

Court of Appeal Emphasizes the “Appropriate Means” Requirement for Discoverability under the *Limitations Act, 2002*

Waleed Malik, Osler, Hoskin & Harcourt LLP

What must a plaintiff know in order to “discover” a claim and trigger a limitation period? Knowledge of the claim itself, including actual knowledge of a loss caused by a defendant, may not be enough in some cases.

*Presidential MSH Corporation v Marr Foster & Co LLP*¹ was one such case. The plaintiff sued the defendants because they had failed to file its tax returns on time, causing the Canada Revenue Agency (“CRA”) to deny certain tax credits. The action was commenced more than two years after the plaintiff discovered that the CRA would be denying the credits. Despite that delay, the Court of Appeal for Ontario held that the action was not statute-barred. According to the Court, the claim was not discovered, and the limitation period did not start running, until the plaintiff also knew that an action was an “appropriate means” for remedying its loss.²

Presidential follows a series of recent decisions that have emphasized the role of the appropriate means criterion in s. 5(1)(a)(iv) of the *Limitations Act, 2002* (the “Act”)³ These decisions confirm that discoverability under the Act has departed from its common law origins by requiring more than knowledge of the material facts underlying a plaintiff’s claim. *Presidential* provides an overview of this recent jurisprudence and distills some guidelines from it, including identifying categories of cases where knowledge of loss may not be enough to trigger a limitation period.

The Discoverability Principle at Common Law and under the Act

The “discoverability principle” originated as a judge-made interpretative tool for construing limitation statutes.⁴ Where applicable, it delays the commencement of a statutory limitation period by providing that “a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.”⁵

The common law principle has been replaced by statutory codifications in many contexts. Section 5 of the Act is one such codification,⁶ and it provides as follows:

¹ 2017 ONCA 325 [“*Presidential*”].

² *Presidential*, at para 49.

³ SO 2002, c 24, Sched B.

⁴ *Fehr v Jacob* (1993), 14 CCLT (2d) 200 (Man CA), at p 206, cited with approval in *Ryan v Moore*, 2005 SCC 38 at para 23, and *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 37.

⁵ *Central Trust Co v Rafuse*, [1986] 2 SCR 147 at p 224.

⁶ Graeme Mew, Debra Rolph, and Daniel Zacks, *The Law of Limitations*, 3rd ed (Toronto: LexisNexis Canada Inc, 2015) at paras 3.66 and 3.90.

A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Section 5(1)(a)(iv), which requires that a claimant know that a proceeding would be an appropriate means to remedy a loss, injury or damage, was not part of the common law discoverability principle or prior limitations legislation in Ontario.⁷ And, until recently, this provision did not have a significant role in the jurisprudence on limitation periods, causing one commentator to ask “[w]here have all the 5(1)(a)(iv) analyses gone?”⁸ However, that requirement has recently taken centre stage in a number of decisions, including *Presidential*.

The Decision in Presidential

Background

Presidential MSH Corporation, the plaintiff, sued Larry Himmelfarb (the plaintiff’s former accountant) and Marr, Foster & Co. LLP (Mr. Himmelfarb’s firm) because the defendants failed to file the plaintiff’s tax returns on time, causing the CRA to deny tax credits that would have been available otherwise.

The plaintiff received the CRA’s notices of reassessment denying the tax credits on April 12, 2010. It retained a lawyer who filed a notice of objection challenging the denial, and also made an application for discretionary relief. Mr. Himmelfarb provided assistance on both fronts. However, in a letter dated May 16, 2011, the CRA stated that it intended to maintain the denial of the tax credits.

⁷ 407 ETR *Concession Company Limited v Day*, 2016 ONCA 709 [“407 ETR”] at para 33.

⁸ Daniel Zacks, “Ontario: Where Have All the 5(1)(a)(iv) Analyses Gone?” (April 18, 2015), *Under the Limit* (blog), online: <<http://limitations.ca/?p=206>>.

The plaintiff commenced an action against the defendants on August 1, 2012 - more than two years after the CRA initially denied the tax credits, but within two years of the CRA's letter stating that it would confirm the initial assessments. The defendants argued that the claim was statute-barred, and succeeded on a motion for summary judgment at first instance. Presidential appealed and, as noted above, was successful at the Court of Appeal.

General Principles

Justice Pardu, who provided reasons on behalf of a unanimous Court, reviewed a number of recent decisions interpreting s. 5(1)(a)(iv), and distilled a few key principles.

