision in s 504(3) of the *MGA* does not apply to this private law duty of care.

Overview of the Applicable Legislation

Nova Scotia Civil Procedure Rules

[16] Rule 4.09 governs what can be pleaded on a crossclaim:

4.09 (1) A defendant may crossclaim against another defendant for a claim of either of the following kinds:

(a) a claim that the other defendant is liable to the first defendant for all or part of the plaintiff's claim;

(b) a claim that would be consolidated with the plaintiff's action if the defendant commenced an independent action for the same claim.

(2) The defendant may crossclaim by filing a notice of defence with crossclaim.

[17] Rule 13.04 governs summary judgment on the evidence:

13.04 (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:

(a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;

(b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

(2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.

(3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.

(4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.

(5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[18] Rule 39.02 deals with the admissibility of affidavit evidence:

> 39.02 (1) A party may only file an affidavit that contains evidence admissible under the rules of evidence, these Rules, or legislation.
>
> (2) An affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information.

[19] Rule 39.04 outlines when a justice can strike all or part of an affidavit:

> 39.04 (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

Limitation of Actions Act (LAA)

[20] The starting point for a limitation period is set out in section 8 of the *LAA*:

> 8 (1) Unless otherwise provided in this Act, a claim may not 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.

[21] However, section 6 of the *LAA* provides guidance as to what limitation period applies when another statute provides a different limitation period "where there is a conflict between this Act and any other enactment, the other enactment prevails."

[22] Section 8(2) sets out the test for discoverability of a cause of action:

> 8(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 or contributed to by an act or omission;
>
> (c) That the act or omission was that of the defendant; and
>
> (d) That the injury, loss or damage is sufficiently serious to warrant a proceeding.

Municipal Government Act (MGA)

[23] Section 504 of the *MGA* sets out the limitation of liability for municipalities with respect to negligent inspections; defines what constitutes a "negligent inspection"; and provides a six-year limitation period from the issuance of the permit:

> No liability
>
> 504 (1) Where a municipality or a village inspects buildings or other property pursuant to this Act or another enactment, the municipality or the village and its officers and employees are not liable for a loss as a result of the manner or extent of an inspection or the frequency, infrequency or absence of an inspection, unless the municipality or the village was requested to inspect at appropriate stages, and within a reasonable time, before the inspection was required, and either the municipality or the village failed to inspect or the inspection was performed negligently.
>
> (2) An inspection is not performed negligently unless it fails to disclose a deficiency or a defect that
>
> (a) could reasonably be expected to be detected; and
>
> (b) the municipality or the village could have ordered corrected.
>
> (3) Notwithstanding the *Limitation of Actions Act* or another statute, a municipality or a village and its officers and employees are not liable for a loss as a result of an inspection or failure to inspect, if the claim is made more than six years after the date of the application for the permit in relation to which the inspection was required.
>
> (4) If a municipality or a village receives a certification or representation by an engineer, architect, surveyor or other person held out to have expertise respecting the thing being certified or represented, the municipality or the village and its officers and employees are not liable for any loss or damage caused by the negligence of the person so certifying or representing.

[24] Additionally, Section 512 creates a 12-month limitation period for actions brought against municipalities:

> 512 (1) For the purpose of the *Limitation of Actions Act*, the limitation period for an action or proceeding against a municipality or village, the council, a council member, a village commissioner, an officer or employee of a municipality or village or against any person acting under the authority of any of them, is twelve months.
>
> (2) Subsection (1) applies, with all necessary changes, to a service commission and a board, commission, authority, agency or corporation of a municipality or a board, commission, authority, agency or corporation jointly owned or established by municipalities or villages.
>
> (3) No action shall be brought against any parties listed in subsection (1) or (2) unless notice is served on the intended defendant at least one month prior to the commencement of the action stating the cause of action, the name and address of the person intending to sue and the name and address of that person's solicitor or agent, if any.

1. Should portions of Kyla Russell and Greg Redden's Affidavits be struck?

[25] The first issue relates to objections to parts of Kyla Russell and Greg Redden's affidavits. The Town argues that paragraphs 7 and 8 of Kyla Russell's Affidavit should be struck. The Town claims that paragraph 7, which discusses a letter sent by the Town's original counsel and comments on the discovery date of the facts underpinning the claim, contains inadmissible hearsay and opinion. The Town further argues that paragraph 8 of Kyla Russell's affidavit, which lists and attaches several reports from engineers evaluating the Property, contains hearsay and opinion evidence.

[26] The Town says paragraphs 5, 7, and 11 of Greg Redden's affidavit, where he discusses the duty of the municipal inspector to ensure that the construction complies with municipal building codes, contains impermissible opinion and

argument. They also submit that paragraph 10 should be struck because it "purports to offer evidence of the knowledge of Mr. Hopkins", which the Town says is inadmissible hearsay (Town's Rebuttal Brief at para. 14). Redden has not provided any rebuttal brief discussing the admissibility of the paragraphs at issue.

Overview of applicable legal principles

[27] Civil Procedure Rule 39.04 allows a judge to strike portions of an affidavit that are not admissible:

> 39.04 (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.
>
> (2) A judge must strike a part of an affidavit containing either of the following:
>
> (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.
>
> (3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.
>
> (4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.
>
> (5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

[Emphasis added].

[28] As noted above, Rule 39.04(2) requires a judge to strike portions of affidavits that contain hearsay where the affiant has not stated the source of the evidence and belief in the truth of its contents.

[29] Our Court of Appeal in *Abbott and Haliburton Co. Ltd. v. White Burgess Langille Inman (c.o.b. WBLI Chartered Accountants*), 2013 NSCA 66, has held that evidence put before the court to defend a summary judgment motion "must be admissible evidence" (para. 52). Chief Justice MacDonald, writing in dissent but not on this point, further noted that the exclusion of potential evidence does not involve impermissible weighing of evidence that delves into the merits of the case and affirmed that striking impermissible evidence during a summary judgment motion accords with the Court's gatekeeping function (para. 54). Chief Justice MacDonald's reasons were later cited with approval by Justice Wood, as he then was, in *MacAulay v. Ali*, 2013 NSSC 271, [2013] NSJ No 430. In *MacAulay*, Justice Wood held that the court cannot accept hearsay evidence on a summary judgment motion.

[30] The only permissible evidence in an affidavit are relevant statements of fact. Opinion evidence, speculation, and hearsay are not admissible *Waverley (Village)*

v. Nova Scotia (Minister of Municipal Affairs), 1993 NSSC 71, [1993] NSJ No 151, at para. 9.

