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Do You Have to Understand your Prospects of Success to Start a Lawsuit?

By Marco P. Falco

In Ontario, the two-year limitation period for most civil lawsuits starts when the plaintiff knows that their action would be an "appropriate means" to remedy their loss.

Over the past seven years, Ontario Courts have sought to define what it means for a lawsuit to be "appropriate" within the meaning of s.5(1)(a)(iv) of the *Limitations Act, 2002*, S.O. 2002, c.24, Schedule B (the "*Act*").

A recent decision of the Ontario Court of Appeal, *Dass v. Kay*, 2021 ONCA 565, addresses the question of whether or not an action is "appropriate" until the plaintiff understands the likelihood of success.

A Family Affair

Dass involved an action by the plaintiff for reputational and commercial harm arising from the defendant's allegedly unauthorized use of the plaintiff's personal information in a loan application. The unauthorized loan application led to the plaintiff's commercial lender refusing to do business with him.

In 2015, the defendant mortgage broker was asked by the plaintiff's brother (the "brother") to secure financing for the $6million purchase of a commercial property.

The loan application listed the plaintiff and his company as guarantors. The loan application was ultimately unsuccessful.

In fact, the plaintiff knew nothing about the loan application. He never agreed to guarantee it and was in no way involved with the property's purchase.

The plaintiff first learned of the unauthorized loan application in July 2015, when he was seeking financing for the purchase of a commercial property. That application was ultimately declined.

On August 21, 2015, after being rejected for his loan application, the plaintiff sent an email to his lawyer, copying the defendant mortgage broker, and complaining that the previous unauthorized loan application by his brother harmed his reputation in the eyes of the lender. He expressed concern that he could lose business and he asked his lawyer if he could pursue criminal charges against his brother and the defendant broker.

In January 2018, after the plaintiff secured financing for his projects through other lenders at significantly higher interest rates, the plaintiff was advised by the lenders that he had been ostracized by the lenders because of his brother's unauthorized loan application.

The plaintiff started his action against the defendants in April 2018, a few months after the lenders advised him of his status with them, but more than two years after the plaintiff had sent the August 2015 email to his lawyers.

The defendants brought a motion to have the plaintiff's claim dismissed on the basis that it was outside the two-year limitation period.

The motion judge agreed, and dismissed the action.

The motion judge held that the plaintiff learned of the unauthorized use of his information by August 2015, as evidenced by his email. At that time, the plaintiff knew he would suffer financial loss as a result of the unauthorized application. The claim was not started until April 2018, and so was outside Ontario's two-year limitation period.

On appeal to the Court of Appeal, the Court affirmed the motion judge's order.

When is a Lawsuit "Appropriate"?

Under section 5 of the *Act*, a plaintiff discovers a claim 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).

Under section 5(1)(a)(iv), the plaintiff does not "discover" the claim within the two-year limitation period until it knows that, having regard to their loss or damage, an action or proceeding "would be an appropriate means to seek to remedy it".

The issue of whether an action is appropriate is contextual and depends on the "factual and statutory context" of each case: *Sosnowski v. MacEwan Petroleum Inc.* 2019 ONCA 1005.

The Court of Appeal has already recognized two situations in which the limitations clock is postponed because the action is not "appropriate":

i. when the plaintiff relies on the defendant's superior knowledge and expertise, especially where the defendant tries to improve the plaintiff's loss; and

ii. where an alternative dispute resolution process offers an adequate remedy and is still ongoing: *Sonowski, supra*.

This list is not closed.

In *Dass*, the plaintiff tried to add a third category to this list.

The plaintiff argued that his action was not appropriate until 2018 because, among other things, it was not until 2018 that he learned he was permanently ostracized from the lender.

The Prospect of Success Does Not Make an Action Appropriate

The Court of Appeal rejected the plaintiff's argument:

The Appellants argue that the motion judge erred by rejecting the proposition that an assessment of the appropriateness of litigation, within the meaning of s.5(1)(a)(iv), includes an assessment of the prospect of the success of litigation, particularly where the party has relied on an assessment of merits by legal counsel.

…

The appellants are not, of course, restricted to the two categories of cases identified to date that delay the start of the limitation period…

What the appellants have proposed is, in effect, an expansion of the class of matters under s.5(1)(a)(iv) [of the *Act*] to include any situation where plaintiffs know that they have been wronged or suffered damage at the hands of the defendants, but doubt they will be able to marshal the evidence to prove the claim and are unsure whether the scale of the eventual commercial loss will make an action remunerative.

This proposal has been considered and rejected by courts repeatedly…

The Court of Appeal's reasoning was governed in part by the fact that to accept the plaintiff's argument would "substantially reduce the certainty [the *Act*] is intended to provide".

Don't Wait Too Long to Assess Your Case

The decision in *Dass* forces plaintiffs to take decisive action regarding their claim the moment they understand they have suffered loss or damage as a result of the defendant's action.

The refusal in *Dass* to postpone the running of the limitations clock on the basis that the plaintiff is not yet sure of success at trial reflects an understanding that all litigation has an end-point.

A plaintiff cannot wait years to gather evidence and assess the merits of their case, in the hope that this will optimize their chances of success.

While the Court in *Dass* was certainly not encouraging frivolous lawsuits, it was sending a message to plaintiffs: don't wait until your action is potentially profitable to start it.

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