First, the appropriate means requirement was not an element of the former limitations statute or the common law discoverability rule. It was added by the Act to deter needless litigation.⁹ That objective is furthered by tolling a limitation period that could otherwise force a rush to litigation and cut short alternatives for resolving parties' disputes.¹⁰

Second, s. 5(1)(a)(iv) can postpone the commencement of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss because of the defendant's actions.¹¹

Third, the appropriate means criterion will require a fact-specific and contextual inquiry. Whether an action is appropriate will depend "on the specific factual or statutory setting of each individual case" and "there are many factual issues that will influence the outcome."¹²

Review of Recent Case Law

Given the fact-specific inquiry required by the appropriate means requirement, Justice Pardu observed that prior case law may be of limited assistance. Nonetheless, she engaged in a thorough review of the recent jurisprudence addressing s. 5(1)(a)(iv) and identified two categories of cases where that provision may delay the commencement of a limitation period.

First, an action against an expert professional may not be appropriate if the professional is engaged in efforts to resolve any injury or loss without recourse to the courts. Justice Pardu referred to *Brown and Chelli-Greco v Rizk*¹³ as examples. Both were medical malpractice cases where the defendant tried to remedy the loss caused by allegedly negligent medical procedures. In both cases, the actions were commenced more than 2 years after the claimants had discovered the loss suffered as a result of the medical procedures. However, the plaintiffs' actions were not statute-barred because they had been commenced within two years of the date on which the plaintiffs stopped receiving assistance from the defendants.

⁹ *Presidential*, at para 17, citing 407 ETR, at para 48.

¹⁰ 407 ETR, at paras 48-49.

¹¹ *Presidential*, at para 17, citing 407 ETR, at para 33.

¹² *Presidential*, at para 18, citing 407 ETR, at para 34, and *Brown v Baum*, 2016 ONCA 325 ["*Brown*"] at para 21.

¹³ 2016 ONCA 489.

Second, an action may not be appropriate while the plaintiff is pursuing another process that could resolve the parties' dispute and eliminate the plaintiff's loss. As an example, Justice Pardu referred to *407 ETR*. That case concerned the collection of unpaid tolls for a public highway. The plaintiff, which operated the highway, had two options for recovering unpaid tolls: a civil action and a statutory license plate denial process. The Court of Appeal in *407 ETR* concluded that the license plate denial process was "an effective, necessary and indeed integral feature of" the public highway system. Therefore, the Court concluded, a civil action was not appropriate, and the limitation period does not begin to run, until the license plate denial process had run its course.

Application of Principles

Justice Pardu then applied the principles noted above to the case before the Court. She concluded that the plaintiff's claim fit within both of the categories where s. 5(1)(a)(iv) can delay the commencement of a limitation period. Until May 2011, the plaintiff was relying on the defendants (its professional advisors) for advice on how to eliminate its loss, and the CRA's appeal process (an alternative to a civil action that could have eliminated the plaintiff's loss) was ongoing. Therefore, the plaintiff's claim was not discoverable until May 2011 and its action was not statute-barred. According to Justice Pardu, the motion judge erred in coming to the opposite conclusion "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."¹⁴ Therefore, she allowed the plaintiff's appeal and permitted its action to proceed to trial.

Discussion and Conclusion

The Act, it has been noted, was a "revised, comprehensive approach to the limitation of actions" and introduced several important reforms to achieve a balance between the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs.¹⁵ It is clear now that the appropriate means requirement in s. 5(1)(a)(iv) was one of those reforms.

The effect of this reform is evident in cases like *Presidential*, *Brown*, and *407 ETR*. By tying the discoverability of claims to something in addition to a claimant's knowledge of its cause of action - a clear departure from the preceding approach - the Act may keep a claim alive longer than the common law discoverability principle would have.

The magnitude of this departure is an open question. After *Presidential*, we know that there are at least two kinds of cases where knowledge of loss alone may not be enough to trigger a limitation period. However, like the cases preceding it, *Presidential* did not restrain the effects of s. 5(1)(a)(iv) to any defined categories. Therefore, it remains to be discovered how many other cases will be affected by the newfound emphasis on the appropriate means requirement.

¹⁴ *Presidential*, at para 49.

¹⁵ *Joseph v Paramount Canada's Wonderland*, 2008 ONCA 469 at para 8.