[31] More recently, this court considered a motion to strike in *King v. Gary Shaw Alter Ego* Trust, 2020 NSSC 288, where Norton J. reviewed the common pitfalls of inadmissible evidence in affidavits:

> [12] Hearsay is one of the most common objections made to the introduction of evidence. It has been defined by the Supreme Court of Canada as follows:
>
> > Written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein. [*R. v. Bradshaw*, 2017 SCC 35, at para. 1 and 20]
>
> [13] Sopinka says:
>
> > The usual hearsay circumstance covered by the rule is where the witness testifies as to what someone else, who is not before the court, said. However, the modern interpretation of hearsay also encompasses prior out-of-court statements made by the very witness who is testifying in court when such earlier statements of the witness are tendered to prove the truth of their contents. [*Supra*, at p. 249]
>
> [14] The defining features of the rule are that the purpose of adducing the evidence is to prove the truth of its contents and the absence of the contemporaneous opportunity to cross-examine the declarant. It is the inability to test the reliability of the evidence by cross-examination of the declarant that makes the admission of such evidence unfair and inadmissible. The rule recognizes the difficulty of the trier of fact assessing the probative value, if any, to be given to a statement made by a person who has not been seen or heard and who has not been subject to cross-examination. [*R. v. Khelawon* [2006] 2 S.C.R. 787]

[32] The difference between a statement of opinion and a statement of fact can be difficult to distinguish. McLachlin J, as she then was, writing for the majority in, *R v. Zundel*, [1992] SCJ No 70, [1992] 2 SCR 731, noted:

> [219]… A statement, tale or news is an expression which, taken as a whole and understood in context, conveys an assertion of fact or facts and not merely the expression of opinion. As noted earlier, the trial judge suggested to the jury that the key element of the distinction is falsifiability. Expression which makes a statement susceptible to proof and disproof is an assertion of fact; expression which merely offers an interpretation of fact which may be embraced or rejected depending on its cogency or normative appeal, is opinion.
>
> [221] The statement must have a sufficiently definite meaning to convey facts. An allegation that X is corrupt is not an assertion of fact because it makes no specific allegation and uses language that lacks [page834] a definite meaning. However, an allegation that X is corrupt because he embezzles from his employer bespeaks sufficiently certain facts to permit its characterization as a factual claim.
>
> [222] The statement must be verifiable through empirical proof or disproof. An allegation that X is a KGB agent is empirically verifiable and therefore factual; an allegation that her temperament would suit her for such work is not verifiable and therefore an expression of opinion. A statement that the hot dogs one makes are 100 percent beef is a verifiable factual claim; a statement that they are delicious is an expression of opinion.

[33] Opinion evidence was discussed by Leblanc J. in *Canadian National Railway Company v. Halifax (Regional Municipality)*, 2012 NSSC 300:

> [11] In addition to extrinsic evidence concerns, this case raises issues of opinion evidence. Charron, J. (as she then was) summarized the law on opinion evidence in *R. v. Collins* (2001), 160 C.C.C. (3d) 85, at para. 17:
>
> > In the law of evidence, an opinion means an "inference from observed fact": see *R. v. Abbey* (1982), 68 C.C.C. (2d) 394 at 409. As stated in *Abbey*, as a general rule, witnesses testify only as to observed facts and it is then up to the trier of fact to draw inferences from those facts. A lay witness will be permitted to give an opinion only with respect to matters that do not require special knowledge and in circumstances where it is virtually impossible to separate the facts from the inferences based on those facts. A witness testifying that "a person was drunk" is a common example of an opinion that can be provided by a lay witness. See *R. v. Graat* (1982), 2 C.C.C. (3d) 365 (S.C.C.) for a review of the law on non expert-opinion. Otherwise, opinion evidence will only be received with respect to matters calling for special knowledge beyond that of the trier of fact. In those cases, an expert in the field may be permitted to provide the judge and jury with an opinion, that is "a ready-made inference which the

> judge and jury, due to the technical nature of the facts, are unable to formulate" (*Abbey* at 409). The law as to expert opinion evidence was authoritatively restated in *Mohan,* supra. Before expert opinion evidence can be admitted, the evidence: (a) must be relevant to an issue in the case; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to any other exclusionary rule; and (d) it must be given by a properly qualified expert.

[12] Paciocco and Stuesser, in *The Law of Evidence in Canada*, 6th ed. (Irwin Law, 2011) the authors summarize the law governing lay opinion evidence at 183:

> Lay witnesses may present their relevant observations in the form of opinions where
>
> * they are in a better position than the trier of fact to form the conclusion;
>
> * the conclusion is one that persons of ordinary experience are able to make;
>
> * the witness, although not expert, has the experiential capacity to make the conclusion; and
>
> * the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.

[34] Finally, the principles of relevance and materiality were discussed by Justice Norton in *Annapolis (County) v. E.A. Farren Limited*, 2021 NSSC 304:

> [9] As to what is relevant, in *R. v. White*, 2011 SCC 13, the Supreme Court of Canada described the concept of relevance in the following terms:
>
> > [36] ...In order for evidence to satisfy the standard of relevance, it must have "some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would be in the absence of that evidence".
>
> [10] The Court had previously commented on this principle in *R. v. Arp* [1998], 3 S.C.R. 339:
>
> > [38] ... To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The

> evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". ...

[11] The parties agree that it is the substantive law governing the cause of action or offence set out in the pleadings that determines relevance. There is an apparent disagreement regarding the scope of what is relevant and how the evidentiary concepts of relevance and materiality differ.

[12] In their text, *The Law of Evidence*, (Toronto: Irwin Law Inc., 2015), authors David Paccioco and Lee Stuesser offer helpful explanations. As to what is "material", the authors say at p. 28:

> Regardless of the kind of proceeding, courts or tribunals resolving issues of fact are being asked to settle particular controversies. They are not interested in information about matters other than those that are that need to be settled. Evidence that is not directed at a matter in issue is inadmissible because it is "immaterial". By contrast, "evidence is material if it is directed at a matter in issue in the case" "what is in issue is determined by and a function of the allegation contained in the pleadings and the governing procedural and substantive law".

Application of the law to the Affidavits

[35] In *MacAulay*, the court struck the exhibits to an affidavit because the deponent had no personal knowledge of the materials. The court held that they could not be admitted for the truth of their contents. Contained in the exhibits were chiropractic and Functional Capacity Evaluation reports. These reports, the court held, contained opinion and hearsay evidence that would require expert testimony (para. 11). These reports are akin to exhibits thirteen to sixteen of Kyla Russell’s affidavit, which includes engineering reports, investigation reports, and valuation reports regarding the alleged defects in the property.

[36] Paragraph 7 of Kyla Russell's affidavit contains opinion evidence.

Paragraph 7 states:

> From a review of the correspondence between counsel that is contained in the file, including review of a "without prejudice" letter dates 2 April 2019 from solicitor Jeffery Delaney, the Plaintiff's lawyer at the initiation of the action, I believe the alleged defects at the root of the action, or the severity of the alleged defects, were discovered in May 2017,

[37] Ms. Russell bases her opinions regarding the discoverability of the defects at the root of the action on a review of a letter that was not attached as an exhibit. She has not advised the court that she has specialized knowledge of engineering or structural defects. She did not say that she believed the Plaintiff's solicitor Jeffery Delaney, nor did she state that he has any specialized knowledge of engineering that would allow him to identify the discovery date regarding the severity of the Property defects. Furthermore, because this letter was not provided to the court, there is no way of assessing the validity of the opinions Ms. Russell expressed. This evidence contains opinion evidence and hearsay and is not admissible.

[38] Similarly, paragraph 8 and the exhibits mentioned therein are not admissible.

Paragraph 8 states:

> From the ADD provided by the Plaintiff, Atlantic Baptist Seniors Citizens' homes Inc. (Atlantic), I attach the following documents:
>
> 1. Engineering Report of JW Cowie Engineering Ltd. Dated 3 August 2017 identifying a variety of alleged deficiencies,

> including to support columns, balconies, and firewalls (Atlantic ADD p. 186-188), marked as exhibit 13;
>
> 2. Engineering Report of JW Cowie Engineering Ltd. Dated 17 January 2018 identifying alleged deficiencies to balconies and exterior walls (Atlantic ADD p. 189-190), marked as exhibit 14;
>
> 3. Additional summary of possible defects recommended for investigation of JW Cowie Engineering Ltd, undated, identifying, inter alia, balconies, sheathing, windows, and vinyl siding joints (Atlantic ADD, p. 10-11), marker as exhibit 15;
>
> 4. Valuation report of Turner Drake & Partners Ltd dated 21 May 2019 providing an opinion on the difference in market value of Drumlin Hills with and without the alleged defects (Atlantic ADD, p. 1279-1284) marked as exhibit 16.

