COURT OF APPEAL FOR ONTARIO

CITATION: Presidential MSH Corporation v. Marr Foster & Co. LLP, 2017 ONCA 325
DATE: 20170424
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Cronk, van Rensburg and Pardu JJ.A.

BETWEEN

Presidential MSH Corporation
(formerly The Martin Schmerz Holding Corporation)

Plaintiff (Appellant)

and

Marr, Foster & Co. LLP and Larry Himmelfarb

Defendants (Respondents)

Allan Sternberg and Daniella Murynka, for the appellant

Michael E. Girard, for the respondents

Heard: January 20, 2017

On appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated July 6, 2016.

Pardu J.A.:

A. INTRODUCTION

[1] The appellant, Presidential MSH Corporation, appeals from summary judgment dismissing its action against the respondents, its former accountant

Larry Himmelfarb and his firm Marr, Foster & Co. LLP, on the ground that the action was barred by passage of a limitation period.

[2] The respondents filed the appellant's corporate tax returns after their due date. As a result, the Canada Revenue Agency ("CRA") denied tax credits that would have been available had the returns been filed on time. The appellant suffered damages of approximately $550,000 in unpaid taxes, interest and penalties.

[3] The appellant received the CRA's Notices of Assessment disallowing each of the claimed credits on April 12, 2010. When Martin Schmerz, a principal of Presidential, got the notices, he immediately asked Himmelfarb what to do and how to fix the problem.

[4] The motion judge inferred that Himmelfarb advised Schmerz to retain a tax lawyer to determine how to solve the tax problem but did not advise him to obtain legal advice about a professional negligence claim against the respondents.

[5] Schmerz did retain a tax lawyer on April 15, 2010, but there was no discussion of a possible action against the respondents. The lawyer filed a Notice of Objection to the CRA assessments, as well as an application for discretionary relief. Himmelfarb helped the appellant prepare its appeals to the CRA by drafting the application for relief and helping the appellant and its lawyer with whatever else they needed, until at least November 2011.

[6] By letter dated May 16, 2011, the CRA responded to the Notice of Objection advising that it intended to confirm the assessments. It did in fact confirm them on July 7, 2011.

[7] The motion judge found that, as late as July 2011, there was still a reasonable chance that the application for discretionary relief would mitigate some or all of the appellant's loss.

[8] On August 1, 2012, the appellant issued its statement of claim against the accountants. This was more than two years after the initial denial by CRA of the credits, but within two years of CRA's refusal to alter the assessments in response to the Notice of Objection.

B. REASONS OF THE MOTION JUDGE

[9] The motion judge's decision to grant summary judgment against the appellant turned on the application of the "discoverability" provision in s. 5(1) of the *Limitations Act*, *2002*, S.O. 2002, c. 24, Sched. B ("the *Act*"):

> 5. (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 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).

[10] More particularly, it turned on when the appellant first knew that, "having regard to the nature of its… loss…, a proceeding would be an appropriate means to seek to remedy it under s. 5(1)(a)(iv) of the *Act* or, given its circumstances and abilities, it ought reasonably to have known this under s. 5(1)(b).

[11] The appellant argued before the motion judge that a proceeding against the respondents was not appropriate before August 1, 2010 for three reasons:

1. No one, including the respondents, had advised it of the possibility of a claim against the respondents;
2. Himmelfarb was actively assisting the appellant in its efforts to eliminate its loss by appealing to the CRA; and
3. The assessments were not confirmed until July, 2011.

[12] In his reasons, at para. 67, the motion judge defined the issue as "whether any or all of these three factors, alone or in combination, might reasonably be supposed to have hidden from the plaintiff the realization that a proceeding would be an appropriate means to seek a remedy for the loss." He concluded that they did not.

[13] The appellant relied on *Brown v. Baum*, 2016 ONCA 325, 348 O.A.C. 251. In *Brown*, this court upheld the decision of a motion judge that it was not legally appropriate for the plaintiff to sue her doctor for professional negligence while the doctor was attempting to ameliorate complications resulting from a surgery he performed on the plaintiff. The motion judge held that *Brown* did not assist the appellant because, as he stated at para. 77 of his reasons, "the doctor continued to treat the patient for the very injury that gave rise to the claim."

