TAX FOR THE Owner-Manager

Editor: Thomas E. McDonnell, QC

Volume 18, Number 1, January 2018

Professional Negligence: The Discoverability of Liability Claims in Tax Cases

In *Presidential MSH Corporation v. Marr Foster & Co. LLP* (2017 ONCA 325), the issue was whether a claim of negligence made by MSH against its individual accountant and his firm (collectively, "the accountants") was statute-barred.

The facts in the case are relatively simple. The events were set in motion when MSH's accountants filed MSH's corporate tax returns after the due date. As a result, the CRA denied income tax credits that would have been available if the tax returns had been filed on time. Consequently, MSH suffered damages of approximately $500,000 in unpaid taxes, interest, and penalties.

MSH received the CRA's notices of assessment disallowing the claimed credits on April 12, 2010. Upon receipt of the notices of assessment, a principal of MSH contacted the accountants to seek advice. In its decision, the Court of Appeal for Ontario (ONCA) stated that the motion judge had inferred that the accountants had advised an MSH principal to retain a tax lawyer to determine how to solve the problem, but they did not advise MSH to obtain legal advice about a professional negligence claim against the accountants.

MSH retained a tax lawyer on April 15, 2010, but there was no discussion of possible action against the accountants. The tax lawyer filed a notice of objection and an application for discretionary relief. The accountant who had made the original omission assisted the tax lawyer in preparing these appeals, until at least November 2011. In a letter dated May 16, 2011, the CRA advised MSH that the assessments would be confirmed; on July 7, 2011, it confirmed them.

The motion judge said that as late as July 2011 there was still a reasonable chance that the application for discretionary relief could mitigate some or all of MSH's loss. On August 1, 2012, the statement of claim was issued against the accountants. That date was more than two years after the initial denial of the tax credits by the CRA but was within two years of the CRA's refusal to change the assessments in response to the notice of objection. Ontario's Limitations Act, 2002 provides for a basic limitation provision, which was applicable in this case. Specifically, the Limitations Act provides that a proceeding cannot be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

It further provides in section 5(1) as follows:

> (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damages 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. . . .

Pardu JA, writing unanimously for the court, began the analysis by reviewing section 5(1) of the Limitations Act and the decision in *407 ETR Concession Company Limited v. Day* (2016 ONCA 709), in which Laskin JA held that the appropriateness test in section 5(1)(a)(iv) of the Limitations Act "can have the effect . . . of postponing the start date of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss because of the defendant's actions." Laskin JA further held that whether an action is appropriate depends on the specific factual or statutory setting of each individual case.

Pardu JA then reviewed the existing case law to determine whether it was appropriate for MSH to commence its action against the accountants while the CRA appeal was still being pursued. She paid particular attention to *Brown v. Baum* (2016 ONCA 325), which she cited as a leading example of the suspension of a limitation period. In *Brown*, the plaintiff suffered severe complications from surgery performed by a medical doctor. The doctor performed a series of subsequent surgeries in an attempt to improve the outcome of the initial surgery. The patient brought an action against the doctor in June 2012, three years after the initial surgery but within two years of the last ameliorative surgery. The motion judge held that the limitation period did not commence until June 2010, when the last ameliorative surgery was performed, and that the patient's proceeding was not appropriate while treatment continued. The ONCA upheld the decision and stated that it would not have been appropriate for the patient to sue the doctor while he was trying to fix the complications that arose in the original

surgery because "he might well have been successful in correcting the complications and improving the outcome of the original surgery." Pardu JA also reviewed the decision in *Chelli-Greco v. Rizk* (2016 ONCA 489), which dealt with a dentist and a similar series of ameliorative operations.

On the basis of this case law, Pardu JA held that legal action may be inappropriate in cases where a plaintiff is relying on the superior knowledge and expertise of a defendant, which often, although not exclusively, occurs in a professional relationship. That is, the limitation period may not begin to run if a professional attempts to remedy an action leading to a possible negligence claim because it may not be appropriate to commence the claim while the ameliorative work is being done. Pardu JA also reviewed a second line of cases relating to discoverability in section 5(1)(a)(iv) of the Limitations Act involving the pursuit of other processes that have the potential to resolve the dispute between the parties and eliminate the plaintiff's loss.

Applying the case law to the facts at hand, the court held that the motion judge had erred in holding that MSH knew or ought to have known that its proceeding was appropriate as early as April 2010, when it received the CRA's notices of assessment disallowing the tax credits. The court held that proceeding was not appropriate, and the plaintiff's underlying claim was not discovered, until May 2011, when the CRA responded to the appellant's notice of objection and advised that it intended to confirm its initial assessments.

The court concluded that the actions of the accountants in attempting to resolve the dispute were significant; it noted that if the CRA appeal process had been successful, MSH's loss would have been substantially eliminated. The court held that it would not have been appropriate for MSH to commence a proceeding against the accountants until the ameliorative efforts had concluded. Accordingly, the court allowed the appeal and set aside the judgment of the motion judge.

This case is of interest to tax practitioners in Ontario who deal with situations in which ameliorative efforts may mitigate or eliminate a possible claim in negligence. Practitioners should be aware that participating in ameliorative efforts may delay the commencement of the limitation period applicable to the negligence claim.

Philip Friedlan and Adam Friedlan
Friedlan Law
Richmond Hill, ON