[39] The exhibits mentioned in paragraph 8 include reports from engineers outlining the defects of the Property. I infer that the evidence is being proffered for the truth of its contents, as no other use was stated, but the writers of the various reports are not available for cross-examination. Ms. Russell did not state the source of this information nor did she state that she verily believes this information to be true. Furthermore, the substance of these reports is not relevant for the purposes of this summary judgment motion which addresses expired limitation periods not the type and extent of defects in the property. These reports would be relevant to liability during a trial but should be introduced by the report writers in accordance with the rules of expert evidence.

[40] Accordingly, I conclude that paragraphs 7 and 8 of Kyla Russell's affidavit should be struck along with exhibits 13-16.

[41] Mr. Redden's affidavit also contains objectionable material, generally in the form of opinion evidence. I have followed Paciocco and Stuesser's guidance on the factors that impact the admissibility of opinion evidence, namely, that a layperson's relevant opinion can be admissible if:

> * they are in a better position than the trier of fact to form the conclusion;
>
> * the conclusion is one that persons of ordinary experience are able to make;
>
> * the witness, although not expert, has the experiential capacity to make the conclusion; and
>
> * the opinions being expressed are merely a compendious mode of stating facts that are too subtle or complicated to be narrated as effectively without resort to conclusions.
>
> (See David M, Paccicco and Lee Stuesser, *The Law of Evidence in Canada*, 6th ed. (Irwin Law, 2011) at pg. 183).

[42] I will reproduce the paragraphs at issue in full and underline the passages that the Town objects to. Paragraph 5 of Mr. Redden's affidavit discusses conversations that Mr. Redden had with Mr. Hopkins and Mr. Redden's beliefs about the role of municipal inspectors. Paragraph 5 states:

> Throughout the construction period Mr. Graham Hopkins acted as the inspector for the Town. I believe, based on my many years of experience in the construction industry and general representations of Mr. Hopkins throughout this project and on other projects, that the Inspector's role is to ensure that individual developments comply in all respects with *Building Code* standards and specifications and those of its *Regulations*.

[43] During cross-examination Mr. Redden confirmed that he had not discussed Mr. Hopkins's role with him nor had he been told that Mr. Hopkins's job was to ensure that Property construction complied with the building code. In light of Mr. Redden's role as a contractor, not as an inspector, his comments on the role of a municipal inspector are speculative. There is no evidence that Mr. Redden has the expertise to provide such an opinion. Therefore, this statement is inadmissible and that entire paragraph should be struck.

[44] Similarly, the sentences at issue in paragraph 7, where Mr. Redden discusses the role of reinspection during a construction project, also contain opinion evidence. The paragraph states:

> Like many projects, inspections resulted in the need to make adjustments to built elements of the project. In such cases, the reinspection work is required so that the inspector can satisfy him or herself that the work complies with the *Building Code* and its *Regulations*. Only then can the Inspector approve a given elements or stage of the project."

[45] This statement is not based on knowledge of the affiant nor any stated source where belief of the source is noted. It proports to provide opinion of the duties of municipal inspectors though Mr. Redden does not have the requisite expertise to provide such evidence. These sentences should be struck.

[46] Paragraph 10 states:

> I believe, based on my many years of experience in the construction industry and my interactions with Mr. Hopkins that he knew Redden Bros. was relying on his inspections to advance the project, remain Code-compliant and bring the construction to a successful completion.

[47] I agree with the Town that this paragraph seeks to establish what the Town knew without evidence to establish that knowledge. It is speculation and opinion evidence and should be struck because Mr. Redden does not have the requisite expertise to make such a statement.

[48] Paragraph 11 states:

> If an inspector demands or imposes incorrect specifications for a project, or an element of a project, such that inappropriate standards are applied or incorrect construction practices or steps are taken, the consequences can be both costly and time consuming for the owner or builder, usually both, and dangerous for others subsequently using the structure.

[49] This statement is related to Mr. Redden's experience as a contractor. It contains an opinion based on his experience that mistakes made in the inspection process can cause issues for the builder and owner of a property. This statement does not attempt argue that the Town has improperly conducted inspections and is an uncontroversial factual assertion that a layperson can provide and Mr. Redden is certainly in a better position than this court to make this finding, given his experience in the construction industry. However, I do not believe that this paragraph is a "compendious mode of stating facts" that are too subtle to otherwise be tendered. (Paccicco and Stuesser, *supra* at §183). There is nothing in this

paragraph that makes factual assertions about the issues between the parties. For this reason, paragraph 11 should also be struck.

Scope of claim and Discoverability

[50] Before delving into the summary judgment motion, I wish to address two preliminary issues that were raised by the parties. These two issues are (1) the scope of the cross-claim; and (2) discoverability of Redden's claim against the Town.

Scope of crossclaim

[51] The Town argues that Redden's crossclaim must be grounded in the facts alleged in the Plaintiff's statement of claim. This is supported by Rule 4.09(1)(a) which states that a crossclaim can simply allege that the other defendant (in this case the Town) is liable for part or all of the Plaintiff's losses. A crossclaim that does this is necessarily dependent on the Plaintiff's Statement of Claim to ground the facts that support liability. Redden's Statement of Defence says:

> 9. … it relied on and was entitled to rely, upon the knowledge, experience and expertise of… the Defendant Town of Bridgewater (Bridgewater) to inspect for and detect those items within its authority to inspect.
>
> 18. …Redden states that any injuries, losses, or damages claimed by the Plaintiff…. Are the result of other events, defects, or deficiencies for which others were responsible…

[52] The relevant passages of Redden's crossclaim state the following:

> 3. In the event that Redden is found liable to the Plaintiff, Redden claims contribution and indemnity from BMR, Cochrane and Bridgewater.
>
> 4. Redden Repeats the provisions of its Statement of Defence to the Plaintiff's Statement of Claim and repeats the allegation with regard to the negligence and conduct of the other Defendants.
>
> 6. Redden refers to and relies on the Plaintiff's allegations against BRM, Cochrane, and Bridgewater as outlined in the Plaintiff's Statement of Claim.

[53] The crossclaim expressly alleges that the other defendants are liable for the losses alleged by the Plaintiff. Paragraph 6 of Redden's crossclaim expressly limits the contents of the crossclaim to the contents of the statement of claim which does not assert that the remedial work provided by Redden is subject to this litigation. The scope of the pleadings is therefore limited to the initial construction of the Property not any remedial work performed by Redden in 2015 and onward.

Discoverability

[54] As noted above, the discoverability principle is codified in the *Limitation of Actions Act*. Section 8(2) of the *Act* states:

> 8(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 or contributed to by an act or omission;

(c) That the act or omission was that of the defendant; and

(d) That the injury, loss or damage is sufficiently serious to warrant a proceeding.