[14] The motion judge appeared to reason that the appellant's claim would have been appropriate, even while the CRA appeal was still ongoing, because the appeal would not have fully eliminated the appellant's claim against the respondents. In particular, it would not have eliminated the appellant's claim for the costs of retaining a tax lawyer to prosecute it:

> In the present case, the plaintiff prudently sought to mitigate the harm caused by the missed filing deadline through multiple applications for administrative relief from CRA and the Minister. If successful, those avenues would have reduced or eliminated the tax liability that gave rise to this claim. The relief sought would not have eliminated the claim entirely since the professional advice needed to pursue those remedies was not without cost and it could not be said whether CRA would grant any of the relief sought. Those applications had some chance of success, but ought not to have deterred a duly diligent plaintiff from considering what other avenues lay open. The plaintiff did in fact hire litigation counsel to do just that in March 2011 prompted – on the record before me – by no other fact than the passage of several months without a favourable reply from CRA. [Emphasis added.]

[15] Finally, the motion judge applied this court's ruling in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652. In *Markel*, Sharpe J.A. stated, at para. 34, that the term "appropriate" in s. 5(1)(a)(iv) of the *Act* means "legally appropriate". He reasoned:

> To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess the tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions.

[16] The appellant renews its arguments on s. 5(1)(a)(iv) of the *Act* before this court, submitting that a proceeding against the respondents was not appropriate before August 1, 2010 and after the CRA appeal finally ran its course.

C. ANALYSIS

(1) The purpose of s. 5(1)(a)(iv) of the *Act*

[17] The motion judge did not have the benefit of this court's decision in *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709, 403 D.L.R. (4th) 485. In that case, Laskin J.A. discussed the purpose of s. 5(1)(a)(iv) of the *Act*. He noted, at para. 48:

> [I]t seems to me one reason why the legislature added "appropriate means" as an element of discoverability was to enable courts to function more efficiently by deterring needless litigation. As my colleague Juriansz J.A. noted in his dissenting reasons in *Hare v. Hare*,

> courts take a dim view of unnecessary litigation. [Citation omitted.]

Laskin J.A. also noted, at para. 33, that the appropriateness criterion in s. 5(1)(a)(iv) was not an element of the former limitations statute or the common law discoverability rule, and that this added element "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."

[18] Laskin J.A. stated, at para. 34, that whether an action is appropriate depends on the specific factual or statutory setting of each individual case. Because of this, case law applying s. 5(1)(a)(iv) is of limited assistance. And in *Brown*, Feldman J.A. noted that "there any many factual issues that will influence the outcome": at para. 21. Further, when s. 5(1)(b) of the *Act* is applied, the determination whether legal action would be appropriate takes into account what a reasonable person with the abilities and in the circumstances of the plaintiff ought to have known. Section 5(1)(b) is described as a modified objective test in *Ferrera v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851, 113 O.R. (3d) 401, at para. 70.

[19] While I agree that whether a plaintiff ought to have known whether a proceeding would have been an appropriate means to seek to remedy damage, injury or loss will turn on the facts of each case and the abilities and

circumstances of the particular plaintiff, prior case law can assist in identifying certain general principles. I turn now to certain of those principles.

(2) The effect of assistance by the defendant to eliminate the loss

[20] First, the cases suggest that a legal proceeding against an expert professional may not be appropriate if the claim arose out of the professional's alleged wrongdoing but may be resolved by the professional himself or herself without recourse to the courts, rendering the proceeding unnecessary.

[21] *Brown* is a leading example of the suspension of a limitation period under s. 5(1)(a)(iv) in these circumstances. In *Brown*, the plaintiff suffered severe complications from a breast reduction surgery performed by the defendant, Dr. Baum, in March 2009. Dr. Baum performed a series of surgeries between May 2009 and June 2010 in an attempt to improve the outcome of the initial surgery. The patient brought an action against Dr. Baum, alleging lack of informed consent, in June 2012, three years after the initial breast reduction surgery but within two years of his last ameliorative surgery. Dr. Baum brought a motion for summary judgment to dismiss the action as statute-barred.

[22] The motion judge held that the limitation period did not commence until June 2010, when the last ameliorative surgery was performed. The patient's proceeding was not appropriate while Dr. Baum continued to treat her.

