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Fixing the Mistake: Limitation Periods in Professional Negligence Cases

Over a decade after Ontario's *Limitations Act, 2002* came into force, courts are still grappling with when a cause of action is discoverable and a limitation period starts to run. An increasingly litigated question relates to whether a limitation period runs while efforts are ongoing to fix the error that gave rise to the plaintiff's claim. The Court of Appeal for Ontario recently addressed this issue in *Presidential MSH Corp v Marr, Foster & Co LLP*.

Presidential MSH Corporation ("Presidential") brought an action against Larry Himmelfarb and Marr, Foster & Co. LLP, Presidential's former accountants, for a delay in filing Presidential's corporate tax returns. Canada Revenue Agency ("CRA") denied Presidential several tax credits and imposed penalties and taxes of approximately $500,000.

After Presidential received CRA's notices of assessment in April 2010, Presidential continued to work with the defendants to try to address these adverse consequences. As late as mid-2011, Presidential held out hope that CRA would grant discretionary relief to relieve against these consequences. Presidential's efforts were unsuccessful. CRA confirmed its assessment in July of 2011.

Presidential issued its Statement of Claim on August 1, 2012, more than two years after Presidential first received CRA's notices of assessment but less than two years after Presidential's efforts to persuade CRA to alter its assessments ultimately proved unsuccessful.

The defendants brought a summary judgment motion on the basis that the claim was statute-barred. The defendants were successful at first instance. Presidential appealed. The Court of Appeal set aside the order granting summary judgment to the defendants.

The question for the Court of Appeal was when, under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, an action in court became "an appropriate means to seek to remedy" the losses incurred by Presidential. Was it at the time of CRA's initial assessment, or only at the time of its decision to confirm?

Presidential's position, which the Court of Appeal agreed with, was that an action was not an "appropriate means" to resolve the dispute until the CRA appeal process was exhausted. The Court of Appeal found that "the motions judge erred… by equating knowledge that the defendants had caused a loss with a conclusion that a proceeding would be an appropriate means to seek a remedy for the loss." As a result, Presidential's claim was commenced within the limitation period.

The Court of Appeal set out helpful guiding principles to navigate the opaque terrain of discoverability under s. 5(1)(a)(iv), particularly in professional liability matters:

- Commencing a legal proceeding may not be "appropriate" in cases where a claim arises out of a professional's alleged wrongdoing but may be resolved by the good faith efforts of that professional. Examples of this would be ameliorative surgeries undertaken to improve the complications arising from prior unsatisfactory surgical results (as in *Brown v Baum* and *Chelli-Greco v Rizk*);
- Limitation periods do not start running simply by virtue of the plaintiff having been prompted to hire a lawyer or having incurred professional fees to remedy a loss;
- Commencing a legal proceeding may not be "appropriate" when other processes for dispute resolution are available and have not yet been exhausted (following the court's recent decisions in *407 ETR Concession Company v Day* and *Lipson v Cassels Brock & Blackwell LLP*). In the interest of certainty and efficiency, it must be "reasonably certain or ascertainable by a court" exactly when that alternate avenue has run its course in order to readily pinpoint when the limitation period on the legal proceeding started to run.

This decision promotes the court's interest in efficient procedures and in preventing unnecessary claims from being advanced. It is of particular application to professional liability claims. It allows room to address professional wrongdoing through processes outside of a courtroom. In many cases, this will encourage timely resolution and reduce or eliminate needless and lengthy litigation.

With notes from Julia Flood