[55] The discoverability principle acts to ensure fairness to a potential plaintiff stating that the limitation period does not begin to run until "the material facts on which [the cause of action] 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; *Pioneer Corp v. Godfrey*, 2019 SCC 42, at para. 31). In *Godfrey*, Justice Brown, writing for the majority, stated:

> [34] …First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had knowledge of the existence of his or her legal rights before such rights expire…
>
> [35] Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff's knowledge of his or her injury, the rule of discoverability will not apply. In *Ryan*, for example, this Court held that discoverability did not apply to s. 5 of the *Survival of Actions Act*, R.S.N.L. 1990, c. S-32, which stated that an action against a deceased could not be brought after one year from the date of death. As the Court explained (para. 24):
>
> > The law does not permit resort to the judge-made discoverability rule when the limitation period is explicitly linked by the governing legislation to a fixed event unrelated to the injured party's knowledge or the basis of the cause of action. [Emphasis added by Brown J.]
>
> By tying, then, the limitation period to an event unrelated to the cause of action, and which did not necessitate the plaintiff's knowledge of an injury, the legislature had clearly displaced the discoverability rule (*Ryan*, at para. 27).

[56] In *WHW Architects*, Justice Bryson, writing for the court, held that the discoverability principle does not apply to the limitation period in section 504 of the *MGA*:

> [12] The discoverability principle does not apply where the limitation period bears no relation to the cause of action or the knowledge of the plaintiff. For example, in *Fehr v. Jacob*, [1993] M.J. No. 135 (Man. C.A.), Justice Twaddle put it this way:
>
> > In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed…
>
> [13] The parties agree that in this case, the discoverability principle does not apply to s. 504(3) of the *Municipal Government Act*. By tolling the six-year limitation period from the date of application for the relevant permit, the legislature clearly separates that period from accrual of the cause of action or the plaintiffs' knowledge of any facts material to that cause of action.

[57] The disposes of the argument that the discoverability rule applies here. However, if one were to disregard section 504 of the *MGA* and apply the judge-made discoverability rule, Redden would still have discovered their cause of action more than two years before their notice of counterclaim was filed, when Redden executed the Remediation Agreement on September 28, 2015.

[58] Moldaver J, writing for the court, in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, discussed discoverability in negligence claims and noted:

> [42] …. 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…
>
> [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.
>
> [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….

[59] Knowing that they suffered a loss and that the Town had a role in inspecting and approving the Property, Redden knew of its potential claim against the Town in September 2015. However, Redden chose not to pursue a claim and has only claimed against the Town for its alleged negligence in response to the Plaintiff's claim. The reasons for Redden's choice not to pursue an action until now are not relevant. I find that their claim was "discovered" by September 2015 which is when they knew the material facts that gave rise to the cause of action. This finding will be relevant to the duty of care issue discussed below not to my analysis on the impact of section 504(3) of the *MGA*.

2. Should summary judgment on the evidence be granted?

[60] The oft-cited leading case with respect to the test for summary judgment is *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89, [2016] NSJ No 505, where Justice Fichaud, writing for the court, held that judges must ask themselves the five following questions when confronted with a motion for summary judgment on the evidence:

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> ***First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?** [Rules 13.04(1), (2) and (4)]
>
> > If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below, or go to trial.
> >
> > The analysis of this question follows *Burton*'s [*Burton Canada Company v. Coady*, 2013 NSCA 95] first step.
> >
> > A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 .
> >
> > The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]
> >
> > *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the

adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

*__Second Question:__ If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**

If the answers to #1 and #2 are both No, summary judgment "must" issue:

Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind -- whether material fact, law, or mixed fact and law.

*__Third Question:__ If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

*__Fourth Question:__ If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on

> his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration.
>
> Then, after the hearing, the judge's decision should state whether and why the discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.
>
> [Emphasis in original].

First question: Is there a genuine issue of material fact?

[61] Redden argues that there are genuine issues of material fact on the issues of (1) the appropriate trigger and scope of the application of s. 504(3) of the *MGA*; and (2) whether the Town owed Redden a duty of care and what are the consequences of a breach of the duty (if the Town owes one).

[62] The Town argues that there is no issue of material fact because the pleadings frame the issue and clearly allege that the cause of action arises out of the initial build of the Property. The Town further argues that the *MGA* is triggered upon application for a permit, as discussed in *Nickerson.*

[63] The court in *MacDonald v. Risley*, 2021 NSSC 250, discussed the concept of "genuine" material issues of fact noting:

> [37] A broad cross section of definitions from reputable dictionaries are remarkably consistent. They include: authentic, real, sincere, possessing the claimed or attributed character, quality or origin. Its meaning is the opposite of counterfeit or disingenuous.
>
> [38] Clearly a broad definition of the word *genuine* is counter-intuitive to the mandated summary judgment process repeatedly prescribed by our appellate court. On the other hand, the word cannot be ignored. It would be a misuse and abuse of the litigation process to simply file a bald or bare denial of a material fact in an affidavit to thwart the intent of the summary judgment process.

[64] Redden has not provided evidence to satisfy me that there is a genuine dispute in relation to the facts that underlie the litigation namely, that Redden was hired to construct the Property, that the Town inspected the Property on various occasions during the initial building stage, and that the Plaintiff discovered defects in the Property. The issues that Redden raises in relation to the remedial work that occurred after the Property was completed are not material to this summary judgment motion. The parties are not asking this court to determine liability or interpret the appropriate standard of care, as this would be a question that would rest on disputed facts and is not appropriate on summary judgment.

Second Question: is there a genuine issue of law in dispute?

[65] Redden's arguments on the disputed issues of "material fact" are better defined as questions of law, which can be answered on a motion for summary judgment. Redden claims that the Town owed Redden a duty of care to inspect and approve the Property construction, which is a question of mixed fact and law

relying on the undisputed facts surrounding the relationship between the parties. Redden and the Town disagree about the interpretation and application of s. 504(3) of the *MGA*. This dispute involves statutory interpretation and is a question of law.

Third Question: Does the challenged pleading have a real chance of success?

[66] I will answer this question by analyzing each question of law starting with Redden's argument on the Town's alleged duty of care.

[67] Redden argues that the Town committed other negligent acts that are not covered by the *MGA* provisions, such as approving the building plans. Redden argues that the Town owed it a duty of care when performing these acts and that the extent of the issues with the Property were not discovered until 2017 so its counterclaim is not outside the limitation period.

[68] The Town argues that it did not owe a duty of care to Redden because to attract such a duty there must be a risk of damage to personal or physical property. Economic harm is not enough to give rise to a duty of care by a municipality. It claims there is a policy rationale not to recognize purely economic loss as subject to a duty of care. Redden only stands to suffer economic loss if it is found liable in the Plaintiff's action. If so, Redden's crossclaim would shift that liability to the Town.

[69] The Town cites *Wirth v. Vancouver (City),* [1990] BCJ No. 1616, 71 DLR (4th) 745, for the proposition that purely economic losses are not recoverable for claims against municipalities for negligent inspection. In this case, the court addressed a claim for negligence against the city of Vancouver for negligently issuing a building permit. Hollinrake J.A., writing for the court, (with concurring reasons from Taylor JA) held that there is no private law duty of care on the city to protect against purely economic loss resulting from breaches of by-laws.

[70] The subsequent decision of the Supreme Court of Canada in *Canadian National Railway Co. v. Norsk Pacific Steamship Co*., [1992] 1 S.C.R. 1021, overturned this holding. McLachlin J, as she then was, writing for the majority, held:

> [241] This Court in *Kamloops (City of) v. Nielsen*, supra, held that the purchaser of a house which the defendant municipality had negligently caused to be constructed could recover his financial loss in the absence of physical damage, affirming the non-exclusionary test *of Anns v. Merton London Borough Council*. It confirmed that claims for economic loss in negligence are not confined to cases where the plaintiff has suffered physical damage or where there has been reliance. Determination of when such liability arises is not a matter so much of finding a single universal formula, as of identifying criteria associated with valid claims. The Court, faced with the same issue which confronts us in this case -- whether recovery for economic loss should be allowed in a new category of case -- adopted an approach at once doctrinal and pragmatic, asking: (1) is there a duty relationship sufficient to support recovery? and, (2) is the extension desirable from a practical point of view, i.e., does it serve useful purposes or, on the other hand, open the floodgates to unlimited liability?