[23] This decision was upheld on appeal to this court. Feldman J.A. held, at para. 18, that it would not have been appropriate for the patient to sue Dr. Baum while he was trying to fix the complications that arose in the original surgery because "he might have been successful in correcting the complications and improving the outcome of the original surgery." Feldman J.A. further stated that "it is not simply an ongoing treatment relationship that will prevent the discovery of the claim under s. 5. In this case, it was the fact that the doctor was engaging in good faith efforts to remediate the damage and improve the outcome of the initial surgery. This could have avoided the need to sue": para. 24.

[24] *Brown* was soon followed in *Chelli-Greco v. Rizk*, 2016 ONCA 489. A patient sued her dentist for professional negligence within two years of her last appointment with the dentist. The dentist moved for summary judgment. He argued that the patient's claim was time-barred because it was discovered more than two years before it was commenced, when the patient first complained of dental work performed by the dentist and demanded reimbursement.

[25] The motion judge denied summary judgment, finding that the patient's decision to continue treatment with the dentist beyond the date of her complaint was based on the dentist's endeavours to repair his deficient dental work. On appeal, this court stated at para. 4: "Given this finding, we see no error in the motion judge's conclusion that the respondent's action was not discovered until

after the treatment and the dentist-patient relationship had ended and that her action was not statute-barred as a result."

[26] Resort to legal action may be "inappropriate" in cases where the plaintiff is relying on the superior knowledge and expertise of the defendant, which often, although not exclusively, occurs in a professional relationship. Conversely, the mere existence of such a relationship may not be enough to render legal proceedings inappropriate, particularly where the defendant, to the knowledge of the plaintiff, is not engaged in good faith efforts to right the wrong it caused. The defendant's ameliorative efforts and the plaintiff's reasonable reliance on such efforts to remedy its loss are what may render the proceeding premature.

[27] Finally, I note that cases in which a defendant who is an expert professional attempts to remedy a loss that a plaintiff has discovered and alleges was caused by the defendant (engaging the potential application of s. 5(1)(a)(iv)) are distinct from cases in which courts have held that a client has not discovered a potential claim for solicitor's negligence until being advised by another legal professional about the claim: see *Ferrara*, at para. 70; and *Lauesen v. Silverman*, 2016 ONCA 327, 130 O.R. (3d) 665, at paras. 25-31. In the latter category of cases, the issue is whether the plaintiff knew or ought reasonably to have known *injury, loss or damage* had occurred (under s. 5(1)(a)(i)) that was *caused by or contributed to by an act or omission of the defendant* (under ss. 5(1)(a)(ii) and (iii)). Section 5(1)(a)(iv) comes into focus where the plaintiff knew

or ought reasonably to have known of his or her loss and the defendant's causal act or omission, but the plaintiff contends the limitation period was suspended because a proceeding would be premature. Although discoverability under more than one subsection of s. 5(1)(a) may be engaged in a single case, it is important not to collapse the analysis of discoverability of loss or damage and the defendant's negligence or other wrong with the determination whether legal action is appropriate although other proceedings to deal with the loss may be relevant to both questions.

(3) The effect of other processes which may eliminate the loss

[28] A second line of cases interpreting and applying s. 5(1)(a)(iv) of the *Act* involves a plaintiff's pursuit of other processes having the potential to resolve the dispute between the parties and eliminate the plaintiff's loss.

[29] This approach to discoverability is consistent with the rule in administrative law that it is premature for a party to bring a court proceeding to seek a remedy if a statutory dispute resolution process offers an adequate alternative remedy and that process has not fully run its course or been exhausted: see *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at paras. 61-70.

[30] In *407 ETR Concession Company,* for example, the plaintiff operated a public toll highway. It was authorized under the *Highway 407 Act, 1998*, S.O.

1998, c. 28, to collect tolls from those who used the highway. There were two methods to collect unpaid tolls: the first by civil action and the second by a statutory license plate denial process. In the latter process, the Registrar of Motor Vehicles would not validate or issue a driver's permit to any person with an outstanding debt owed to the plaintiff.