[71] Holding that a duty of care can be found despite a party suffering only economic loss when there is a relationship of sufficient proximity, McLachlin J stated:

> [258] In summary, it is my view that the authorities suggest that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance (*Hedley Byrne*); where there is a duty to warn (*Rivtow*); and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land (*Kamloops*). But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability. The result will be a principled, yet flexible, approach to tort liability for pure economic loss. It will allow recovery where recovery is justified, while excluding indeterminate and inappropriate liability, and it will permit the coherent development of the law in accordance with the approach initiated in England by *Hedley Byrne* and followed in Canada in *Rivtow, Kamloops* and *Hofstrand*.
>
> [259] I add the following observations on proximity. The absolute exclusionary rule adopted in *Stockton* and affirmed in *Murphy* (subject to *Hedley Byrne*) can itself be seen as an indicator of proximity. Where there is physical injury or damage, one posits proximity on the ground that if one is close enough to someone or something to do physical damage to it, one is close enough to be held legally responsible for the consequences. Physical injury has the advantage of being a clear and simple indicator of proximity. The problem arises when it is taken as the only indicator of proximity. As the cases amply demonstrate, the necessary proximity to found legal liability fairly in tort may well arise in circumstances where there is no physical damage.
>
> [260] Viewed in this way, proximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.

[72] *Martel Building Ltd. v. Canada*, 2000 SCC 60, gave the Supreme Court of Canada another chance to review the principles of recovery for economic loss. Writing for the court, Iacobucci and Major JJ, held:

> [37] Over time, the traditional rule was reconsidered. In *Rivtow* and subsequent cases it has been recognized that in limited circumstances damages for economic loss absent physical or proprietary harm may be recovered. The circumstances in which such damages have been awarded to date are few. To a large extent, this caution derives from the same policy rationale that supported the traditional approach not to recognize the claim at all. First, economic interests are viewed as less compelling of protection than bodily security or proprietary interests. Second, an unbridled recognition of economic loss raises the spectre of indeterminate liability. Third, economic losses often arise in a commercial context, where they are often an inherent business risk best guarded against by the party on whom they fall through such means as insurance. Finally, allowing the recovery of economic loss through tort has been seen to encourage a multiplicity of inappropriate lawsuits…
>
> [38] In an effort to identify and separate the types of cases that give rise to potentially compensable economic loss, La Forest J., in *Norsk, supra,* endorsed the following categories (at p. 1049):
>
> 1. The Independent Liability of Statutory Public Authorities;
>
> 2. Negligent Misrepresentation;
>
> 3. Negligent Performance of a Service;
>
> 4. Negligent Supply of Shoddy Goods or Structures;
>
> 5. Relational Economic Loss.

[73] In *Ingles v Tutkaluk Construction Ltd.*, 2000 SCC 12, the Supreme Court of Canada considered a claim against a city for negligent inspection. Bastarache J, writing for the court, held:

> [19] While I have stated above that a government agency will not be liable for those decisions made at the policy level, I must emphasize that, where inspection is provided

> for by statute, a government agency cannot immunize itself from liability by simply making a policy decision never to inspect. The decisions in *Anns v. Merton London Borough Council*, supra, and *Kamloops v. Nielsen*, supra, establish that in reaching a policy decision pertaining to inspection, the government agency must act in a reasonable manner which constitutes a *bona fide* exercise of discretion. In the context of a municipal inspection scheme, we must bear in mind that municipalities are creatures of statute which have clear responsibilities for health and safety in their area. A policy decision as to whether or not to inspect must accord with this statutory purpose; see, for example, *Kamloops v. Nielsen*, at p. 10.
>
> [20] Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances. Recently, in *Ryan v. Victoria*, supra, at para. 28, Major J. reaffirmed that the measure of what is reasonable in the circumstances will depend on a variety of factors, including the likelihood of a known or foreseeable harm, the gravity of that harm and the burden or cost which would be incurred to prevent the injury. The same standard of care applies to a municipality which conducts an inspection of a construction project. While the municipal inspector will not be expected to discover every latent defect in a project, or every derogation from the building code standards, it will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied; see, for example, *Rothfield v. Manolakos*, supra, at pp. 1268-69.

[74] In *Condominium Corporation No. 9813678 v. Statesman Corporation*, 2009 ABQB 493, the court discussed the plaintiff's argument that the city had, in addition to their inspection duties, a duty of care to ensure that the construction of a building was done safely. The city argued that it did not have control over the construction process and did not have a "close and direct" relationship with the eventual occupants of a building under construction. The city also argued that it made a policy choice not to oversee all elements of the construction process, noting that policy decisions are exempt from a private law duty of care. Finally, the

city argued that the *Safety Codes Act* exempted it from liability. This, the city said, was a policy reason not to recognize a duty of care.

[75] When discussing municipal liability, the court noted:

> [217] To determine whether a *prima facie* duty of care was owed by the City to the Plaintiffs it is instructive to consider the decision of the Supreme Court of Canada in *Rothfield v. Manolakos* (1989) SCJ No 120, (1989) SCR 1259. That case dealt with two actions brought against, *inter alia*, the City of Vernon. One action was brought by the property owner who had been dealing with the municipality and the second action was brought by an adjacent neighbour who had not been dealing with the City of Vernon.
>
> [218] In writing for the majority, La Forest, J. commenced his analysis of the scope of the duty of care owed by the City of Vernon as follows at paragraphs 4-5:
>
> > The city adopted the relevant building by-law "for the health, safety and protection of persons and property" pursuant to s. 734 of the *Municipal Act*, R.S.B.C., c. 290, as amended. By application of the test formulated by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] … the city, once it made the policy decision to inspect building plans and construction, owed a duty of care to all who it is reasonable to conclude might be injured by the negligent exercise of those powers. This duty is, of course, subject to such limitations as may arise from statutes bearing on the powers of the building inspector.
> >
> > In *Kamloops v. Nielsen*, [1984] 2 S.C.R. 2, this Court did not deal with an owner builder, but I see no reason why such a person would not fall within the scope of the duty of care owed by a municipality. There is, admittedly, an important distinction between the reliance of third parties on a municipal building inspector and the reliance of an owner builder. Third parties, such as neighbours and subsequent purchasers or occupiers of a building, obviously have no say in the actual construction of a building that proves defective. It is therefore reasonable that they should be entitled to rely on the municipality to show reasonable care in inspecting the progress of the construction. Owner builders, by contrast, are in a position to ensure that the building is built in accordance with the relevant building regulations, and from this it may be argued that they are not entitled to rely on the municipality. This would appear to be the view of Cory J., who states that it is the owner who should ensure through his contractors that

> the building is safe and structurally sound, and complies with the municipal by-law.
>
> [Emphasis added by myself].

[76] In *Rothfield,* La Forest J., writing for the majority, held that a municipality had a duty to inspect building plans with reasonable care:

> [10] As Cory J. has noted, the building inspector exercised his discretion in this case not to require plans by a professional engineer, and in such cases it was the practice to rely on on-site inspections to ensure compliance with the standards of the by-law. I am prepared to accept that as a general proposition this is not an unreasonable thing to do. The many small projects that come to the city must be processed with a reasonable measure of flexibility and efficiency, and undoubtedly many of the rudimentary specifications and sketches that are submitted to the inspector do not contain all the information necessary to enable the city to fully assess whether a project is up to standard. It would be unrealistic for the city to insist that owners submit fully adequate plans for such projects. By the same token, however, it would be unreasonable to impose on the city the burden of perfecting all such plans.
>
> [11] It seems to me, however, that it is incumbent on the city to at least examine the specifications and sketches. If an examination of these reveals that they may reasonably serve in the construction of a project, it would appear sensible to issue a permit. The inspector is functioning within the parameters of a legislative scheme in which it is normal to ensure that a project fully meets the standards of the by-law at the on-site inspection stage. It would tend to defeat the discretion not to require professional plans if a more exacting standard were imposed on the city inspector. The city's duty, after all, is only to exercise reasonable care.

[77] It is open to this court to find that the Town owed a duty of care to Redden. However, the cases above are not entirely analogous to the case at bar. The cases where a duty of care was found largely address losses suffered by *property owners*. Here, the duty of care alleged is for economic loss that a *construction company* could suffer if the property owner suffers a loss. A recognition of a duty to prevent

this type of loss is not an established category and would create a novel duty of care.

Do these circumstances justify finding a novel duty of care?

[78] As the specific question of whether a municipality owes a duty to a contractor (not occupier) to prevent economic loss has not been addressed by Canadian courts, a novel duty of care analysis is required. The onus rests on Redden to establish a relationship of sufficient proximity in accordance with the *Anns/Cooper* framework to establish the duty. The *Anns/Cooper* framework was outlined by McLachin CJ and Major J, writing for the court, in *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 SCR 537:

> [30] In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care…

[79] In *Cooper,* the plaintiff argued that the Registrar of Mortgage Brokers owed a duty of care to investors who were defrauded by a mortgage broker. The court concluded that the Registrar owed a statutory duty to the public as a whole but not

to individual investors. Therefore, the plaintiff did not have a sufficient degree of proximity to the Registrar to justify a private law duty of care.

[80] The Town's statutory duty under the *Building Code Act*, R.S.N.S. 1989, c. 46, is owed to the occupiers of buildings in order to ensure that buildings are safe for human use and habitation. The *Act* permits a building owner to appeal if the owner disagrees with any findings of the building official. The *Act* provides no recourse for construction companies affected by a dispute (s. 15(1)).

[81] Though municipalities owe a duty of care to occupiers of buildings, this does not necessarily support a duty extending to those who build those buildings. The relationship of proximity to occupiers rests on the premise that an occupier relies on a municipality to ensure that the building meets code requirements as they may suffer property damage or personal injury if it does not. Though the builder may also rely on a municipality to approve construction and maintain code compliance, their personal property is not at risk.

[82] Redden claims that the Town's duty to inspect and the liability limitation provisions in the *MGA* only cover negligent inspections. Redden argues that the Town was negligent in their approval of the Property's design and construction and

"other responsibilities or obligations as they may appear" (Redden's Brief, para. 44).

[83] In *Beutel Goodman Real Estate Group Inc. v. Halifax (City*), [1998] NSJ No 302, 169 NSR (2d) 248, Nathanson J., reviewed a municipal inspector's issuance of an occupancy permit even though the property did not comply with the *National Building Code*. He held that a municipality owes a duty of care to property owners and occupiers when approving building plans. He did not comment on whether that duty extended to those building the properties subject to the approved plans.

[84] In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 SCR 85, La Forest J, writing for the court held that there can be recovery in tort for the cost of repairing dangerous defects in a property:

> [42] … I note that the present case is distinguishable on a policy level from cases where the workmanship is merely shoddy or substandard but not dangerously defective. In the latter class of cases, tort law serves to encourage the repair of dangerous defects and thereby to protect the bodily integrity of inhabitants of buildings. By contrast, the former class of cases bring into play the questions of quality of workmanship and fitness for purpose. These questions do not arise here. Accordingly, it is sufficient for present purposes to say that, if Bird is found negligent at trial, the Condominium Corporation would be entitled on this reasoning to recover the reasonable cost of putting the building into a non-dangerous state, but not the cost of any repairs that would serve merely to improve the quality, and not the safety, of the building.
>
> [43] I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to

> take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.

[85] In *1688782 Ontario Inc. v. Maple Leaf Foods Inc*., 2020 SCC 35, Brown and Martin JJ, writing for the majority, clarified that *Winnipeg Condominium* does not, as a rule, extend liability to purely economic loss. Instead, Justices Brown and Martin noted:

> [45]… the economic loss incurred to avert the danger "is analogized to physical injury to the plaintiff's person or property" (P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (1995), 427, at p. 429). The point is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property "outside the ambit of perceived danger" (*ibid*, at p. 440; see also *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), at p. 404).
>
> [46] As we see it, then, recovery for the economic loss sustained in *Winnipeg Condominium* was founded upon the idea that, in the eyes of the law, the defendant negligently interfered with rights in person or property…

[86] There is no evidence that the defects of the Property were dangerous. Furthermore, Redden, as a contractor, not an occupier, has not pleaded that it has been economically harmed by the structural deficiencies, only that it stands to suffer harm if found liable.

[87] Brown and Martin JJ summarized:

> [18] To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant

> owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. To satisfy the element of damage, the loss sought to be recovered must be the result of an interference with a legally cognizable right…
>
> [19] This explains why the common law has been slow to accord protection to purely economic interests. While this Court has recognized that pure economic loss may be recoverable in certain circumstances, there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss. For example, economic loss caused by ordinary marketplace competition is not, without something more, actionable in negligence…

[88] Brown and Martin JJ held that the true question when determining if there is a duty upon a defendant to protect against pure economic loss is focused on the proximity of the relationship between the parties:

> [30] Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury. As this Court affirmed, "foreseeability alone" is insufficient to ground the existence of a duty of care. Rather, a duty arises only where a relationship of "proximity" obtains (*Cooper*, at paras. 22 and 30-32; see also *Livent*, at para. 23). Whether a proximate relationship exists between two parties at large, or inheres only for particular purposes or in relation to particular actions, will depend on the nature of the relationships at issue (*Livent*, at para. 27). It may also depend on the nature of the particular kind of pure economic loss alleged.
>
> …
>
> [32] In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid.*).
>
> …
>
> [35] That entitlement, however, operates only so far as the undertaking goes. As this Court cautioned in *Livent*, "[r]ights, like duties, are ... not limitless. Any reliance on the part of the plaintiff which falls outside of the scope of the defendant's undertaking of responsibility that is, of the purpose for which the representation was made or the

> service was undertaken necessarily falls outside the scope of the proximate relationship and, therefore, of the defendant's duty of care" (para. 31, citing Weinrib and A. Beever, *Rediscovering the Law of Negligence* (2007), at pp. 293-94). This "end and aim" rule precludes imposing liability upon a defendant for loss arising where the plaintiff's reliance falls outside the purpose of the defendant's undertaking. *Livent* makes clear, then, that considerations of undertaking and reliance furnish not only a principled basis for drawing the line in cases of negligent misrepresentation or performance of a service between duty and no-duty, but also for delineating the scope of the duty in particular cases, based upon the purpose for which the defendant undertakes responsibility. Reliance that exceeds the purpose of the defendant's undertaking is not reasonable, and therefore not foreseeable.
>
> …
>
> [65] In determining whether proximity can be established on the basis of an existing or analogous category, "a court should be attentive to the particular factors which justified recognizing that prior category in order to determine whether the relationship at issue is, in fact, truly the same as or analogous to that which was previously recognized" (*Livent*, at para. 28). This is because, as between parties to a relationship, some acts or omissions might amount to a breach of duty, while other acts or omissions within that same relationship will not. Merely because particular factors will support a finding of proximity and recognition of a duty within one aspect of a relationship and for one purpose to compensate for one kind of loss does not mean a duty will apply to all aspects of that relationship and for all purposes and to compensate for all forms of loss.