[31] The plaintiff sued the defendant in 2013 for unpaid tolls incurred through use of the highway between 2008 and 2010. The defendant had been put into the statutory license denial process, and his driver's permit expired in 2011, after which it was not renewed by the Registrar. He argued that the plaintiff's claim was time-barred because it was discovered in 2013, outside the limitation period.

[32] This court held that a civil action was not an appropriate means for the plaintiff to recover the unpaid tolls until 2011, "when the usually effective license plate denial process had run its course": para. 39. Given the statutory process, it would have been inappropriate to require the plaintiff to prematurely resort to court proceedings while the statutory alternative process was ongoing, which might make the proceedings unnecessary. In fixing the date when a proceeding is legally appropriate under s. 5(1)(a)(iv) of the *Act*, "[i]f the claim is the kind of claim that can be remedied by another and more effective method provided for in the statute, then a civil action will not be appropriate until that other method has been used": para. 39.

[33] *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165, 114 O.R. (3d) 481, is a case that dealt with tax advice and dispute resolution through the courts.

[34] In *Lipson*, the plaintiff and 900 taxpayers donated cash and timeshare weeks to registered athletic associations through a Timeshare Tax Reduction Program. The promotional material for the program included an opinion prepared by the defendant law firm. The defendant stated that it was unlikely that Canada Customs and Revenue Agency ("CCRA") could successfully deny tax credits. However, in 2004, the CCRA notified the plaintiff that it intended to disallow his claim for tax credits. Two of the other donors launched proceedings as a test case to challenge the CCRA's disallowance. The test case settled in 2008 on the basis that the donors would receive tax credits for their actual cash donations but not for their donations of timeshare weeks.

[35] In 2009, the plaintiff commenced a proposed class action for solicitor's negligence and negligent misrepresentation based on the defendant's opinion that it was unlikely that the CCRA could successfully deny the tax credits the plaintiff anticipated receiving. The defendant opposed certification on the grounds that the class members' claims were statute-barred. It argued that the claims were discoverable in 2006, when the CCRA disallowed the tax credits. The motion judge agreed and the plaintiff appealed.

[36] This court allowed the appeal. It held that it was not clear that the plaintiff's claim was discovered in 2004, when the validity of the defendant's opinion was first challenged by taxation authorities, because discovery of a potential problem with the opinion was not discovery of a negligence claim. There was merit in the plaintiff's allegation that he did not discover his claim until the two representative test cases were settled in 2008. His pleadings did not demonstrate that he knew the CCRA's challenge to his credit claim would likely be successful prior to 2008. That could not have been determined until the conclusion of the dispute with the CCRA.

[37] Goudge and Simmons JJ.A identified two issues with the motion judge's reasons:

> On the one hand, although the motion judge seems to acknowledge that the notices of disallowance were not a final disposition of the tax credit issue – and therefore at best provided notice of a potential claim – he appears to have concluded that all class members should have known when they received the notices of disallowance that the CCRA could successfully challenge their claims for tax credits and that the action therefore became statute-barred at that time.
>
> Further, the motion judge appears to have treated the class members' knowledge that they were incurring professional fees to challenge the CCRA's denial of the claimed tax credits as a relevant factor affecting the commencement of the limitation period.
>
> In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional

> fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of Cassels Brock.
>
> As pleaded in the fresh as amended statement of claim, the Cassels Brock opinion was that it was unlikely that the CCRA could successfully deny the claimed tax credits. Accordingly, the fact of a CCRA challenge to the tax credits did not, in itself, mean the challenge would likely be successful or make the Cassels Brock opinion invalid. Further, even accepting that receipt of the notices of disallowance prompted class members to obtain professional advice and to launch test case litigation to challenge the denial of the tax credits, that conduct does not demonstrate when class members knew, or ought reasonably to have known, that the test case litigation would not likely be entirely successful. [Citations omitted.] [Emphasis added.]

[38] I note that, although the court in *Lipson* did not explicitly address the appropriateness criterion in s. 5(1)(a)(iv) of the *Act*, its reasoning would be accurately described as holding that the plaintiff did not discover that a proceeding against the defendant was necessary or appropriate until the tests cases were resolved in 2008. Before then, and particularly in 2004, the mere fact that the taxation authorities had resisted the plaintiff's tax credits claim did not give the plaintiff knowledge that commencing a proceeding against the defendant in court would be necessary or an appropriate means to recover his losses.