[89] Redden argues that the Town was negligent because it breached the Development Agreement which was made with Redden and the Plaintiff. The Development Agreement is an important consideration when determining if the parties were in a proximate relationship. The impact of a contractual relationship between the parties on the *Anns/Cooper* analysis was discussed in *Maple Leaf Foods*, where Justices Martin and Brown noted:

> [68] Given the possibility of an existing allocation of risk by contract, a proximity analysis must account for two concerns. First, the reasonable availability of adequate contractual protection within a commercial relationship, even a multipartite relationship, from the risk of loss is an "eminently sensible anti-circumvention

> argument" that militates strongly against the recognition of a duty of care (Stapleton, at p. 287; see also p. 286). As La Forest J., dissenting, recognized in *Norsk*, at p. 1116, "the plaintiff's ability to foresee and provide for the particular damage in question is a key factor in the proximity analysis". For example, a plaintiff may have been able to anticipate risk and remove, confine, minimize or otherwise address it by way of a contractual term (Linden et al., at para. 9.87).
>
> [71] The second concern is related to the first. If the *possibility* of reasonably addressing risk through a contractual term, even within a chain of contracts, presents a compelling argument against allowing a plaintiff to circumvent a contractual arrangement by seeking recognition of a duty of care in tort law, it follows that where the parties *have done so*, this consideration weighs even more heavily against such recognition. As Professor Stapleton explains, this particular anti-circumvention argument arises "not only [where] alternative protection by way of an arrangement with [the middle] party [was] available, but was obtained" (Stapleton, at p. 287 (emphasis added)). Again, this Court's decision in *Design Services* is instructive:
>
> > In my view, the observation of Professor Lewis N. Klar (*Tort Law* (3rd ed. 2003), at p. 201) -- that the ordering of commercial relationships is usually in the bailiwick of the law of contract -- is particularly apt in this type of case. To conclude that an action in tort is appropriate when commercial parties have deliberately arranged their affairs in contract would be to allow for an unjustifiable encroachment of tort law into the realm of contract.
> >
> > [Emphasis added by Brown and Martin; para. 56.]

[90] In *Maple Leaf Foods*, the majority concluded that because there was a contractual provision that precluded liability, there was a good policy reason not to recognize the relationship as sufficiently proximate to establish a duty of care. In this case, the Development Agreement is a contract that outlines the parties' respective obligations. The Development Agreement explicitly states that it does not impact the builder's obligation to construct the Property in accordance with applicable building codes. It does not state that the Town has any obligation to the builders or the Property owners.

Policy implications negativing a duty of care

[91] The Development Agreement states that the proposed development was passed by a resolution of Town Council. This provides another reason not to impose a duty of care, as policy decisions are exempt from a private law duty of care (*Nelson (City) v. Marchi*, 2021 SCC 41). This consideration falls into the second stage of the *Anns/Cooper* test, as noted by McLachlin CJ and Major J in *Cooper:*

> [37] This brings us to the second stage of the *Anns* test. As the majority of this Court held in *Norsk*, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in *Hercules Managements*, *supra*, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.
>
> [38] It is at this second stage of the analysis that the distinction between government policy and execution of policy falls to be considered. It is established that government actors are not liable in negligence for policy decisions, but only operational decisions. The basis of this immunity is that policy is the prerogative of the elected Legislature. It is inappropriate for courts to impose liability for the consequences of a particular policy decision. On the other hand, a government actor may be liable in negligence for the manner in which it executes or carries out the policy. In our view, the exclusion of liability for policy decisions is properly regarded as an application of the second stage of the *Anns* test. The exclusion does not relate to the relationship between the parties. Apart from the legal characterization of the government duty as a matter of policy, plaintiffs can and do recover. The exclusion of liability is better viewed as an immunity imposed because of considerations outside the relationship for policy reasons -- more precisely, because it is inappropriate for courts to second-guess elected legislators on policy matters. Similar considerations may arise where the decision in question is quasi-judicial (see *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, 2001 SCC 80).

[92] In *3311876 Nova Scotia Limited v. Trenton (Town*), 2023 NSSC 60, this court held that a decision made by a town council was a policy decision, noting that councils are elected and that they debate in open forums using a deliberative process that accounts for differing views and balance competing interests (paras. 53-56).

[93] There is no evidence before this court of the process in which the Town Council came to the decision to approve the development. The Development Agreement notes that the Property is situated in an area to which the Policy 4.35 of the Municipal Planning strategy applies, requiring a Development Agreement to be approved before the area can be developed (Development Agreement, Exhibit 23 of the Affidavit of Kyla Russell). Both of these, the vote to approve the development and the Municipal planning strategy, suggest that the Town made a policy decision to approve the Property development. If this was not a policy decision, the nature of the decision and the implication of court interference with decisions made by town councils provides a strong policy reason not to recognize a duty of care under the second stage of the *Anns/Cooper* test.

Conclusion on duty of care

[94] For these reasons, there is no real chance of success on the pleading that the Town owed Redden a duty of care for the approval of building plans and their conduct during the construction process, apart from their inspection duties where liability is otherwise precluded by section 504(3) of the *MGA*.

[95] Furthermore, as noted in *Norsk*, establishing a duty of care does not equate to establishing liability:

> [262] While proximity is critical to establishing the right to recover pure economic loss in tort, it does not always indicate liability. It is a necessary but not necessarily sufficient condition of liability. Recognizing that proximity is itself concerned with policy, the approach adopted in Kamloops (paralleled by the second branch of Anns) requires the Court to consider the purposes served by permitting recovery as well as whether there are any residual policy considerations which call for a limitation on liability. This permits courts to reject liability for pure economic loss where indicated by policy reasons not taken into account in the proximity analysis.

[96] In addition to the "No Liability" provisions in s. 504(3) of the *MGA*, s. 512 sets out a 12-month limitation period for claims brought against a municipality. In *Smith v. Parkland Investments Limited*, 2019 NSSC 74, Justice Jamieson addressed a similar issue. The plaintiff sued the town of Truro for negligent inspection and approval of a development agreement for a neighbouring property. The court held that the date of discovery was eight years prior to the commencement of the action and therefore the limitation period had expired, along with the four-year equitable extension of the limitation period pursuant to section 12 of the *LAA*.

[97] As discussed above, Redden's potential claim against the Town was "discovered" in September 2015, when they suffered an economic loss by signing a Remediation Agreement with the Plaintiff under which Redden paid security to the Plaintiff, reimbursed the Plaintiff for expenses it incurred remedying other defects, and performed remediation work without compensation. Even if the Town did owe Redden a duty of care, the limitation period would have expired in September 2016. Redden did not bring an action against the Town within 12 months from the date of the Remediation Agreement. Therefore, Redden is statute-barred from bringing an action against the Town for negligence based on a common law duty of care and has no real chance of success on this issue.

[98] There is however, a second question of law that Redden has raised regarding the interpretation of the *MGA* limitation period. I will address and determine that question now.

Interpretation of the MGA no liability provisions (section 504(3))

[99] Redden and the Town have differing interpretations of the triggering date for the limitation period set out in section 504(3) of the MGA. Section 504(3) states:

> 504(3) Notwithstanding the *Limitation of Actions Act* or another statute, a municipality or a village and its officers and employees are not liable for a loss as a result of an inspection or failure to inspect, if the claim is made more than six years after the date of the application for the permit in relation to which the inspection was required.

[100] Redden asks this court to interpret s. 504(3) to mean the that the limitation period begins on the date that the last permit application was submitted. The Town submits that the appropriate trigger date for the limitation period is from the date of the first permit application.

[101] The facts in *WHW Architects* bear a striking resemblance to this case. The Halifax Regional Municipality (HRM) was named as a defendant on a claim for negligent inspection of a building that had been constructed by WHW Architects and which experienced water leakage problems. HRM brought a motion to dismiss the claim against it based on the “no liability” provisions in section 504 of the *Municipal Government Act*. The court held that the no liability provision precluded an action in negligence after six years.

[102] Similarly, in *Nickerson*, Beveridge JA, held that section 504(3) meant that a municipality could not be liable after the six-year period passed:

> [60] Section 504(3) directs that the municipality is "not liable", not that a plaintiff must bring a claim within six years of the relevant permit date. To a prospective plaintiff, it is of little import if the provision is viewed as an ultimate limitation period or a stipulation of immunity that extinguishes his or her claim of damage caused by allegedly negligent conduct. The words are clear. There is no longer a viable claim against a municipality for negligent inspection after six years….

[103] Redden has argued that the limitation period should not begin to run until the last permit was issued. The Court in *Nickerson* unequivocally stated that a claim

against a municipality "based on negligent inspection cannot succeed" if it is made six years after the "permit application date" (para. 83). Redden asks me to interpret s 504(3) in a manner that is inconsistent with a ruling of the Court of Appeal. This approach would not only be incorrect but would contradict binding precedent and ignore the clear wording of the provision, which is a clear signal of legislative intent. If the legislature wishes to limit liability from six years after the permit application date, that is its choice. As noted by Justice Brothers in *Bancroft v. Nova Scotia (Minister of Lands and Forestry*), 2021 NSSC 234:

> [5] Elected officials on occasion make decisions, and use procedures, that leave some constituents feeling betrayed and even incensed. Where those officials exceed their power, judicial review may provide a remedy. But where the decisions are within their lawful authority, as in this case, the court cannot intervene. In such circumstances, if a remedy is sought by the public, the proper recourse in our constitutional democracy is not through the courts, but at the ballot box.

[104] Though Justice Brothers was dealing with judicial review, her comments are nonetheless applicable here. If the legislature's choices have consequences that are unsatisfactory to the public, the place to address it is at the polls not the courts.

[105] Redden notes that the case law does not answer the question of what permit application to use as the triggering date for the limitation period when there are multiple permits that have been applied for. However, I need not answer that question here. The Plaintiff's Statement of Claim clearly states that the Town issued an occupancy permit for the Property on March 31, 2010. It follows that the

final permit application was submitted and the limitation period began running no later than March 31, 2010. There is no evidence to suggest otherwise. As such, the limitation period expired no later than March 31, 2016.

[106] The Plaintiff's statement of claim was filed on August 31, 2017, and Redden's crossclaim was filed February 10, 2021. Both are outside the six-year limitation period. As noted above, discoverability is not an issue in this proceeding and the limitation period was not affected by the filing of the cross-claim.

[107] Redden has not provided this court with evidence to suggest that there were any other permit applications that would serve as the basis for a later limitation period, nor have they provided any evidence to refute the conclusion that the limitation period expired by the time it filed its claim.

[108] In *Milbury v Nova Scotia (Attorney General*), 2007 NSCA 52, Roscoe JA, writing for the court, noted:

> [24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test…

[109] This case was decided before the current summary judgment framework was developed. However, the court's remarks suggest that by establishing that the

limitation period has expired, the applicant will satisfy the first part of the *Shannex* test, that there is no genuine issue of material fact. This approach was applied in *Cochrane v. HFX Broadcasting*, 2021 NSSC 341, affirmed at 2022 NSCA 67, where Arnold J. noted that the first question for a court to determine is if the limitation period bars the proceeding. If so, the other party may present evidence that the limitation period did not expire before the action was commenced, for example based on incapacity or discoverability (paras. 33-36).

[110] As discussed above, the discoverability principle does not apply because s. 504(3) clearly states and has been interpreted by this court to mean, that the limitation period runs from the date on which the application for a permit was opened. There is no evidence of any incapacity issues that would have prevented Redden from beginning their action against the Town.

[111] Section 504(3) of the *MGA* precludes liability against the Town for their inspections of the Property as the limitation period has expired. As such, a claim against the Town is for negligent inspection is bound to fail.

[112] I conclude that the two questions of law raised by Redden have no real chance of success.

Disallowing a limitations defense

[113] The *LAA* section 12(2) allows a party to bring a motion to disallow a defence premised on a limitation period having passed. This provision and its relationship with s 504(3) of the *MGA* was discussed in *Nickerson*, where the Court of Appeal held that section 12(2) was not applicable to the six-year limitation period set out in s 504(3):

> [67] But in this case, the *LAA* provided that the limitation period for negligence was six years, subject of course to the various ways that the limitation period could be longer, or waived by the equitable relief provisions found in s. 3(2) of the *LAA*.
>
> [68] The only reason for the direction "Notwithstanding the *Limitation of Actions Act*" is to ensure that there would be no confusion. The six-year period found in s. 504(3) of the *MGA* would operate without regard to the various ways that time might be extended or waived by the *Limitations of Actions Act*.
>
> [71] Furthermore, the consequences of interpreting s. 504(3) as merely being a limitation period would render the words "Notwithstanding the *Limitation of Actions Act* or any other statute" and that municipalities are "not liable" meaningless. According to the respondents, municipalities could indeed be found liable if a court disallowed what they say is a limitation defence. The *LAA* would apply, despite the legislative direction in s. 504(3) that it did not. That cannot be what the legislature intended.

[114] *Nickerson* makes clear that the limitation period cannot be extended by provisions in the *LAA.* Furthermore, section 12 of the *LAA* would not be applicable in this case as the injuries suffered by the claimants (the Plaintiff and Redden) are purely economic, while this section only applies to personal injury claims; s. 12(2).

[115] The limitation period has expired. Therefore, Redden, on the basis of its pleadings, has no real chance of success in an action against the Town. Following

the approach set out in *Jesty v. Vincent A Gillis Inc.*, 2019 NSSC 320, if the limitation period has passed and there is no evidence to support the extension of a limitation period, then summary judgment is an appropriate disposition (para. 35).

Conclusion

[116] Summary judgment is granted to the Town in relation to Redden's crossclaim against the Town. I also grant the consent dismissal of the Plaintiff's action against the Town.

[117] In the circumstances I award no costs to the Town in relation to the consent dismissal of the Plaintiff's claim. Redden and the Town have not provided me with submissions on costs. These parties shall have 30 calendar days from the date of release of this decision to try to reach an agreement on costs. If they fail to do so, they may file written submissions and I will determine what the appropriate award of costs should be.

McDougall J.