[39] Non-administrative, alternative processes have also been seen in other cases as having the potential to resolve a dispute, thus rendering a court proceeding inappropriate or unnecessary.

[40] For example, in *Independence Plaza 1 Associates, L.L.C. v. Figliolini*, 2017 ONCA 44, a plaintiff sued on a foreign judgment in Ontario. The defendant, the foreign judgment debtor, said that the plaintiff's action was time barred. The issue was whether the plaintiff's claim on the foreign judgment was discovered at the time of the foreign trial judgment or at the time of the decision on the appeal from that judgment in the foreign jurisdiction.

[41] This court held that the claim was not discovered, and thus the limitation period did not begin to run, until the foreign appeal process had run its course. This was because it was not legally appropriate for the plaintiff to commence a legal proceeding in Ontario until then. Strathy C.J.O. observed at para. 77:

> In the usual case, it will not be legally appropriate to commence a legal proceeding on a foreign judgment in Ontario until the time to appeal the judgment in the foreign jurisdiction has expired or all appeal remedies have been exhausted. The foreign appeal process has the potential to resolve the dispute between the parties. If the judgment is overturned, the debt obligation underlying the judgment creditor's proceeding on the foreign judgment disappears.

[42] In *Figliolini*, Strathy C.J.O. approved of the reasoning of Chiappetta J. in *U-Pak Disposals (1989) Ltd. v. Durham (Regional Municipality)*, 2014 ONSC 1103. *U-Pak* involved a motion to amend a statement of claim, including to add plaintiffs in a proceeding against the defendant municipality. The defendant had issued a request for tender for the contracting of waste disposal services for residents of the municipality. The defendant argued that the claims of the new

proposed plaintiffs, which arose out of alleged wrongdoing by the defendant in the tender process, were statute-barred, as they would be added more than two years after the tender process began but less than two years after it concluded.

[43] Master Abrams disagreed. She permitted the amendment of the statement of claim, and the defendant to plead the limitation period. She held that there was a plausible argument the claim was not discoverable until the tender process ended: see 2013 ONSC 6535.

[44] Her decision was upheld by Chiappetta J., who wrote, at paras. 24-25:

> The Master concluded that 'legally appropriate' could be interpreted to include circumstances where the commencement of a proceeding would affect a legal relationship between the parties. The legal implications for taking action during the course of an active tender process were known to the Plaintiff; under the terms of the tender, Durham Region would have been within its legal right to disqualify the Plaintiff and the proposed plaintiffs' bid.
>
> In my view, the Master correctly concluded there is a potentially successful argument to be made by the prospective plaintiffs that their claims were not legally appropriate until the whole tender process expired because a claim during the process would legally disqualify them from continuing to participate in the very process that may upon its completion form the foundation of the claim. If this argument were accepted, the proposed plaintiffs could not have had a viable claim as of [the date of the first alleged wrongdoing by the defendant in the tender process] because the 'appropriate means' element of discoverability had not yet crystallized. [Emphasis added.]

Thus, *U-Pak* provides another example of a scenario in which it may not be appropriate or necessary for a plaintiff to commence a court proceeding while an alternative process that could potentially affect or eliminate its dispute with the defendant remains ongoing.

[45] Many of the cases dealing with the effect of alternative processes on the appropriateness of a court proceeding have applied the concept of a proceeding being "legally appropriate" articulated by this court in *Markel*. *Markel* involved a dispute between sophisticated insurers claiming indemnity under statutory loss transfer rules. The limitations issue that arose concerned whether a legal proceeding was "inappropriate" while settlement discussions between the parties were ongoing and thus, whether a claim was not discovered until these negotiations broke down.

[46] Recall that, in *Markel*, the court held that the term "appropriate" in s. 5(1)(a)(iv) means "legally appropriate". This interpretation avoided entangling courts in the task of having to "assess [the] tone and tenor of communications in search of a clear denial" that would indicate the breakdown of negotiations between the parties. That would permit a plaintiff to delay the discoverability of a claim for "some tactical or other reason" and "inject an unacceptable element of uncertainty into the law of limitation of actions" (at para. 34).

[47] Similarly, in *407 ETR Concession Company*, at para. 47, Laskin J.A. stated that the use of the term "legally appropriate" in *Markel* "signified that a plaintiff could not claim it was appropriate to delay the start of the limitation period for tactical reasons, or in circumstances that would later require the court to decide when settlement discussions had become fruitless" (emphasis added).

[48] These cases instruct that if a plaintiff relies on the exhaustion of some alternative process, such as an administrative or other process, as suspending the discovery of its claim, the date on which that alternative process has run its course or is exhausted must be reasonably certain or ascertainable by a court. In *Markel*, the date on which settlement discussions between the parties ran their course, and thus the date on which the plaintiff's claim was purportedly discovered, was not sufficiently certain or ascertainable by the court. By contrast, in *Figliolini* it was reasonably certain that the foreign appeal process had been exhausted on the day that the foreign appellate court had released its judgment, and in *Lipson* it was reasonably certain that the CCRA appeal process ran its course on the date that the 2008 test cases were settled.

(4) Application to this case

[49] In the present case, I conclude that the motion judge erred in holding that the appellant 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 its tax credits. In my view, the 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 motion judge erred at para. 67 of his reasons 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. I say this for the following reasons.

[50] First, the motion judge erred in distinguishing the present case from *Brown* when applying the appropriateness criterion under s. 5(1)(a)(iv) of the *Act*. The appellant looked to its professional advisors, the respondents, to provide accounting and tax advice. It relied on the respondents' advice to retain a tax lawyer to object to the CRA's Notices of Assessment. As did the doctor in *Brown*, Himmelfarb attempted to ameliorate the loss to the appellant that the respondents caused in failing to file the appellant's tax returns in time.

[51] Himmelfarb's involvement in the appellant's appeal to the CRA was not trivial. The motion judge held at para. 78 of his reasons that Himmelfarb's role "was of a supporting nature only" and that "he was not directing the case." While this may be true, it unduly discounts Himmelfarb's role in attempting to resolve the appellant's dispute with the CRA. Himmelfarb recommended that the appellant obtain a tax lawyer's advice. He drafted the application for discretionary relief. He helped the appellant and its lawyer with whatever else they needed.

[52] Had Himmelfarb, together with the tax lawyer that he advised the appellant to enlist in aid, prosecuted the CRA appeal successfully, the appellant's loss would have been substantially eliminated, and it would have been unnecessary to resort to court proceedings to remedy it. The fact that the appellant would have been unable to recover the fees it paid the tax lawyer, except through litigation, is in my view inconsequential. It is the claim that is discoverable, not the full extent of damages the plaintiff may be able to recover. It would not have been appropriate under s. 5(1)(a)(iv) of the *Act* for the appellant to commence a proceeding until Himmelfarb's ameliorative efforts concluded.

[53] Similarly, the CRA appeal process had the potential to eliminate the appellant's loss. As an alternative process to court proceedings, it could have resolved the dispute between the appellant and the respondents. These results would have made a proceeding unnecessary. It would not have been appropriate for the appellant to commence a proceeding until the CRA appeal process was exhausted in May 2011.

[54] Likewise, this court's decision in *Markel*, as interpreted in *407 ETR Concession Company*, about the meaning of the concept of a proceeding being "legally appropriate" under s. 5(1)(a)(iv) of the *Act* supports rather than undermines the appellant's position in this case. This is not a case where the claimant sought to toll the operation of the limitation period by relying on the continuation of an alternative process whose end date was uncertain or not

reasonably ascertainable. It was clear that the end date of the CRA appeal in this case was May 16, 2011, when the CRA responded to the appellant's Notice of Objection advising that it intended to confirm the assessments. In my view, the motion judge erred in invoking *Markel* to dismiss the appellant's claim as time barred.

D. DISPOSITION

[55] Accordingly, I would allow the appeal, set aside the order of the motion judge and dismiss the motion for summary judgment. I would award costs of the appeal to the appellant in the agreed sum of $15,000.00, inclusive of disbursements and taxes.

Released: "GP" "APR 24 2017"

"G. Pardu J.A."
"I agree. E.A. Cronk J.A."
I agree. K. van Rensburg J.A."